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Circuit Court of Florida,
17th Judicial Circuit.
Broward County
Marina SWEAT, Plaintiff,
v.
TOWN OF DAVIE, Florida, a municipal corporation, Defendant.
No. 04-10003 (12).
July 16, 2007.

West Headnotes
**Civil Rights 78 1244**

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Police officer failed to demonstrate that she engaged in statutorily protected activity or expression by complaining about alleged sexual harassment, as required to establish prima facie claim of retaliation under the Florida Civil Rights Act; employee's only complaints were to her friends, she did not make any formal complaints to employer or supervisors. West's F.S.A. § 760.01 et seq.

Order Granting Defendant's Motion for Summary Judgment

Dorian Damoorgian, Broward Circuit Court Judge.
THIS CAUSE having come on to be heard on Defendant's Motion for Summary Judgment, and the Court having heard argument of counsel, and being otherwise advised in the premises. it is hereupon, ORDERED AND ADJUDGED that said Motion be, and the same hereby is GRANTED. and the Court sets forth the following reason for its decision.

*BACKGROUND*

The Plaintiff originally filed a Complaint setting forth two substantive counts pursuant to *Florida Statutes* § 760.01 *et seq.* She sued for sexual harassment and retaliation and sought unspecified damages. (*Complaint* ¶¶ 2, 62-76). The Court dismissed both counts of the Complaint and the Amended Complaint with leave to amend both times. The Plaintiff then filed a Second Amended Complaint, which only brought a cause of action for re-

taliation, as the Plaintiff dropped her sexual harassment allegations.

The Court dismissed the Plaintiff's Second Amended Complaint, but allowed her to amend the pleading, because Plaintiff's counsel argued that he should be able to allege a comment that Lt. Legacki (who is an alleged lesbian), who is the alleged sexual harasser, uttered when she saw the Plaintiff leave the shower in the locker room, in order to demonstrate that the Plaintiff had a good faith belief that she was subjected to sexual harassment by hearing the comment. That comment had only been alleged in the Second Amended Complaint as being an "inappropriate comment". In the Third Amended Complaint, the Plaintiff alleges that the "inappropriate comment" concerned "a tattoo located below Plaintiff's vagina" (*Third Amended Complaint* ¶ 13), but fails to specify what the actual comment was. In any event. Plaintiff testified in her deposition concerning what the comment was, and the comment does not create a sexually hostile work environment, because the Plaintiff merely stated that the comment was, "Oh, that's what all the guys are talking about. That's the tattoo that all the guys are talking about." (*Dep. of Sweat* at 46). This simple comment by a fellow female officer (even if Lt. Legacki were lesbian) could not have been construed by a reasonable person as constituting sexual harassment. and therefore, Plaintiff could not have had a reasonable good faith belief that hearing that comment subjected her to sexual harassment, which requires summary judgment in Davie's favor, *Clark Country Sch. Dist. v. Breeden*, 532 U.S. 268, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001).

Even assuming, *arguendo*, that Plaintiff did have a good faith belief that hearing that comment was actionable sexual harassment, Plaintiff cannot establish a prima facie case of retaliation in any event, because she did not engage in statutorily protected activity, as she did not complain about the comment, but rather simply told some friends of hers on the force about it. (*Dep. of Sweat* at 49-52). Assuming. *arguendo*, that Plaintiff's iteration of the incident can be construed to constitute a formal complaint of sexual harassment putting Davie on notice of it. there is no causal relation between her "complaint" and her termination, because the decision-maker did not know that she had told three sergeants in passing about Lt. Legacki uttering the comment. (*Affidavit of Chief George* ¶¶ 1-3). Moreover, even if Plaintiff could establish that a prima facie case of retaliation. she cannot rebut Davie's legitimate, non-retaliatory reason. namely, all of the policy violations that Plaintiff committed, which were the cause of her termination.[FN1]

