

**UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION**

Laura Zylstra Kaiser,

COURT FILE NO. 15-cv-1030-CBK

Plaintiff,

FIRST AMENDED COMPLAINT

v.

(JURY TRIAL DEMANDED)

Bryan Gortmaker, in his Official Capacity as
South Dakota Director of the Division of
Criminal Investigation, and Mark Black,

Defendants.

Plaintiff Laura Zylstra Kaiser, by and through her attorneys Nichols Kaster, PLLP and Johnson Pochop & Bartling, brings this action for retaliation, discrimination, and other violations of law, stating the following claims against Defendants Bryan Gortmaker, in his Official Capacity as South Dakota Director of the Division of Criminal Investigation, and Mark Black:

PARTIES

1. Laura Zylstra Kaiser (“Plaintiff”) is a resident of Aberdeen, South Dakota.
2. At all relevant times, Bryan Gortmaker served as the Director of the South Dakota Division of Criminal Investigation (“DCI”).
3. At all relevant times, Mark Black was a South Dakota resident and a DCI employee.
4. At all relevant times, Plaintiff was an “employee” of DCI within the meaning of 42 U.S.C. § 2000e(f) and S.D. Stat. § 20-13-1. During her employment, Plaintiff was based in DCI’s Aberdeen, South Dakota office.

JURISDICTION & VENUE

5. This action arises under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (“Title VII”). As such, this Court has original jurisdiction to hear this Complaint and to adjudicate the claims stated herein pursuant to 28 U.S.C. § 1331.

6. Plaintiff brings additional claims under the South Dakota Human Relations Act, S.D. Stat. § 20-13-1 et seq., and South Dakota common law. Supplemental jurisdiction is proper for such claims under 28 U.S.C. § 1367.

7. Venue is proper under 28 U.S.C. § 1391 because the events or omissions giving rise to the claims occurred within the Northern or Central Division of the District of South Dakota.

FACTUAL ALLEGATIONS

8. On August 13, 2003, shortly after finishing law school, Plaintiff was hired as a Special Agent with DCI. She was assigned to the Drug Task Force in Aberdeen, South Dakota.

9. In this role, Plaintiff was responsible for preparing and executing search warrants, drug investigations, interrogating suspects, interviewing witnesses, and testifying in court.

10. For the next eight years, Plaintiff received positive performance reviews and was eventually promoted to Special Agent III—the highest agent level—in January 2011.

11. In her 2011 mid-year evaluation, Plaintiff was praised for her exceptional work product, ability “to work amicably with other DCI agents and members of her task force,” relentless work, and above-average case activity.

12. Plaintiff was appointed to serve as the acting supervisor for the Northeast DCI agents while her supervisor was on vacation in July of 2011.

Erickson Joins the Drug Task Force and Begins Harassing Plaintiff

13. In or about August 2011, Brown County Deputy Ross Erickson was assigned to the Drug Task Force. Almost immediately, he began making sexually explicit comments to Plaintiff, revealing personal information, and making her feel uncomfortable, including, but not limited to:

- a. Asking “Were you horny when you were pregnant?”;
- b. Saying “Go ahead and walk away, because I am going to stare at your ass the whole time”;
- c. Texting her to ask what color underwear she was wearing;
- d. Stating it was a “good thing” she was not single because otherwise he would hit on her “all the time”;
- e. Remarking that Plaintiff looked “hot” when she wore glasses,
- f. When she spoke about her guns, commenting to her “that sounds hot”;
- g. Petting her hair and, on one occasion, putting his arm around her and swaying;
- h. When Plaintiff asked for his keys, stating they were in his pocket and she should get them herself;
- i. After Plaintiff said her husband would be out of town that weekend, asking her: “Should I come over Saturday around 6?” and,
- j. Having her watch a lewd music video set in a police department.

14. Although Erickson’s comments made Plaintiff uneasy and upset, she feared reporting Erickson would adversely affect her career.

15. Six years earlier, in September 2005, Plaintiff made a harassment complaint against a co-worker. Her then-supervisor, Assistant Director Brian Zeeb, said her complaint could be seen as a sign of weakness and made a comment along the lines of, “In the future, if you want a promotion or transfer to a new duty station, some may see this incident as your inability to get along with others.” Rather than undertaking an investigation, Zeeb forced her to confront

her harasser. As a result of this experience with DCI administration, Plaintiff feared future reports would adversely affect her career.

16. When she was unable to withstand Erickson's harassment any longer, on October 17, 2011 Plaintiff called a fellow female agent, Jessica Page, for advice. Page told Plaintiff not to tell anyone or report Erickson because it would only cause problems.

