IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CASSANDRA M. PRUITT, Plaintiff, v. CITY OF ATLANTA, SGT. JOHN T. ELLIS, and LT. MICHAEL S. KREHER, in their Individual Capacity, Defendants.	:	CIVIL ACTION NO. 1:13-cv-01289-AT

ORDER

This case arises out of a videotaped prostitution sting at a hotel, during which Plaintiff, an undercover vice cop for the City of Atlanta, removed her clothes in order to secure an arrest based on assurances from her supervisor that any nude footage would be deleted. Instead, the footage was saved and viewed by numerous male officers. Plaintiff was put on administrative leave because she was apparently viewed by some City administrators as too emotionally distraught about these circumstances to continue in her job. When she returned nine months later, Plaintiff, who was regarded as one of the best undercover vice cops in the department, was reassigned to the fleet vehicle maintenance and open records units.

I. PROCEDURAL BACKGROUND

Plaintiff filed suit alleging that Defendants subjected her to sexual harassment and a hostile work environment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*., and the Equal Protection Clause of the Fourteenth Amendment as enforced through 42 U.S.C. § 1983.[1]

The Magistrate Judge assigned to this case recommended that the Court grant judgment in favor of the Defendants on Plaintiff's Title VII claim. The Magistrate Judge likewise recommended that Plaintiff's parallel Equal Protection claim should be dismissed (but without evaluation of Defendants' qualified immunity defenses) based on his finding that Plaintiff had not established a prima facie case of sexual harassment under Title VII. (R&R at 103.)

Plaintiff filed Objections to the R&R, and after a careful *de novo* review of the record on summary judgment, this Court declined to adopt the R&R's recommendation that judgment be granted in Defendants' favor on Plaintiff's Title VII sexual harassment based hostile work environment claim. The Court found that when viewed properly under the summary judgment standard, Plaintiff had presented sufficient evidence upon which a reasonable jury could determine that she was subjected to a sexually hostile work environment.

As Plaintiff's Equal Protection claim was not expressly addressed in the R&R, the Court addressed for the first time Defendants Ellis and Kreher's

[1] Plaintiff also alleged state law claims against Defendant City of Atlanta ("the City") for negligent supervision and retention and against Defendants Sgt. John T. Ellis and Lt. Michael S. Kreher for intentional infliction of emotional distress.

assertion of the qualified immunity defense. The Court noted that Defendants failed to assert in their motion why Ellis and Kreher, individually, are entitled to qualified immunity. Instead the motion lumped the two Defendants together and offered a solitary sentence to support their defense: "Plaintiff cannot show that the making and viewing of a surveillance video from an undercover Vice Unit operation by authorized APD sworn personnel is a violation of clearly established law."[2] (Def.'s Br. Supp. Mot. Summ. J. at 32-33, Doc. 91.) Because qualified immunity is an individual – not a collective – defense, the Court found that the issue of Defendants' qualified immunity was not properly before the Court. The Court denied Defendant's Motion for Summary Judgment without prejudice and granted Defendants leave to refile their motion on the limited issue of whether Ellis and Kreher are *individually* entitled to qualified immunity.[3]

Defendant Ellis and Kreher filed a Renewed Motion for Summary Judgment as to Qualified Immunity on Plaintiff's Equal Protection Claim brought pursuant to 42 U.S.C. § 1983 [Doc. 140] which is now pending before this Court.

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[2] In the section of their Reply brief addressing Plaintiff's § 1983 Equal Protection claim, Defendants simply referred back to their discussion of the merits of Plaintiff's Title VII sexually pervasive hostile work environment claim without specifically addressing the "clearly established prong" of the Qualified Immunity Defense.

[3] In the meantime, the parties attempted to settle the case through mediation, and the case was administratively closed pending the outcome of the mediation. After the mediation failed, Plaintiff filed a new action against Defendants for retaliation (Civil Action No. 1:15-cv-2925-AT) and indicated she would seek consolidation of the two cases. The Court stayed this action so the two cases could be tried together in the event Plaintiff's claims in the related retaliation case survived Defendants' dispositive motions. That case is now ready for trial in conjunction with Plaintiff's claims in this action. However, the Covid related backlog in trials will delay the immediate scheduling of the case for trial.

II. FACTUAL BACKGROUND

A. Plaintiff's Employment in APD's Vice Unit

Plaintiff Cassandra Pruitt was employed as a police officer in the Atlanta Police Department's Vice Unit, under the criminal investigations division. The Vice Unit is responsible for investigating crimes involving prostitution. Lt. Kreher was the head of APD's Vice Unit.

This case arises out of a prostitution sting that took place at a hotel. A Vice hotel detail requires three rooms: the date room, the monitor room, and the processing room. The date room is where the undercover officers engage a suspected prostitute. The monitor room, which adjoins the date room, holds the electronic equipment used to monitor the suspect's interaction with officers in the date room. A third room contains the processing team. Processing entails drafting the police report and completing other paperwork for the detail.

Plaintiff worked different roles in the undercover Vice operation including processing, monitoring, takedown, and the actual undercover role. As an undercover decoy, Plaintiff would, among other things, arrange meetings with suspected prostitutes in hotel rooms and visit their residences. Plaintiff estimated that she participated in twenty-five to thirty hotel or motel details as a member of Vice. She was assigned to the undercover team for every one of those details.

Beginning in July 2011, Atlanta Police Chief George Turner required that Vice take video and audio recordings of all its operations. Vice used several types

of devices capable of recording its operations, including a key fob that can record audio and video, and a "Pelican" briefcase with a clock radio. The "Pelican" device has two components: (1) a Pelican briefcase box with a monitor screen and Sony 8 millimeter tape recorder, and (2) a clock radio with a remote camera. Together, the Pelican briefcase and clock radio allowed Vice to monitor the date room remotely and to record prostitution details. When using the Pelican briefcase/clock radio, every officer in the monitor room could watch the sting as it unfolded inside the date room.

B. The October 28, 2011 Undercover Prostitution Operation

On October 28, 2011, Sgt. Ellis prepared and approved a tactical plan for a Vice Unit operation to arrest suspected prostitutes at a Sheraton Hotel in Atlanta. Vice conducted three sting operations that evening which resulted in the arrests of two females on prostitution charges. Sgt. Ellis assigned Officer Pruitt to play the role of undercover decoy in the date room. Investigator Jordan, stationed in the monitor room, was assigned to monitor the date room, assist with detainees, and conduct counter surveillance in the hallways near the detail. Upon hearing the takedown signal, Investigator Jordan would notify the takedown team. The takedown team, consisting of Sgt. Ellis, Investigator Maria Gresham, and another officer, was also stationed in the monitor room and responsible for detaining the suspect after receiving the signal. Two officers in the processing room were responsible for processing the suspect after takedown was completed. On the

night of the October 28, 2011 sting operation, Lt. Kreher was absent from work and Sgt. Ellis lead the operation.[4]

Officers began the operation by searching the Internet for suspected prostitutes and telephoning them to arrange "dates." There were three different suspected prostitutes that responded to calls made by the officers. As part of the second sting operation on October 28th, Officer Pruitt telephoned the suspect on the pretext of planning a "surprise" for her boyfriend's birthday. Officer Mercure, who agreed to play the part of the boyfriend, was familiar with the suspect, because Vice had previously tried to make a case against her. Apparently under the impression that police officers were prohibited from removing their clothes, the suspect, as a rule, would not speak to potential clients about money or a sexual act until the parties to the transaction were nude. True to her reputation, the suspect informed plaintiff that she would speak to them only after she arrived at the hotel and everyone's clothes were off.