> FN1. In September of 2003, Sweat was terminated by the Town of Davie for failure to make probation. (*See* Exhibit 3 to Davie's Statement of Disputed Facts). Sweat testified that she did not know why she was terminated by the City (*Dep. of Sweat* at 90-9 ). but she did know that she failed to meet probation. *Id.* at 91. In September, 2003, Sweat received her annual performance evaluation in which she was found to have been deficient, reflecting a general lack of knowledge of General Orders and procedures, lack of on view activity and acting in violation of departmental policies. (See Exhibit 4 to Davie's Statement of Disputed Facts).
>
> Termination of employment of Marina Sweat was recommended to Chief John George by Major Scott McInerney for failure to meet the basic standards of conduct and competency set by the Davie Police Department, as analyzed in detail in Major McInerney's Memorandum of September 8, 2003. (*See* Exhibit 5 to Davie's Statement of Disputed Facts). Officer Sweat was charged and found to have violated the rules of switching shifts with another police officer without receiving prior approval. (*See* Exhibits 5 and 6 to Davie's Statement of Disputed Facts). Officer Sweat stated that she did not know the rule on shift changes. (*Dep. of Sweat* at 177, 188-189).
>
> When Sweat moved from Broward County to Palm Beach County, she took her police vehicle outside

of Broward County without obtaining prior permission of the police chief. *Id.* at 82-83; *see* Exhibit 6 to Davie's Statement of Disputed Facts. The regulations of the Town of Davie require that approval be obtained from the Police Chief or his designee before operating a police vehicle outside Broward County. (*See* Exhibit 7 to Davie's Statement of Disputed Facts). Sweat was found to have violated General Orders at the Town of Davie Police Department by obtaining such approval, prior to taking her police vehicle to Palm Beach County. (*See* Exhibit 5 and Exhibit 6 to Davie's Statement of Disputed Facts). Sweat admitted that she never bothered to look at the rules. (*Dep. of Sweat* at 83). She only looked at the rule during the Internal Affairs Investigation. *Id.* at 83. Then she learned it was a violation. *Id.*

A citizen of Palm Beach, County. filed a complaint against Sweat for driving her police vehicle in an erratic manner in Palm Beach County. (*See* Exhibit 8 to Davie's Statement of Disputed Facts: *Dep. of Sweat* at 218-219). The complainant was an officer in another jurisdiction. *Id.* at 219. Sweat admits to not using her turn signals to switch lanes. *Id.* at 220. When asked why she was not using her signals. Officer Sweat, who was driving a police vehicle) said, "How many people do?" *Id.* at. 220.

Chief George, the decision-maker who terminated Sweat, had no idea that Sweat ever made an informal complaint of sexual harassment concerning Lt. Legacki seeing her nude in the woman's locker room or any other incident. (*Affidavit of Chief George* ¶¶ 1-3). Moreover. Chief George did not know of any complaint made by Plaintiff concerning discrimination, harassment, or retaliation of any type when he decided to fire her. *Id.* Chief George fired Sweat for the reasons discussed above, as outlined in his letter to Sweat. *Id.*

It is settled that to establish a prima facie case of retaliation under the Florida Civil Rights Act, a plaintiff must allege that 1) she engaged in statutorily protected activity; 2) she suffered an adverse employment action: and 3) there is a causal relation between the two events. *Guess v. City of Miramar,* 889 So.2d 840, 846 (Fla. 4th DCA 2004). Moreover, a plaintiff has to show that any protected activity (such as a complaint about sexual harassment) was made in good faith, meaning that a reasonable person in the shoes of the plaintiff would have thought that they were being subjected to sexual harassment. *Clark County Sch. Dist. v. Breeden,* 532 U.S. 268, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001) (attached hereto as Exhibit 2); *Little v. United Technologies,* 103 F.3d 956. 959-60 (11th Cir. 1997). Further, once a prima facie case is established, the defendant has the burden to proffer a legitimate, non-retaliatory reason (which I have found Davie has done in this case, see note 1. and then the burden shifts back to the plaintiff to establish that the defendant-employer's reason is not believable. *Guess v. City of Miramar,* 889 So.2d 840, 847-48 (Fla. 4th DCA 2004).

*MEMORANDUM OF LAW*

1. THE LEGAL STANDARDS FOR GRANTING A MOTION FOR SUMMARY JUDGMENT PURSUANT TO RULE 1.150(c)

Summary judgment
shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any. show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.

Fla. R. Civ. P. 1.150(c).

