

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

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CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

KATHLEEN STERNBERG,

Plaintiff,

v.

THE CITY OF MUSCATINE,

Defendant.

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* 3-99-CV-90043
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ORDER DENYING MOTION FOR
SUMMARY JUDGMENT

This matter comes before the Court on Defendant's Motion for Summary Judgment, filed on May 12, 2000. Defendant, the City of Muscatine ("Muscatine"), seeks summary judgment on all claims asserted by Plaintiff, Kathleen Sternberg ("Sternberg"), in her Second Amended Complaint filed on September 30, 1999. On June 6, 2000, Sternberg filed a Resistance to Muscatine's Motion for Summary Judgment. Muscatine filed a Reply to Sternberg's Resistance on June 16, 2000. The Court declines to hear oral arguments on this matter. The Motion is now considered fully submitted.

I. FACTS

This is an employment discrimination suit brought by Sternberg against her former employer, the City of Muscatine. Sternberg's lawsuit is based on allegations that while working for Muscatine, she was subject to sexual harassment and sex discrimination in violation of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e *et seq.* ("Title VII"), and the Iowa Civil Rights Act, Iowa Code Chapter 216 *et seq.* ("ICRA"), and that she was denied leave under the

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Family Medical Leave Act, 29 U.S.C. § 2601 *et seq.* ("FMLA"). Sternberg requested a jury trial on these issues. The following facts are viewed in the light most favorable to Sternberg as the non-moving party. *See Porous Media Corp. v. Pall Corp.*, 110 F.3d 1329, 1337-38 (8th Cir. 1997).

Sternberg worked for Muscatine approximately twenty hours per week as a part-time police radio dispatcher beginning on November 8, 1989, until her resignation on December 30, 1997. The job of police radio dispatcher included the following duties: handling walk-in traffic; monitoring the radios; answering administrative and 911 calls; giving out fire calls; dispatching police; dispatching ambulances; taking money for fines and bicycle licences; handling impound work; handling animal calls; insuring the safety of officers; handling jailing; and various other clerical tasks. Sternberg primarily worked the weekend day shift, except for 1993, when she chose to work nights. In addition, she regularly came in outside of her scheduled hours as needed, and frequently covered sick days or vacation days.

Muscatine Police Chief Gary R. Coderoni ("Chief Coderoni") had overall command of and responsibility for the Muscatine Police Department. From May 26, 1995, through June 24, 1998, Lieutenant Brian Hammer ("Lieutenant Hammer") supervised the dispatchers as to "day-to-day" operations.¹ The captain of support services² was in "overall" charge of communications and the dispatchers as a "function," but not specifically the individual dispatchers on a daily basis. In general, problems involving the dispatchers that came up on a day-to-day basis were

¹During this time period, Lieutenant Hammer, as supervisor, conducted the dispatcher evaluations. Sternberg was not evaluated during this time.

²Captain Robert Yant was the Captain of Support Services when Sternberg was hired, and Captain Robert Torgerson was the Captain of Support Services when Sternberg resigned.

handled by Lieutenant Hammer, and if the issues could not be handled by Lieutenant Hammer, they were handled by the captain of support services. Sometimes Lieutenant Hammer would go directly to Chief Coderoni with dispatcher issues. In addition, Sternberg's direct supervisor during her shift was the on-duty shift commander, Lieutenant Grant Pickering during the week, if he was present, and Sergeant Terry Carman ("Sergoant Carman") during the weekends, if he was present.

Sergeant Carman often lost his temper and would yell, red-faced, at Sternberg and the other dispatchers, who were all female, claiming that their performance was deficient. Sergeant Carman called Sternberg names, referring to her more than once as a "dumb bitch." He told her she was stupid and could not do anything right, and asked her "why don't you ever think?" Upon learning during a staff meeting that she had fallen at home he stated, "It's too bad she didn't break her neck." In addition, Sergeant Carman filed a large number of complaints regarding Sternberg's performance, a majority of which were found unwarranted after investigation.³

As a result of these incidents, Sternberg was physically scared of Sergeant Carman, she was often reduced to tears after dealing with him, she was afraid to make decisions, and made errors she would not have otherwise made. Sergeant Carman did not treat male employees in this manner. He did not lose his temper with them, but was instead respectful and discussed performance issues in private.

³ Lieutenant Hammer reviewed the tapes of radio transcripts and found few problems with Sternberg's performance. He attributed most of the problems were a result of the change to a new radio system and were not the result of incompetence.