Officer Pruitt entered the monitor room and asked Sgt. Ellis, "What's the S.O.P. on getting nude?" Sgt. Ellis responded that there was no S.O.P. on the subject.[5] At the time, no S.O.P. covered Vice operations.[6] Investigator Gresham,

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[4] APD's chain of command, from highest to lowest rank, is as follows: chief, assistant chief, deputy chiefs, majors, captains, lieutenants, sergeants, corporals, and officers. Sgt. Ellis was the highest-ranking officer at the scene on October 28, 2011.

[5] That was true at the time of the incident, but S.O.P. 5121 § 4.5., adopted afterwards, prohibits occupational nudity except in limited circumstances. *See* S.O.P. 5121 §4.5 ("At no time shall a member of the Vice Unit conduct any details or investigations that allow the undercover officer or any other member of the unit to undress completely, resulting in complete nudity, unless it becomes an officer safety issue and the undercover officer is in immediate danger prior to help arriving.").) That rule has an exception: Vice officers working street level prostitution may "show

who was also present in the monitoring room, testified that she overheard Sgt. Ellis advise Officer Pruitt that "if she was comfortable with getting nude, it would be fine." Officer Pruitt told Sgt. Ellis she had a problem with undressing because the operation was being videotaped. Sgt. Ellis promised Officer Pruitt that if she needed to disrobe to make the case he would delete the video. Officer Pruitt expressed concern about male officers in APD seeing her nude and told Sgt. Ellis that she hoped to make the case without taking off her clothes.

Officer Pruitt met the suspect in the hotel lobby and escorted her to the date room. When Officer Pruitt returned to the date room, she set down the key fob recording device on a table. According to Officer Pruitt, she pointed the key fob in a direction that would not video record her if she were to disrobe.[7] The Pelican briefcase/clock radio was also used to monitor and record the operation. Officers Pruitt and Mercure were not aware that the Pelican briefcase/clock radio, which Vice had only recently started using, was recording the detail as opposed to simply broadcasting the events to the officers in the adjacent room for monitoring of the sting.[8] The events that occurred after the suspect entered the

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their genitals inside an undercover vehicle, out of public view, to dispel to the target that they are not law enforcement in order to affect the arrest." (*Id.*)

[6] On the date of the detail, Lt. Kreher was in the process of drafting the S.O.P. for Vice operations and thus no written policy specifically governing its operations existed. S.O.P. 5121, specific to Vice operations, took effect on March 1, 2012.

[7] Plaintiff stated in her APD November 17, 2011 Employee Statement that although she had set up the key fob to record she had pointed it "in a direction that would not record her if she had to get naked" and "was assured by Sgt. Ellis that if by any chance [she] was shown nude in any video that he would delete it."

[8] The briefcase/clock radio unit was borrowed from Homeland Security.

date room were recorded and transferred to a DVD that is part of the evidentiary record.[9]

Once in the room, Officer Pruitt noticed that the officers had left a ticket book from the first detail in plain view, which she and Officer Mercure tried to distract the suspect from noticing. Plaintiff removed her shirt to cover the ticket book. The suspect had also set her purse down in front of the clock radio, obstructing the monitor room's view. Officer Pruitt gave the suspect money and told her to go into the bathroom and count it. Taking advantage of the suspect's absence, plaintiff moved the purse aside and threw the ticket book underneath the bed. While the suspect was in the bathroom, Officer Pruitt took off her pants.

The suspect emerged from the bathroom and undressed. At this point, according to Officer Pruitt, the officers did not yet have a case against her. After the suspect undressed, Officer Mercure, shirtless, stood behind her and rubbed her buttocks. Officer Pruitt was in the bed, wearing only her bra and panties. The suspect asked Officer Pruitt if she could "take that off," meaning her underwear. The suspect also told Officer Pruitt she wanted to see "all of her." Officer Pruitt complied with the request, removing her bra and panties.[10] The suspect then climbed into the bed between plaintiff and Officer Mercure. At this point, the undercover team still had not made the case.

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[9] The parties agree that the DVD, which contains footage of all three details on October 28, 2011 from the clock radio, is a true and accurate depiction of those details.

[10] Plaintiff's deposition and the video show that the suspect requested that Plaintiff take off her underwear.

In bed, Officer Pruitt and the suspect laid down their respective "rules." Officer Pruitt inquired if the suspect would engage in anal sex. The suspect whispered to plaintiff that she would "do anal" for an extra hundred dollars. The suspect having agreed to perform a sexual act in exchange for money, Officer Pruitt concluded that the case was made.

Shortly thereafter, Officer Pruitt wove the takedown signal, "swallow," into conversation with the suspect. Investigator Jordan notified the takedown team that the signal had been given. Sgt. Ellis ordered the takedown team to "hold up" to ensure that the undercover team had not accidentally given the signal and that they had enough evidence to make the case; in his view, there was no emergency situation demanding their immediate entry. When the signal was given, Sgt. Ellis was watching the monitor. Officer Mercure and Officer Pruitt repeated the takedown signal several times after it was initially given.

Once Investigator Jordan confirmed that the case was made, the takedown team attempted to enter the date room through the adjoining door. However, tape placed over the door's lock at the beginning of the operation had come loose and the lock had engaged.[11] Unable to force the adjoining door open, the team exited the monitor room and used a room key to access the date room through the front door.

The takedown team entered the date room about forty-five seconds after the initial takedown signal was given by Officer Pruitt. In her deposition,

[11] Vice's practice was to put tape over the lock on the adjoining door to ensure that officers could enter and leave the date room if necessary.

Investigator Gresham testified that after hearing the undercover team give the takedown signal several times she became concerned for their safety. Lt. Kreher testified that once the signal is given the takedown team should respond as quickly as possible.

Shortly before the takedown team entered, Officer Mercure headed to the bathroom, leaving Officer Pruitt and the suspect in bed. As the takedown team entered the room, Officer Pruitt got out of the bed with a sheet covering her body, picked up her panties, and walked into the bathroom. Before reaching the bathroom, Officer Pruitt had to drop the sheet and was left fully exposed. When plaintiff passed by Sgt. Ellis, he turned his head to look at her. Sgt. Ellis later remarked, in the presence of at least one other Vice officer, that he "got a full frontal [view of Officer Pruitt] and it was nice." As the two other takedown officers directed the suspect to put her clothes on, Sgt. Ellis can be seen moving toward the bathroom door and lingering there. When Officer Pruitt entered the bathroom, the door to the bathroom was closed behind her.

In addition to being shown in her underwear, Officer Pruitt appears nude, with her bare breasts showing, in the video recording.

At the end of the operation, Sgt. Ellis took all evidence, including the key fobs, and left them for Lt. Kreher. For reasons unrelated to Plaintiff's claims, Sgt. Ellis was transferred out of the Vice Unit the next day on October 29, 2011.

C. Multiple APD Officers View the October 28, 2011 Footage

On November 1, 2011, Lt. Kreher returned to work after a week's absence that caused him to miss the October 28th detail. Waiting on his desk were two key fobs, one with a note from Officer Pruitt asking him to download her video from another sting conducted the day after the prostitution detail on October 29, 2011, and two 8 millimeter tapes dated October 27 and 28. Because Vice did not have the equipment necessary to transfer the 8 millimeter footage to DVD, Lt. Kreher took the tapes to Investigator Teague in APD's Homeland Security division.

