IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

DIANA L. MILLER	)	
	)	CIVIL ACTION NUMBER
	)	
Plaintiff	)	08C-07-231-JOH
	)	
v.	)	
	)	
STATE OF DELAWARE,	)	
DEPARTMENT OF PUBLIC SAFETY	)	
	)	
Defendant	)	

Submitted: December 17, 2010
Decided: April 6, 2011

MEMORANDUM OPINION

Upon Motion of the State of Delaware, Department of Public Safety -
GRANTED, In Part, and DENIED, In Part

Appearances:

Jeffrey K. Martin, Esquire, of Martin Associates, P.A., Wilmington, Delaware, attorney for the Plaintiff

Jenifer D. Oliva, Esquire, (Argued), and Michael F. McTaggart, Esquire, Deputy Attorneys General, Department of Justice, Wilmington, Delaware, attorney for the Defendant

HERLIHY, Judge

Plaintiff Diana L. Miller filed a complaint against defendants State of Delaware, and Delaware Department of Public Safety and Homeland Security (the "Department") on July 28, 2008, after filing a charge of discrimination with the Delaware Department of Labor ("DDOL") on August 21, 2007, and receiving a right to sue letter on July 17, 2008.[1] Miller's complaint asserts three causes of action: gender discrimination in the form of a hostile work environment, *quid pro quo* sexual harassment, and retaliation. After the matter survived plaintiff's motion for default judgment and the Department's motion to dismiss,[2] discovery was conducted. The Department contends that Miller's allegations are time-barred, and that she does not have sufficient facts within the statutory period to invoke the continuing violations doctrine which would otherwise enable her to bring in behavior which would otherwise be time barred. Additionally, the Department argues that even if Miller's actions are not time-barred, she is unable to meet the requisite burden of proof for each of the claims raised in her complaint. The Court finds that Miller's hostile work environment claim is time barred, that she does not have a claim for retaliation but her claim for *quid pro quo* sexual harassment survives the Department's motion. For that reason, the Department's motion for summary judgment is GRANTED, in part, and DENIED, in part.

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[1] State's App. Vol. 4, A001108-A001111, A001116-A001117. Hereafter, the footnote citations will refer to the "State's" brief or appendix.

[2] *Miller v. State*, 2009 WL 1900394 (Del. Super.); *Miller v. State*, 2010 WL 2861851 (Del. Super.).

Facts

Miller's complaint alleges a long course of improper and unwelcome sexual advances by two Delaware State Police officers, Lieutenant Paul Taylor ("Taylor") and Captain John Laird ("Laird"). To support these claims she and several current and former members of Delaware State Police ("DSP") Troop 2 were deposed. For clarity of reference, they are as follows:

1) Kevin McDerby ("McDerby"), a retired major who testified as to the common practices at DSP.

2) Cathy Prouse ("Prouse"), Laird's secretary.

3) Theresa Schneiderwent ("Schneiderwent"), a secretary who had relationships with both Taylor and Laird.

4) Blaine Quickel ("Quickel"), a Sergeant who had a relationship with Miller.

5) Mark W. Seifert ("Seifert"), Internal Affairs officer at DSP in charge of discipline.

6) Thomas F. MacLeish ("MacLeish"), Colonel, DSP Superintendent, who placed him on suspension and moved for Laird's decertification.

7) Albert J. Homiak ("Homiak"), Major at Troop 2 during Miller's employment.

8) Harry W. Downes ("Downes"), Human Resources Major at Troop 2 during Miller's employment.[3]

Miller worked for the Delaware State Police ("DSP") beginning in 1998.[4] She applied to transfer within the DSP to the position of Traffic Secretary at Troop 2, for better

[3] Curiously, neither Laird nor Taylor was deposed.

[4] Miller Dep. 16:9-10 (Oct. 6, 2009).

working hours, and was hired by a panel which included Taylor.[5] She began this position in October 2004.[6] Taylor was her direct supervisor in this position, and Taylor reported directly to Laird, who was the Troop 2 Commander, the highest ranking officer at the troop.[7]

Miller alleges that Taylor's sexual advances began soon after her transfer to Troop 2 in 2004. She claims that he threw small pieces of paper and candy wrappers down her shirt on a regular basis, to the point where she left her desk upon his approach, and eventually removed the candy dish.[8] She also claims he discussed his sex life with her, and told her that he had "girls" in Sussex and New Castle counties, but needed Miller to be his Kent County "girl."[9] Miller claims that these direct propositions subsided for a while in fall 2005, when she began dating Quickel, but continued through 2006, though she fails to establish any specific dates.[10] She does, however, indicate that Taylor's sexually inappropriate behavior was "prior to February 2007" and that "everything was fine" between them in February and March 2007, before and during her medical leave.[11] Miller

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[5] *Id.* at 20:14-19.

[6] *Id.* at 35:9-10.

[7] *Id.* 21:22, 22:17-18, 35:15.

[8] *Id.* 41:16-43:8, 135:19-23.

[9] *Id.* 133:15-23.

[10] *Id.* 144 - 145:10, 150; Miller Dep. 34:10-16 (Oct. 13, 2009).