Sternberg complained to Lieutenant Hammer and to Chief Coderoni about these incidents. On December 30, 1996, Sternberg filed a formal Equal Employment Opportunity Commission ("EEOC") complaint concerning a particular incident during which Sergeant Carman shoved a paper in Sternberg's face, pointed his finger at her, told her she was "stupid," and yelled, "you are the only one I have trouble with. The only one." Muscatine investigated the complaint and determined that there was no EEOC violation. However, Chief Coderoni ordered Sternberg and Sergeant Carman to engage in mediation, which took place on February 7, 1997. No other action was taken against Sergeant Carman.

Following the mediation, there was little direct confrontation between Sternberg and Sergeant Carman. However, Corporal Anderson and Officers Perley and Cox continued the harassing conduct, some at the direction of Sergeant Carman. They belittled Sternberg about her job performance in front of coworkers. They acted "unprofessional on the radio" toward her, mimicking her voice, responding, "Never mind, Base" in a sarcastic tone, and repeating "10-9" (which means repeat). They also referred to Sternberg as "Screech" on the radio. Officer Cox told the female dispatchers they made too many mistakes and "the guys" did a better job than the dispatchers did. Officer Perley wrote disparaging remarks under Sternberg's name in the Rolodex in the dispatch office including "she is stupid" and "she should be fired." The officers filed numerous complaints about Sternberg's performance in her personnel file. The treatment by these officers continued until she resigned.

While Sternberg never filed a formal EEOC complaint regarding the other officers' radio conduct, Muscatine issued a memorandum regarding "proper radio etiquette" after Sternberg complained to the department about the officers' conduct. She complained to Lieutenant Hammer and Chief Coderoni about the behavior of the officers. No disciplinary action was

taken against the officers. Sternberg experienced increased stress as a result of their behavior and her blood pressure increased.

Near the end of December 1997, Sternberg made a request to Chief Coderoni for a leave of absence due to job-related stress. When asked by Sternberg about the possibility of a leave of absence, Chief Coderoni said "no problem." The following day, he told Sternberg that filing a claim under the Family Medical Leave Act ("FMLA") was the appropriate way to handle her leave request and that in order to do so, she needed to procure a letter from her doctor. On December 26, 1997, Sternberg left her doctor's letter at Chief Coderoni's office requesting a leave of absence from January 1, 1998, through the end of February 1998. On or about December 27, 1997 Chief Coderoni informed Sternberg in person that her FMLA request was granted. On December 29, 1997, however, he wrote Sternberg a letter informing her that she needed to fulfill additional conditions to qualify for FMLA benefits. On December 30, 1997, Sternberg received notice that because of the time needed to process her request she could not begin her leave on January 1, 1998. Sternberg resigned from her job the same day.

II. SUMMARY JUDGMENT STANDARD

The Eighth Circuit Court of Appeals has stated that "summary judgment should seldom be granted in the context of employment actions, as such actions are inherently fact based Summary judgment is not appropriate unless all the evidence points one way and is susceptible to no reasonable inferences sustaining the position of the nonmoving party." *Hindman v. Transkrit Corp.*, 145 F.3d 986, 990 (8th Cir. 1998) (citations omitted). "[I]nferences are often the basis of the claim . . . and 'summary judgment should not be granted unless the evidence could not support any reasonable inference' of discrimination." *Breeding v. Gallagher & Co.*,

164 F.3d 1151, 1156 (8th Cir. 1999) (quoting *Lynn v. Deaconess Med. Ctr.-West Campus*, 160 F.3d 484, 486-87 (8th Cir. 1998)).

Nevertheless, the plain language of Federal Rule of Civil Procedure 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also Snow v. Ridgeview Med. Ctr.*, 128 F.3d 1201, 1205 (8th Cir. 1997) (citing *Bialas v. Greyhound Lines, Inc.*, 59 F.3d 759, 762 (8th Cir. 1995)). The trial judge's function is not to weigh the evidence and determine the truth of the matter, but rather, to determine whether there is a genuine issue for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Celotex*, 477 U.S. at 323-24; *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *Johnson v. Enron Corp.*, 906 F.2d 1234, 1237 (8th Cir. 1990).

The precise standard for granting summary judgment is well-established and oft-repeated: summary judgment is properly granted when the record, viewed in the light most favorable to the nonmoving party and giving that party the benefit of all reasonable inferences, shows that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *See Fed. R. Civ. P. 56(c); Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994).