II. PLAINTIFF CANNOT MAINTAIN A CLAIM FOR RETALIATION

The Plaintiff must satisfy the following three elements to establish a prima facie case of retaliation, namely, that she: 1) engaged in statutorily protected conduct or expression; 2) suffered adverse employment action subsequent to such activity; and 3) there was a causal link between the protected conduct or expression and the adverse employment action. *Guess v. City of Miramar,* 889 So.2d 840, 846 (Fla. 4th DCA 2004); *Little v. United Technologies,* 103 F.3d 956, 959 (11th Cir.1997); *Morgan v. City of Jasper,* 959 F.2d 1542, 1547 (11th Cir.1992). The other circuits agree with the Fourth District Court of Appeal and the Eleventh Circuit regarding the elements necessary to establish a prima facie case of retaliation. *Fennell v. First Step Designs, Ltd.* 83 F.3d 526, 535 (1st Cir.1996); *Reed v. A.W. Lawrence & Co.,* 95 F.3d 1170. 1178 (2d Cir. 1996); *Barber v. CSX Dist. Servs.,* 68 F.3d 694, 701 (3d Cir.1995); *Mattern v. Eastman Kodak Co.,* 104 F.3d 702, 704 (5th Cir.1997); *EEOC v. Avery Dennison Corp.,* 104 F.3d 858, 860 (6th Cir.1997); *Johnson v. University of Wisconsin-Eau Claire.* 70 F.3d 469, 479 (7th Cir.1995); *Kinkead v. Southwestern Bell Tel. Co.,* 49 F.3d 454, 456 (8th Cir.1995); *Berry v. Stevinson Chevrolet,* 74 F.3d 980, 985 (10th Cir.1996).

A. Plaintiff Cannot Establish that She Engaged in Statutorily Protected Conduct or Expression Opposing Discrimination; Therefore, Plaintiff Cannot Fulfill the First Element of the Prima Facie Case for Retaliation

In this case, the Plaintiff cannot fulfill the first element of the prima facie case--because she did not engage in protected activity-for two reasons: 1) she did not specifically complain about sexual harassment or disparate treatment discrimination and 2) even if she had, she certainly did not do so while having an objectively and subjectively reasonable belief that she was being subjected to sexual harassment or disparate treatment discrimination. These two concepts will be discussed in turn.

First, it is clear from a review of the Third Amended Complaint that there are no factual allegations which support the conclusory assertion in paragraphs 17 and 18 of the Third Amended Complaint that the Plaintiff in fact engaged in protected activity. The only allegation that even remotely pertains to this concept is found in paragraph 14 of the Third Amended Complaint which alleges that after the incident where Lt. Legacki allegedly stared down the Plaintiff in the shower "Plaintiff reported this incident to her immediate supervisors Sgt. Necolettos, Sgt. Horovitz and Sgt. Johnson and who took no corrective action." (*Third Amended Complaint* ¶ 14). In Plaintiff's deposition she testified that she merely told those sergeants what had happened, and that she would not characterize the provision of that information as being a complaint of sexual harassment, she was just "telling them what had happened." (*Dep. of Sweat* at 49-52, 54, 55). Simply "telling [some co-workers] what had happened" is hardly the same as unequivocally and clearly complaining of discrimination or harassment. The Fourth District Court of Appeal has recently held that an employee's complaint of discrimination or harassment must be specific and unequivocal, as follows:

an employee's statement or communication cannot be deemed to be in opposition to an unlawful employment practice unless it refers to a specific practice of the employer that is allegedly unlawful. 'Vagueness as to the nature of the grievance ... prevents a protest from qualifying as protected activity."

*Guess v. City of Miramar,* 889 So.2d 840, 847 (Fla. 4th DCA 2004). In *Guess,* the Fourth District Court of Appeal held that the plaintiff could not establish a retaliation claim, because the complaint was not unequivocal and specific. In comparing the case before it to the *Dupont-Lauren v. Schneider (USA), Inc.,* 994 F.Supp. 802, 823 (S.D.Tex.1998) case, the court noted that like "*Dupont-Lauren,* the plaintiff did not complain of any specific activity, nor did she accuse any specific person of discrimination against her. Thus, her comments were too vague to constitute protected activity under the opposition clause." *Id.* Accordingly, like the plaintiffs in *Guess* and *Dupont-Lauren,* here, the Plaintiff's testimony shows that she told three sergeants about the shower incident, there are no allegations that she clearly conveyed to the proper officials at the Town of Davie that she was com-

plaining about discrimination or harassment. (*Dep. of Sweat* at 49-54, 74-76, 458, 191-92). The three sergeants were not required to do anything simply because a co-worker told them that another co-worker stared at her funny in the shower, and stated in reference to her tattoo that, "Oh, this is what all the guys are talking about."

