DISTRICT COURT, PITKIN COUNTY, STATE OF COLORADO **506 East Main Street, Suite E** **Aspen Co., 81611**	
MELINDA CALVANO, **Plaintiff,** **v.** **THE CITY OF ASPEN, and STEVE BARWICK, In his official capacity as Aspen City Manager,** **Defendants.**	**COURT USE ONLY**
	Case Number: **07 CV 115** **Ctrm:**

ORDER RE: DEFENDANTS' MOTION TO DISMISS

This matter is before the Court on Defendants' Motion to Dismiss. Having reviewed the motion, response, reply, the sur-reply, the file and relevant authorities, the Court enters this order.

I.

This is an employment discrimination suit in which Plaintiff is raising statutory and constitutional claims under Title VII of the Civil Rights Act, 42 U.S.C. § 1983 and C.R.C.P. 106(a)(4) against the City of Aspen ("City") and Defendant Steve Barwick, in his capacity as Aspen City Manager ("Barwick"). Plaintiff was formerly employed as an officer with the Aspen Police Department ("APD") and is seeking damages under the theories of hostile work environment and wrongful retaliation. The amended complaint alleges that in early 2006, Plaintiff filed an internal complaint with the Human Resources Department on the grounds that male officers had subjected her to various acts of sexual harassment and had created a hostile work environment. Following this complaint, the director of human resources sent a memorandum to Barwick containing numerous recommendations to be implemented by the APD to prevent future occurrences of sexual harassment, but the recommendations were not adopted.

On June 7, 2006, Plaintiff attempted a forcible arrest of Carol Alexy ("Alexy"). Because Alexy was generally unresponsive to Plaintiff's commands, Plaintiff used a taser

on Alexy to subdue her until a back-up officer could arrive on the scene. On July 27, 2006, Barwick terminated Plaintiff's employment on the grounds that she had violated the department's use of force policy when she used her taser on Alexy. Plaintiff denies that she violated the use of force policy and alleges that she was fired as retaliation for her prior sexual harassment complaint. She further alleges that statements made by Barwick to the media concerning her termination were a mere pretext to conceal the true motive behind her firing and that those statements impugned her professional reputation and have prevented her from finding comparable employment.

In an attempt to settle the matter, the City agreed to grant Plaintiff a name-clearing hearing. By agreement of the parties, the City retained Judge Jim Carrigan of the Judicial Arbiter Group, Inc. to serve as the hearing officer. After the hearing, the hearing officer issued a written ruling holding that Plaintiff violated the use of force policy when she arrested Alexy. Thereafter, on September 12, 2006, Plaintiff filed a charge of discrimination with the Colorado Civil Rights Division ("CCRD"), and the CCRD issued a right to sue letter on July 19, 2007. Defendants now move to dismiss Plaintiffs' claims under C.R.C.P. 12(b)(5).

II.

When reviewing a motion to dismiss under Rule 12(b)(5), a court must accept the allegations in the complaint as true and construe them in a light most favorable to the plaintiff. *Titan Indem. Co. v. Travelers Property Cas. Co. of America*, 181 P.3d 303, 306 (Colo. App. 2007), *cert. denied*, 2008 WL 1777405 (Colo. 2008). Although a court may only consider matters within the confines of the pleadings, any documents or exhibits referred to within the complaint may also be considered without converting the motion into one for summary judgment. *Id.*

III.

Defendants first contend that Plaintiff's Rule 106 claim must be dismissed because it was untimely filed and the hearing officer was not a governmental officer. Although the claim was filed on time, the Court agrees with Defendants that the hearing officer's findings may not be reviewed under Rule 106.

Plaintiff has filed a Rule 106 claim for the sole purpose of reviewing the findings made in the name-clearing hearing. The parties agree that a Rule 106 claim must be filed in district court "not later than thirty days after the final decision of the body or officer." C.R.C.P. 106(a)(4). The original complaint in this matter was filed on August 6, 2007. Defendants argue that because the hearing occurred on January 24, 2007, the Rule 106 clam should have been filed no later than March 1, 2007. However, the hearing officer's written order was not issued until July 6, 2007. Under C.R.C.P. 6(a), Plaintiff would need to file her claim no later than August 6, 2007, the date on which the complaint was filed. As such, the claim was timely filed.