III. ANALYSIS

Sternberg's Second Amended Complaint ("Complaint") consists of five counts: Count I is a sex discrimination claim against Muscatine and seeks damages under Title VII and ICRA;

Count II is a sexual harassment claim against Muscatine and seeks damages under Title VII and ICRA; Count III is a retaliation claim against Muscatine and seeks damages under Title VII and ICRA; Count IV alleges a violation of the FMLA against Muscatine and seeks damages under 29 U.S.C. § 2601 *et seq.*, and ICRA; and Count V is a constructive discharge claim against Muscatine and seeks damages under Title VII, ICRA, and the FMLA.

Count I: Sex Discrimination

Title VII prohibits an employer from discriminating “against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1). To establish a *prima facie* case of discrimination based on sex, Sternberg must show that: (1) she is female; (2) she was qualified to do perform her job; (3) she was subject to adverse action by the employer; and (4) others not in the protected class were treated more favorably. *See Walker v. St. Anthony’s Med. Ctr.*, 881 F.2d 554, 557-58 (8th Cir. 1989). The first two elements are not in dispute. Muscatine contends, however, that the third element cannot be met because Sternberg was not subject to adverse employment action. Sternberg counters that she was subject to adverse employment action through the verbal and written abuse she received from Sergeant Carman, Corporal Anderson, and Officers Perley and Cox.

“Termination, cuts in pay or benefits, and changes that effect an employee’s future career prospects are significant enough to meet [the Title VII adverse employment action standard].” *Kerns v. Capital Graphics, Inc.*, 178 F.3d 1011, 1016 (8th Cir. 1999). However, adverse action may consist of “action less severe than outright discharge.” *See Kim v. Nash Finch Co.*, 123 F.3d 1046, 1060 (8th Cir. 1997) (finding “serious employment consequences that adversely affected or undermined [the plaintiff’s] position” even though the plaintiff was not discharged,

demoted or suspended). As noted above, Sergeant Carman and the other officers would often scream at and ridicule Sternberg. In addition, they papered Sternberg's employee file with negative reports and reprimands, which can contribute to an adverse action. *See id.* at 1060. In fact, Sergeant Carman actively solicited complaints from the shift officers about Sternberg and on one occasion ordered an officer to complete a complaint form about Sternberg. The actions of Sergeant Carman and the other officers interfered with Sternberg's ability to do her job. Finally, Sternberg claims her resignation was a constructive discharge which should be considered an adverse employment action. "A constructive discharge may constitute an adverse employment action." *See Spears v. Missouri Dep't of Corrections and Human Resources*, 210 F.3d 850, 854 n.3 (8th Cir. 2000) (finding no evidence of constructive discharge). This Court finds that Sternberg has raised a genuine issue of material fact as to whether she suffered an adverse employment action.

The fourth element is also disputed by the parties. Sternberg claims that she and other women in the office were often targets of harassment not directed toward men in the office. According to Sternberg, Sergeant Carman did not lose his temper with male police officers, did not speak condescendingly to male officers, did not throw objects at them, and did not criticize their performance in front of other employees like he did to the women in the office. Instead, Sergeant Carman's practice was to discuss job performance issues with male officers in private and to conduct his affairs with them in a professional, appropriate manner. The Court finds a genuine issue of material fact has been raised as to the fourth element.

Once Sternberg presents a prima facie case of sexual discrimination, Muscatine as the employer must provide a legitimate, non-discriminatory reason for its employment decision. *See McDonald Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973). If Muscatine is able to do so,

the presumption raised by Sternberg is dropped from the case. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993). However, Muscatine does not attempt to present a legitimate, non-discriminatory reason for Sternberg's resignation, simply stating "Sternberg cannot establish a prima facie case of disparate treatment based on gender." Def.'s Mem. at 11. The Court has reviewed the record in its entirety and agrees that Sternberg has created genuine issues of material fact on her sex discrimination claim, which precludes the grant of summary judgment.

Count II: Sexual Harassment Based on a Hostile Work Environment

A workplace that is "permeated with 'discriminatory intimidation, ridicule, and insult . . . sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment'" violates Title VII. *Harris v. Forklift Sys.*, 510 U.S. 17, 20 (1993) (quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65-67 (1986)) (hereinafter "the *Harris* standard"). In order to state a claim for sexual harassment based on a hostile work environment, Sternberg must show that there are genuine issues of material fact that:

(1) she is a member of a protected group; (2) she was subject to unwelcome sexual harassment; (3) the harassment was based on sex; and (4) the harassment affected a term, condition, or privilege of employment.

