

COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT – 2ND DIVISION
CIVIL ACTION NO. 01-CI-2882

MELINDA J. MASSARONE

PLAINTIFF

vs.

**PLAINTIFF’S MEMORANDUM *CONTRA* DEFENDANTS’
MOTION FOR SUMMARY JUDGMENT**

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT,
et al

DEFENDANTS

* * * * *

This case is rife with disputed fact issues for the jury to decide. Defendants deny virtually every assertion of any misconduct of any kind, even to the extent that they contradict and inculcate one another. The jury will be called on here to decide what happened and what liability follows from these actions. Because these disputed fact issues exist, defendants’ motion for summary judgment should be **overruled** in its entirety.

Defendants’ memorandum in support of their motion ignores and omits a vast body of inculpatory testimony and evidence, as well as the relevant law. Defendants misstate, misconstrue and misrepresent plaintiff’s claims, and do not even mention Kentucky’s three leading sex discrimination cases, *Meyers v. Chapman Printing*, *Bank One v. Murphy* and *Kentucky Center for the Arts v. Handley*.

STATEMENT OF THE CASE

Plaintiff’s Causes of Action

Plaintiff Melinda J. Massarone was the second woman to earn and attain the rank of Captain with the Division of Police.

LFUCG’s Division of Police developed and maintained, while defendant Larry Walsh was chief of police, a pattern and practice of discriminatory employment practices based on the female sex of employees and other persons seeking employment. *Amended Complaint ¶ 18-19.*

LFUCG is liable to her for sex discrimination in terms and conditions of her employment, which caused the end of that employment, along with very substantial personal, financial and other injuries. *Amended Complaint* ¶ 34, 44.

There is direct evidence of Walsh's gender bias against Massarone. *Amended Complaint* ¶ 22-23. Defendants admit that she threatened Walsh with legal action upon learning of his gender biased statement directed toward her. Walsh retaliated against her in violation of KRS 344.280. Devers conspired with Walsh and/or aided and abetted unlawful employment practices in violation of KRS 344.380.

The Regime of Gender Discrimination Instituted and Maintained by Walsh

Defendants omit the searing testimony of Anna Phillips. Phillips, who was known as Anna Rathke when she served as a police officer, was raped by Walsh, while she was still a probationary officer and her employment in jeopardy.

After Phillips had failed to satisfactorily complete the police academy because she had failed the shooting part of the curriculum, Walsh approached her and said he would help like to help her. Phillips depo. at 4 - 6.¹ Phillips did agree to go to Walsh's farm where they did, indeed, practice shooting. *Id.* at 6. During the course of the day, Walsh engaged in very erratic behavior, exclaiming that "he had a lot of enemies, a lot of people out to get him." *Id.* at 8. Walsh several times during the day referred "to females within the police department being bitches and whores." *Id.* Walsh coupled these statements with "racial statements that he did not like the black officers." *Id.* Many times Walsh referred to black officers using the vile epithet "nigger." *Id.* at 9.

¹ A complete condensed copy of Phillips' deposition with exhibits also included is attached hereto and marked Exhibit A.

Walsh made a very crude sexual pass at Phillips at the end of the day, where “he pulled [Phillips] over towards him in the truck and stuck his hands down [her] pants, and [Phillips] was pushing him away, and this went one maybe one, two minutes, and then we left.” Id. at 7. Walsh then drove Phillips back to his house in Lexington, ostensibly for the purpose of cleaning her pistol, where he forcibly pulled her into a bedroom area and resumed, as Phillips describes it, “again was making advances, pulling at my clothes, trying to kiss me, grabbing body parts, and again I was pushing him off and being resistant, and he took me home.” Id. at 9 – 10.

Phillips, at the time of Walsh’s actions, remained a probationary officer subject to being fired at any time and without any due process rights. Phillips depo. at 10 -11.

About a week or two later Walsh appeared unannounced at Phillips’ apartment. He entered and began, as she relates it, “making sexual advances, grabbing at my clothes. He was pulling my clothes off.” Id. at 11. Phillips resisted:

I was pushing away and I also told him I did not want to do that, and he was saying things and continued.

Id.

Walsh proceeded to rape Phillips:

Q: Did this culminate in you and Walsh having sexual intercourse?

A: Yes.

Q: Was your participation voluntary?

A: No.

Q: Were you forced to have sexual intercourse with Larry Walsh?

