

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

<b>DENISE DURGIN,</b>	)	
	)	
<i>Plaintiff</i>	)	
	)	
<b>v.</b>	)	<b>Civil No. 97-325-P-C</b>
	)	
<b>TOWN OF SOUTH BERWICK,</b>	)	
	)	
<i>Defendant</i>	)	

**RECOMMENDED DECISION ON  
DEFENDANT’S MOTION FOR SUMMARY JUDGMENT**

The plaintiff, formerly employed as a secretary at the South Berwick, Maine police department, presses a Title VII claim against the defendant Town of South Berwick. She alleges that she suffered sexual harassment from her supervisor, the defendant’s chief of police. Having removed the case here from state court, the defendant now seeks summary judgment. For the reasons that follow, I recommend that the summary judgment motion be granted.

**I. Summary Judgment Standards**

Summary judgment is appropriate only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .’” *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir.

1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

## **II. Factual Scenario**

Viewed in the requisite plaintiff-favorable light, the summary judgment record reveals the following: The plaintiff was employed as the secretary to the South Berwick police department from December 31, 1991 to April 24, 1995. Affidavit of Dana Lajoie ("Lajoie Aff."), Exh. A to Defendant[']s Statement of Material Facts ("Defendant's SMF") (Docket No. 7), at ¶ 1. Dana Lajoie was chief of the police department during this period and the plaintiff's supervisor. *Id.* Lajoie reported to Town Manager Richard Brown, who was responsible to the South Berwick Town Council. *Id.*; Affidavit of Richard Brown ("Brown Aff."), Exh. B to Defendant's SMF, at ¶ 1. At all times relevant to this litigation, the defendant had a policy expressly forbidding sexual harassment of one town employee by another. Brown Aff. at ¶ 2. The plaintiff was aware of the policy and, specifically, the fact that it designated the town manager and the town's administrative assistant as

the persons to whom complaints of sexual harassment should be made. Deposition of Denise Durgin (“Durgin Dep.”), Exh. D to Defendant’s SMF, at 40-41.

At least during the latter part of her tenure with the police department, the plaintiff and her husband would occasionally socialize with Lajoie and his wife outside the workplace. Lajoie Aff. at ¶ 3; Durgin Dep. at 22. These activities included dancing, birthday parties, swimming at the Lajoie family pool and the plaintiff doing Mrs. Lajoie’s hair. Lajoie Aff. at ¶ 3; Durgin Dep. at 22-25. The plaintiff’s daughter was a regular babysitter for Lajoie and his wife. Lajoie Aff. at ¶ 3.

In October 1994, upon returning from a police chiefs’ meeting, Lajoie invited the plaintiff to go out with him for drinks. Plaintiff’s Answers to Defendant’s Interrogatories (“Interrog. Resp.”), Exh. 1 to Plaintiff’s Memorandum in Opposition to Defendant’s Motion for Summary Judgment (“Plaintiff’s Memorandum”) (Docket No. 9), at ¶ 5. The plaintiff declined the invitation, stating that she was going home to her husband. *Id.*; Durgin Dep. at 52. Lajoie suggested that the plaintiff call her husband and lie by telling him that she was going out for drinks with some friends. Interrog. Resp. at ¶ 5; Durgin Dep. at 52. The plaintiff again declined, whereupon Lajoie became angry, leaving the plaintiff’s office and slamming the door behind him. Interrog. Resp. at ¶ 5; Durgin Dep. at 52. This was the only time Lajoie ever extended such an invitation to the plaintiff. Durgin Dep. at 52-53. However, in November 1994, as Lajoie and several of his friends were having a conversation about their annual trip to Lajoie’s hunting camp in northern Maine, Lajoie suggested that the plaintiff go along as the group’s cook. Lajoie Aff. at ¶ 7; Durgin Dep. at ¶ 53. The plaintiff, who knew from a previous conversation with Lajoie that this trip was intended for “just the guys,” said she would only go if the trip included spouses so she could bring her husband. Durgin Dep. at 53. The idea that Lajoie had invited the plaintiff to serve as the cook on his annual hunting trip

became something of a running joke around the South Berwick Police Department, but it was a matter the plaintiff took very seriously. *Id.* at 54. She did not accept Lajoie’s invitation, which she understood to be a direct request for sexual favors of some kind. *Id.*; Report of Paul D. Pierce, Chief Investigator, Maine Human Rights Commission (“MHRC”), Exh. 3 to Plaintiff’s Memorandum, at 12.<sup>1</sup>