Hocevar v. Purdue Frederick Co., No. 98-4075, 2000 WL 798101 at *4 (8th Cir. June 22, 2000) (citing *Phillips v. Taco Bell Corp.*, 156 F.3d 884, 888 (8th Cir. 1998)); *see also Quick v. Donaldson Co., Inc.*, 90 F.3d 1372, 1377 (8th Cir. 1996) (citing *Kopp v. Samaritan Health Sys., Inc.*, 13 F.3d 264 (8th Cir. 1994)).

In addition, in a case of co-worker harassment, a fifth element must be proven: that Muscatine "knew or should have known of the harassment and failed to take proper remedial action." *Phillips*, 156 F.3d at 888; *see also Callanan v. Runyun*[sic], 75 F.3d 1293, 1296 (8th Cir. 1996) (failure by defendant to take "prompt remedial action reasonably calculated to end the

harassment"). However, in a case of supervisor harassment, no fifth element is required, and instead courts must consider the affirmative defense of *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) and *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998). Although plaintiff's intent is not entirely clear from the pleadings or briefs, the Court will proceed with a co-worker harassment analysis as to the actions of Corporal Anderson and Officers Perley and Cox, and will proceed with a supervisor harassment analysis as to Sergeant Carman. Sternberg's state and federal discrimination claims are examined together because Iowa civil rights laws are analyzed using the same framework as is applied to federal Title VII claims. See *Brine v. University of Iowa*, 90 F.3d 271, 274 (8th Cir. 1996) (citing *Smith v. ADM Feed Corp.*, 456 N.W.2d 378, 382 (Iowa 1990); *Annear v. State*, 419 N.W.2d 377, 379 (Iowa 1988)).

Sternberg has produced sufficient evidence to establish a prima facie case of co-worker sexual harassment based on a hostile work environment. First, Sternberg is female, a protected class under 42 U.S.C. § 2000e-2(a)(1). Second, there are genuine issues of material fact as to whether Sternberg was subject to unwelcome sexual harassment. Muscatine argues that because the conduct in question was not explicitly sexual in nature, she fails to prove sexual harassment. However, "not every aspect of a work environment characterized by hostility and intimidation need be explicitly sexual in nature to be probative." *Hathaway v. Runyon*, 132 F.3d 1214, 1222 (8th Cir. 1997) (citing *Kopp*, 13 F.3d at 269; *Hall v. Gus Const. Co., Inc.*, 842 F.2d 1010, 1014 (8th Cir. 1988)); see also *Carter v. Chrysler Corp.*, 173 F.3d 693 (8th Cir. 1999) (finding "harassment alleged to be because of sex need not be explicitly sexual in nature"); *Quick*, 90 F.3d at 1377 (quoting *Hall*, 842 F.2d at 1014) ("Congress intended to define discrimination in the broadest possible terms, so it did not enumerate specific discriminatory practices nor 'elucidate the parameter of such nefarious activities.' Since sexual harassment can occur in

many forms, it may be evidenced by acts of physical aggression or violence and incidents of physical abuse"). Sternberg has provided sufficient evidence that she was subject to unwelcome sexual harassment by Sergeant Carman, Corporal Anderson, and Officers Cox and Perley to survive summary judgment.

In analyzing the third element, that the harassment was based on sex, "the critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Harris*, 510 U.S. at 372 (Ginsburg, J. concurring) (citing 42 U.S.C. § 2000e-2(a)(1)). The Eighth Circuit has held that all that is necessary for purposes of summary judgment is evidence that "members of one sex were the primary targets of the harassment." *Quick*, 90 F.3d at 1378 (citing *Kopp*, 13 F.3d at 269-70). As discussed above, women in the office suffered harassment that men did not. If women were not the only targets, it is clear that they were the primary targets of the harassment. The Court has reviewed the record in its entirety and finds there are genuine issues of material fact as to whether the verbal and written harassment by Sergeant Carman, Corporal Anderson, and Officers Cox and Perley was primarily directed at Sternberg and the other women in the office.