[11] Miller Dep. 151:23-24, 152: 3-9 (Nov. 20, 2009).

left for FMLA leave on February 20, 2007 and did not return to work until early April.[12] She claims that in April 2007, after her return from medical leave, Taylor avoided her completely, gave her the "silent treatment," and was cold towards her.[13] Miller also makes a vague accusation that sometime in 2007, possibly April, when Taylor allegedly rubbed his foot under her seat from behind, for about sixty seconds, while they were traveling to a luncheon event for a co-worker's birthday. She does not give a specific date for this incident.[14] She also says that it was "out of the blue," since he had stopped his other sexually harassing behaviors by that time.[15]

In 2006, there was significant reorganization at Troop 2, and Miller was to report directly to Laird. However, she was unhappy with this move since she claims he "gave her the creeps."[16] Miller claims that Laird's inappropriate behavior towards her began soon after she started working at Troop 2, though worsened after the reorganization. According to Miller, when she first worked at Troop 2, Laird would come into her office, stare at her for a while, then leave.[17] She claims that after the reorganization he would stare at her

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[12] Miller Dep. 188:15-17 (Oct. 6, 2009).

[13] Miller Dep. 53:22-55, 151:22-154:4 (Nov. 20, 2009).

[14] Miller Dep. 34:10-38:23 (Oct. 13, 2009); 281-288 (Oct. 23, 2009).

[15] *Id.* 296:22-300:2.

[16] Miller Dep. 223:12-226:24 (Oct. 13, 2009).

[17] Miller Dep. 43:19-44:20 (Oct. 6, 2009).

from his office, since her desk has been moved near it.[18] In December 2006 she claims he "played footsies" with her under the table at a Troop 2 Christmas party at the Chesapeake Inn.[19] He would also allegedly change clothes in his office where she could see him, in a manner she felt was trying to get her attention.[20] Laird's overt sexual advances did not begin until sometime in March 2007, while she was out on medical leave.[21] According to Miller, she was at home, heavily medicated, in bed recovering from surgery, when Laird paid her a visit in full uniform. During their conversation, Laird suddenly began groping her breasts and attempted to kiss her.[22] He also made a comment at the time that his wife, Cissy Laird ("Cissy"), knew he was visiting Miller and that they had driven by her house before.[23] This was disturbing to Miller.[24] She claims she tried to "block out" the incident.[25] Laird had also begun texting Miller in 2007 saying that he "wanted" her, and she has submitted saved text messages of this type that she received in June and July 2007.[26] In

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[18] Miller Dep. 263:20-265 (Oct. 13, 2009).

[19] *Id.* 271.

[20] *Id.* 278.

[21] *Id.* 287:6-9.

[22] *Id.* 287:7-295, 324:16-332:21; Miller Dep. 31:22-32:2 (Nov. 20, 2009).

[23] Miller Dep. 327:1-3 (Oct. 13, 2009).

[24] *Id.* 325:22-327:11.

[25] Miller Dep. 211:4-12 (Nov. 20, 2009).

[26] *Id.* 7:8-13; State App. Vol: 4, A001220-A001222.

April, he sent her a text message picture of himself in a bathing suit on the beach.[27] Quickel has testified that around the time Miller alleges Laird began pursuing her, Laird had Taylor tell Quickel to end his relationship with her, and that Laird once said "he was going to be a problem for him [Quickel]."[28]

It was after Miller returned to work that she was notified of several administrative complaints against her from her colleagues for alleged neglect of her work duties.[29] This eventually grew into a formal internal affairs investigation. During this time, Miller alleges, Cissy befriended Miller.[30] She and Cissy began to do more things socially together, like go out for drinks.[31] She thought Cissy was genuinely trying to be a friend to her.[32]

Miller had increasing anxiety about her job security in light of the ongoing internal affairs investigation, and Cissy suggested she and Miller go away on a "girls" weekend

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[27] Miller Dep. 48:23-50 (Nov. 20, 2009).

[28] Quickel Dep. 17-19.

[29] State App. Vol. 4, A000936.

[30] Miller Dep. 144:16-146:21 (November 20, 2009).

[31] *Id.* 160-161:19.

[32] *Id.* 253:20-254.

to Cabo, Mexico.[33] Miller gave Cissy her credit card information to book the trip.[34] Without consulting her, Cissy made the travel arrangements so that Laird would also come along.[35] This made Miller uncomfortable, but Cissy insisted that they needed Laird for protection since they were going out of the country.[36]

The Lairds began visiting Miller's house after the vacation was booked, since Cissy thought they needed to get to know each other better and make Miller feel more comfortable with Laird before the trip.[37] They would bring dinner and wine.[38] In June 2007, Miller and Cissy attended a baseball game with several other Troop 2 staff members.[39] At the game Cissy made a comment to Miller that Laird had "chosen her" and "she fit the shoes."[40] Despite her continuing discomfort with Laird and Cissy's strange comments, Miller accepted her friendship because she "felt deserted by everybody at the

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[33] *Id.* 161:20-162:3.

[34] *Id.* 217-218.

[35] *Id.* 225.

[36] *Id.* 227, 232:7-10.

[37] *Id.* 227:1-228:15.

[38] *Id.* 233:18-235, 238:15-16.

[39] Miller Dep. 229:15-230:13 (October 13, 2009).

[40] *Id.* 229:15-18.