[objection by Walsh’s counsel]

A: He was very aggressive and I stated to him that was not what I wanted to do, and he continued. I would say he definitely at a minimum coerced me, I was intimidated, and [he] pressured me.

Q: Why were you intimidated?

A: By several things: one, my position at the police department and his; his physical stature. He's well over six foot. He's a very big man. He was being very aggressive. In the conversations I had had with him prior to that, he did not sound like a rational person and I was afraid of him.

Q: Is it fair to say you were afraid both for your job and for your physical safety?

A: Yes.

Phillips depo. at 12 -13.

Some months later Joe Famularo, who was then Public Safety Commisisoner, was investigating sexual harassment at the police department. Walsh phoned Phillips and urged her to give a false statement to Famularo. Phillips depo. at 13-14.

Phillips did not file any complaint with the government, criminal or otherwise, regarding Walsh raping her. She did inform her sergeant, Doug Smith, that Walsh had raped her but asked him not to take any action.² She explained her actions as follows:

... I asked him not to, that I was not intending to make a formal complaint. I was afraid for my physical safety. I was afraid of retribution. I did not want people to know about this. I was wanting to be safe and I wanted him to know what was going on.

Phillips depo. at 42.

Phillips subsequently detailed Walsh's rape of her in a sworn statement taken by local attorney Ron Greene. Id. Walsh's lawyer suggested wrongly that Phillips' statement to Greene undercut her claim of fear:

Q: Were you not concerned that the sworn statement might cause some harm to you or hurt your job in some way?

² Phillips' concerns have proved well-founded. LFUCG, whose Division of Police should be investigating criminal charges against Walsh for his rape of Phillips, is actually paying his lawyer to defend him.

A: No one knew about the sworn statement. I went to him because I wanted to document and tell someone what had happened. I did not want to pursue anything with that. I did not want him to do anything with that statement, but to have it in the event that I was harmed or something happened with my job. He's an attorney. He had to keep that in confidence. I was not afraid of someone knowing about that as a result of me doing that.

Phillips depo. at 42 – 43.³

That Walsh had engaged in some sort of forcible sexual encounter with Phillips became a regular topic of conversation in the police department and in the workplace. Sgt. Joan Root has testified that information came to her attention that Walsh had been involved in some type of forcible sexual encounter with Phillips.⁴ Root also testified that she believed that women did not have as fair of opportunity to advance their career as men while Walsh was Chief of Police. Although she did not articulate the basis for this conclusion, a reasonable jury could certainly conclude that one basis for her belief as the information that had come to her attention regarding Phillips.

Shelli Jones, who did not join the police force until 1998, about five years after Phillips left the police department, also had brought to her attention Walsh's misconduct directed toward Phillips. Jones depo. at 74.

Massarone was also aware of the reports of Walsh's misconduct directed at Phillips. Massarone depo. at 154-155. Walsh referred to Devers as "an ignorant bitch" in Massarone's presence. Massarone depo. at 136.

When there is wide spread belief or discussion that the head of an organization has committed a felony sex crime on a subordinate employee, coupled with the apparent decision that no investigation or action of any type would be taken in regard to that incident, a reasonable

³ Exhibit 2 to Phillips' deposition is a notarized authorization she executed for Ron Greene to release a copy of her statement to counsel for Massarone.

⁴ Sgt. Root's deposition has not been transcribed yet.

jury might fully conclude that the work atmosphere is a gender hostile environment. No female officer would dare raise a ruckus or press her rights on even substantial and legitimate employment issues when the Chief of Police can get away with raping a female officer. Maybe a jury will see it a different way but it is for a jury to decide.

Walsh's custom of coercively approaching female recruit officers, whose job status is in jeopardy, was also directed at former police officer Marcia Davis, who was known initially as Marcia Caldwell when employed by defendant LFUCG. It was suggested to Davis, while she was very early in her recruit stage, that she resign. Davis depo. at 26. Knowing that defendant LFUCG would not allow her to reenter the recruit program at a later date Davis decided not to resign as suggested. Id. at 13.

Shortly after Davis declined the suggestion that she resign, she was approached by an instructor, Don Kelly, who told her that Walsh had seen her, found her attractive and wanted her to give him a call. Davis depo. at 14. Kelly provided Davis with Walsh's phone number. Id. There was also indications to Davis that an Officer Owens knew about Walsh's interest as well. Id. at 14-15. She resolved to sink or swim on her own merits and the next day returned Walsh's phone number to Kelly. Id. at 15. She informed Kelly that she would rise or fall on her own merits. Id. Kelly took Walsh's phone number back from Davis, although no doubt with great chagrin.