In order to prove the fourth element, Sternberg must show that the alleged "harassment affected a term, condition, or privilege of employment." *Quick*, 90 F. 3d at 1377. Sternberg presents evidence that, among other effects, she often left confrontations with Sergeant Carman in tears and that she was physically scared of him, which she claims detrimentally impacted her performance at work. The Court finds this is sufficient to raise an issue of material fact for a jury to determine whether these incidents are "sufficiently severe or persuasive" to be evidence of sexual harassment under the *Harris* standard. See *Howard v. Burns Bros., Inc.*, 149 F 3d 835,

841 (8th Cir. 1998) (“Once there is evidence of improper conduct and subjective offense, the determination of whether the conduct rose to the level of abuse is largely in the hands of the jury . . . [t]here is no bright line between sexual harassment and merely unpleasant conduct.”). The Court finds a genuine issue of material fact exists as to this element.

As to the fifth element, and the actions of Corporal Anderson and Officers Cox and Perley, Sternberg has presented sufficient evidence that Muscatine “knew or should have known of the harassment and failed to take proper remedial action.” *Phillips*, 156 F.3d at 888. Sternberg has presented evidence that she complained on several occasions to Lieutenant Hammer about the behavior of her “co-workers” Corporal Anderson and Officers Cox and Perley, and that both Lieutenant Hammer and Sternberg complained to Chief Coderoni about the behavior of those three officers. Muscatine claims that it took proper remedial action when Chief Coderoni ordered mediation between Sternberg and Sergeant Carman, but that action does not address the conduct of the three officers. There are genuine issues of material fact as to whether Muscatine took proper, or any, remedial action as to the conduct of Corporal Anderson and Officers Cox and Perley.

The Court also finds that a genuine issue of material fact has been raised as to plaintiff's claim of supervisor sexual harassment. The Court first notes that neither party stated facts to indicate that Sergeant Carman was “a supervisor with immediate (or successively higher) authority over [Sternberg].” *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765; *Todd v. Ortho Biotech, Inc.*, 175 F.3d 595, 598 (8th Cir. 1999) (“The Court did not further explain what it meant by ‘supervisor.’”). However, based on Chief Coderoni's deposition testimony that the shift commander was Sternberg's direct supervisor and the parties' statements that Sergeant

Carman was the shift commander when Sternberg worked weekends, this Court finds that a supervisor harassment analysis is appropriate with regard to the actions of Sergeant Carman.

In a supervisor harassment case, the plaintiff must prove the first four elements discussed above, and then, instead of the fifth element:

An employer is subject to vicarious liability for an actionable hostile environment created by a superior with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, *see* Fed. R. Civ. P. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of the preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Ellerth, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

Muscatine argues that it is entitled to summary judgment because Sternberg unreasonably failed to take advantage of the preventative and corrective measures offered by the city. This Court must first determine whether Sternberg suffered a tangible employment action because the affirmative defense is only available to a defendant if the plaintiff did not suffer any tangible adverse employment action. *See Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807; *Newton v. Caldwell Lab.*, 156 F.3d 880, 883 (8th Cir. 1998).

As noted above in the discussion of Count I, Sternberg claims her resignation was a constructive discharge that constitutes an adverse employment action. "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. . . . A tangible employment action in most cases inflicts direct economic harm." *Ellerth*, 524 U.S. at 761. The Eighth Circuit has stated that a constructive discharge may constitute an adverse employment action. *See Spears*, 210 F.3d at 854 n.3;

Ogden v. Wax Works, Inc., 214 F.3d 999, 1007 (8th Cir. 2000); see also *Cherry v. Menard, Inc.*, 101 F. Supp. 2d 1160, 1173 (N.D. Ia. 2000) (“Under the ‘significant change in employment status’ or ‘inflict[ion] of direct economic harm test’ of what constitutes a ‘tangible employment action,’ *Ellerth*, 524 U.S. at 761-62, a constructive discharge that results from the sexually harassing conduct of a supervisor should suffice to deprive the employer of the *Ellerth/Faragher* affirmative defense.”) Under these authorities, this Court finds that a constructive discharge may constitute an adverse employment action and there is a genuine issue of material fact as to whether Sternberg’s resignation was a constructive discharge. As such, Muscatine is not entitled to the *Ellerth/Faragher* affirmative defense at this stage.

The Court has reviewed the record in its entirety and agrees Sternberg has raised genuine issues of material fact on her sexual harassment claim that preclude the grant of summary judgment as to both her co-worker harassment and supervisor harassment claims.