17. Plaintiff asked Page if she should discuss Erickson's treatment with Black, who worked in the Aberdeen office. Plaintiff had a close relationship with Black and wanted his guidance and opinion on how to best address the harassment. Page responded it was a good idea.

18. Later that day, Plaintiff told Black about Erickson's conduct. Black was supportive offered to speak to Erickson for Plaintiff. Plaintiff considered his offer but decided she would speak to Erickson herself. Plaintiff thanked Black for his support and asked him not to tell anyone about her difficulties with Erickson.

19. Plaintiff approached Erickson on or about October 18, 2011 and explained that she was not comfortable with his sexually-oriented comments. Erickson acknowledged his comments were inappropriate, apologized, and said he would not make any such comments in the future.

Black Tells Others of Erickson's Conduct

20. Unbeknownst to Plaintiff, Black told Brown County Deputy Damian Bahr and DCI Agent Dave Lunzman, the only other law enforcement in the Aberdeen office, about Erickson's treatment toward Plaintiff.

21. On or about October 20, 2011, Erickson told Plaintiff that Black had told the "entire office" about what was happening. Plaintiff apologized and stated that it was not her intent to have the office know about the issue. She mentioned she regretted telling Black.

22. Later that day, Plaintiff approached Black and asked why he shared her personal information. Black attempted to shift the blame to Plaintiff and began ignoring her.

23. On information and belief, Black then called Supervisor Jason Even to report Plaintiff's complaints against Erickson and told Even he no longer wanted to work with Plaintiff because he could not trust her.

24. That afternoon, Black surreptitiously met with Erickson, Bahr, and Lunzman in a park. On information and belief, and knowing Even would investigate Plaintiff's harassment complaint, Black worked with Erickson, Bahr, and Lunzman to formulate a set of talking points in an effort to have Plaintiff removed from the department or terminated, including planning to state they did not trust Plaintiff, she falsified the harassment to test Black's trustworthiness, they were unwilling to work with her, and that she was mentally ill and schizophrenic.

DCI Investigates Plaintiff's Complaint

25. On or about October 21, 2011, Even interviewed Black, Erickson, Bahr, and Lunzman regarding Plaintiff's complaint. On information and belief, and in accordance with Black's plan, they told Even they did not trust Plaintiff, accused her of having mental issues, and claimed Plaintiff was using the allegations to test Black.

26. Later that day, Even met with Plaintiff and accused her of fabricating her allegations. He threatened that this issue could result in Plaintiff's termination.

27. Plaintiff denied Even's accusations and pointed out that Erickson had admitted to the conduct.

28. Even told Plaintiff that the issue seemed orchestrated and he was skeptical of her explanation. He then told Plaintiff he was not satisfied with her work product and performance, contradicting her positive performance review she had received months earlier.

Plaintiff is Placed on Work Improvement Plan

29. Less than two weeks after Plaintiff's harassment complaints were reported, on or about November 4, 2011, Plaintiff was put on a 30-day work improvement plan ("WIP"), allegedly because she failed to maintain satisfactory relationships with her co-workers and supervisors, was a disruptive influence in the office, her work product was unsatisfactory, and she failed in providing leadership.

30. As part of her WIP, Plaintiff was given nine tasks to complete, including:

- a. Rebuild positive relationships with co-workers, supervisors, and managers;
- b. Refer to co-workers, supervisors, and customer agencies in professional and respectful terms;
- c. Support decisions made by managers;
- d. Recruit, maintain, and use at least one informant in the next 30 days;
- e. Initiate her own investigations;
- f. Have at least two face-to-face meetings with every law enforcement agency and document all conversations she had during those meetings;
- g. Discuss case activity and issues with Even on a weekly basis;
- h. Contact an agent regarding teaching at the training center; and
- i. Undergo a psychological assessment.

31. Plaintiff took affirmative steps to maintain positive relationships with co-workers, supervisors, managers, and DCI customers and stakeholders even though she had done nothing wrong. However, officers gave her the silent treatment and would not respond when Plaintiff said "hello" or "goodbye."

32. When attempting to speak with Black on November 8, he said, "We are done. Don't ever approach me again."

33. As required, Plaintiff underwent a psychological assessment to assess her mental and emotional status, which DCI had linked to her maternity leave even though Plaintiff had returned from leave nearly a year earlier and had received two positive performance reviews and a promotion since then.