Investigator Teague converted the 8 millimeter tape of the October 28 prostitution operation to two DVDs. When Investigator Teague noticed what was transpiring on the screen, he beat on the wall to call Investigator Jackson to his office. Investigator Jackson viewed the video and saw Officer Mercure "bending over a female prostitute and spreading her butt cheeks" and saw Officer Pruitt removing her clothing. Investigator Beard, who chanced to be passing down the hall, was summoned to view the video. He saw Officer Pruitt in her bra and Officer Mercure rubbing the suspect/prostitute's buttocks. Investigator Dupree, who was looking for Investigator Jackson, was shown the video. Investigator Mercier saw the video of the officers undressed and in bed with the suspect when he went upstairs to go to lunch with Investigator Jackson.

Some of the investigators thought the officers in the video had acted inappropriately. After viewing the video, Investigator Jackson reported to Lt.

Coyt that Homeland Security was downloading an "inappropriate video" for Vice and "he needed to come see it." The video was again played for Lt. Coyt who saw the nude footage of Officer Pruitt. Homeland Security then contacted Lt. Kreher, who viewed the video with them. During his deposition, Lt. Kreher testified that it was inappropriate for Investigator Teague to invite other members of Homeland Security to view the recording.

Lt. Kreher, concerned about the October 28th detail, took the recording to his supervisor, Major Randell Robinson, and played it for him.[12] Major Robinson did not believe that Officers Pruitt and Mercure had violated any rule that would subject them to discipline. He was not concerned with Officer Mercure's touching of the suspect and did not plan to take disciplinary action against him. Nevertheless, Lt. Kreher determined to retrain and counsel Officer Mercure. After the meeting with Major Robinson, Lt. Kreher took the DVDs and 8 millimeter tapes back to his office.

Later that day, Lt. Kreher scheduled a meeting in his office with plaintiff and Officer Mercure. As Sgt. Dingle, the unit's new sergeant,[13] passed by the office, Lt. Kreher invited him in to "get his feet wet," and played the video for Sgt. Dingle in front of Officer Pruitt and Officer Mercure. Officer Pruitt was startled by what she saw. She asked Lt. Kreher where the video had come from and told him that Sgt. Ellis had promised her he would delete any video depicting her nude. She was visibly upset and began to cry. When Officer Pruitt asked Lt.

[12] In Vice's chain of command, Lt. Kreher reported directly to Major Robinson.
[13] Sgt. Dingle joined Vice on November 1, 2011, when Sgt. Ellis was transferring out of Vice.

Kreher how many people had seen the video, he responded that "so many people had seen it." Officer Pruitt asked what he meant by "so many people." Lt. Kreher responded that numerous people in Homeland Security and Major Robinson had seen the video.

Lt. Kreher later explained that he showed Officers Pruitt and Mercure the video because he wanted them to explain their actions. Lt. Kreher specifically wanted to know why Officer Mercure touched the suspect and why plaintiff felt the need to undress. Officer Pruitt asked Lt. Kreher to stop the video, but he refused. Lt. Kreher paused the tape with Officer Pruitt's breast exposed on the monitor.

The following day, Lt. Kreher held an informal training session with the entire Vice Unit to discuss the October 28 detail. During the session, retired APD officer Herman Glass spoke to the group about the importance of safety. During the training, Investigator Gresham asked if she could step outside to speak personally with Officer Pruitt. Lt. Kreher told Investigator Gresham that "whatever she needed to say would be said in that room." Investigator Gresham then revealed that Sgt. Ellis had ordered the takedown team to hold up before entering the date room.

According to Officer Mercure, news of the October 28th Vice detail "spread through the department like a high school room," co-workers make comments about "the threesome in the hotel room," and that "it seemed like the whole department was joking about it."

Missing Key Fob Footage

Officer Pruitt used a key fob to record the prostitution detail on October 28. Lt. Kreher knew from Sgt. Ellis that Officer Pruitt used a key fob recording device, as was standard practice of the Vice Unit, during the October 28, 2011 detail. Lt. Kreher also saw Officer Pruitt place the key fob on the hotel table/dresser at the beginning of the footage recorded on the briefcase/clock radio.

After being made aware that multiple male officers in the department had viewed the recorded video footage of the undercover prostitution sting, Officer Pruitt informed Lt. Kreher that she wanted to know what had happened to the video of the detail from the key fob. At her request, Officer Pruitt and Lt. Kreher together viewed all files downloaded from the key fobs that had been left with him after the detail, but none contained footage of any of three prostitution details on October 28, 2011.[14]

Officer Pruitt asked Lt. Kreher to contact Sgt. Ellis to ask him what happened to the video on the key fob. Lt. Kreher contacted Sgt. Ellis to inquire about the key fob footage from the October 28, 2011 detail. Sgt. Ellis told Lt. Kreher that the key fobs from the detail had been left on Lt. Kreher's desk. The APD has not been able to locate any recorded key fob footage from the October 28, 2011 detail.

[14] One key fob contained footage from Officer Pruitt's October 29, 2011 Occupy Atlanta detail, and another had video from an October 29, 2011 spa detail that Officer Pruitt was not involved in. The third key fob was empty.

OPS Complaints

The City maintains a sexual harassment policy. (DSUMF ¶ 99; R-DSUMF ¶ 99.) All City employees are subject to the policy. The penalty for "severe and pervasive" harassment" is disciplinary action up to and including dismissal. APD S.O.P. 2020 § 4.1.2 states that supervisors must report allegations of Priority 1 misconduct to the Office of Professional Standards ("OPS") immediately. Sexual Harassment is defined as a Priority 1 complaint.

Officer Pruitt expressed to Lt. Kreher her concerns about the missing video from the key fob, that so many officers in the Homeland Security division had watched the video, and about Homeland Security having access to the nude video. During the informal training session, Lt. Kreher told Officer Pruitt that he did not want an OPS complaint/control number issued. Lt. Kreher did not report Officer Pruitt's complaints to OPS.

After Officer Pruitt told Lt. Kreher that Sgt. Ellis promised her he would destroy evidence, Lt. Kreher and Major Robinson determined that the alleged destruction of evidence was a Priority I OPS complaint and that they would contact Major Dancy to start an OPS investigation.

Because Officer Pruitt was dissatisfied with how Lt. Kreher was handling her complaint, she sought out Sgt. Janice Sturdivant, the supervisor of Police Personnel. Sgt. Sturdivant met with Plaintiff and Chief Shawn Jones on November 3, 2011. Officer Pruitt was so distraught that she had worn her Fulton

County Police shirt to work. After Officer Pruitt voiced her concerns, Stg. Sturdivant escorted her to OPS at the direction of Chief Jones.

The same day, November 3, 2011, Plaintiff initiated a complaint with OPS by giving a statement to Investigator Davis. In the statement, she alleged that "a naked tape that was used in an undercover [operation] in [V]ice was viewed by officers and supervisors and a secondary tape is completely unaccounted for." She informed the investigator that Sgt. Ellis had made a comment about receiving a "full frontal" view of her. On November 17, Plaintiff provided OPS with an addendum to her original statement. OPS investigated Plaintiff's allegations. As part of the investigation, Investigator Davis took sworn statements from the officers who participated in the October 28, 2011 operation at the Sheraton. In addition, she took sworn statements from the members of Homeland Security who viewed the video.