Count III: Title VII Retaliation

To establish a prima facie retaliation case, Sternberg is required to prove that “(1) she engaged in protected activity; (2) [Muscatine] took adverse action against her; and (3) there is a causal connection between the two.” *Hocevar*, 2000 WL 798101 at *4 (citing *Scott v. County of Ramsey*, 180 F.3d 913, 917 (8th Cir. 1999)). Here, it is undisputed that Sternberg engaged in Title VII protected activity when she filed an EEOC complaint against Sergeant Carman. However, Muscatine claims that Sternberg failed to prove the second and third elements because she did not suffer a tangible employment action. Sternberg counters that the tangible employment action took the form of her alleged constructive discharge. As discussed above, there is a genuine issue of material fact as to whether Sternberg was constructively discharged. If she was, Sternberg will have suffered a tangible employment action. The Court finds there is

also a genuine issue as to whether the two events were connected. Therefore, the Court finds that there are genuine issues of material fact as to whether Muscatine engaged in retaliation against Sternberg.

Court IV: Violation of FMLA

The Court's September 27, 1999 Order denying Muscatine's Motion for Partial Summary Judgment and Motion to Strike upheld the constitutionality of 29 C.F.R. § 825.110(d) (1998). The regulation provides in part: "If the employer confirms eligibility [for FMLA benefits] at the time notice of leave is received, the employer may not subsequently challenge the employee's eligibility." "[W]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Kinman v. Omaha Public Sch. Dist.*, 171 F.3d 607, 610 (8th Cir. 1999) (citing *Arizona v. California*, 460 U.S. 605, 618 (1983); *Morris v. American Nat'l Can Corp.*, 988 F.2d 50, 52 (8th Cir.1993)).

In *Ragsdale*, the case submitted to the Court in Muscatine's Supplement to Brief in Support of Summary Judgment, the Eighth Circuit addressed the constitutionality of two Department of Labor regulations, 29 C.F.R. § 825.208(c) and 29 C.F.R. § 825.700(a). See *Ragsdale v. Wolverine Worldwide, Inc.*, No. 99-3319, 2000 WL 943787 at *3 (8th Cir. July 11, 2000). However, the constitutionality of those regulations are not at issue here, and Muscatine's supplemental brief is not instructive on the regulation in question, 29 C.F.R. § 825.110(d).

The Court finds that there has been no change in its initial position:

Plaintiff notified the police chief on or about December 19, 1997, of her medical leave request. This notice sufficiently satisfies the FMLA notice requirement. See 29 C.F.R. § 303(b) ("The employee need not expressly assert the rights under the FMLA or even mention the FMLA, but may only state the leave that is needed."). In her sworn affidavit, Plaintiff states that when she first notified the police chief he told her leave request "would not be a problem." Pl.'s Aff. Plaintiff also states that the police

chief granted her leave request on or about December 27, 1997. These statements sufficiently create a genuine issue of material fact regarding whether Defendant initially confirmed eligibility. *See DuBose v. Kelly*, No. 98-1943MN, 1999 WL 619063 (8th Cir. Aug. 17, 1999).

Order Den. Mot. for Partial Summ. J. and Mot. to Strike at 6-7 (footnote omitted).

The Court finds, looking at the evidence in the light most favorable to Sternberg, genuine issues of material fact exist whether Muscatine confirmed Sternberg's eligibility pursuant to the FMLA when Chief Coderoni told Sternberg it would be "no problem" for her to take time off or when he later granted her request.

Count V: Constructive Discharge

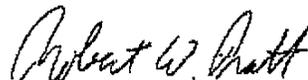
According to the Eighth Circuit, "a constructive discharge occurs when an employer, through action or inaction, renders an employee's working conditions so intolerable that the employee essentially is forced to terminate her employment." *Henderson v. Simmons Foods, Inc.*, No. 99-1914, 2000 WL 772716 at * 24 (8th Cir. June 16 2000) (citing *Kimzey v. Wal-Mart Stores*, 107 F.3d 568, 574 (8th Cir. 1997)). Sternberg claims her resignation on December 30, 1997 was a constructive discharge. The Court finds that there is a genuine issue of material fact as to whether the employer created objectively intolerable working conditions with the intention of forcing Sternberg to quit. *See Coffman v. Tracker Marine, L.P.*, 141 F.3d 1241, 1247 (8th Cir. 1998).

IV. CONCLUSION

For the preceding reasons, a judgment as matter of law cannot be entered in favor of Muscatine on any of Plaintiff's claims. Defendant City of Muscatine's Motion for Summary Judgment is **DENIED**.

IT IS SO ORDERED.

Dated this 10th day of August, 2000.



ROBERT W. PRATT
U.S. DISTRICT JUDGE