Troop."[41] She alleges that Cissy regularly made comments about her husband's "needs," and that he had "stuck his neck out" for Miller, and that she and Laird were the only people at Troop 2 who would defend her against the impending investigations involving her relationship with Quickel and the complaint about her work situation.[42]

The second time the Laird's brought dinner, they started sleeping over afterwards.[43] On the third visit, Cissy insisted she would sleep in a guest room, and that Laird would sleep in the same bed as Miller.[44] With each visit both Cissy and Laird became more demanding and controlling about what Miller would do with Laird.[45] Miller said "She's very pushy, and he in his creepy way was pushy too."[46] Cissy made comments that he wanted to take a bath with her, and that he was the only one who stood up for her at work, so she needed to do what he wanted.[47] She felt pressured to take a bath with him to keep her job, and the two had sexual intercourse on that occasion.[48] Miller claims it was non-

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[41] Miller Dep. 150:8 (November 20, 2009).

[42] *Id.* 180:19-181:1.

[43] *Id.* 235:9.

[44] *Id.* 238:21-239.

[45] *Id.* 243:10-11.

[46] *Id.* 239:19-245.

[47] *Id.* 240:17-24, 242:23-24.

[48] Miller Dep. 301:18-23 (October 23, 2009); 256-257, 280-282, 290:4-293:14 (November 20, 2009).

consensual because she "didn't want to do it and [she] felt like [she] had to."[49] She also said that she did not think of the sexual act as a crime, because "the fact that he was in my house…the way it went down, just didn't occur to me."[50] She did feel like he might fire her or Cissy might physically harm her if she did not do exactly what he wanted.[51]

Miller claims she did not know how the handle the situation,[52] but tried, unsuccessfully, to get out of the Mexico trip.[53] This was around the time she also attempted to transfer out of Troop 2.[54] Cissy continually assured Miller that the trip would not be like their visits to her house, and that Miller would be designated a "cousin" for the trip, in a separate room.[55] They were put in one room with a king sized bed and pull-out couch.[56] Then Cissy said Miller would be "Mrs. Laird" and she would be the "cousin."[57] Cissy also had Miller's passport throughout the trip.[58] Laird and Miller had non-consensual sex once

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[49] *Id.* 291:9-13.

[50] *Id.* 292:21-23.

[51] *Id.* 320.

[52] *Id.* 272:9-10.

[53] *Id.* 246-247.

[54] *Id.* 245:7-8.

[55] *Id.* 324, 328, 334.

[56] *Id.* 334.

[57] *Id.* 335.

[58] *Id.* 335:22-338:3.

on the trip.[59] During the trip, Miller's relationship with the Lairds deteriorated. Miller objected to having sexual intercourse with Laird, and Cissy became extremely hostile and manic towards Miller.[60]

Upon the group's return from Cabo, Laird and Miller were not on speaking terms, but Laird did call Miller and arrange a meeting at the Smyrna Rest Area to talk. At this meeting Laird allegedly threatened Miller that it would not be good for her if she exposed their relationship.[61] It was soon after this that Miller lodged her complaint against Laird. She did so in early August during the Internal Affairs investigation into her relationship with Quickel.

DSP has an anti-sexual harassment policy, and a reporting protocol.[62] Among other things, relationships between supervisors and subordinates are strictly forbidden in the DSP anti-sexual harassment policy.[63] Troopers could face discipline for using their superior positions to influence sexual misconduct, regardless of whether the subordinate consents to the relationship.[64]

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[59] 257:6-8, 349-351.

[60] *Id.* 277-278:6.

[61] Miller Dep. 73-76 (August 1, 2007).

[62] State App. Vol. 4, A001123-A001147.

[63] McDerby Dep. 22; Seifert Dep. 8:1-7, 9:12-10:2.

[64] McDerby Dep. 22:3-24:18, 25:16-27:28; Seifert Dep. 9:12-10:2.

Miller claims that she never reported Taylor's initial behavior because she believed she would have to report it to Laird, who made her uncomfortable.[65] She also claims that she did not report these incidents because she was intimidated by both Taylor and Laird, and their positions within the troop.[66] She also never reported the incidents to human resources, because they were never helpful to her, so she did not see the point in trying to report Taylor's behavior.[67] Although some were under the impression that Taylor was happily married, another female employee at DSP testified to a different experience.[68] Schneiderwent, who worked with both Taylor and Laird at Troop 9 (and had sexual relations with them both), testified to the hostility towards women at DSP, and the attitude toward reporting gender discriminatory behavior.

According to Schneiderwent, she had a relationship with Taylor, which she broke off.[69] She then began dating another civilian employee at the Troop, and Taylor became hostile towards both of them. He commented about how he could not believe she would "pick a janitor over a lieutenant."[70] He referred to her as a "bitch," and she claims he "had

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[65] Miller Dep. 43:19-44:20 (Oct. 6, 2009).

[66] Miller Dep. 43:3-19 (Nov. 20, 2009).

[67] *Id.* 37:16-21.

[68] McDerby Dep. 25:5-7.

[69] Schneiderwent Dep. 25.