The Investigative Disposition, dated February 14, 2012, determined that Plaintiff's allegations of sexual harassment and mishandling of evidence were unfounded. In particular, it exonerated Lt. Kreher and Sgt. Ellis of violations of S.O.P. 4.0.04 (Conduct). However, it sustained a violation of S.O.P. 4.2.3(1) (Responsibilities of Supervisor) against Sgt. Ellis for telling plaintiff he would delete evidence. On March 9, 2012, Major Dancy approved the investigative findings. Sgt. Ellis received a three-day suspension for telling plaintiff he would delete video evidence that depicted her nude. The City did not discipline Lt.

Kreher for conduct related to Plaintiff's complaint. No one from Homeland Security who saw the video was disciplined.

Plaintiff also brought a complaint with Yvonne Yancy, the Human Resources Commissioner about the delay in OPS's investigation. Commissioner Yancy contacted Major Dancy to ensure that the OPS investigation was proceeding. Commissioner Yancy told plaintiff she would investigate, and once Plaintiff was able to return to work, she could choose a suitable position. However, Yancy did not conduct an independent investigation into Officer Pruitt's complaint, but waited for OPS to finish its investigation. Commissioner Yancy believed the OPS investigation "covered the issues" and considered it "inappropriate to interfere" in that investigation. After OPS completed its investigation, Commissioner Yancy read the OPS disposition and concluded that the investigation was thorough, complete, and accurate.

Change in Plaintiff's Employment After October 28, 2011

The day plaintiff filed her complaint with OPS she was put on paid administrative leave. The record does not speak clearly about how and why this happened. Plaintiff testified that she did not ask to be placed on leave, did not want to be out on leave, and does not know who made the decision to put her on leave. According to Commissioner Yancy, Plaintiff was crying and visibly upset during their meeting. She "felt like [plaintiff] did not need to be in the workplace in that state," and recommended to Chief Turner that Plaintiff go out on administrative leave.

While on administrative leave, Plaintiff could not work overtime, which resulted in a decrease in her pay. Plaintiff's paycheck immediately before being placed on leave (November 4, 2011) was $1,796.93, which included $818.03 of overtime compensation. While out on leave, plaintiff's pay checks were reduced to between $992 and $997 per pay period.

In July 2012, plaintiff returned to work after nine months of paid administrative leave. Upon her return, she was offered a position to work in the office of either Deputy Chief Jones or Deputy Chief Ernest Finley. Plaintiff expressed an interest in working with Chief Jones. Under Chief Jones's command, Plaintiff was offered a position in central records or fleet service maintenance. Plaintiff was placed in fleet services where she worked for approximately six months. Plaintiff was then offered and accepted a position in open records.

Since the October 28, 2011 detail, plaintiff has undergone treatment with an APD psychologist and her own doctor.

III. LEGAL STANDARDS

A. Summary Judgment

The movant on summary judgment bears the initial responsibility of asserting the basis for his motion. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).[15] "The nature of this responsibility varies, however, depending on

[15] This includes and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,'" the movant believes demonstrate the absence of a genuine issue of material fact. Celotex Corp., 477 U.S. at 323.

whether the legal issues, as to which the facts in question pertain, are ones on which the movant or the non-movant would bear the burden of proof at trial." *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115 (11th Cir. 1993).

"For issues ... on which the non-movant would bear the burden of proof at trial, the moving party is not required to support its motion with affidavits or other similar material negating the opponent's claim to discharge this initial responsibility." *Id.* (internal citations and quotations omitted). The movant may discharge his burden by: (1) "showing – that is, pointing out to the district court – that there is an absence of evidence to support the non-moving party's case," or (2) supporting his motion for summary judgment "with affirmative evidence demonstrating that the non-moving party will be unable to prove its case at trial." *Id.* at 1115-16; *Celotex Corp.*, 477 U.S. at 324-25.

Once the movant has carried his burden, the non-moving party is required to present competent evidence designating "specific facts showing that there is a genuine issue for trial." *Celotex Corp.*, 477 U.S. at 324. "The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

B. Qualified Immunity

On the defendant's motion for summary judgment based on qualified immunity, the Court must "resolve all issues of material fact in favor of the plaintiff, and then determine the legal question of whether the defendant is entitled to qualified immunity under that version of the facts." *Stephens v.*

DeGiovanni, 852 F.3d 1298, 1313 (2017) (quoting *Durruthy v. Pastor*, 351 F.3d 1080, 1084 (11th Cir. 2003)); *see also Tolan v. Cotton*, ––– U.S. ––––,(2014) (reversing Court of Appeals holding that police officer's actions did not violate clearly established law because it failed to view the evidence at summary judgment in the light most favorable to the suspect as the nonmoving party). "With the facts so construed," the court reviews the evidence using "the plaintiff's best case," not because the court must determine what facts "the parties might be able to prove, but, rather, whether or not certain given facts showed a violation of clearly established law." *Perez v. Suszczynski*, 809 F.3d 1213, 1217 (11th Cir. 2016); (quoting *Lee v. Ferraro*, 284 F.3d 1188, 1190 (11th Cir. 2002)); *Stephens v. DeGiovanni*, 852 F.3d at 1314.

Qualified immunity protects government officials performing discretionary functions from liability if their conduct does not violate "clearly established *statutory or constitutional* rights of which a reasonable person would have known." *Perez*, 809 F.3d at 1218 (emphasis added); *Hope v. Pelzer*, 536 U.S. 730 (2002) (citation omitted); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). A government official asserting a qualified immunity defense bears the initial burden of showing "he was acting within his discretionary authority." *Glasscox v. City of Argo*, 903 F.3d 1207 (11th Cir. 2018) (citation omitted). After the official makes this showing – or where there is no dispute the official's conduct was

discretionary[16] – the burden shifts to the plaintiff to show that "(1) the defendant violated a constitutional right, and (2) this right was clearly established at the time of the alleged violation." *Id.*; *Lee v. Ferraro*, 284 F.3d at 1194 (stating that the burden rests on the plaintiff to show that qualified immunity is not appropriate).

To be clearly established, the state of the law must give the defendant "fair warning" that his conduct was unlawful. *Perez*, 809 F.3d at 1222; *Hope*, 536 U.S. at 741. A right is clearly established where it would be "sufficiently clear that every reasonable official would understand that what he is doing is unlawful, in light of the specific context of the case, not as a broad general proposition.'" *Glasscox*, 903 F.3d at 1217 (quoting *District of Columbia v. Wesby*, ––– U.S. ––––, 138 S.Ct. 577, 589 (2018)) (internal quotation marks and citations omitted). "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Stephens*, 852 F.3d at 1316 (quoting *Hope*, 536 U.S. at 739). "The relevant, dispositive inquiry in determining whether right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Whittier v. Kobayashi*, 581 F.3d 1304, 1308 (11th Cir. 2009) (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001)).

[16] Plaintiff does not dispute that both Defendants Ellis and Kreher were acting in their discretionary capacity. (Resp., Doc. 145 at 5.)