34. On information and belief, DCI offered Plaintiff's position to Pierre Agent Jeff Bellen while Plaintiff was in the midst of her WIP.

Plaintiff Demoted and Transferred

35. Throughout fall 2011, as the result of the way she was treated by her male coworkers, Plaintiff's stress caused her to require sick leave, she began seeing a counselor, and she was prescribed medication for anxiety and depression. She also began losing weight, vomiting due to stress, and her hair began falling out.

36. On December 8, 2011, Assistant Director Dan Satterlee informed Plaintiff she met the WIP's requirements with one exception: she had not rebuilt positive relationships.

37. Although she successfully met eight of nine objectives, Plaintiff was involuntarily demoted from Special Agent III to Special Agent II, which resulted in a reduction in her pay.

38. Plaintiff was reassigned to the Medicaid Fraud Control Unit in Pierre, South Dakota, over 150 miles from Aberdeen, effective January 3, 2012. On information and belief, Plaintiff is the only agent who has ever been transferred against her wishes.

39. Plaintiff informed Satterlee that she felt she was being retaliated against for bringing her sexual harassment complaint to light. She requested additional time to improve the relationships with her peers who were ignoring her and refusing to work with her.

40. Plaintiff said she could not afford to transfer to Pierre because her husband was a police officer in Aberdeen, she had a 15 month old son, and they had recently built a home. Satterlee refused to consider Plaintiff's request to continue to be assigned to the Aberdeen office.

41. Plaintiff filed a grievance regarding her demotion, transfer, and treatment on December 12, 2011.

42. On December 27, 2011, Plaintiff reported sexual harassment and retaliation to Brown County State's Attorney Kim Dorsett. The next day, Plaintiff filed a formal grievance regarding her demotion with Director Gortmaker.

43. Plaintiff also contacted South Dakota Attorney General Marty Jackley on December 28, 2011 to alert him to the facts and request that he stay the order of transfer.

Plaintiff Moves to Pierre

44. Plaintiff began in her new position on January 3, 2012.

45. In Pierre, Plaintiff was isolated from her husband and son and forced to live in the Law Enforcement Academy dormitory that was under 24-hour surveillance and subject to search at any time. Plaintiff had a 10:00 p.m. curfew and no members of the opposite sex (including her husband and son) were allowed in her room.

46. Plaintiff's grievance with Gortmaker was denied on January 9, 2012.

47. Plaintiff contacted the Equal Employment Opportunity Commission ("EEOC") in January 2012 to file a Charge of Discrimination. In her Charge, Plaintiff included allegations regarding the above conduct, as well as Defendant Black's conduct, which placed Defendants on notice that litigation was contemplated.

Plaintiff Applies to Department of Social Services

48. After Plaintiff filed her charge, DCI began providing negative references about Plaintiff to potential employers.

49. Plaintiff applied to the Department of Social Services (“DSS”) in January 2012. DSS had two openings and Plaintiff’s interview went very well. Plaintiff was told she would be hearing from DSS the following week after they had reviewed her references.

50. Plaintiff was not offered either position after DSS spoke with her reference, Zeeb. On information and belief, Zeeb prevented and/or encouraged DSS not to hire her.

51. On information and belief, one of the candidates hired instead of Plaintiff had been working at Menards and was far less qualified for the position than Plaintiff.

DCI Continues Retaliating Against Plaintiff

52. Plaintiff officially filed a grievance with Attorney General Jackley regarding her demotion and transfer on January 22, 2012.

53. On or about February 16, 2012, Plaintiff met in person with Attorney General Jackley and provided him with a detailed letter regarding her experience with DCI and the unlawful conduct described herein.

54. The letter stated in part:

It is clear to me that had I never brought forth that I was a victim of ongoing sexual harassment then I never would have been retaliated against by DCI demoting me and transferring me away from my family and home. As I said before, I have two options, the state can either realize and admit they abused their power in retaliating against me and reinstate me as an Agent III with necessary back pay and reinstate me back in Aberdeen. Agent Black made it clear he cannot work with me therefore I would request he be transferred to another duty station with three weeks’ notice since this is apparently a practice of DCI. I would further request Deputies Erickson and Bahr and Agent Lunzman receive some sort of administrative discipline for their involvement, particularly regarding their admitted meeting at the park to decide how to best handle the situation with me; part of which included all of them stating they felt I was mentally ill.