The cases that affirm the grant of summary judgment on retaliation claims where the employee's "complaint" was vague or where the complaint failed to clearly convey to the employer that the employee was opposing unlawful discrimination or harassment are legion. *See, e.g.*, *Sullivan v. River Valley Sch. Dist.*, 197 F.3d 804 (6th Cir.2000) (affirming grant of summary judgment when the "complaint" was vague); *Miller v. American Family Mut. Ins. Co.*, 203 F.3d 997 (7th Cir.2000) (affirming grant of summary judgment where the plaintiff merely complained of unfair treatment, and did not specifically convey to the employer that she was opposing pregnancy discrimination).

In Plaintiff's deposition, notably. she testified that hearing the comment from Lt. Legacki did not inspire her to read Davie's policies and procedures concerning sexual harassment nor did it inspire her to make a complaint to Davie's Human Resources Department. (*Dep. of Sweat* at 50-51). Sgt. Tomasich was Plaintiff's direct supervisor, but she admitted that she never went up the chain of command to tell him about the shower incident with Lt. Legacki, but rather just told some of her friends about the incident. *Id.* at 74-76.

Regarding the second issue, in order for an employee to fulfill the first clement to the retaliation prima facie case, the courts require that an employee complaining about perceived discrimination or harassment have an objectively reasonable and subjectively reasonable belief that he or she is suffering from unlawful discrimination or harassment when they complain of same. *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001); *Little v. United Technologies*, 103 F.3d 956, 959-60 (11th Cir.1997). Otherwise, an employee who believes that they are going to be disciplined or terminated could simply make-up any reason to complain to attempt to prevent the employer from going forward with the discipline.

The type of incident which is alleged to have been complained about in this case-an isolated incident of one employee staring another down in. the shower-- has been held to not constitute protected activity, and in fact Plaintiff admitted in her deposition that the utterance of the comment in the shower would not constitute sexual harassment if Lt. Legacki were not a lesbian. (*Dep. of Sweat* at 54). In *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001), the Supreme Court of the United States reversed the Ninth Circuit's reversal of the grant of summary judgment to the Title VII defendant. The Court held that "no one could reasonably believe" that a single sexually explicit remark could be a violation of Title VII. The Court explained:

Just three Terms ago, we reiterated, what was plain from our previous decisions, that sexual harassment is actionable under Title VII only if it is "so 'severe or pervasive' as to 'alter the conditions of [the victim's] employment and create an abusive working environment.' " ... Workplace conduct is not measured in isolation, instead, 'whether an environment is sufficiently hostile or abusive' must be judged 'by looking at all the circumstances,' including the 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.' " Hence, "[a] recurring point in [our] opinions is that simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.' "

No reasonable person could have believed that the single incident recounted above violated Title VII's standard.

*Id.* at 268.

Similarly, in *Little*, the Eleventh Circuit unequivocally held that an employee's "opposition" to an isolated, racially offensive comment by a co-worker does not constitute statutorily protected activity because, among other things, isolated comments are not attributable to employers, and thus do not constitute an unlawful employment practice. *Little v. United Technologies*, 103 F.3d 956. 959-60 (11th Cir. 1997). In *Little*, the Eleventh Circuit framed the issue as follows: "Is an employer's alleged retaliation against an employee for opposing an offensive or derogatory remark uttered by a co-worker actionable under Title VII?" *Id.* at 958. The court answered the question in the negative, and held that: "We conclude that a racially derogatory remark by a co-worker, without more. does not constitute an unlawful employment practice under the opposition clause of Title VII." *Id*, at 961.

There are two cases from the Eleventh Circuit which specifically hold that an incident where a co-worker stares at the plaintiff in such a way that the plaintiff believes that the co-worker is leering at or ogling them in a sexual manner does not constitute actionable sexual harassment, and in this case Plaintiff's allegations do not even arise to such level. *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1244 (11th Cir.1999) (*en banc*); *Gupta v. Florida Bd. of Regents*, 212 F.3d 571.583 (11th Cir. 2000).