[70] *Id.* 51:24-52:1.

names for everybody."[71] Schneiderwent testified that people do not report improper behavior (like Taylor's "bitch" comments) in DSP because: "when you work in a male oriented environment, you don't make waves"[72] and that, as a female employee:

> You don't make waves. You don't want to be a bitch. You don't want to complain about anything…There is old school, which is guys that have been around since the '70s and '80s. And you can tell as soon as you talk to one of them by the way they talk and they way they act in the office who is old school. Paul Taylor was old school. The individuals that I've had the opportunity to work with here lately like Lieutenant Colonel Page, he's not old school. Very professional, very – there is just a difference. You would know if you worked in that environment. But you don't go in, you don't make waves. I'm the only female in my building other than one female trooper.[73]

As to her relationship with Laird, Schneiderwent said he pursued a sexual relationship with her, but it was short lived.[74] Additionally, Schneiderwent knew of Miller, and testified that the troopers would often discuss Miller's body and what she wore to work.[75]

Much of the parties' factual allegations and questioning during depositions had to do with Miller's behavior in the workplace, her job performance, and an internal investigation that was launched against Miller in the spring of 2007. According to Miller, she always received good job performance reviews during her time at Troop 2. The

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[71] *Id.* 50:6.

[72] *Id.* 51:1-2.

[73] *Id.* 65:15-66:9.

[74] *Id.* 31-32.

[75] *Id.* 47-48.

Department disputes this fact, but several of Miller's co-workers support Miller's allegation that her work product was at least on par with the requirements.[76] This fact is also partially confirmed by her 2006 performance review, which states her work performance "Exceeds Expectations."[77] It is undisputed that there were personality conflicts at Troop 2, and that Miller did not get along with some of the other administrative assistants, one of whom, Cathy Prouse, gave deposition testimony regarding what she witnessed between Miller, Laird, and Taylor, and the workplace environment at Troop 2.[78] These conflicts seemed to begin to interfere with Miller's work performance in the spring of 2007, around the same time she alleges Laird's harassment began.

The record also indicates that the administrative assistants Miller worked with were supplying some of the information to Rhonda Davis of DSP Human Resources to build a record that was later used to initiate an internal investigation against Miller.[79] Davis later signed an affidavit regarding Miller's workplace behavior for the purposes of this litigation.[80] Miller disputed the allegations that her behavior was inappropriate, and gave many explanations that the behavior reported had been significantly twisted to her

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[76] Cathy Prouse Dep. 33:8-34:24; Mark Seifert Dep. 22:24;

[77] State's App. Vol. 4, A000908.

[78] State's App. Vol. 2, A000487-A000508.

[79] Email from Dawn Haass to Rhonda Davis, State's App. Vol. 4, A001012.

[80] State's App. Vol. 4, A001118-A001122.

detriment.[81] The Internal Affairs investigation on September 5, 2007, ruled that "The allegation of Conduct Unbecoming and Neglect of Duty in violation of Delaware State Police Civilian Work Rules has been ruled as **Not Substantiated**."[82]

Miller has alleged that much of her negative reputation in the workplace was created by Laird's preferential treatment of her. This apparent perceived favoritism is confirmed by the included emails, the testimony of her co-workers, and the testimony of Seifert, the Lieutenant Colonel in charge of discipline at Troop 2.[83] Laird was confronted about his perceived favoritism toward Miller, which he generally denied, but "understand[s] the perception factor…and I observe the dynamics of the actual and real situation."[84]

There are also several facts that indicate Miller may have suffered injury from these incidents. During the months leading up to her reporting of Laird in August 2007, Miller began seeking medical treatment for severe stomach pains, which the doctor attributed to stress.[85] Additionally, Quickel testified that he had seen Miller upset several times, but when she finally told him about Laird, it was different. Quickel testified that she was "almost like a little kid when they hyperventilate and they can't talk. But she came in the

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[81] Emails between Rhonda Davis and Diana Miller, State's App. Vol. 4, A000965-A000966.

[82] State's App. Vol. 4, A001049. Emphasis in original.

[83] Emails in State's App. Vol. 4, A000936-A000958.

[84] Email from John Laird to Albert Homiak, State's App. Vol. 4, A000939.

[85] Miller Dep. 327:9-330:15 (Oct. 23, 2009).

back door in the patrol area and was visibly upset. And I couldn't really understand what she was trying to tell me."[86]

Miller attempted to transfer out of Troop 2 to the position of Purchasing Services Administrator in June of 2007,[87] but was denied the position as she was unqualified.[88] After Miller made her official complaint to DSP authorities against Laird in early August 2007, she was voluntarily transferred to a position at the Delaware State Police Training Academy ("the Academy"), with equal pay and benefits.[89] Following Miller's complaint against Laird, an internal affairs investigation at DSP was undertaken, and MacLeish, DSP Superintendent, determined that Miller had offered sufficient proof of her allegations to suspend Laird.[90] MacLeish would not allow Laird to resign in lieu of suspension.[91] He attempted to have Laird stripped of his certifications and divested of his pension, but was ultimately unable to because Laird filed for retirement during his suspension.[92]

Parties' Contentions

The Department argues that Miller's action fails for several reasons, and that it is

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[86] Quickel Dep. 22:15-23:3.

[87] State's App. Vol. 4, A001081.

[88] State's App. Vol. 4, A001083.

[89] State's App. Vol. 4, A001044-A001047.

[90] MacLeish Dep. 21.

[91] MacLeish Dep. 22.

[92] MacLeish Dep. 28.

entitled to summary judgment as a matter of law. First, it asserts that Miller's failure to make a complaint to DDOL within 120 days of Taylor doing anything means her action is time barred as to him. Second, it claims that Miller's allegations against Taylor, and any other allegations of conduct occurring before April 23, 2007 are time barred because Miller waived her right to raise the continuing violations doctrine, which would extend the 120 day period, by not mentioning it in her answering brief.[93] Third, the Department contends that Miller is unable to meet the burden of proof required for her claims of gender discrimination, hostile work environment, *quid pro quo* sexual harassment claim, and retaliation.