My other option is to resign from my position and somehow accept that due to DCI's retaliation, I have to deal with the fact DCI robbed me of my career as a state agent. I can never be a state agent again and they stole that from me. As I have already explained, being an agent was all I ever wanted and who I was and they stole that from me. I have suffered from hair loss, inability to sleep, loss of twenty pounds in less than two months, as well as vomiting, all of which my therapist says is due to the stress caused to me by the agency's retaliation. For the past seven weeks I have gone home to my dorm room isolated from my son and husband.

55. The grievance was denied on February 23, 2012.

56. Plaintiff amended her Charge of Discrimination on April 4, 2012. After amending, DCI refused to provide any references or verifications to prospective employers.

57. Shortly thereafter, on April 16, 2012, Plaintiff was informed that she would not be able to live in the dormitory after September 1, and that her per diem and ability to use her state vehicle to commute home, as well as being compensated for travel time, would be discontinued on June 1, 2012.

58. Unable to tolerate DCI's treatment any longer, on May 8, 2012, Plaintiff was constructively discharged. She notified DCI via e-mail that she had no choice but to resign and her last day would be May 18, 2012.

59. Specifically, Plaintiff e-mailed a letter of resignation on or about May 8, 2012, to several parties, including but not limited to, all DCI Agents in the State of South Dakota, employees of the Attorney General's Office, including on information and belief, the Attorney General, Marty Jackley, and several chiefs, sheriffs, and law enforcement.

60. Plaintiff's resignation letter detailed the facts that led to her resignation including but not limited to the alleged sexual harassment by Erickson, her subsequent conversations and interactions with Black, her placement on a work improvement program, and demotion and transfer following her complaints.

61. The resignation letter stated in part: “Based on the unjust and immoral actions of DCI and their condoning the sexual harassment of me and transferring me away from my family as well as demoting me, I have no other choice but to regretfully resign my position with DCI.”

62. Plaintiff received a letter dated May 8, 2012, from Daniel Satterlee confirming that her letter of resignation via e-mail was accepted. He also informed her she was suspended with pay immediately until her resignation date. Bryan Gortmaker was carbon copied on the letter from Satterlee.

63. On information and belief, Bryan Gortmaker provided a copy of Plaintiff’s resignation e-mail to the EEOC in a letter dated May 9, 2012.

64. On or about May 11, 2012, Plaintiff also notified the EEOC of her resignation. She subsequently executed an amended EEOC Charge of Discrimination on or about October 26, 2012, asserting an allegation of constructive discharge and submitted it to the EEOC via mail for filing. Plaintiff received a Right to Sue in connection with her Charge of Discrimination against DCI on or about July 10, 2015.

65. On information and belief, DCI has since prevented Plaintiff from obtaining numerous positions for employment, including with DSS, the Department of Corrections (“DOC”), the Department of Labor and Relations (“DLR”), and private employers, by providing negative references and misrepresentations about Plaintiff’s employment, demotion, discharge, and performance.

66. As a result of the discriminatory and retaliatory treatment, Plaintiff filed a Charge of Discrimination against DOC on April 28, 2014 after she was not selected for numerous positions for which she was qualified, and did not receive a single job offer.

67. Plaintiff similarly filed a Charge of Discrimination against DSS on July 28, 2014 and DLR on August 28, 2014 after she was not selected for numerous positions for which she was easily qualified.

68. On information and belief, Plaintiff's applications were disregarded solely as a result of DCI references.

CAUSES OF ACTION

COUNT I

Reprisal Discrimination in Violation of Title VII of the Civil Rights Act of 1964 against Defendant Gortmaker

69. Plaintiff incorporates the foregoing paragraphs by reference.

70. Title VII, 42 U.S.C. § 2000e-3(a) provides in part that it is an unlawful employment practice for an “employer to discriminate against any of his employees or applicants for employment” or “to discriminate against any individual” “because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.”

71. As described herein, Plaintiff was transferred, demoted, and eventually terminated in retaliation for her protected conduct in violation of 42 U.S.C. § 2000e-3. After her constructive discharge, and in further violation of Title VII, DCI continued to retaliate against Plaintiff by interfering with her applications for employment with other state agencies; refusing to provide job references to other companies to which Plaintiff applied; and otherwise ensuring she was denied job opportunities.

72. As a direct and proximate result of Defendant's unlawful conduct, Plaintiff has suffered loss of past and future income and employee benefits, mental anguish, emotional distress, humiliation, embarrassment, loss of reputation, and other damages in excess of \$75,000.

73. Plaintiff is entitled to attorneys' fees and costs in connection with this claim.

74. Plaintiff is entitled to punitive damages because Defendant committed the above-alleged conduct with reckless disregard and/or deliberate disregard for her rights and safety.