The following day Kelly came forward with a cover story. He told Davis that offering Walsh's phone number had all been part of a big practical joke. Davis depo. at 15-16. He did not explain why he had wanted to make a fool out of Davis or to get her in trouble with the chief of police by setting her up. Walsh denied having Kelly or Owens approach any women police recruits on his behalf; he denied knowledge of their practical jokes.

Davis also testified that she was physically abused by her training officer. Davis depo. at 34. She said nothing, fearing that doing so would end her career. Id. at 35.

Walsh attempted to prey upon more women recruits than Phillips and Davis. A number of female officers reported to Sgt. Arty Greene that they had received similar overtures from Walsh. Arty Greene affidavit ¶ 14 at pp. 6 - 7.⁵ So widespread was the practice that an anonymous letter sent in 1999 reported this practice, and specifically identified Kelly and Owens. Walsh depo., exhibit 3.⁶

Police officer Deanna Bradley was also subjected to harassment by Walsh. The proxy that approached her was R.C. Richardson. Richardson just told Bradley straight-out that Walsh was aware that she had split up with her husband, that he was interested in sexual activity with her and inquired if she was reciprocally inclined. Bradley depo. at 9 - 10. Bradley declined and thereafter found her efforts at advancement continually stymied. Id. at 11 - 12.

Sgt. Joan Root was herself subjected to sexual harassment and groping by Walsh. While she was still a patrol officer and Walsh was a captain, he saw fit to physically grope her in the command unit of the emergency response unit. She noted that the police department then, as it claims to now, had at least a written policy prohibiting such sexual harassment on the job. She does not know why Walsh saw fit to completely ignore and violate the policy.

Root testified that, as a woman, she felt that reporting Walsh's misconduct would be counterproductive for her career. Root also testified that, while Walsh was chief of police, she felt that women lacked lesser opportunities to advance their careers than men. Although she could not explain why, a reasonable juror could certainly conclude that her opinion was based at

⁵ Sgt. Greene's affidavit is attached and marked as Exhibit B.

⁶ Anna Rathke (now Phillips) was also referred to in this letter that was ignored by LFUCG, despite its supposed policy of investigating thoroughly even anonymous complaints against police officers.

least in part on the fact that she had been aware of Walsh being engaged in a forcible sexual encounter with Phillips.

Walsh frequently displayed both gender and racial bias in his regular conversation. Jimmy Green, a former safety officer, has tendered an affidavit regarding Walsh's frequent usage of gender and racial epithets, regular expressions of the inferiority of women and disdain for minorities, particularly African-Americans. Jimmy Green affidavit.⁷

Former Assistant Police Chief Larry Ball informed Bill Massarone that Walsh had referred to Melinda Massarone as "bitch" and "whore" and indicated that he would not promote her to captain. Ball also told Bill Massarone that Walsh frequently used derogatory references to Melinda Massarone and other women police officers. Bill Massarone depo. 44 – 47.

Walsh has not limited his vile hatefulness only to women; in direct contradiction to federal and state law, along with Urban County Government policies, he has directed this hate toward minorities, specifically African-Americans. Jimmy Green's affidavit attests to this. Stronger affirmation comes from his assistant police chief Ulysses Berry noted, a more hateful and racist statement cannot be imagined in the following uttered by Walsh:

Well, you can go back to the Garrison thing, and you're an experienced commander, you ought to be able to look at the Garrison shooting, and realize that if they had their sticks on, they'd never had to kill that nigger.

If they'd had their sticks on, if, if they'd hope to get to that stick, just like when they get out on a disorder call, if they both just had their sticks and had been able to resort to those sticks, I bet you they wouldn't have had to kill him.

I don't give a fuck that they had to kill him, but, but, let's just be... being honest about it.

Walsh's Regime of Retaliation and Intimidation

Defendants predictably omit the ample evidence of Walsh's active efforts to perpetuate discrimination, to intimidate those would act to eradicate it and to act with complete lawlessness.

⁷ Jimmy Green's affidavit is attached hereto and marked Exhibit C.