Nevertheless, the Court is persuaded by Defendants' argument that the hearing officer

was not a governmental officer exercising quasi-judicial authority. Review under Rule 106(a)(4) is limited to the action of a "governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions." To determine whether a decision is quasi-judicial, a court must look "to the nature of the decision being made, the scope of those affected by it, and the procedure used to make it." *Prairie Dog Advocates v. City of Lakewood*, 20 P.3d 1203, 1207 (Colo. App. 2000). Even if the challenged procedures are not prescribed by statute, they may still be quasi-judicial if "the governmental decision is likely to adversely affect the protected interests of specific individuals, and if a decision is to be reached through the application of preexisting legal standards or policy considerations to present or past facts." *Id.*

As stipulated by the parties during the name-clearing hearing, the purpose of the hearing was to determine "whether [Plaintiff] violated the Aspen Police Department's 'Use of Force' policy during her June 7, 2006 contact with Carol Alexy." *Amended Compl.*, Exhibit B. Because it appears that the hearing was not mandated by statute, the City entered into an agreement with Plaintiff to provide her with an opportunity to clear her name. Defendants' argument in favor of dismissal is twofold: (1) that the hearing officer was not acting as a governmental officer because the procedures for the hearing were negotiated by agreement of the parties; and (2) the hearing officer's findings did not impact Plaintiff's protected liberty interest because she was an at-will employee and had already been terminated prior to the hearing. In rebuttal, Plaintiff maintains that the hearing officer was acting on behalf of the City because he was selected and paid by the City for his services. Plaintiff also argues that the hearing officer's findings affected a protected liberty interest because the hearing officer's findings affirmed the basis of Barwick's decision to terminate Plaintiff's employment and Barwick's claims that she had violated the use of force policy impugned her professional reputation and prevented her from obtaining comparable employment.

As an initial matter, the Court agrees with Plaintiff that she has a protected liberty interest in her good name and reputation as it affects her ability to obtain future employment. *Workman v. Jordan*, 32 F.3d 475, 480-1 (Colo. 1994). The hearing officer's findings that Plaintiff violated the use of force policy could have a negative affect upon her ability to find future employment in the law enforcement field. The hearing officer found that Plaintiff violated a provision in the Aspen Police Department Use of Force Policy forbidding the use of a taser "unless a backup officer is present, absent circumstances such as a life threatening situation or urgent exigent circumstances." *Amended Compl.*, Exhibit B at 8. The hearing officer further found that Plaintiff violated C.R.S. § 18-1-707(1) which requires an officer to use "reasonable and appropriate physical force upon another person when and to the extent that [she] reasonably believes it necessary." *Id.* at 12.

In light of these factors, the name-clearing hearing had many of the characteristics of a quasi-judicial proceeding because the hearing officer received oral testimony and exhibits into evidence, allowed each party to make legal arguments in defense of their respective positions, made credibility determinations and applied his factual findings to the applicable statute and department policy. However, the Court agrees with Defendants

that the hearing officer cannot be treated as a governmental officer because he was retained to serve as a private arbitrator who was acting under a private agreement between the parties. In particular, the hearing officer was not a city employee, but was retained through the Judicial Arbiter Group, a private arbitration firm. Although an arbitrator may operate in a quasi-judicial capacity, he is "not to be the agent of the party who appoints him, but an impartial judge between the parties." *Noffsinger v. Thompson*, 98 Colo. 154, 156, 54 P.2d 683, 684 (1936).