To counter the Department's motion, Miller first alleges a gender discrimination claim in violation of 19 *Del. C.* §711(b), arguing that she was the victim of a hostile work environment created by both her superiors and other civilian personnel. Second, Miller alleges *quid pro quo* sexual harassment, also in violation of 19 *Del. C.* §711(b). This claim is based on Captain John Laird's alleged actions, and the alleged actions of his wife, who is accused of acting upon his direction to manipulate Miller into a sexual relationship with him. Miller's second cause of action alleges a retaliation claim in violation of 19 *Del. C.* §726. In support of this claim, Miller alleges that she was denied transfer requests during her time at Troop 2, and subjected to a hostile work environment. Miller argues that her claim against Taylor are not barred under the continuing violations doctrine.

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[93] State Suppl. Br. at 1.

Standard of Review

Summary judgment may only be granted where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[94] The moving party has the initial burden of proving that no genuine issue of material fact exists, and that he or she is entitled to summary judgment.[95] The Court must view the evidence in the light most favorable to the non-moving party.[96] If a material fact is in dispute, or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law, summary judgment is inappropriate.[97] Thus, if it appears that there is any reasonable hypothesis by which the non-moving party might recover, the motion for summary judgment will be denied.[98]

In response to a motion for summary judgment, the non-moving party must "go beyond the pleadings" and do so by depositions or other sworn testimony, designate "specific facts showing that there is a genuine issue for trial."[99] The question on summary judgment is whether *any rational* finder of fact could find, on the present record, viewed

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[94] *Windom v. Ungerer*, 903 A.2d 276, 280 (Del. 2006).

[95] *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995).

[96] *Id*. at 1364.

[97] *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

[98] *Vanaman v. Milford Mem'l Hosp., Inc.*, 272 A.2d 718, 720 (Del. 1970).

[99] *Mertig v. Milliken & Michaels of Del., Inc.*, 923 F. Supp. 636, 644 (D. Del. 1996).

in the light most favorable to the non-moving party, that the substantive evidentiary burden had been satisfied. "The judge who decides the summary judgment motion may not weigh qualitatively or quantitatively the evidence adduced on the summary judgment record. The test is not whether the judge considering summary judgment is skeptical that plaintiff will ultimately prevail."[100]

Discussion

Miller's claim is made exclusively under 19 *Del. C.* § 711. That section and related ones in Chapter 7, §§ 710, 712-718, are patterned along the lines of the federal employment discrimination law in 42 U.S.C. § 2000e. That provision was part of the 1964 federal Civil Rights Act and is better known as "Title VII." Delaware courts take the "interpretive lead" from District Court and Third Circuit Court of Appeals decisions regarding interpretations of Title VII.[101] No Delaware case has yet adopted the federal standards for determining a gender discrimination hostile work environment claim, a *quid pro quo* sexual harassment claim, or a gender based retaliation claim. As has been done in other types of discrimination cases, the Court today adopts the federal tests for determining the various sexual harassment claims delineated in federal decisions. The Court will analyze Miller's claims in conformity with those decisions.

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[100] *Cerberus Int'l, Ltd. v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1150 (Del. 2002).

[101] *Riner v. Nat'l Cash Register*, 434 A.2d 375, 376 (Del. 1981).

Title VII was designed by Congress "to prevent the perpetuation of stereotypes and a sense of degradation which serve to close or discourage employment opportunities for women."[102] In Delaware, sexual harassment claims are approached in an expansive, rather than a restrictive manner.[103] Sexual harassment is a "systemic social problem that involves a personal assault on the recipient."[104] There is considerable social value in preventing sexual harassment in the workplace, and failure to combat it is detrimental to public policy.[105] It is particularly crucial in this case, when the accused are public safety officers who are bound to protect and defend all of the citizens of Delaware, that Miller's claims are evaluated with meaningful consideration.

The United States Supreme Court has determined that two types of sexual harassment exist under Title VII, Hostile Work Environment and *quid pro quo* sexual harassment. In general, an employee may also assert a Retaliation claim if he or she has suffered employment action against him or her as a protected class or for exercising their rights under Title VII. Miller has brought all three of these claims under state law, against the Department for the time when she was working as a civilian employee at Troop 2 in Bear, Delaware.

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[102] *Andrews v. City of Phila.*, 895 F.2d 1469, 1483 (3d Cir. 1990).

[103] *Schuster v. Derocili*, 775 A.2d 1029, 1038 (Del. 2001).

[104] *Schuster*, 775 A.2d at 1039.

[105] *Id.*

In *Meritor Savings Bank v. Vinson,*[106] the United States Supreme Court noted that "not all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege of employment.'"[107] The Supreme Court also suggested that the "'mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee' would not affect the conditions of employment to a sufficiently significant degree to violate Title VII."[108]

Regrettably, the vast majority of the factual record the Department proffers seems to focus on building a case against Miller regarding her work performance and behavior at Troop 2, and attacking her credibility, almost forgetting that this case is a sexual harassment claim and that credibility at this juncture is not to be determined. Whether Miller adequately fulfilled the duties of her employment has little to do with whether she was the victim of a hostile work environment, *quid pro quo* sexual harassment, or retaliation. It is clear that these facts could be used to question the credibility of Miller's allegations in front of a fact-finder. However, the use of this information to question Miller's credibility is greatly diminished by the fact that the allegations against her were ruled "Not Substantiated" by an independent Internal Affairs investigation.[109] The Court

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[106] 477 U.S. 57, 67, 106 S.Ct. 2399, 2405, 91 L.Ed 49, 60 (1986).