In this case, as set forth above, Plaintiff never complained to anyone at the Town of Davie about any discriminatory or harassing conduct, and therefore, for purposes of the first element to her prima facie retaliation case, Plaintiff cannot satisfy that element. Again, while the Third Amended Complaint does allege in conclusory fashion that Plaintiff engaged in protected activity and complained about the harassment (*Third Amended Complaint* ¶¶ 17-18), there is no record evidence from Plaintiff's deposition that supports that conclusory contention. In fact. Plaintiff admitted that her discussion with the three sergeants did not constitute a complaint, and she further admitted that the three sergeants to whom she told about the comment, none of them retaliated against her, nor did any of them pass the information up the chain of command. (*Dep. of Sweat* at 55-56).

As *Breeden* and *Little* make clear, even if the Court were to find that Plaintiff's informing the three sergeants about the shower incident constitutes protected activity (which the Court does not), the Court is required to find that such "complaint" was not made in either objective or subjective good faith, and thus not actionable. Accordingly, because the Plaintiff cannot satisfy all of the elements to her prima facie case of retaliation, the Court enters summary judgment in favor of Davie.

Finally, paragraph 17 suggests that the Plaintiff alleges that she was also fired (in addition to the "complaint" about the shower incident to the three sergeants) because she complained about disparate treatment. The only allegations in, the Third Amended Complaint that could possibly constitute disparate treatment are the following: (1) Plaintiff was not allowed to take her vehicle out of Broward County (*Third Amended Complaint* ¶ 15.B-D); (2) Major McInerney submitted a memorandum that contained a false statement concerning who was present at a meeting, *id* ¶ 15,G-I; (3) Plaintiff was not allowed to handle two different calls, *id.* ¶ 15.N-P., S; and (4) Plaintiff had mental difficulties performing the job of a police officer, *id.* ¶ 15.T-X. None of these activities constitute disparate treatment, because they do not constitute adverse employment actions.

The courts have expressly rejected the notion that all hostile acts which occur toward a plaintiff constitute adverse employment action. *Wu v. Thomas.* 996 F.2d 271, 273, 274 & n. 3 (11th Cir.1993) (stating "[t]hat all hostile acts are [not] wrongful". and noting that no case in the Eleventh Circuit "establish [es] the proposition that every unkind act, even those without economic consequences, can violate Title VII"). Moreover, the courts require that the adverse employment action cause the plaintiff "tangible injury" or "tangible harm," meaning an economic consequence. *Id.* at 273 & n. 3. "[A]n employment action ... is not adverse merely because the employee dislikes it or disagrees with it." *Doe v. Dekalb COunty Sch. Dist.*, 145 F.3d 1441. 1449 (11th Cir. 1998)

(citations omitted). Otherwise, “every trivial personnel action that an irritable, chip-on-the-shoulder employee did not like would form the basis for a discrimination suit.” *Id.* (citations omitted). Thus, “not everything that makes an employee unhappy is an actionable adverse employment action.” *Id.* The talisman for determining adversity is objectivity: “[The] plaintiff must demonstrate that a reasonable person in his position would view the employment action as adverse.” *Id.* With these precepts in mind, the Court will turn to Plaintiff's allegations in turn.

Title VII. like the Florida Civil Rights Act, covers discrimination in the general terms and conditions of an employee's employment. 42 U.S.C. § 2000e-2(a)(1) (1994). Plaintiff alleges generally that she complained of disparate treatment discrimination. In *International Bhd. of Teamsters v. United States,* 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). the Supreme Court of the United States defined disparate treatment. The Court stated:
‘Disparate treatment’ such as alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion. sex or national origin. Proof of discriminatory motive is critical....

*Teamsters,* 431 U.S. at 335-36 & n. 15 (citations omitted). The Eleventh Circuit has also noted that “proof of discriminatory motive is a necessary element of a disparate treatment case.” *Perryman v. Johnson Prods. Co.,* 698 F.2d 1138, 1141 n. 4 (11th Cir.1983).

To state *a prima facie* case of discrimination in the terms and conditions of employment,

Plaintiff must establish that: (1) she belongs to a protected class; (2) she performed her job satisfactorily; (3) she suffered an adverse employment action (*e.g.,* demoted, terminated, etc.): and (4) her employer treated similarly situated employees outside her classification more favorably. *McDonnell Douglas Corp.,* 411 U.S. at 802. *See also Carter v. City of Miami,* 870 F.2d 578, 582 (11th Cir.1989) (holding that “adverse employment action” is part of the *prima facie* case).