Here, because Plaintiff does not allege that she was entitled by statute or ordinance to a name-clearing hearing but received one only by an agreement with the City, the Court finds that the hearing officer acted more as a private arbitrator than a governmental officer. This conclusion is supported by the fact that Plaintiff does not allege that the findings of the hearing officer would have been binding upon either the City or Barwick. Although the City agreed to retain the hearing officer to provide Plaintiff with an impartial venue in which to clear her name, it does not follow that the hearing officer was serving as a city officer. As such, because the hearing officer was not a governmental officer, Plaintiff is not entitled to challenge his findings under Rule 106.

IV.

Defendants further argue that the claims against Barwick are barred under the doctrine of qualified immunity. The Court disagrees.

"[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982). In this case, however, Barwick is not subject to civil damages because he is only being sued in his official capacity. *Kentucky v. Graham*, 473 U.S. 159, 165-6, 105 S. Ct. 3099, 3105 (1985). As such, qualified immunity is not an available defense in official capacity suits. *Id.* at 167. Therefore, because Barwick is only being sued in his official capacity, qualified immunity does not apply in this matter.

V.

Defendants next contend that Plaintiff's wrongful retaliation claim fails as a matter of law because Plaintiff was an at-will employee and Barwick had valid grounds to terminate Plaintiff's employment. The Court disagrees.

A claim for wrongful retaliation consists of the following elements: (1) protected opposition to discrimination or participation in a proceeding arising out of discrimination; (2) adverse action by the employer; and (3) a causal connection between the protected activity and the adverse action. *Sauers v. Salt Lake County*, 1 F.3d 1122, 1128 (10th Cir. 1993). Even when legitimate reasons for termination are proffered, a plaintiff may still prevail on an employment discrimination claim by showing that the legitimate reasons offered are mere pretexts for unlawful discrimination. *Branson v. Price River Coal Co.*,

853 F.2d 768, 770 (10th Cir. 1988). Here, Defendants argue that the allegations in the complaint fail to satisfy the third element: that there is a causal connection between any protected activity and Barwick's conduct.

In relevant part, the protected activity alleged in the complaint relates to Plaintiff's complaint filed with Human Resources regarding her allegations of sex discrimination and hostile work environment. Plaintiff further alleges that Barwick failed to adopt the recommendations arising out of her complaint to Human Resources, ignored an internal investigation suggesting that Plaintiff did not violate the use of force policy, and terminated her in retaliation of her complaint. When construed in a light most favorable to Plaintiff, the Court finds that the allegations in the amended complaint state a viable claim for pretextual retaliation. Contrary to Defendants' assertion, it is immaterial that Plaintiff was an at-will employee because "at-will status does not preclude a plaintiff from bringing a Title VII retaliation claim." *Hansen v. Alta Ski Lifts*, 141 F.3d 1184 (10th Cir. 1998). Moreover, although Barwick's basis for terminating Plaintiff was affirmed by the hearing officer, the findings made at the name-clearing hearing are not controlling in this matter. Rather, Plaintiff may still prevail on her claim regardless of whether the hearing officer agreed with Barwick's belief that Plaintiff had violated the use of force policy. Therefore, dismissal of the wrongful retaliation claim is unwarranted at this time.

VI.

Defendants next argue that Plaintiff's claim of hostile work environment must be dismissed because it is barred under the statute of limitations. The Court disagrees.

"Timely pursuit of administrative redress is a prerequisite to filing suit under Title VII." *Davila v. Qwest Corp., Inc.*, 113 Fed. Appx. 849, 852 (10th Cir. 2004). Because Colorado is a "deferral state" under Title VII, any charge of discrimination must be filed with the CCRD within the 300 day limitations period provided in 42 U.S.C. § 2000e-5(e)(1). *Id.*; *White v. BFI Waste Services, LLC*, 375 F.3d 288, 292 (4th Cir. 2004) ("The 300-day period, rather than the 180-day period, applies where, as here, state law also proscribes the alleged employment discrimination and the plaintiff files with a state or local employment discrimination agency either before filing with the EEOC, or concurrently therewith."). In relevant part, § 2000e-5(e)(1) provides as follows:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred...except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the

Commission with the State or local agency.