[107] *Meritor*, 477 U.S. at 67, 106 S.Ct. at 2405, 91 L.Ed at 60.

[108] *Id.*, quoting *Rogers v. EEOC,* 454 F.2d 234, 238 (5th Cir.1971).

[109] State's App. Vol. 4, A001049.

sees no other purpose for the inclusion of this information by the Department except to cloud the record and distract from the potential legitimacy of Miller's legal claim.

Though the record is replete with extensive facts and testimony, most peculairly, depositions of several key players, including Laird, Taylor, and Cissy, were not taken. Despite the missing testimony, Miller goes beyond the pleadings as to her *quid pro quo* sexual harassment claim, precluding the complete summary judgment sought by the Department.

Miller's Hostile Work Environment Action Is Time Barred, and the Continuing Violations Doctrine Can Not Be Applied

Since no Delaware cases have adopted the federal tests for determination of a hostile work environment claim under Delaware's anti-discrimination statutes, this Court does so today. The Third Circuit Court of Appeals in *Andrews v. City of Phila.*,[110] articulated the objective, five-factor test used to determine whether harassment is so severe or pervasive that the working environment becomes hostile or abusive:

(1) the employees suffered intentional discrimination because of their sex;
(2) the discrimination was pervasive and regular;
(3) the discrimination detrimentally affected the plaintiff;
(4) the discrimination would detrimentally affect a reasonable person of the same sex in that position; and
(5) the existence of respondeat superior liability.[111]

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[110] 895 F.2d 1469 (3d Cir.1990).

[111] *Andrews,* 895 F.2d at 1482; see also *Duffy v. Dep't of State*, 598 F.Supp.2d 621 (D. Del. 2009).

"Intent to discriminate on the basis of sex," under the test, "is implicit" and "should be recognized as a matter of course in [factual scenarios] involving sexual propositions, innuendo, pornographic materials, or sexual derogatory language."[112] In determining whether the objectionable conduct is sufficiently extreme to incur liability, the totality of the circumstances and the "overall scenario" must be considered to help "ensure that more subtle forms of discrimination do not go undetected."[113]

In addition to the objective requirements, for a hostile work environment claim to be actionable, the offensive conduct must create a work environment that a reasonable person would find to be abusive or hostile. "[T]he victim must subjectively perceive the environment to be abusive to make out a Title VII claim. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation."[114] The *Andrews* court also noted that the objective inquiry requires the finder of fact to determine whether the work environment is sexually hostile, rather than the court at the summary judgment stage.[115] A complaint does not need detailed factual allegations; however, "a plaintiff's obligation to provide the grounds of his [or her] entitle[ment] to relief requires

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[112] *Andrews* 895 F.2d at 1482, n. 3.

[113] *Duffy*, 598 F.Supp.2d at 627-28.

[114] *Mertig*, 923 F.Supp. at 643.

[115] *Mertig*, 923 F. Supp. at 644 (citations omitted).

more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." The "[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true."[116]

Although Miller has raised a number of significant issues of material fact in her hostile work environment claim, the procedural issue of whether or not Miller's claims against Taylor in support of a hostile work environment are time barred must first be determined. This issue turns on which date applies for tolling the statute of limitations, and whether any offending acts occurred within the statutory period to create a claim under the "continuing violations" doctrine. Miller has filed her claim under 19 *Del. C.* 711 with the DDOL. The applicable procedure is as follows:

> The administrative process requires the following:
> *Statute of limitation and filing procedure.* -- Any person claiming to be aggrieved by a violation of this chapter *shall first file a charge of discrimination within 120 days of the alleged unlawful employment practice or its discovery,* setting forth a concise statement of facts, in writing, verified and signed by the charging party. The Department shall serve a copy of the verified charge of discrimination upon the named respondent by certified mail. The respondent may file an answer within 20 days of its receipt, certifying that a copy of the answer was mailed to the charging party at the address provided.[117]

Any discriminatory act occurring within the 120 days prior to the filing of a complaint with the DDOL is considered timely filed. Miller's complaint with the DDOL

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[116] *Hayes v. Delaware State Univ.*, 726 F.Supp.2d 441, 449 (D. Del. 2010).

[117] 19 *Del. C.* §712(c)(1)(emphasis added).

was filed on August 21, 2007. This means that a Hostile Work Environment complaint filed with the DDOL in response to any conduct by Taylor occurring on or after April 23, 2007 is timely.[118]

To determine if any conduct occurring before April 23, 2007, may be used to support Miller's claim depends upon whether the continuing violations doctrine applies.