Former Sgt. Arty Greene provides an initial example. Sgt. Greene complained of what he perceived to be a racially discriminatory transfer for officers on his squad. Greene affidavit ¶ 5, exhibit A. In response, Walsh threatened to have Greene fired and Greene was formally disciplined for raising the issue of racial discrimination. Greene affidavit ¶¶ 6 – 7, exhibit B. Furthermore, Walsh subsequently graded down Green’s performance appraisal based on his protest about the racial discrimination. Greene affidavit ¶ 12, exhibit D. Walsh, of course, in the face of documents to the contrary professes ignorance of Greene’s discipline and lies about his own actions.

Assistant Police Chief Ulysses Berry has testified that it was Sgt. Greene’s duty to protest to what he perceived to be racial discrimination directed at his officers and that his protest that was in no way insubordinate. Berry depo. at 16. Chief Berry confirms that the letter of counseling issued Arty Greene was an unlawful form of retaliation. Id. at 17.

Chief Berry also confirmed that an attempt to intimidate an officer for reporting racist conduct by his supervisor would be unlawful. Berry depo. at 23. Chief Berry specifically confirmed that an accusation by Walsh directed at an officer who had reported racist comments by his supervisor as having staged a “coup” would be an unlawful attempt by Walsh to intimidate the officer. Id. Such actions by Walsh, Chief Berry confirmed, would be contrary to department policies and procedures. Id. Chief Berry confirmed that an instance where Walsh accused an officer who had reported a discriminatory practice as having staged a “coup” as something that most definitely should be investigated. Id. at 25. He further confirmed that a major or assistant chief that knows that Walsh has attempted to intimidate an officer who has reported racist comments by the supervisor should either address it with Walsh or circumvent Walsh and go over his head to somebody else in the government. Id.

Chief Berry that any commander under Walsh would be reluctant to circumvent him and have somebody else in government address his racist comment because they would jeopardize their career in doing so. Berry depo. at 26.

Chief Berry's comments lead right into Walsh's actions directed at Lt. Mark Barnard. Barnard, along with other officers, did their duty and reported racist statements, which were among other things affecting the integrity of the work done by the homicide unit in skewing it in racially discriminatory ways, and reported racist conduct by a Captain William Fockele. Among other things, Fockele once directed Barnard not to work on a homicide case involving an African-American victim because "it only affected 10% of the population and if that 10% of the population wanted it solved, they would come forward with the information." Barnard depo. at 12.

Walsh subsequently chastised Barnard, accused him of having orchestrated a coup against Fockele and said that he and other officers had set Fockele up. Barnard depo. at 15 - 16. These accusations happened several times, including once in a meeting attended by former public safety commissioner Ed Gardner, Capt. Barry Cecil, Capt. Kevin Sutton and Assistant Chief Hall, which was extensively to examine the Penny wrongful arrest case and in which Walsh told Barnard not to participate and said the fault for the whole matter went back to the Fockele coup. Id. at 16 - 17, 19. Barnard confirmed that he did not feel comfortable going forward with any grievances or complaints because he feared retaliation or retribution instigated by Walsh. Id. at 21.

Sgt. David Lyons was also accused by Walsh of having participated in a "coup" with regard to Fockele's removal. Lyons depo. at 8 - 9. This occurred in a meeting in the Fall of

2000 attended by Assistant Chief Ken Hall, Walsh and then Major Beatty also in reference to the Paul Penny case. Id.

Sgt. Lyons confirmed that Larry Walsh fostered an environment as Chief in which police officers were reluctant or complain or report or file grievances about issues that affected them in the workplace because of concern that they would be subjected to retaliation or retribution instigated by Walsh. Lyons depo. at 10 - 11.

Detective Paul Williams also confirmed that Walsh was responsible as Chief for fostering an environment in which police officers were reluctant to complain about workplace issues. Williams depo. at 15 – 16. Williams also testified regarding how the integrity of a homicide investigation had been breached by the removal of a report concerning an interview of Walsh. Id. at 15.

The police department has an official “policy” that requires that anonymous complaints about misconduct by police officers being thoroughly investigated.⁸ One such anonymous complaint about misconduct by Walsh came in the form of a letter directed to, among others, council man George Brown in March 1999. Walsh depo., exhibit 3. This letter detailed Walsh’s widespread sexual harassment and sexually discriminatory practices in the police department, including having Kelly approach officers on his behalf, including L.C. Richardson approach female officers on his behalf, and also included specific mention to Anna Phillips. The investigation that this letter spawned consisted solely of speaking with Walsh, who denied any of the misconduct. Answers to Plaintiff’s Second Set of Interrogatories to Defendant LFUCG #13.⁹ A reasonable jury can conclude that in fact the policy of the Urban County Government was to tolerate anything Walsh did.