The amended complaint refers to the charge of discrimination which Plaintiff filed with the CCRD. Although the complaint alleges that the charge was filed on July 19, 2007, the charge was actually filed on September 12, 2006. *Defs' Motion to Dismiss*, Exhibit I. The charge alleges that the most recent act of discrimination occurred on July 27, 2006, the date of Plaintiff's termination. In addition, the charge alleges that Plaintiff was subjected to harassment based on her gender during the course of her employment and filed a gender bias complaint with Human Resources on February 16, 2006. Thereafter, the charge alleges that Plaintiff applied for a promotion in June, 2006, but was passed over for the position despite being the only applicant.

Defendants contend that no act of alleged discrimination occurring prior to March 16, 2006 is actionable under Title VII, but the Court does not follow the logic behind Defendants' position. By applying the 300 day limitations period, the Court finds that the charge filed with CCRD would preserve Plaintiff's right to sue on any discriminatory acts occurring on or after November 16, 2005. When the complaint and charge form are construed in a light most favorable to Plaintiff, it appears that most, if not all, of the discriminatory conduct occurred within the 300 day limitations period under § 2000e-5(e)(1). Therefore, the Court finds that the claim was timely filed.

VII.

Defendants contend that Plaintiff's claim under 42 U.S.C. § 1983 must be dismissed because Barwick's statements are not defamatory as a matter of law, Defendants' conduct does not "shock the conscience" and the complaint fails to allege a causal link between the conduct alleged and a custom or policy of the City. The Court disagrees.

"To state a valid cause of action under § 1983, a plaintiff must allege the deprivation by defendant of a right, privilege, or immunity secured by the constitution and laws of the United States while the defendant was acting under color of state law." *Hill v. Ibarra*, 954 F.2d 1516, 1520 (10th Cir. 1992). Section 1983 creates a cause of action for the violation of a federal statute so long as the underlying statute creates an enforceable right. *Id.* As noted above, the defense of qualified immunity is not applicable and Plaintiffs' Title VII claims were timely filed. In addition to her Title VII claims, Plaintiff alleges that Defendants violated her constitutional rights to be free from gender discrimination by subjecting her to disparate treatment and by acquiescing to acts of sexual harassment.

Nonetheless, a municipality cannot be held vicariously liable under § 1983 for the acts of its agents, but is liable only if "there is a direct causal link between a municipal policy or custom and the alleged constitutional deprivation." *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385, 109 S. Ct. 1197, 1203 (1989). Such a link may be established in the following ways: "(1) the municipality may be liable for a decision by its properly constituted legislative body; (2) an official policy exists when the municipal board or agency exercises authority delegated to it by a municipal legislative body; (3) actions by those with final decision-making authority for the municipality constitute official policy;

(4) the municipality may be liable for a constitutional violation resulting from inadequate training when its failure to train the lawless employee reflects a deliberate indifference to the plaintiff's constitutionally-protected rights; or (5) the municipality's custom caused the constitutional violation." *Darr v. Town of Telluride, Colo*, 495 F.3d 1243, 1256-7 (10th Cir. 2007). Here, the allegations in the amended complaint sufficiently draw a link between Barwick's conduct and a municipal policy or custom because Plaintiff alleges that Barwick, as a final policy maker, wrongfully terminated her as an act of retaliation and allowed his subordinates to engage in repeated acts of discrimination by failing to adopt the Human Resources Department recommendations. As such, because Plaintiff has filed a facially valid claim under Title VII and has alleged a sufficient link between Barwick's conduct and municipal policy, Plaintiff has stated a proper statutory basis for a § 1983 claim.

Moreover, Plaintiff has also stated a constitutional basis for a § 1983 claim. Statements made by Barwick concerning the reasons for Plaintiff's termination may have infringed upon Plaintiff's protected liberty interest if the following test is satisfied: (1) the statements must impugn the good name, reputation, honor, or integrity of the employee; (2) the statements must be false; (3) the statements must occur in the course of terminating the employee or must foreclose other employment opportunities; and (4) the statements must be published. *Workman*, 32 F.3d at 481. Assuming that Plaintiff's allegations are true, the aforementioned test has been satisfied in this case. Specifically, Plaintiff alleges that Barwick stated to the media that Plaintiff was terminated because she violated the City's use of force policy, that the statements were "patently false" and pretextual, and that the statements hindered Plaintiff's professional reputation and her ability to obtain future employment in her chosen field.