On a continual basis, but at no time specified in the record, Lajoie would make comments of a sexual nature to the plaintiff. Durgin Dep. at 38; Interrog. Resp. at ¶ 2. He would remark that the plaintiff’s clothes were “sexy,” that she looked “sexier” when she wore a skirt or dress to work as opposed to jeans that made her seem like a “slob,” that she looked better when she wore her hair short, and that a certain perfume made her “smell so good” that he “could eat” her. Durgin Dep. at 38-40. Lajoie also stared at the plaintiff and made kissing and/or biting sounds in her presence. Interrog. Resp. at ¶ 2.

Lajoie’s behavior toward the plaintiff changed after the fall 1994 incidents in which she refused his invitations. Durgin Dep. at 112.<sup>2</sup> He began to blame her for problems in the office and

---

<sup>1</sup> The defendant objects to consideration of the MHRC investigator’s report, contending it would be inadmissible at trial as hearsay and thus not cognizable here pursuant to the requirement in Fed. R. Civ. P. 56(e) that the summary judgment record be limited to “such facts as would be admissible in evidence.” The investigator’s findings may be credited at the summary judgment stage. *See* Fed. R. Evid. 803(8)(C) (hearsay exception for “factual findings resulting from an investigation made pursuant to authority granted by law”); *Smith v. Massachusetts Inst. of Tech.*, 877 F.2d 1106, 1112-23 (1st Cir. 1989) (noting that trial judge may, but is not required, to exclude such evidence as unreliable).

<sup>2</sup> Pages 111 through 116 of the Durgin Deposition are included in the excerpts of that document appended to the Plaintiff’s Memorandum as Exhibit 2.

otherwise to make clear that he did not regard the plaintiff's performance as satisfactory.<sup>3</sup> *Id.*; Interrog. Resp. at ¶ 9. In November 1994 he threatened to investigate her in connection with missing cash the department had received as a fine.<sup>4</sup> Durgin Dep. at 69-73. In April 1995 he accused her of leaking confidential information to the media about a juvenile matter even though he himself was actually the source of the information.<sup>5</sup> Interrog. Resp. at ¶ 7; Durgin Dep. at 64-67.<sup>6</sup> He also accused her on one occasion of returning to work from lunch with alcohol on her breath.<sup>7</sup> Interrog. Resp. at ¶ 7; Durgin Dep. at 56-58.

The plaintiff met with Brown on April 17, 1995 to complain about the treatment she was receiving from Lajoie. Interrog. Resp. at ¶ 6; Brown Aff. at ¶ 4. She explained that she had asked Lajoie to stop making inappropriate "comments and gestures" and that she believed it was

---

<sup>3</sup> According to Lajoie, the plaintiff's job performance "began to decline" in "mid- to late 1994" because she "seemed at times preoccupied with personal problems, especially financial problems she and her husband were experiencing." Lajoie Aff. at ¶ 8. This paragraph of the Lajoie Affidavit also makes reference to other personal problems allegedly experienced by the plaintiff. *Id.* The plaintiff has denied that any such stresses were at issue during the relevant period. Durgin Dep. at 85-106.

<sup>4</sup> Lajoie offers a version of this incident that stops short of accusing the plaintiff of stealing from the department but states that he "did not feel that [he] was being told the truth about what had occurred and, at the very least, Ms. Durgin had clearly mishandled funds that were entrusted to her." Durgin Aff. at ¶ 10.