⁸ A copy of this policy is attached hereto and marked Exhibit D.

⁹ A copy of this answer is attached hereto and marked Exhibit E.

A jury conclusion that the policy of the government was to tolerate anything Walsh did would be supported by its actions in this case. Here, over a year and a half ago it was presented with information, specifically a letter written by Anna Phillips, stating that she had been raped by Walsh. Rather than investigate this alleged felonious activity, the government has (1) provided a lawyer for Walsh to defend him; (2) made that lawyer the same lawyer that represents it so that it could share all of its information with Walsh to make sure he did not get in trouble; and, (3) take absolutely no steps to investigate in any way Walsh's misconduct directed at Ms. Phillips. A reasonable jury could conclude from this that the government is prepared to tolerate and defend even felonious criminal activity by Walsh.

ARGUMENT

POINT 1

THERE ARE QUESTIONS OF FACT FOR A JURY TO RESOLVE ON MASSARONE'S SEX DISCRIMINATION CAUSE OF ACTION.

There is direct evidence of Walsh's gender bias supporting Massarone's sex discrimination cause of action. The *McDonnell Douglas* scheme of shifting burdens is therefore inapplicable. Furthermore, a prima facie case merely requires proof raising an inference of discrimination – not fulfillment of some artificially constructed “elements.” Furthermore, even if Massarone were so restricted and required to establish, as a preliminary matter, elements of a prima facie case, defendants misstate the applicable elements. Finally, Massarone's burden on presenting a prima facie case is “de minimis” and is one “easily met.” In any event, the record shows evidence raising an inference of discrimination. Accordingly, defendants' motion for

summary judgment on Massarone's sex discrimination claim against LFUCG should be overruled.¹⁰

Defendants erroneously assume that Massarone must establish a prima facie case of discrimination and ignore the direct evidence of discrimination arising from Walsh's statements. Defendant Walsh stated in reference to Massarone becoming a Captain that "I'll never promote that bitch" and "I'll never promote that whore." And Walsh saw to it that she was driven from that position and, indeed, entirely from the police department.

Walsh's statements constitute direct evidence of gender bias on his behalf. *Burns v. McGregor Elec. Indus., Inc.*, 989 F.2d 959, 964 (8th Cir. 1993). "Vulgar and offensive epithets such as these are "widely recognized as not only improper but as intensely degrading, deriving their power to wound not only from their meaning but also from 'the disgust and violence they express phonetically.'" *Katz v. Dole*, 709 F.2d 251, 254 (4th Cir. 1983). Where a plaintiff presents direct evidence of discrimination, the burden-shifting analytical framework discussed by defendants where a plaintiff must present a prima facie case, etc. is inapplicable. *Trans World Airlines, Inc. v. Thurston*, 105 S.Ct. 613, 621-622 (1985).

Of course, defendants deny that Walsh made any statements constituting direct evidence of discrimination. Doubtlessly in their (surely to be lengthy) reply defendants will assert that Walsh's statements are unconnected with the termination of Massarone's employment. Whether Walsh made these statements and their connection to the termination of Massarone's employment are for the jury to decide.

Defendants' assertion that Massarone must fulfill some artificial construct of "elements" is, aside from the above, incorrect. The Supreme Court itself has emphasized that the *McDonnell*

¹⁰ Massarone makes no claim that either Walsh or Devers is an "employer" within the meaning of KRS 344.040. Accordingly, there is no point in addressing defendants' arguments under section III.B. of their memorandum.

Douglas scheme is not to be automatically and ritualistically applied to every case, *United States Postal Serv. v. Aikens*, 103 S.Ct. 1478, 1482 (1983), and courts have recognized that “[e]vidence can be in the form of the *McDonnell Douglas* prima facie case, or other sufficient evidence – direct or circumstantial – of discriminatory intent.” *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 855 (9th Cir. 2002)(*en banc*), *cert. granted*, 123 S.Ct. 816 (2003), *citing Aikens, supra*.