However, because not all government conduct is actionable under § 1983, Defendants maintain that Plaintiff's claim fails as a matter of law because the conduct alleged does not "shock the conscience." A plaintiff may state a valid substantive due process claim against a state actor under one of two theories: that the alleged conduct infringed upon a "fundamental right," or the conduct was so egregious as to "shock the conscience." *Seegmiller v. LaVerkin City*, 528 F.3d 762, 767 (10th Cir. 2008). Because the fundamental rights analysis is limited to a narrow category of rights, such as "those relating to marriage, family life, child rearing, and reproductive choices," *Id.* at 770, Plaintiff may prevail on her constitutional claim only if it satisfies the "shocks the conscience" test.

"Conduct that shocks the judicial conscience...is deliberate government action that is 'arbitrary' and 'unrestrained by the established principles of private right and distributive justice.'" *Id.* at 767 (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S. Ct. 1708 (1998)). Whether conduct in a specific case "shocks the conscience" is highly contextual and there is no precise formula to be applied. Nevertheless, the analysis usually turns on the culpable mental state of the actors involved, such that "liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." *County of Sacramento v. Lewis*, 523 U.S. 833, 849, 118 S. Ct. 1708, 1718 (1998). Conversely, "conduct intended to injure in some way unjustifiable by any

government interest is the sort of official action most likely to rise to the conscience-shocking level." *Id.* Furthermore, a mental state lower than intentional conduct but greater than negligence, such as recklessness or gross negligence, may, in some instances, elevate conduct to the level of conscience shocking activity. *Id.* Reckless conduct is more likely to "shock the conscience" if the state actors involved had "the opportunity to deliberate various alternatives prior to selecting a course of conduct." *Wilson v. Lawrence County*, 260 F.3d 946, 956 (8th Cir. 2001).

In light of the foregoing, whether Barwick's conduct was egregious enough to shock the conscience will depend upon an evaluation of all the circumstances which eventually resulted in Plaintiff's termination. The Court does not believe that such an inquiry can occur by merely reading the pleadings, but can only be made after some discovery has taken place. In essence, Plaintiff alleges that Barwick's explanation for firing Plaintiff was a false pretext for gender discrimination, which implies that Barwick either knew that Plaintiff did not violate the use of force policy or that he recklessly disregarded the mandates of the policy as applied to Plaintiff's conduct. As such, the Court finds that the complaint alleges facts which, if true, would give rise to a substantive due process claim under the "shock the conscience" test.

VIII.

In summary, because the hearing officer presiding over the name-clearing hearing was not a governmental officer, Plaintiff's claim under Rule 106 fails as a matter of law. However, because Plaintiff has timely filed her Title VII claims and has pled facially valid claims for statutory and constitutional relief under § 1983, those claims cannot be dismissed. Defendants' request for attorney fees and costs under C.R.S. §§ 13-16-113(2) & 13-17-201 is denied because only one claim, and not the entire action, is being dismissed. *U.S. Fax Law Center, Inc. v. T2 Technologies, Inc.*, 183 P.3d 642, 648 (Colo. App. 2007); *City of Westminster v. Centric-Jones Constructors*, 100 P.3d 472, 487 (Colo. App. 2003). Plaintiff's request for attorney fees is also denied.

IT IS THEREFORE THE ORDER OF THE COURT that Defendants' Motion to Dismiss is granted in part and denied in part. As to Plaintiff's first claim for relief under Rule 106, the motion is granted and that claim is dismissed with prejudice. Otherwise, the motion is denied. The parties' requests for attorney fees and costs are denied.

DATED this 22 day of October, 2009.

BY THE COURT:

James B. Boyd
District Court Judge