In determining whether the reasonable defendant would know his conduct is unconstitutional, the Court may consider "the relevant case law at the time of the violation." *Stephens*, 852 F.3d at 1315. To be clearly established, a legal principle must be "settled law, meaning that it is not merely suggested, but rather is dictated by controlling authority or a robust consensus of cases of persuasive authority." *Glasscox*, (quoting *Wesby*, 138 S.Ct. at 589-90) (internal quotation marks omitted). A plaintiff's constitutional right "is clearly established if a concrete factual context exists so as to make it obvious to a reasonable government actor that his actions violate federal law." *Stephens*, 852 F.3d at 1315 (quoting *Fils v. City of Aventura*, 647 F.3d 1272, 1291 (11th Cir. 2011)). It is not required that the case law be "materially similar" to the defendant's conduct; "[b]ut, where the law is stated in broad propositions, 'a very high degree of prior factual particularity may be necessary.'" *Id.*; *Fils*, 647 F.3d at 1291 (quoting *Hope*, 536 U.S. at 740-41).[17] Plaintiff is not required to cite "a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (citing *Ashcroft v. al–Kidd*, 563 U.S. 731, 741 (2011)).

Alternatively, the court may look "not at case law, but at the defendant's conduct, and inquire whether that conduct 'lies so obviously at the very core of

[17] "When case law is needed to 'clearly establish' the law applicable to the pertinent circumstances, [the courts] look to decisions of the U.S. Supreme Court, the United States Court of Appeals for the Eleventh Circuit, and the highest court of the pertinent state." *Marsh v. Butler County, Ala.*, 268 F.3d 1014, 1032–33 n. 10 (11th Cir. 2001).

what the Constitution prohibits that the unlawfulness of the conduct was readily apparent to the defendant, notwithstanding the lack of fact-specific case law.'" *Stephens*, 852 F.3d at 1315 (alterations to original); *Fils*, 647 F.3d at 1291; *Vinyard v. Wilson*, 311 F.3d 1340, 1355 (11th Cir. 2002). In other words, "in the absence of fact-specific case law, the plaintiff may overcome the qualified immunity defense when the preexisting general constitutional rule applies with obvious clarity to the specific conduct in question." *Vinyard*, 311 F.3d at 1351 (quoting *Hope*, 536 U.S. at 740-41.) "[G]eneral statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though "the very action in question has [not] previously been held unlawful." *Hope*, 536 U.S. at 741 (alteration in original) (emphasis added) (quoting *Lanier*, 520 U.S. at 270–71, 117 S.Ct. 1219).

"Officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Stephens*, 852 F.3d at 1316; *Hope*, 536 U.S. at 741. Qualified immunity is unavailable "if an official knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the plaintiff." *Stephens*, 852 F.3d at 1317; *Harlow*, 457 U.S. at 815.

C. Sexual Harrassment/Hostile Work Environment in Violation of Title VII and Equal Protection

The elements of a claim for employment discrimination under Title VII and for a violation of the Equal Protection clause of the Fourteenth Amendment in the context of public employment are coterminous.

Title VII of the Civil Rights Act makes it "an unlawful employment practice for an employer ... to discriminate against any individual with respect to [her] compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . ." 42 U.S.C. § 2000e–2(a)(1). This includes requiring employees to work in a discriminatorily hostile or abusive environment. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 20 (1993); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986). Sexual harassment is actionable "[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris*, 510 U.S. at 20 (quoting *Meritor*, 477 U.S. at 65, 67 (internal citations and quotation marks omitted)); *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982).

The determination of whether conduct is actionable under Title VII "is not, and by its nature cannot be, a mathematically precise test." *Harris*, 510 U.S. at 22. Instead, "whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances." *Id.* at 23. Factors to consider "may include 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." But, this list of factors is not exclusive or exhaustive and "no single factor is required." *Id.*

Title VII is not the exclusive remedy for employment discrimination in the context of public employment. Under 42 U.S.C. § 1983, a public employee may also assert a challenge to employment discrimination on the basis of race or sex, based on the constitutional right of equal protection under the Fourteenth Amendment. *See Davis v. Passman*, 442 U.S. 228, 235 (1979) (holding that the equal protection clause confers a federal constitutional right to be free from gender discrimination); *Thigpen v. Bibb County, Ga.*, 223 F.3d 1231, 1237 (11th Cir. 2000) (finding that Title VII is not the exclusive remedy for discrimination claims against state or municipal employers, where those claims derive from violations of Constitutional rights, and section 1983 remains an available cause of action for bringing equal protection claims against municipal employers which allegedly have engaged in employment discrimination).

The Supreme Court has held that the Equal Protection clause confers a federal constitutional right to be free from gender discrimination. *Davis v. Passman*, 442 U.S. 228, 235 (1979). And the Eleventh Circuit has held that there is a constitutional right to be free from unlawful sex discrimination and sexual harassment in public employment. *Cross v. Alabama*, 49 F.3d 1490, 1507 (11th Cir. 1995). Thus, in cases in which a plaintiff asserts an equal protection claim

under § 1983 as a parallel basis for a claim of employment discrimination under Title VII, the elements of the two causes of action are the same. *Id.* at 1508 (holding that the elements of a claim for sexual harassment/hostile work environment in violation of Title VII and the Equal Protection Clause are identical); *Hardin v. Stynchcomb*, 691 F.2d 1364, 1369 n.16 (11th Cir. 1982) (same).

In establishing a violation of the Equal Protection Clause in the employment context, a plaintiff must prove discriminatory motive or purpose, and discriminatory intent should be inferred in the same manner as under Title VII. *Whiting v. Jackson State Univ.*, 616 F.2d 116, 121-122 (5th Cir. 1980); *Cross*, 49 F.3d at 1507-1508; *c.f. Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000) (holding that "it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation . . . The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination").

IV. THE COURT'S PRIOR FINDINGS ON SUMMARY JUDGMENT

As noted above, the Court declined to adopt the R&R granting Defendants' Motion for Summary Judgment on Plaintiff's Title VII claim. (*See* Ord., Doc. 138.) The Court agreed with a host of findings made by the Magistrate Judge.

But, after careful, in-depth *de novo* review of the Motion for Summary Judgment record and Plaintiff's Objections and Defendants' Reply, the Court found it was unable to resolve a wide range of material facts that control disposition of this case absent engaging in improper weighing of the evidence and evaluation of witness credibility and motivation. *See, e.g., Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000); *Hairston v. Gainesville Sun Pub. Co.*, 9 F. 3d 913, 918 (11th Cir. 1993).

For this reason, the Court did not adopt a range of critical factual findings reached in the R&R, including:

- The R&R concludes that Plaintiff voluntarily made the choice to go nude in the undercover prostitution sting, unaffected by any manipulation or pressure from Sgt. Ellis. The Magistrate Judge erred in totally minimizing how Sgt. Ellis substantively would have impacted Pruitt's decision-making by falsely representing to her that if she disrobed, all video tape revealing her nude body would be deleted and thus would not be shown or accessible within the police department. As indicated by Plaintiff's shock and humiliation when a videotape showing her breasts surfaced, Ellis's false promise may well have materially affected Plaintiff's decision to move forward with nudity in the sting operation. Additionally, the Magistrate Judge reached his conclusion by underrating any coercive dynamics entailed in Plaintiff's assigned job as the only female undercover agent available that evening in luring a targeted prostitute whose modus operandi effectively required Plaintiff to disrobe as a precondition to engaging in sex for money. While a reasonable jury might ultimately reach a determination that Plaintiff totally voluntarily

undertook nudity in the sting operation, unaffected by Sgt. Ellis's conduct, it could also reach the contrary determination.