<sup>5</sup> Again, this incident involves a disputed factual issue for trial. Lajoie offers a starkly different version of this incident, stating that the plaintiff was, in fact, responsible for giving confidential information to the media about an ongoing juvenile investigation. Lajoie Aff. at ¶ 16.

<sup>6</sup> These pages from the Durgin Deposition appear as part of Exhibit 2 to the Plaintiff's Memorandum.

<sup>7</sup> Lajoie's version of this event is that he "was not seriously accusing Ms. Durgin of drinking on the job" but was "only joking about the strong odor" from a banana peel that someone had placed in a trash can nearby. Lajoie Aff. at ¶ 11.

“becoming impossible for [her] to satisfactorily perform [her] duties.”<sup>8</sup> Interrog. Resp. at ¶ 6. Brown told the plaintiff he would be willing to meet with her and Lajoie to discuss her complaints. Brown Aff. at ¶ 6. The plaintiff did not take Brown up on his offer. *Id.* Nor did she ever complain to Beverly Hasty, the town’s administrative assistant. Affidavit of Beverly Hasty, Exh. C to Defendant’s SMF, at ¶¶ 1-3.

On April 18, 1995 Lajoie arrived at the police station and found the plaintiff taking an unauthorized cigarette break, which lasted approximately 20 minutes, in the parking lot of the building. Lajoie Aff. at ¶ 9.<sup>9</sup> Prior to this incident, Lajoie had spoken to the plaintiff about the number of smoking breaks she was taking throughout the day and the amount of time she was spending away from her duties. *Id.* She had received orders setting specific times for cigarette breaks and instructions not to take such breaks at other times.<sup>10</sup> *Id.*

The plaintiff did not report for work between April 19 and April 24, 1995. Brown Aff. at ¶ 6. She called in sick on Thursday and Friday, April 19 and 20. Lajoie Aff. at ¶ 13. When the plaintiff did not appear for work on Monday, April 23, Lajoie tried to call her but learned that her home

---

<sup>8</sup> According to Brown, when he met with the plaintiff on April 17 she expressed no concerns about sexual harassment and “related no allegations that Chief Lajoie was making inappropriate comments about her dress, her haircut, or that he had asked her to join him for a drink after work.” Brown Aff. at ¶ 5. Brown’s account is that the meeting focused on the plaintiff’s perception that she had been accused of taking money. *Id.* at ¶ 4.

<sup>9</sup> In contrast to the incidents described *supra*, the events set out in paragraph 9 of the Lajoie Affidavit are not controverted in the plaintiff’s statement of material facts.

<sup>10</sup> A workplace injury apparently forms the backdrop for the department’s crackdown on the plaintiff’s smoking breaks. In January 1995 the plaintiff was allegedly injured when she fell outside the town offices while outside smoking. Durgin Aff. at ¶ 9. The plaintiff received workers’ compensation benefits for these injuries even though Lajoie believed the plaintiff had not yet reported to work at the time of the incident. *Id.*

phone had been disconnected. *Id.* He thereupon drove to her house, pulling into her driveway just as the plaintiff was getting into her car. *Id.* The plaintiff told Lajoie she was going to the doctor's office and had no idea when she would be back on the job. *Id.* On April 24, 1995 the plaintiff submitted a letter of resignation to Brown. *Id.*; Brown Aff. at ¶ 6; Durgin Dep. at 46. The letter read as follows:

As we discussed, in part, last week, due to circumstances existing at the South Berwick Police Department, not of my creation, and beyond my control, I feel I am not able, nor allowed, to effectively perform my duties as the department's secretary.

Therefore, effective today, 04/24/95, I am compelled to submit this letter of resignation.

Exh. 3 to Brown Aff.