> Under the continuing violation doctrine, if a plaintiff has filed a charge of discrimination that is timely as to any incident of discrimination in furtherance of an ongoing policy of discrimination, all claims of acts of discrimination under that policy will be timely even if they would be untimely standing alone.…The doctrine does not apply to discrete employment actions. Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable unlawful employment practice.[119]

Miller was transferred to Troop 2 as an administrative specialist in October 2004. She claims Taylor's alleged harassing behavior began almost immediately. He solicited her

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[118] Sufficient facts of record exist beyond Miller's pleadings and deposition testimony *might* have supported a claim of Hostile Work Environment at Troop 2, if the claim had also been brought under Title VII and filed with the EEOC, rather than under 19 *Del. C.* §711 filed with the DDOL only. Had this matter been filed with the EEOC, litigated in Federal Court, and thus given the benefit of the 300 day statute of limitations, sufficient facts would seem to exist to send the matter to finder of fact. *See, Hayes*, 726 F.Supp.2d at 450 ("In states that have an entity with the authority to grant or seek relief regarding an alleged unlawful practice...a plaintiff who files a grievance with that agency has 300 days from the time of the employment practice to filed the charge with the EEOC...Delaware is such a state."); *Maynard v. Goodwill Indus. of Delaware*, 678 F.Supp.2d 243, 250 (D. Del. 2010). However, this matter was not filed as such and therefore is subject to the 120 statute of limitations provided for in 19 *Del. C.* §712(c)(1).

[119] *Maynard*, 678 F.Supp.2d at 250-51 (citations omitted).

for sex, asked her to be his Kent County "girl," and threw candy wrappers down the front of her shirt. She claims that although this type of behavior ebbed and flowed throughout her employment, and may have continued through 2006, but that it definitely ended before her surgery in February 2007. Miller cited to one alleged incident in April where Taylor rubbed his foot under her seat from when they were car pooling to a work luncheon, but has not provided any precise dates that sufficiently sets this incident within the statutory period.[120] Otherwise, Miller claims that when she returned to work after her surgery in late March, Taylor completely avoided her, and would not talk to her unless she spoke to him first. Completely avoiding someone and not talking to them does not constitute the type of behavior present in a sexually hostile work environment. In addition, the testimony of Schneiderwent provides a particularly compelling look into the office culture within the DSP that makes it plausible that a sexually hostile work and discriminatory work environment that is both degrading to women in general. Her testimony that many of the male officers made comments about Miller's body shows that Troop 2 may have been a particularly hostile work environment for Miller. MacLeish also testified to the fact that Troop 2 was a male dominated environment, which could potentially support Miller's claim.[121]

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[120] Miller Dep. 296:22-300 (October 23, 2009)

[121] MacLeish Dep. 19:10-11.

Despite these facts, the 120 day statute of limitations period began on April 23, 2007. Miller has not met her burden of proof to show that the alleged illegal behavior in support of her Hostile Work Environment claim occurred on or after this date. Her vague allegation of the foot rubbing incident at an undisclosed time in April is inadequate to show that she was the victim of a pervasive, sexually hostile work environment within the statutory period.[122] She has not shown that Taylor's foot rubbing was in furtherance of an ongoing policy of discrimination as distinct from an isolated incident. Since she testified that most of the other illegal behavior had definitely ceased by 2007, her hostile work environment claim fails. The offending behavior specifically attributed to Taylor clearly falls outside of the 120 day statutory period, and the continuing violations doctrine can not be applied to any of the alleged harassment to bring in the years of alleged prior conduct or testimony of the other DSP employees. For these reasons the Departments's motion for summary judgment with regard to the timeliness of Miller's hostile work environment claim against Taylor is GRANTED.

Quid Pro Quo Sexual Harassment Claim

Like the tests for determining a hostile work environment claim, Delaware courts have not yet adopted the federal tests for determining a *quid pro quo* sexual harassment

[122] Plaintiff has had more than sufficient opportunity to establish the precise date of this incident. While the Court wishes to give validation to this incident, there is simply insufficient factual proof proffered that the incident occurred within the statutory period for purposes of applying the continuing violations rule and permitting the inclusion of all alleged incidents from 2005 - 2007. She has failed to meet her burden of showing there's a genuine issue of material fact on this point. *Howard v. Food Four Stores, New Castle, Inc.*, 201 A.2d 638, 640 (Del. 1964).

claim. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes *quid pro quo* sexual harassment when "(1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment [or] (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual."[123]

Under this test, the consequences for an unfavorable response by the harassed to the sexual advances must be sufficiently severe as to alter the harassed employee's "compensation, terms, conditions, or privileges of employment,"[124] or to "deprive or tend to deprive [him or her] of employment opportunities or otherwise adversely affect his [or her] status as an employee."[125] Not every insult, offensive or negative comment amounts to a Title VII claim. Additionally, objectionable conduct attributable to an employer is not always sufficient to alter an employee's terms, conditions, or privileges of employment and is thus not always sufficient to violate Title VII.[126] However, the consequences need not be so severe that they amount to economic or tangible discrimination.[127]

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[123] *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1296-97 (3d Cir. 1997) *abrogated by Burlington N. & Santa Fe Railway Co. v. White*, 548 U.S. 53, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006), on grounds that application of the Title VII retaliation provision is not limited to employer's employment related or workplace actions.

[124] *Robinson*, 120 F.3d at 1296; 42 U.S.C. 2000e-2(a)(1).

[125] *Robinson,* 120 F.3d at 1296; 42 U.S.C. 2000e-2(a)(2).

[126] *Robinson,* 120 F.3d at 1296.