- The R&R reaches into the arena of evaluating and weighing evidence that might be viewed by a jury differently. For example, the R&R rejected Plaintiff's contention that Sgt. Ellis intentionally brushed against Officer Pruitt as she tried to make her way to the bathroom during the takedown and concludes that no reasonable jury could credit her allegation. (*See* R&R 74-5) ("If Sgt. Ellis's body grazed plaintiff's, as plaintiff alleged . . . but the video does not clearly show, it was owing to circumstances beyond either's immediate control, such as the narrow entryway (at the time packed with several officers) and Sgt. Ellis's large frame."). The video shows that while Plaintiff passes Ellis, he turns toward her, swivels out of the way, reaches out his arm, and then follows her back toward the bathroom. The video's depiction of Plaintiff's intersection with Ellis on the way to the bathroom can be viewed in differing ways. Coupled with Ellis's statement that he got a "nice full frontal" view, and his prolonged stare, a jury could conclude that he intentionally brushed himself against Plaintiff's nude body while making a show to move out of her way.
- The R&R also weighs the evidence against Plaintiff to conclude that Lt. Kreher acted professionally when he showed the nude video footage to another male supervisor and asked Plaintiff to explain her conduct. (R&R 85-86.) The R&R disregards Officer Pruitt's testimony that Lt. Kreher forced her to watch the nude footage in front of 3 men, during which he paused the screen with her breast exposed and refused to stop the video when Officer Pruitt wept and plead for him to stop the video. (Pruitt Dep. 120). A reasonable jury could find that his intent in exhibiting the video and freezing the image of her breast during this meeting was sexually based harassment.

- The R&R determined that Plaintiff offered no "cohesive theory" to persuasively suggest that the missing key fob video footage was intentionally removed by Sgt. Ellis. However, the evidence does suggest that Sgt. Ellis may have removed the key fob from the chain of custody, and a reasonable jury might reach the inference that Ellis misappropriated the video footage under the specific circumstances of this case, particularly given his sexual remark and possible sexual conduct toward Plaintiff during the sting.
- The humiliating impact of dissemination of sensitive information regarding Plaintiff's body and nude involvement in this sting operation is understated in the R&R. As Officer Mercure stated, news of this "spread through the department like a high school room" and that "it seemed like the whole department was joking about it." (Mercure Dep. at 101-102; Ex. 1 to Mercure Dep.) Officer Mercure observed that this was the first time he knew of an incident within vice being leaked out and in his view, one of the top reasons was that Officer Pruitt was nude in the video. (*Id.* at 105.) Under the circumstances of the events that transpired in Vice, Pruitt testified that "she felt like [she] couldn't work in undercover anymore,"[18] (Pruitt Dep. at 153), though in the past she had been considered a top flight undercover agent. She almost immediately needed counseling from a psychologist at the department and was on leave for approximately nine months before being reassigned out of the vice unit.

(Ord., Doc. 138 at 5-8.)

[18] It is unclear whether Plaintiff requested that she be reassigned to a different unit or whether she felt like she was being precluded from working an undercover detail.

In taking a narrow, quantitative approach to counting the number of "acts"[19] which should properly be viewed as sexual harassment and therefore considered as the measure of whether hostile work conditions were pervasive or severe, the Court found the R&R failed to consider all the specific circumstances of the case. (*Id.* at 9.) *Harris*, 510 U.S. at 23 ("[W]hether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances.") On the other hand, Plaintiff's version of the evidence, if construed in the most favorable light, instead shows a far more severe, disturbing, and deeply humiliating picture than that captured by the "three harassing acts" prism adopted in the R&R. (*Id.*)

When construed in Plaintiff's favor and viewed in totality, the Court found there was sufficient evidence for Plaintiff's sexual harassment/hostile work environment claim to go before a jury:

> Under Plaintiff's version of the evidence (construed in the light most favorable to her) Officer Pruitt was manipulated into participating nude in a prostitution sting based on her male supervisor, Sgt. Ellis's false commitment that video footage of her nudity would be erased. Meanwhile, she had no knowledge that a clock radio monitor was video recording her engagement in graphic sexual activity during the sting operation, her naked breasts, and her appearance in sexually provocative underwear. Plaintiff's supervisor, Sgt. Ellis, next acted sexually inappropriately toward her during the takedown of the sting. He subsequently purposely handed over the clock radio video to the head of the vice unit, Lt. Kreher. Meanwhile, the key fob video recording mysteriously vanished, although as the sergeant in charge, Ellis had responsibility

[19] The R&R concluded that the only acts that can be counted in establishing Plaintiff's hostile work environment claim are: "(1) Sgt. Ellis's 'full frontal' remark, (2) his prolonged stare at Officer Pruitt's nude body, and (3) Investigator Teague's exhibition of the detail footage to other Homeland Security officers." (R&R at 87.)

for maintaining proper custody of the key fob device. Plaintiff understandably feared under these circumstances (including Ellis's sexual comments and conduct toward her) that Ellis had retained the footage for his own purposes.

In his capacity as the head of vice, Lt. Kreher would have known that the clock radio video footage captured images of a prostitution sting and therefore likely involved some sexual acts or nudity. Nevertheless, he handed the tapes over to the Police Department Homeland Security Unit male investigator for video conversion with no directions regarding confidentiality in handling. When the investigator viewed the tape, he (or other investigators) summoned at least five additional male investigators to watch and talk about the video's "graphic and sensitive footage."[20] Again, viewed in the light most favorable to the Plaintiff, the Homeland Security officers' group video viewing reeked of a fraternity party's boisterous, leering viewing of a titillating movie. The Police Department never directed the officers to maintain confidentiality regarding the video tape images, and there is no reason given the atmospherics of these events and Officer Mercure's testimony to find that any confidentiality was maintained.

Later that same day, Lt. Kreher showed similar indifference to the confidentiality and sensitivity of the video tape when he convened a small group conference, including Plaintiff, to watch the video and discuss the sting operation. While Defendants may view this as an entirely appropriate management conference, a reasonable jury could alternatively find that Lt. Kreher's insistence on subjecting Plaintiff to the re-play of the graphic video in front of her male colleagues and supervisor, including a new sergeant she had never met before, was a sexually abusive and hostile act. Thereafter, Lt. Kreher held an informal training session with vice unit staff members regarding safety issues posed by this undercover action.[21] Although the meeting was purportedly held to address safety issues, when the only other female officer in the team raised her concern that Sgt. Ellis had improperly delayed the takedown and placed the undercover agents in greater danger, this concern appears to have garnered no attention or concern. While the video was not shown at the meeting, Lt. Kreher apparently took no steps to address the sensitivity of any discussion or dissemination of information regarding Plaintiff's nudity in the video.

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[20] Later, Major Robinson and Lt. Coyt of Homeland Security provided an obfuscated response in reply to the Department's Office of Professional Standards investigative inquiry regarding all persons who viewed the video while in possession of Homeland Security.

[21] A retired Atlanta Police Department officer also was brought in to speak during the session.