### **III. Discussion**

Under Title VII of the Civil Rights Act of 1964, it is an "unlawful employment practice for an employer . . . to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). The Equal Employment Opportunity Commission has promulgated guidelines specifying that sexual harassment is a form of employment discrimination based on sex in violation of Title VII. *See* 29 C.F.R. § 1604.11. Specifically,

[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such an individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

*Id.* Invoking these principles, the plaintiff seeks relief under both the “quid pro quo” and “hostile environment” theories of sexual harassment. The defendant contends it is entitled to summary judgment on either theory.

Among the things a plaintiff must prove to sustain a claim of quid pro quo sexual harassment is that “the employee’s reaction to the supervisor’s advances affected a tangible aspect of her employment.” *Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 783 (1st Cir. 1990) (citations omitted). In other words, “[t]he acceptance or rejection of the harassment by an employee must be an express or implied condition to the receipt of a job benefit or the cause of a tangible job detriment.” *Id.* at 784 (citations omitted). The phrase “tangible job detriment” has reference to “compensation, terms, conditions, or privileges of employment.” *Id.* (quoting *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 898 (1st Cir. 1988)). By using the word “conditions,” the First Circuit was obviously not referring to the factors, outside the terms of the employment relationship, that might give rise to a hostile-environment claim. *See Lipsett*, 864 F.2d at 897 (quid pro quo harassment occurs “when a supervisor conditions the granting of an economic or other job benefit upon the receipt of sexual favors from a subordinate, or punishes that subordinate for refusing to comply.”) (citations omitted). The present record includes no evidence from which a reasonable factfinder could determine that Lajoie’s sexual advances impacted the plaintiff’s compensation, terms, conditions or privileges of employment.

Hostile-environment sexual harassment claims are analyzed under a somewhat more generalized rubric. The focus is on the third factor enumerated in the EEOC guideline, i.e., whether the sexual harassment had the purpose or effect of unreasonably interfering with the plaintiff’s work performance or creating an intimidating, hostile or offensive working environment. *See Morrison*

*v. Carleton Woolen Mills, Inc.*, 108 F.3d 429, 436-37 (1st Cir. 1997) (stressing the need to demonstrate harassment of sufficient severity or pervasiveness).

[A]n employer “is liable upon a finding of hostile environment sexual harassment perpetrated by its supervisors upon employees if an official representing the institution knew, or . . . should have known, of the harassment’s occurrence, unless that official can show that he or she took appropriate steps to halt it.”

*Id.* at 437 (quoting *Lipsett*, 864 F.2d at 901). Invoking these authorities, the defendant contends it cannot be held liable for Lajoie’s hostile-environment sexual harassment of the plaintiff because the plaintiff failed to follow the defendant’s sexual harassment policy by reporting the conduct to Brown (the town manager) or Hasty (the administrative assistant). According to the defendant, in these circumstances it cannot be said that the Town of South Berwick knew or should have known about the harassment.

The plaintiff does not address the defendant’s contention that, under the rule laid down in *Morrison* and *Lipsett*, her failure to put the town’s designated complaint recipients on notice of the harassment until two days before she ceased reporting for work is fatal to her hostile-environment claim against the town. I thus find myself constrained to determine that the defendant is entitled to summary judgment. Although an employer may still be liable “even when the employee alleging hostile environment harassment fails to notify the employer of his or her complaint, and even when such an employee fails to invoke an existing grievance procedure to protest the alleged harassment,” *Lipsett*, 864 F.2d at 901 (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986)), the plaintiff has failed to meet her burden to demonstrate, pursuant to *Lipsett*, that the defendant, “in the exercise of reasonable care, should have known[] of the harassment’s occurrence,” *id.* For this reason, the defendant is also entitled to summary judgment on the plaintiff’s claim of hostile-

environment sexual harassment.

#### **IV. Conclusion**

For the foregoing reasons, I recommend that the defendant's motion for summary judgment be **GRANTED**.

#### **NOTICE**

*A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.*

*Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.*

*Dated this 15th day of April, 1998.*

---

*David M. Cohen  
United States Magistrate Judge*