[127] *Robinson,* 120 F.3d at 1296, quoting *Meritor,* 477 U.S. at 64, 106 S.Ct. at 2403. *See also* (continued…)

Miller's allegations support a classic *quid pro quo* claim against Laird. He was a significant superior, and went against the DSP's sexual harassment policy to pursue a sexual relationship with Miller. She was disliked by many of her coworkers at Troop 2, and Laird was in a position to utilize Miller's vulnerable position to make her believe he could save her job if the internal investigations against her did not go well.

The facts of record support Miler's claim that Laird used her unpopular position in the workplace to build trust and reliance upon him, giving him an unfair position when he subsequently pursued sexual favors from her. She was the subject of an internal affairs investigation and extremely unpopular at work. Miller claims that Laird and his wife consistently made comments that they were the only people who were behind her at work. They allegedly showed up at her home unannounced, and made demands on her that they claimed could affect her employment status. Miller says manipulated into a vacation with the couple. She consistently states that she did not want a sexual relationship with Laird, and claims she was pressured into having sex with Laird twice for fear she would lose her job if she did not. These types of facts are of the variety that support a classic *quid pro quo* claim.

Further, an Internal Affairs investigation of Laird began right after Miller's complaint. Very shortly, Col. McLeish determined that Laird should be suspended, and

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[127](…continued)
Harris v. Forklift Systems, Inc., 510 U.S. 17, 21, 114 S.Ct. 367, 370, 126 L.Ed.2d 295 (1993).

he was. McLeish's efforts to further discipline Laird came to naught as Laird retired while he was on suspension. The fact that Laird received such harsh disciplinary action in response to Miller's allegations sufficiently suggests that some merit exists in her claims, and that it would be appropriate for a finder of fact to determine whether Miller's allegations are credible. Indeed, the overwhelming tenor of the Department's motion is an attack on Miller's credibility, and is unresponsive to this aspect of the case. Regrettably, Laird was not deposed.

In deciding a motion for summary judgment, the Court does not make credibility determinations or weigh the strength of the evidence.[128] "The non-moving party's evidence is to be believed and all justifiable inferences are to be drawn in his [or her] favor."[129] Whether or not Miller is credible is a question for the jury, and inappropriate for a summary judgment motion. Since Miller has established enough issues of material fact to show that she has a potentially viable claim for *quid pro quo* sexual harassment against Laird, the motion for summary judgment is DENIED.

Retaliation Claim

Miller has made several allegations regarding employment retaliation against her at Troop 2 because of her gender, and because of her complaint against Laird. She claims that while working at Troop 2, she was not promoted, and was denied a higher paying position because she is a woman.

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[128] *Maynard*, 678 F.Supp.2d at 250.

[129] *Id.*

The requirements for establishing a retaliation claim in the Third Circuit are well-settled, and this Court adopts them today. To succeed in a claim of employment retaliation, "a plaintiff must demonstrate that: 1) she engaged in activity protected by Title VII; 2) the employer took an adverse employment action against her; and 3) there was a causal connection between her participation in the protected activity and the adverse employment action."[130] To establish the requisite causal connection, a plaintiff may show a close temporal proximity between the protected activity and the alleged retaliatory conduct, or by submitting "circumstantial evidence…that gives rise to an inference of causation."[131] Unlawful retaliation is usually found when the defendant's retaliatory conduct "has impaired or might impair the plaintiff in employment situations."[132]

The record does not support a claim of retaliation. The undisputed facts show no indication that Miller was denied a promotion or job transfer because of her gender during her time at Troop 2. Miller only attempted to transfer out of Troop 2 once, in June 2007.[133] The record shows that she was the second to last qualified applicant for the position.[134] Additionally, merely applying for another job or promotion is not a *per se*

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[130] *Nelson v. Upsala Coll.*, 51 F.3d 383, 386 (3d Cir. 1995).

[131] *Marra v. Phila. Hous. Auth.*, 497 F.3d 286, 302 (3d Cir. 2007).

[132] *Nelson*, 51 F.3d at 387.

[133] State's App. Vol. 4, A001081.

[134] State's App. Vol. 4, A001083.

protected activity under Title VII. Miller's second claim is that she was retaliated against for her complaint against Laird when she was transferred to her position at the police academy in Dover. There is no question that Miller's reporting of Laird constitutes a protected activity under Title VII. However, Miller has not demonstrated that adverse employment action was taken against her because of such reporting. Miller's complaint against Laird is dated August 1, 2007, after which she was offered a transfer to the Academy. Miller does not dispute that she voluntarily took the position at the academy, which is equal in pay and benefits.[135] Additionally, in response to Miller's complaint, DSP suspended Laird, stripped him of his retirement credentials, and never reinstated him to his position.[136]

The undisputed facts do not demonstrate that Miller experienced employment retaliation in response to her gender or because she reported Laird's alleged sexual harassment. For these reasons, the State's motion for summary judgment as to Miller's retaliation claim is GRANTED.

Conclusion

For the reasons stated herein, the Department's motion for summary judgment on the issue of timeliness is GRANTED. The Department's motion for summary judgment

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[135] State's App. Vol. 4, A001044-A001047.

[136] State's App. Vol. 4, A001020; MacLeish Dep. 28:13-29:5 (as a result, though Laird will still get a pension, he will not receive a retired ID folder or badge).

on the issue of hostile work environment is GRANTED. The Department's motion for summary judgment on the issue of *quid pro quo* sexual harassment is DENIED. The Department's motion for summary judgment on the issue of retaliation is GRANTED.

IT IS SO ORDERED.

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J.