> Lt. Kreher also told Plaintiff at the informal training that he did not want any complaint filed with the Office of Professional Standards – that, in effect, he wanted any complaint to stay quiet. Plaintiff meanwhile was upset regarding the Department's failure to secure the missing key fob video footage and to ensure that no video footage images were still accessible or circulating. Kreher's course of conduct gave her grave concerns over whether he was prepared to handle her complaint in an appropriate, independent, and professional manner.
>
> On November 3, 2011, Plaintiff filed a formal complaint with OPS. She was initially advised that the investigation would be completed in 60 days. Meanwhile, on November 23, 2011, Plaintiff filed a complaint with Commissioner Yancy in the City's Human Resources department. However, the investigation exonerated Lt. Kreher and found insufficient evidence to determine whether Sgt. Ellis violated the department policies (based on his conduct toward Plaintiff during the sting, his commenting on seeing her nude body, and his handling of the key fob).[22] Plaintiff's Human Resources sex discrimination complaint was not resolved by the City's law department until May 29, 2012, and competent evidence suggests no additional investigation was performed beyond that originally undertaken by OPS. The evidence construed in Plaintiff's favor indicates that at the start of the complaint process, the Department placed Plaintiff on administrative leave for 9 months and she received significantly less pay as a result.

(Order at 9-12.) Taking into account the totality of the evidence and the specific factual circumstances of the case, the Court found that Plaintiff presented sufficient evidence upon which a reasonable jury could determine that she was subjected to a sexually hostile work environment.

[22] Sgt. Ellis did receive a 3-day suspension for violating department policy by representing he would destroy video footage.

V. DISCUSSION

A. Whether Plaintiff's Evidence Demonstrates a Constitutional Violation

As mentioned above, Title VII is not the exclusive remedy for employment discrimination in the context of public employment; when a public employee challenges an act of employment discrimination on the basis of race or sex, such a claim may also violate the constitutional right of equal protection under the Fourteenth Amendment. *See Davis v. Passman*, 442 U.S. 228, 235 (1979) (holding that the equal protection clause confers a federal constitutional right to be free from gender discrimination); *Thigpen v. Bibb County, Ga.*, 223 F.3d 1231, 1237 (11th Cir. 2000) (finding that Title VII is not the exclusive remedy for discrimination claims against state or municipal employers, where those claims derive from violations of Constitutional rights, and section 1983 remains an available cause of action for bringing equal protection claims against municipal employers which allegedly have engaged in employment discrimination). In cases in which a plaintiff asserts an equal protection claim under § 1983 as a parallel basis for a claim of employment discrimination under Title VII, the elements of the two causes of action are the same. *Cross*, 49 F.3d at 1508 (holding that the elements of a claim for sexual harassment/hostile work environment in violation of Title VII and the Equal Protection Clause are identical); *Hardin v. Stynchcomb*, 691 F.2d 1364, 1369 n.16 (11th Cir. 1982) (same).

"A plaintiff wishing to sustain an equal protection claim of sexual harassment must show both sexual harassment and an intent to harass based upon that plaintiff's membership in a particular class of citizens — i.e. male or female." *Faragher v. City of Boca Raton*, 864 F. Supp. 1552, 1565 (S.D. Fla. 1994), *aff'd*, 166 F.3d 1152, 1153 (11th Cir. 1999) (reinstating judgment in favor of plaintiff on remand from Supreme Court). "The 'harassment' prong is met by showing actionable harassment under Title VII. The 'intent' prong requires proof that the defendant's discriminatory conduct was intentional; that is, the conduct was because of the plaintiff's status as a male or female, rather than because of some other personal characteristic." *Id.*

1. Parties' Contentions on Summary Judgment

Defendants' Renewed Motion for Summary Judgment incorporates by reference their prior motion previously rejected by the Court as insufficient to establish qualified immunity:

> [A]s discussed in Defendants' Motion for Summary Judgment (Doc. 91) and their Reply (Doc. 116), Plaintiff's allegations of violations of rights by these Defendants constitute disagreements about their supervisory decisions for the operations of the APD Vice Unit; however, they do not show a clearly established right that Defendants Ellis and Kreher knowingly violated. Absent that showing, Defendants Ellis and Kreher are entitled to qualified immunity on all federal claims asserted against them in their individual capacity in the instant lawsuit which should be dismissed as a matter of law.[23]

[23] To the extent there is any confusion by Defendants, Defendants are entitled to assert the affirmative defense of qualified immunity as to Plaintiff's Equal Protection claim only. The defense is not available in response to Plaintiff's Title VII claim which the Court has allowed to proceed to trial.

(Doc. 140 at 4.)[24] Defendants did not file a separate statement of undisputed material facts along with their renewed motion, and instead reassert and incorporate the statement of facts previously filed.[25]

Plaintiff in response articulates why Defendant Ellis and Defendant Kreher, separately, are liable for their own individual conduct in violation of her statutory and constitutional right to be free from sex discrimination and harassment in the workplace.

First, as to Defendant Ellis, Plaintiff asserts that he violated Plaintiff's rights and the police department's zero tolerance sexual harassment policy by: (1) delaying the take down of the suspect so he could see Plaintiff in the nude on the video monitor feed in the adjacent hotel room; (2) leering at Plaintiff's nude body as she attempted to enter the bathroom when the take down team entered the room to make the arrest; and (3) failing to secure and account for potential nude video footage of Plaintiff from the key fob recording device used by Plaintiff during the sting operation.

Second, Plaintiff asserts that Defendant Kreher is liable because: (1) he failed to request a control number on Plaintiff's complaint of sexual harassment;

[24] As Defendants' original motion was comprised of a single sentence and their original Reply brief was devoid of argument on the clearly established prong, Defendants' Renewed Motion fares no better and is ripe for denial due to Defendants' failure to comply with the Court's Order.
[25] As the Court noted in its prior Order declining to adopt the R&R, this case contains a complex factual record, rendered all the more messy and difficult by Defendants' often unwarranted objections to a broad swath of Plaintiff's Amended Additional Facts which Plaintiff Contends are Material and Present a Genuine Issue for Trial. (Docs. 113-1, 116-1.) Defendants failed to heed this Court's admonishments and neglected to take the opportunity to present a clean, streamlined record on which the Court could rely in determining the merits of Defendants' renewed motion for judgment in their favor.

(2) he had no legitimate reason for giving the video footage to APD's homeland security division prior to the case being called for trial or without confidentiality instructions; (3) he failed to request that Investigator Teague (and the other officers from the homeland security division) be disciplined for their improper actions in displaying the nude video footage of Plaintiff for a group viewing; and (4) he forced Plaintiff to view the nude footage in a meeting with three male officers, paused the video while Plaintiff's bare breast was shown on the screen, and refused to stop the video when Plaintiff became upset.

For the first time, and only in their renewed Reply brief, Defendants provide a more substantive and fulsome argument in support of their qualified immunity defense.[26] These arguments, however, effectively seek to challenge Plaintiff's version of the events as unsupported by the record and ask the Court to construe all inferences against Plaintiff. Where the evidence in the record, reasonably construed in Plaintiff's favor, supports her version of the facts, the Court must determine whether that version of the facts establishes a constitutional violation. Defendants' arguments ignore this standard.[27]

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[26] The Court is not required to consider Defendants' arguments raised for the first time in their Reply. *Tafal v. Lion Antique Invs. & Consulting Servs.*, 459 F. App'x 847, 849 (11th Cir. 2012)) ("The district court had no obligation to consider an argument raised for the first time in the reply brief."); *Murphy v. Farmer*, 176 F. Supp. 3d 1325, 1342 (N.D. Ga. 2016) ("It is common practice for the Court not to hear arguments raised for the first time in a reply brief.").