In this case, for purposes of Plaintiff's retaliation claims, the Plaintiff cannot show that she had an objective or subjective belief that she had a disparate treatment claim., because none of the incidents for which she complains constitute adverse employment action for purposes of establishing a disparate treatment case. None of the Plaintiff's concerns requires the conclusion that any one of them constitutes adverse employment action, but rather they are trivial personnel actions, which are not actionable. Moreover, Chief George did not know about them when he decided to fire her. (Affidavit of Chief George ¶¶ 1-3).

B. Plaintiff Cannot Establish any Causal Link Between Her Statutorily Protected Activity and Her Termination (Because She Did Not Engage in any Statutorily Protected Activity)

Although the courts have stated that to establish the causal link element “a plaintiff merely has to prove that the protected activity and the negative employment action are not completely unrelated,” *Coutu v. Martin County Bd. of County Comm'ners,* 47 F.3d 1068, 1074 (11th Cir.1995), the courts have held that temporal proximity between the alleged protected activity and the adverse employment action, by itself, is not always sufficient to satisfy the causal link. element. *Mize v. Jefferson City Bd. of Educ.,* 93 F.3d 739. 745 (11th Cir. 1996); *Coutu,* 47 F.3d at 1074; *Soileau v. Guilford of Maine, Inc.,* 105 F.3d 12 (1st Cir.1997) (discounting plaintiff's temporal proximity argument by noting that the “narrow focus ignores the larger sequence of events and also the larger truth” and thus affirming the trial court's grant of summary judgment for the defendant); *Bartlik v. United States Dep't of Labor,* 73 F.3d 100, 103 n. 7 (6th Cir.1995); *Johnson v. University of Wisconsin-Eau Claire,* 70 F.3d

469, 480 (7th Cir.1996); *see Stevens v. St. Louis Univ. Med. Ctr.* 97 F.3d 268, 272 (8th Cir.1996) (affirming summary judgment for the defendant, stating that while the allegation of temporal proximity was sufficient to establish the prima facie case, it did not rise to the level required to prove pretext). As the Eleventh Circuit has stated:

It does not follow, however, that every time a person engages in constitutionally protected activity within a short time prior to an adverse employment decision that an inference may be drawn that they were related. Every act of expression is not equally as likely to draw a negative response from an employer as every other; for the link to be made, it must be reasonable to assume that the employer had cause to retaliate.

*Mize,* 93 F.3d at 745 (affirming summary judgment for the defendant, and analyzing causal link in terms of motive, and holding that when a third party must approve the adverse employment action recommended by the person that has a motive to retaliate against the plaintiff. whether retaliation occurred becomes highly attenuated).

In this case, Plaintiff cannot satisfy the causal link element to her prima facie case, precisely because she did not engage in any statutorily protected activity, but also because the decision-maker was unaware about the shower incident or that Plaintiff told three sergeants about it. Accordingly, because Plaintiff failed to complain to the Town of Davie about any discrimination or harassment, her termination could not have been causally linked to any complaint, and because the decision-maker (Chief George) did not know about the incident or that she had informally told three sergeants about it, Plaintiff cannot satisfy her prima facie case for her retaliation claim. ( *Affidavit of Chief George* ¶¶ 1-3). The Third Amended Complaint does not allege who terminated the Plaintiff. The Third Amended Complaint does allege that Major McInerney is the individual who told Plaintiff that she was terminated (and that she was terminated for "failure to make probation"). (*Third Amended Complaint* ¶ 15.CC.). This is so even though the Third Amended Complaint suggests that Lt. Legacki is the individual who is retaliating against the Plaintiff, *See id.* ¶ 15.F.

In any event, because Chief George had no idea about Plaintiff's "complaint" to the three sergeants, and was thus not aware of Plaintiff's "complaint", as a matter of law, he could not have terminated Plaintiff because of that "complaint", which requires summary judgment for *Davie. Lubetsky v. Applied Card Sys., Inc.,* 296 F.3d 1301 (11th Cir.2002) (affirming grant of summary judgment in favor of defendant-employer, because decision-maker did not know about the protected activity); *Strickland v. Water Works and Sewer Board of City of Birmingham,* 239 F.3d 1199 (11th Cir.2001); *Clay v. Holy Cross Hosp.,* 253 F.3d 1000, 1005-07 (7th Cir.2001) (affirming grant of summary judgment because decision-maker did not know about the protected activity); *Geraci v. Moody-Tottrup, Int'l, Inc.,* 82 F.3d 578. 580-82 (3d Cir. 1996) (affirming grant of summary judgment where plaintiff could not prove that the decision-maker knew that she was pregnant, despite plaintiff telling several co-workers that she was); *Robinson v. Adams,* 847 F.2d 131 5. 1316 (9th Cir. 1987) (affirming grant of summary judgment, because decision-maker did not the plaintiff's race). *See also L'Argent v. United Space Alliance, L.L.C.,* 2006 WL 680806 (M.D.Fla.2006) (holding same as the above cases): *Cooper v. Miami-Dade County,* 2004 WL 2044298 (S.D. Fla. 2004) (holding same as the above cases).