Also contrary to what might be gleaned incorrectly from defendants’ memo, a plaintiff’s burden of proof to present a prima facie case is “The *prima facie* requirement for making a Title VII claim ‘is not onerous’, and ‘imposes a burden easily met.’” *Cline v. Catholic Diocese*, 206 F.3d 651, 660-61 (6th Cir. 1999). A plaintiff’s burden of proof at the prima facie stage is “de minimis.” *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1114 (2d Cir. 1988).

Even if there was no direct evidence of discrimination and Massarone had to present a prima facie case, there remain fact issues for the jury. First, defendants misstate the prima facie elements of Massarone’s sex discrimination cause of action. The elements may be as follows: (1) that she belongs to a protected class; (2) that she was performing her duties satisfactorily; (3) that she was discharged; and, (4) that her discharge occurred in circumstances giving rise to an inference of discrimination based on her membership in that class. *Chambers v. TRM Copy Ctrs. Corp.*, 43 F.3d 29, 37 (2d Cir. 1994). Alternatively, the elements of her prima facie case are as follows: (1) that she was a member of a protected class; (2) that she was qualified for the position; and, (3) that she was displaced from the position despite her qualifications. *Ruby v. Springfield R.-12 Public School District*, 76 F.3d 909, 911 (8th Cir. 1996).

Walsh’s sexual overtures toward Massarone (and his continuing references to them), his gender-biased statements directed at Massarone and other women police officers, his sexual assault and gross sexual harassment of other women police officers, his orchestration of sexual

harassment of female officers through proxies, his generating a work atmosphere in which women officers feared too much for their career to complain or report mistreatment, including physical assaults, his racist conduct, and his actions to intimidate and punish officers who spoke up in protest of discriminatory conduct provide the circumstances giving rise to an inference of discrimination based on Massarone's sex. *Meyers v. Chapman Printing Co.*, Ky., 840 S.W.2d 814, 822-823 (1992)(evidence of sexual innuendo, terminology and comments, statements regarding the unfitness of women in general and plaintiff in particular to work, demeaning attitude toward women influenced even assignments and employees' conversation about managing agent's hostility toward women); *Kentucky Center for the Arts v. Handley*, Ky.App., 827 S.W.2d 697, 701 n.5 (1992)(discriminatory atmosphere probative of discriminatory intent); *White v. Rainbo Baking Company*, Ky. App., 765 S.W.2d 26, 30 (1988)("The evidence of other discriminatory acts by the [employer] was admissible to show prima facie case or pretext.").

Walsh's misconduct directed at Massarone through the years is probative of her claim. *See United Air Lines, Inc v. Evans*, 97 S.Ct. 1885, 1889 (1977)("[E]ven evidence of conduct that is time-barred 'may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue.'"; *Noland v. McAdoo*, 39 F.3d 269, 272 (10th Cir. 1994)(acts by plaintiff's supervisors of sexual harassment prior to his becoming her supervisor and while he was her co-worker should have been considered on summary judgment by district court as it provided relevant circumstantial evidence to explain the events occurring after he became her boss); *Ercegovich v. Goodyear*, 154 F3d 344, 356 (6th Cir. 1998)("evidence of a corporate state of mind or a discriminatory atmosphere is not rendered irrelevant by its failure to coincide precisely with the particular actions or time frame involved in the specific events that generated a claim of discriminatory treatment.").

Walsh's discrimination and harassment directed at other employees is also probative. *Meyers, supra; Handley, supra; White, supra; see also EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 897-898 (9th Cir. 1994)(evidence of past instances of sexual harassment probative in gender-based discharge case); *Carter v. Chrysler Corp.*, 173 F.3d 693, 701 n.7 (8th Cir. 1999)(where there was no dispute that plaintiff had heard about sexually demeaning references to her written in the men's restroom such evidence was relevant to whether a hostile environment existed and whether plaintiff reasonably viewed it to be hostile or abusive); *Smith v. Sheahan*, 189 F.3d 529, 533 (7th Cir. 1999)(evidence of co-worker's hostile behavior toward women co-workers); *Schwapp v. Town of Avon*, 118 F.3d 106, 111 (2d Cir. 1997)("the fact that a plaintiff learns second-hand of a [sexually] derogatory comment or joke by a fellow employee or supervisor also can impact the work environment" and holding the incidents occurring before the plaintiff commenced employment are probative); *Estes v. Dick Smith Ford*, 856 F.2d 1097, 1103 (8th Cir. 1988)(reversing the trial court's exclusion under Rule 403 of evidence of employer's discriminatory hiring practices and discriminatory practices directed at customers). That such discrimination was of another type than based on sex is also irrelevant. *See Carr v. Allison Gas Turbine Division of General Motors*, 32 F.3d 1007 (7th Cir. 1994)(reversing a defense verdict and entering judgment for plaintiff and observing that instances of racial harassment directed at a co-worker was proof toward sustaining claim of sexual harassment claim by plaintiff); *Hafford v. Seidner*, 183 F.3d 506 (6th Cir. 1999)(holding that religious discrimination was proof toward sustaining plaintiff's claim of race discrimination); *Hicks v Gates Rubber Co.*, 833 F.2d 1406, 1415-17 (10th Cir. 1987)(holding that "incidents of racial harassment which may, by themselves, be insufficient to support a racially hostile work environment claim can be combined with