COUNT II

Sex Discrimination in Violation of Title VII of the Civil Rights Act of 1964 against Defendant Gortmaker

75. Plaintiff incorporates the foregoing paragraphs by reference.

76. 42 U.S.C. § 2000e-2(a)(1) provides that it is unlawful for an employer "to fail or refuse to hire or to discharge any individual, or to otherwise discriminate against any individual with respect to [her] compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex[.]"

77. Defendant's conduct described herein violates 42 U.S.C. § 2000e-2.

78. As a result of Defendant's conduct, Plaintiff has suffered and will continue to suffer past and present loss of income, mental anguish, emotional distress, humiliation, embarrassment, loss of reputation and other damages in an amount in excess of \$75,000. Plaintiff is also entitled to attorneys' fees and costs incurred in connection with this claim.

79. The above-alleged acts were committed with malice, or reckless or deliberate disregard for Plaintiff's rights and safety. As a result, she is entitled to punitive damages.

COUNT III

Reprisal Discrimination in Violation of The South Dakota Human Relations Act against Defendant Gortmaker

80. Plaintiff incorporates the foregoing paragraphs by reference.

81. The South Dakota Human Relations Act of 1972 makes it an unfair or discriminatory practice to engage in any reprisal, economic or otherwise, against a person by reason of his or her protected activity. S.D. Stat. § 20-13-26.

82. Defendant's conduct described herein, including its treatment toward Plaintiff, her demotion, and her termination, violates S.D. Stat. § 20-13-26.

83. In further violation, DCI continued to retaliate against Plaintiff by interfering with her applications for employment with other state agencies; refusing to provide a job reference to other companies to which Plaintiff applied; and otherwise ensuring she was denied job opportunities.

84. As a result of Defendant's violations, Plaintiff has suffered and will continue to suffer damages, including past and present loss of income, mental anguish, emotional distress, humiliation, embarrassment, loss of reputation and other damages.

85. Plaintiff is entitled to punitive damages because Defendant committed the above-alleged conduct with reckless disregard and/or deliberate disregard for her rights and safety.

COUNT IV
Sex Discrimination in Violation of
The South Dakota Human Relations Act
against Defendant Gortmaker

86. Plaintiff incorporates the foregoing paragraphs by reference.

87. The South Dakota Human Relations Act of 1972 makes it an unfair or discriminatory practice to discharge and employee or refuse to hire and applicant because of sex. S.D. Stat. § 20-13-10.

88. Defendant's conduct described herein violates S.D. Stat. § 20-13-10.

89. As a result of Defendant's violations, Plaintiff has suffered and will continue to suffer damages, including past and present loss of income, mental anguish, emotional distress, humiliation, embarrassment, loss of reputation and other damages.

90. Plaintiff is entitled to punitive damages because Defendant committed the above-alleged conduct with reckless disregard and/or deliberate disregard for her rights and safety.

COUNT V
Tortious Interference
against Defendant Mark Black

91. Plaintiff incorporates the foregoing paragraphs by reference.

92. By virtue of her employment, Plaintiff had a valid contractual relationship with DCI, and a reasonable expectation of economic gain resulting from the relationship.

93. Defendant Black acted outside the scope of his employment with the intent to cause the destruction of, or harm to, Plaintiff's relationship with DCI. Defendant Black acted solely in furtherance of his own personal interests, with no benefit to DCI.

94. Black's improper conduct was the proximate cause of the destruction of, or harm to, the business relationship.

95. As a direct and proximate result of said conduct, Plaintiff has suffered loss of income and benefits, career opportunities, career progression, mental anguish, and emotional distress in an amount to be determined at trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Laura Zylstra Kaiser prays for judgment against Defendants Bryan Gortmaker, in his Official Capacity as South Dakota Director of the Division of Criminal Investigation, and Mark Black as follows:

- A. That the practices of Defendants complained of in this Complaint be determined to violate the rights secured to Plaintiff under Title VII, the South Dakota Human Relations Act, and South Dakota common law;
- B. For all relief available to Plaintiff, including compensatory relief and damages arising from loss of past and future income, benefits, emotional distress, and other damages, with interest on such amounts, and punitive damages in an amount in excess of \$75,000;
- C. For such other and further relief available;
- D. For Plaintiff's attorneys' fees, costs and disbursements incurred herein;
- E. For a jury trial on all issues;
- F. For such further and other relief as the Court deems just and equitable.

Dated: December 17, 2015

/s/Kelsea K. Sutton

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