In *Strickland,* a grant of summary judgment was affirmed by the court because the plaintiff had failed to establish a prima facie case because there was no evidence that the decision-maker had any knowledge of the plaintiff's protected activity. *Strickland,* 239 F.3d at 1199. Without such knowledge. it is impossible for the decision-maker to have been motivated by the protected activity when the plaintiff was disciplined, and therefore impossible for the plaintiff to establish the requisite causal link. *Id.* There are cases that concur with this ruling. *See, e.g., Raney v. Vinson Guard Serv. Inc.,* 120 F.3d 1192, 1196 (11th Cir.1997). Accordingly, even if I had

found that the Plaintiff has sufficiently alleged that she engaged in protected activity (and 1. specifically found that she did not), Davie is entitled to summary judgment on an additional ground, namely, because the Plaintiff cannot satisfy the third element of the prima facie case-that there was a causal link between her protected activity and the adverse employment action.

III. EVEN IF PLAINTIFF COULD ESTABLISH A PRIMA FACIE CASE FOR RETALIATION (WHICH SHE CANNOT), PLAINTIFF'S POOR EVALUATION CONSTITUTES A LEGITIMATE, NON-DISCRIMINATORY REASON FOR HER TERMINATION.

When a plaintiff alleges retaliation. liability depends on whether the protected activity (or protected classification) actually motivated the employer in making the decision at issue. *Reeves v. Sanderson Plumbing Prods., Inc.* 530 U.S. 133, 120 S.Ct. 2097, 2105, 147 L.Ed.2d 105 (2000). That is, the plaintiff's protected trait must have "actually played a role in [the decision-making] process and had a determinative influence on the outcome." *Id.* Recently, the Eleventh Circuit, sitting *en banc*, discussed the inner-workings of the *McDonnell-Douglas* framework in great detail. *Chapman v. AI Transport*, 229 F.3d 1012 (11th Cir.2000) (*en banc*). Under the *McDonnell-Douglas* framework, once a *prima facie* case is established, a presumption that the employer unlawfully discriminated against the employee arises. *Id.* at 1025. The defendant-employer must then articulate a legitimate, non-discriminatory reason for the challenged action. *Id.* Once the defendant-employer articulates one or more legitimate business reasons, the presumption of discrimination is eliminated. *Id.* Then, the plaintiff must come forward with significant probative evidence "to permit a reasonable fact finder to conclude the reasons given by the employer were not the real reasons for the adverse employment decision", because
[i]f the employee does not proffer sufficient evidence to create a genuine issue of material fact regarding whether each of the defendant's articulated reasons is pretextual, the employer is entitled to summary judgment on the plaintiff's claim.

*Id.* at 1024-25.

Significantly, a "plaintiff is not allowed to recast an employer's proffered nondiscriminatory reasons or substitute her business judgment for that of the employer." *Id.* at 1030. Provided that the proffered reason is one that might motivate a reasonable employer, the employee must meet that reason head-on and rebut it and the employee cannot succeed by simply quarreling with the wisdom of that reason." *Id. See also Alexander v, Fulton County*, 207 F.3d 1303, 1341 (11th Cir.2000) (holding that "it is not the court's role to second-guess the wisdom of an employer's decisions as long as the decisions are not racially motivated"). The courts "do not sit as a super-personnel department that re-examines an entity's business decisions. No matter how mistaken the firm's managers," the federal courts do not interfere. *Chapman*, 229 F.3d at 1030. Rather, the Court's "inquiry is limited to whether the employer gave an honest explanation of its behavior." *Id.* The Fourth District Court of Appeal has used this same standard. *Guess v. City of Miramar*, 889 So.2d 840, 847-48 (Fla. 4th DCA 2004).