incidents of sexual harassment to prove a pervasive pattern of discriminatory harassment in violation of Title VII.”).

Discriminatory comments may be linked to other acts. *Carter*, 173 F.3d at 701.

Defendants of course deny all of this. Thus, issues exists for a jury to resolve.

Defendants remarkably and incredibly argue that Massarone was not subjected to an “adverse employment action.” The end result of defendants’ illegal employment practices and misconduct was the end of Massarone’s employment as a police officer. Whether this is characterized as an affirmative discharge or a constructive discharge, it makes no difference as both are an “adverse employment action.” *See Turner v. The Pendennis Club*, Ky. App., 19 S.W. 3d 117, 121 (2000).

Defendant’s discussion about the similarly situated issue is also incorrect. Whether or not two employees are similarly situated is a question of fact for the jury. *Graham v. Long Island Railroad*, 230 F.3d 34, 39 (2nd Cir. 2000). Furthermore, the Supreme Court advised in *Meyers* that such questions, even if they involve some application of law to fact, in employment discrimination cases are committed for the jury’s resolution. 840 S.W.2d at 822.

Defendants argue that Massarone can only be similarly situated to a person who is also a captain at the same time. Recently, now Major Mike Bosse has testified that Chief Devers wanted to remove Massarone, who had requested a transfer in any event, from her communications position and inquired if then-Captain Bosse would be interested. He declined. Here is an instance of two captains neither of which wanted to be in communications and the male was granted the opportunity to honor his wishes, while the woman, Massarone, was not and, as a result, was ultimately forced to end her career with the police department. A

reasonably jury could conclude that this is differential treatment of similarly situated police captains indicates gender discrimination.

Defendant LFUCG's motion for summary judgment on Massarone's sex discrimination claim should be overruled.

POINT 2

FACT ISSUES EXIST ON MASSARONE'S RETALIATION CLAIM.

Defendants ignore controlling legal authority and misstate the prima facie elements of Massarone's retaliation claim, which were set out in *Kentucky Center for the Arts v. Handley*, Ky. App., 827 S.W. 2d 697, 701 (1991), as follows: (1) she engaged in a protected activity, (2) she was disadvantaged by an act of her employer; and, (3) there was a causal connection between the activity engaged in and the employer's act.

Viewing the evidence in the light most favorable to Massarone, which the court must do at this stage, she can demonstrate that she engaged in a protected activity. Specifically, Walsh made statements specifically referring to her are direct evidence of gender bias. There is no dispute that these statements indicate gender biased on his behalf, as several witnesses have acknowledged including Walsh. Walsh depo. at 30 – 31; Skiba depo. at 23 – 24; Ulysses Berry depo. at 36; Robert Stack depo. at 15. In response, Massarone had it communicated to Walsh that she would institute legal action if he followed his gender bias and did not promote her as she had earned. In fact, defendants that Walsh discussed her possible lawsuit against him in a meeting with her. Accordingly, the evidence indicates that Massarone had communicated to Walsh that she would institute legal action if his gender bias resulted in her not being promoted as he had asserted. A jury can find that she engaged in protected activity and that Walsh was aware of it.

Defendant's argument that Massarone suffered no adverse employment action is both legally and factually incorrect. First, KRS 344.280 prohibits retaliation or discrimination "in any manner." This is a "broader" protection than provided by federal law, as "the Kentucky provision condemns any retaliatory act instead of merely acts of discrimination." *Bank One v. Murphy*, 52 S.W.3d at 553 (Keller, J., concurring in part and dissenting in part). Therefore, the extended discussion by defendants on pages 14 – 16 of their Memorandum is irrelevant. Secondly, the adverse employment action that resulted from Walsh's retaliation was the end of Massarone's employment. Even if viewed as a constructive discharge, this is an adverse employment action within the meaning of the law. *Turner v. Pendennis Club, supra*.

