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January 10, 2020

The Honorable R. Brooke Jackson  
United States District Judge

**re: Notice of Intent on Motion for Summary Judgment by Defendant Jerome Schiager;  
Lori Frank v. City of Fort Collins and Jerome Schiager  
18-cv-3204-RBJ-NRN**

Introduction. On behalf of Defendant Jerome Schiager (“Schiager”), I am submitting this Notice of Intent to file a Motion for Summary Judgment, pursuant to this Court’s Practice Standards revised December 1, 2019. I conferred by telephone with Jennifer Robinson, attorney for Plaintiff Lori Frank (“Frank”), who stated that she believed there were factual issues which made such a motion futile.

Background. Frank has been a criminal analyst at the Ft. Collins Police Department for about 20 years, while Schiager has been employed by the department for about 28 years in various positions from police officer to interim chief of police. While Schiager was the deputy chief, he was Frank’s supervisor for about 15 months, from about November 2015 until February 7, 2017.

Frank’s Complaint. In her December 14, 2018, Complaint (Doc. No. 2), Frank alleged a number of claims against the City, but brought only the eighth claim under 42 U.S.C. § 1983 for denial of equal protection against Schiager and Terence Jones (this Court later dismissed Mr. Jones from the case). Most of Frank’s allegations against Schiager go back many years. She also alleged that after Schiager became her supervisor in 2015, he retaliated against her by imposing too high a standard he did not use for any other employees, giving her a “needs improvement” evaluation in November 2016, and placing her on a performance improvement plan (“PIP”) at the same time which resulted in a delay in Frank’s expected raise on January 1, 2017. Frank’s claim is for denial of equal protection based on gender, but her complaints about Schiager are based on his alleged personal retaliation against her.

Motion to Dismiss and Order. On January 31, 2019, Schiager filed a motion to dismiss under Fed.R.Civ.P. 12(b)(6) (Doc. No. 20). On August 20, 2019, this Court issued its Order partially granting and partially denying Schiager’s motion (Doc. No. 40). On Schiager’s argument that the claim against him was barred by the two-year statute of limitations, this Court agreed that the events alleged in the Complaint that occurred prior to December 14, 2016, were barred (Doc. No. 40, pp. 10-11). This Court also noted that Frank had conceded that Schiager was not involved in events that occurred since February 7, 2017, when he was placed on paid administrative leave while Frank’s complaints were investigated by an outside investigator (Schiager was reinstated in July 2017 without any discipline but was no longer Frank’s supervisor), and thus he had no personal participation in such events. As a result, the Court’s

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Order limited Schiager's exposure to events that occurred in a window of a little less than two months from December 14, 2016, to February 7, 2017.

This Court also ruled, however, that there were allegations in the Complaint of three events in that window that were sufficient to survive the motion to dismiss: (1) Schiager placed an unrealistic error rate on Frank's work without doing so to a male colleague (Erik Martin) who made errors; (2) Frank did not get her expected pay raise on January 1, 2017, because Schiager placed her on the PIP; and (3) Schiager treated Frank differently by excluding her from two staff meetings in January 2017 (Doc. No. 40, p. 12). This Court also held that Frank's allegations in the Complaint were sufficient to survive Schiager's other arguments, including his defense of qualified immunity (Doc. No. 40, pp. 17-22).

Defenses on Motion for Summary Judgment. Schiager contends he is entitled to summary judgment as to these remaining events based on his defense of qualified immunity. But, I will first address his contention that he is also entitled to summary judgment as to the first two of the three events listed above based on his defenses of the statute of limitations and lack of personal participation.

Statute of Limitations and Personal Participation. As to the first event in the window noted above, the alleged "unrealistic error rate" was imposed in the November 16, 2016, PIP where Schiager wrote that one of Frank's quarterly reports must be free of errors. Frank and her attorney complained about this error rate in a November 30, 2016, letter and memo to the City so she was plainly on notice prior to December 14, 2016. As the Tenth Circuit has held, the statute of limitations is triggered when the plaintiff knew of facts that would put a reasonable person on notice that wrongful conduct caused harm.

As to the second event noted above, that Frank's January 1, 2017, pay raise was delayed, Frank alleged in the Complaint that Schiager told her on January 6, 2017, that her raise would be delayed because of the PIP. This allegation implied that Frank did not learn of the effect of the PIP on the pay raise until less than two years before the Complaint was filed. But, Frank admitted in her deposition and written discovery that she knew when the PIP was imposed on November 16, 2016, that it would cause a delay in her raise pursuant to a City policy, so this event should be barred.

This second event should also be barred because Schiager had no personal participation in setting salaries or creating the City policy that delayed the raise, and he tried to avoid having Frank's raise delayed but was overruled by a City Human Resources employee.

Qualified immunity. Frank bears a heavy two-part burden to show that (1) her right to equal protection was violated and (2) the law was clearly established as to the particular circumstances of this case in the period from December 14, 2016, to February 7, 2017.

As to the first element, despite the general allegations in Frank's Complaint about a gender-based denial of equal protection, her complaints about Schiager's actions are based on their long-running personal dispute and his alleged retaliation. Her gender discrimination theory appears to have been raised

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for the first time when Frank filed a charge of discrimination with the EEOC on December 13, 2017. Frank's primary complaint about being placed on a PIP is an example of how the facts are based on Schiager's alleged personal actions towards her, not on gender. Referring to the PIP, Frank stated in her memo that accompanied her lawyer's November 30, 2016, letter to the City, as referred to above, that "no one else in the agency is held" to the error standard that Schiager imposed on her. Similarly, as for the allegations that Schiager did not place Eric Martin on a PIP for his errors (which she called "minor" in her November 14, 2017, summary of her complaints, and Martin is not a comparator anyway because he held a very different job), or caused her raise to be delayed, there is no evidence that Schiager took these actions against any other female employee. These examples include the first two events in the window noted above.

In addition, although Frank generally alleged in the Complaint that Schiager treated female employees worse than males, when asked about that in her deposition she admitted she could not identify any such female employee. We also deposed four current or former female employees who were disclosed by Plaintiff as having knowledge about Schiager's allegedly worse treatment of female employees, but they testified that they had no knowledge that Schiager discriminated or retaliated against them or any other female employees (some did testify that Frank said Schiager retaliated against her).

As for Frank's claim that Schiager prevented her from attending "staff" meetings in January 2017 (the third event in the two-month window described above), she has admitted that Schiager invited two other women who attended those meetings. Further, the evidence will be that Schiager held those meetings only for higher-ranked personnel which included those two women, not for the whole staff. Discretionary personnel decisions that upset one female employee do not turn a personal retaliation case into a gender-based equal protection claim. Such claims that attempt to "constitutionalize" personnel decisions by public employers and their supervisors against one employee are barred under Engquist v. Oregon Dep't of Agriculture, 553 U.S. 591 (2008), as an improper type of "class of one" claim.

As to the second element, Frank must show that the law on equal protection was clearly established as to the particular facts of this case at the relevant time. The Tenth Circuit has held that general principles on equal protection in employment are not sufficient to satisfy the second element. Morman v. Campbell County Mem. Hosp., 632 Fed. Appx. 927, 936-37 (10<sup>th</sup> Cir. 2015). Frank may disagree with Schiager's personnel decisions such as placing her on a PIP, but discretionary actions such as these (a PIP is not even a form of discipline under the City system) are shielded by qualified immunity. See, Cummings v. Dean, 913 F. 3d 1227, 1241-42 (10<sup>th</sup> Cir. 2019). I could not find cases that clearly established a violation of equal protection in the particular facts of this case.

Sincerely,



David R. DeMuro