In this case, the Plaintiff has pled herself out of court, because she has alleged that she did sign the evaluation that slates she performed poorly and Major McInerney told her that she was terminated for "failure to make probation". (*Third Amended Complaint* ¶ 15.CC.). The Plaintiff has no evidence to challenge the fact that Chief George fired her for performance deficiencies that were outlined *supra*, in note 1. In fact, in her deposition, Plaintiff could not even articulate what her claim was for retaliation. In the first day of the deposition[FN2] of Marina Sweat, she was asked why she was suing the Town of Davie for retaliation. and she answered as follows:

FN2. Ms. Sweat's first day of deposition was taken on January 6, 2006. Her second day of deposition

was taken on March 23, 2006.

Q. And what are you suing them for?
A. Retaliation.
Q. Okay, Retaliation for what?
A. Where do I begin?
Q. At the beginning.
A. For - I was a good officer. I had great evaluations. I did my job.
I did it effectively. In three days before my probation is up you're going to tell me that I'm not good enough?
There's a problem with that because, you know, if you're a supervisor, you're telling me, okay, you're poor in this, you're lacking on this. you're not doing well on this, then you know there's a problem. There's red flags going up.
But you mean to tell me that in 14 months that I'm working at Davie. I'm getting above average or better, not accommodations, but evaluations, and then two or three days before my probation is up 1 get fired. Yes, I have a problem with that.
Q. Okay. But what I'm trying to understand is you're making a claim of retaliation?
A. Well, for not being - for not - for not being a key player. For not - I don't know how to explain this. I was retaliated against.

(*Dep. of Sweat* at 25-27). The above-testimony shows that Plaintiff is completely unable to articulate her retaliation claim under the FCRA. The theory in the lawsuit is that Plaintiff was retaliated against after she complained of sexual harassment for making the claim of sexual harassment.

Finally, it is clear in this case that absolutely no evidence of retaliation exists (as none is alleged in the Third Amended Complaint), and that the Town of Davie's business judgment should not be second-guessed by Plaintiff or the Court, under the circumstances of this case. *Alphin v. Sears, Roebuck & Co.,* 940 F.2d 1497. 1501 (11th Cir. 1991) (stating that the court is not to "sit as a super-personnel department that re-examines an entity's business decisions"); *Martin v. Ryder Distrib, Resources, Inc., 811* F. Supp. 658, 664 (S.D. Fla. 1992).

Further. it is important to note that the Davie Police Department, as a paramilitary organization, has an acute need to keep cohesion and morale among its members. *Rollins v. Florida Dep't of Law Enforcement,* 868 F.2d 397, 399 (11th Cir.1989) (affirming judgment for the defendant on plaintiff's retaliation claim when plaintiff frequently expressed his complaints "in an insubordinate and antagonistic manner" by, among other things, questioning the credibility of the FDLE's Director). *See also Rogers v. Miller,* 57 F.3d 986, 992 (11th Cir.1995) (noting that "[s]tatements critical of the commanding officer of a paramilitary group, such as the office of the county sheriff, carry with them the real potential for damaging cohesion and morale"). In *Bushy v. City of Orlando,* 931 F.2d 764 774 (11th Cir.1991), the court noted that:
In quasi-military organizations such as law enforcement agencies, comments concerning co-workers' performance of their duties and superior officers' integrity can 'directly interfere[ ] with the confidentiality. esprit de corps and efficient operation of the [police department].'

(alterations in original). Accordingly, Davie's decision to terminate a police office for poor performance, as outlined in the memorandum by Chief George, should not be second-guessed by a Court. when there is no evidence to suggest that Chief George was motivated by retaliatory intent.

There simply is no evidence that Plaintiff was retaliated against or that any of the employment decisions made

with respect to her were the result of retaliatory motive on the part of anyone working for the Town of Davie.

Accordingly, it is ORDERED AND ADJUDGED that Davie's Motion for Summary Judgment is GRANTED as to all claims in the Third Amended Complaint for the reasons stated in this opinion.

DONE AND ORDERED in Chambers. at Fort Lauderdale, Broward County, Florida, this _____ day of _____, 2007.

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Dorian Damoorgian

Broward Circuit Court Judge

Copies furnished to:

Chris Kleppin, Esq.

F. Scott Fistel, Esq.

Sweat v. Town of Davie
2007 WL 3234638 (Fla.Cir.Ct. ) (Trial Order )

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