A fact issue exists regarding the causal connection between Massarone's protest and the end of her employment. Massarone made numerous efforts at securing a transfer and relief from the untenable position she found herself in. Walsh was responsible for denying them, although he denies ever being aware of them. Paradoxically, defendant LFUCG asserts that Massarone would have been transferred and her problems alleviated if Walsh had known about her transfer requests. *Answers to Plaintiff's Interrogatories #5*.¹¹ Thus, a jury can find that those requests were denied in retaliation for her protest and threats of a lawsuit and that these retaliatory actions caused her termination. Accordingly, defendants' motion for summary judgment should be overruled.

POINT 3

FACT ISSUES EXIST ON MASSARONE'S HOSTILE WORK ENVIRONMENT CAUSE OF ACTION

¹¹ A copy is attached and marked exhibit F.

Defendant's discussion of hostile work environment is also factually and legally incorrect. Massarone worked under a regime instituted and maintained by Larry Walsh hostile on gender directed at her and probably every other woman involved in the department.

The existence of a hostile work environment must be assessed from the totality of the circumstances. *Ammerman v. Board of Education, Ky.*, 30 S.W.3d 793, 798 (2000). Relevant to this assessment is conduct directed specifically at the plaintiff, conduct directed at co-workers, conduct directed at third parties, *Meyers, supra; White, supra; Estes, supra; Schwapp, supra*, conduct of which the plaintiff becomes aware through conversation and discussion in the workplace, and includes conduct that is not specifically of a sexual nature. *Meyers, supra*. Because the assessment is whether the workplace is permeated with a discriminatory atmosphere, discrimination in other forms, such as racial or religious discrimination, is also relevant to assessing the existence of a hostile work environment based on sex. *Carr v. Allison Gas, supra; Hafford v. Seidner, supra; Hicks v. Gates Rubber, supra*.

The question of whether the harassment is sufficiently severe and pervasive is ultimately committed to the jury, as the Supreme Court recognized in *Meyers*. 840 S.W.2d at 822. Defendants omit much evidence and argue that it was not. This issue is for the jury to decide upon consideration of all of the evidence. Accordingly, defendant LFUCG's motion for summary judgment on Massarone's hostile work environment claim should be **overruled**.

POINT 4

IF LFUCG WERE ENTITLED TO THE AFFIRMATIVE DEFENSE RECOGNIZED IN BANK ONE V. MURPHY AND DERIVED FROM THE FARAGHER/ELLERTH CASES, THERE ARE FACT ISSUES FOR A JURY.

Defendant LFUCG is not entitled to the affirmative defense. First, the actions of her supervisor resulted in a tangible employment action - the end of Massarone's employment. Therefore, the *Faragher/ Ellerth* affirmative defense is not available.

Defendant's assertion that the promulgation of a written "policy" regarding sexual harassment establishes the first prong of the affirmative defense is incorrect. This argument was specifically rejected by the Kentucky Supreme Court in *Bank One v. Murphy*. In *Murphy*, the court specifically rejected the bank employer's argument that its promulgation of a written policy established the first prong of the defense. Rather, the court noted prior instances of sexual harassment committed by the offending employer created a fact issue as to whether or not this element of the defense had been established. The widespread evidence of Walsh's misconduct operates likewise. Therefore, there is a fact issue for the jury on this issue. Secondly, there is a fact issue as to the second element of the defense as well. A jury could find that it was reasonable for Massarone to have decided not to pursue remedies outside the police department. Massarone would be entitled to present evidence "to the effect that the employer has ignored or resisted similar complaints or has taken adverse actions against employees in response to such complaints." *Leopold v. Baccarat, Inc.*, 239 F. 3d 243, 246 (2nd Cir. 2001). There is obviously testimony that can be offered for a jury to consider as to whether or not it was reasonable or unreasonable for Massarone to complain about Walsh's conduct to higher-ups; this testimony will come from Ulysses Berry, Arty Greene, Mark Barnard, David Lyons, Paul Williams and others.

CONCLUSION

For all the foregoing reasons, defendants' motion for summary judgment should be **overruled** in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing was hand-delivered this ____ day of February, 2003, to the following:

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