[27] At this stage in the proceedings, the court views all evidence and factual inferences in the light most favorable to Plaintiff as the non-moving party and resolves all issues of material fact in Plaintiff's favor. *Id.* (citing *Lee*, 284 F.3d at 1190). The court must review the evidence in this manner "because the issues appealed here concern not which facts the parties might be able to prove, but, rather, whether or not certain given facts showed a violation of clearly established law." *Id.* (noting that "what are considered the 'facts' may not turn out to be the 'actual' facts if the case goes to trial; rather, they are the 'facts' at this stage of the proceedings") (citing *Morton*

This Court has already concluded, in the prior summary judgment order, that there is sufficient evidence, considering the totality of the circumstances, that the alleged harassment was sufficiently severe and pervasive to create a hostile environment for purposes of a Title VII claim against the Defendants and that sufficient evidence exists for a jury to draw an inference that the Defendants' actions were motivated by gender animus. Because the Eleventh Circuit applies Title VII analysis to hostile environment/sexual harassment claims brought under the Equal Protection Clause, the Court concludes that applying the analysis it earlier applied in the context of the Title VII claim, Plaintiff's evidence also establishes a constitutional violation (as explained below).

2. Defendant Ellis

Defendant Ellis first challenges Plaintiff's contention that he purposefully delayed the takedown so he could see Plaintiff in the nude on the video monitor as "pure speculation" and "proven to be utterly impossible by an examination of the video . . . since the camera was almost completely obstructed" when the takedown signal was given. (Reply, Doc. 146 at 6.) For this reason, Defendant argues that the evidence does not suggest that Sgt. Ellis was motivated by a desire to to see Plaintiff in the nude when he delayed the takedown. (*Id.* at 7.)

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v. Kirkwood, 707 F.3d 1276, 1280 (11th Cir. 2013)). Accordingly, while Plaintiff's allegations may not be the "actual facts" or the facts ultimately proven, the legal question of whether Defendants are entitled to qualified immunity must be determined "under th[is] version of the facts." *Id.* (citing *Lee*, 284 F.3d at 1190 (internal quotation marks omitted)); *Kingsland v. City of Miami*, 382 F.3d 1220, 1234 (11th Cir. 2004) ("Viewed in the light most favorable to Kingsland, the evidence shows that the arresting officers in this case behaved in an objectively unreasonable fashion and were therefore not entitled to qualified immunity. Given the significance of the disputed issues of fact here, qualified immunity from suit is effectively unavailable, even though after a full trial the officers may yet prevail on the merits.").

Defendant Ellis also challenges Plaintiff's allegation that he "visibly leered" at Plaintiff as she fled nude to the bathroom upon the entry of the other officers on the takedown team. Instead, Ellis contends that "Plaintiff was only visible for a maximum of three seconds, and the fact that [he] looked in the direction of a co-worker who was unexpectedly walking past him without any clothing does not establish that he was leering or that he should have reasonably known that looking in someone's direction when something unexpected occurs constituted a violation of Plaintiff's federally guaranteed rights."[28] (*Id.* at 7.)

Finally, Ellis objects to Plaintiff's assertion that he intentionally mishandled the key fob footage of the prostitution sting in violation of Plaintiff's rights.[29] Defendant Ellis contends there is no evidence that a key fob video of the prostitution detail was ever recorded, but that even if it exists no nude footage of Plaintiff would have been captured. Ellis insists that Plaintiff's continued assertion that nude footage of her on the key fob must exist is contradicted by her own sworn statement and testimony that she placed the key fob on the dresser "in a direction that would not record [her] if she had to get naked." (*Id.* (citing Defs.' Ex. 9 to Pruitt Deposition.))

[28] Defendant Ellis's argument that the possibility of encountering Plaintiff in the nude when he entered the hotel room with the takedown team was unexpected is belied by the evidence. As part of the team watching the sting on the video in the adjacent monitoring room, Sgt. Ellis was aware that Plaintiff was unclothed in the bed when the takedown team entered the hotel room to effect the suspect's arrest.

[29] Although footage from the key fob has never been recovered, Plaintiff maintains that she used the key fob to record the undercover operation and that it may contain nude video of her during the prostitution sting.

Defendant Ellis's arguments once again ask this Court to view and judge each of the alleged acts in isolation. The applicable standard, however, requires an examination of the totality of the evidence. *See Harris*, 510 U.S. at 23 ("[W]hether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances."); *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1242, 1246 (11th Cir. 1999) ("In sexual harassment cases, the courts must consider the alleged conduct in context and cumulatively. Therefore, we set forth all alleged harassing conduct so that we can look at the totality of the circumstances . . . The courts should examine the conduct in context, not as isolated acts, and determine under the totality of the circumstances whether the harassing conduct is sufficiently severe or pervasive to alter the terms or conditions of the plaintiff's employment and create a hostile or abusive working environment.").

As detailed extensively above, when properly viewed in Plaintiff's favor, the evidence in the record paints an entirely different picture than that presented by Defendant Ellis in the Reply. And as this Court already found,

> A reasonable jury could find that Plaintiff was subjected to a sexually hostile work environment as a result of the course of events involving the sting operation, the bait and switch on Sgt. Ellis's breached promise as to video disclosure, the Defendants' handling of the video materials, and the police department's alleged callous and offensive missteps in handling of this matter thereafter. A reasonable jury could similarly determine that Plaintiff was psychologically and professionally impaired or damaged as a result of Defendants' actions and inaction. Put differently, a reasonable jury could find that as a result of Sgt. Ellis's manipulation and false representation, Plaintiff was subjected to the severe humiliation of having video images of her nude body in a sexual context circulated

> to at least a subset of personnel within the Police Department and the resulting cascade of events.

(Order at 13-14.) Under Eleventh Circuit precedent, this same evidence also supports a claim for an Equal Protection violation. *See Cross v. Alabama*, 49 F.3d 1490, 1507-08 (11th Cir. 1995).

2. Defendant Kreher

Defendant Kreher argues that Plaintiff's contention that Lt. Kreher failed to take action on her complaint of sexual harassment and refused to request the issuance of an OPS control number "is a gross mischaracterization of his testimony, which essentially was the opposite of the fact for which Plaintiff cites it." (Reply, Doc. 146 at 9.) Defendant contends that in the cited portion of the deposition transcript, Lt. Kreher noted that he did not believe that Officers Pruitt and Mercure's conduct during the prostitution detail, as shown in the infamous video, would warrant the issuance of an OPS investigation control number, but that Officer Pruitt's allegation that Defendant Ellis promised that he would delete surveillance video was a potential violation for which he had requested a control number. According to Defendant, Lt. Kreher could not have known that "making this statement" was a violation of Plaintiff's clearly established federal rights.

Defendant Kreher appears to misunderstand Plaintiff's complaint. Plaintiff testified she complained to her lieutenant, Defendant Kreher, about: (1) the Department's failure to secure the missing key fob video footage and to ensure that no video footage images were still accessible or circulating, and (2) the

Department's failure to address the treatment of the nude video of Plaintiff by the Department's division of Homeland Security. Lt. Kreher's deposition testimony highlights that he gave no credence to Plaintiff's concerns surrounding the dissemination of the nude video footage. (Kreher Dep. at 87-88, 90-94, 129-132, 138-39, 144-45.) Instead, Lt. Kreher stated he was only concerned about Officer Mercure's conduct in fondling of the suspect during the sting and Officer Pruitt and Sgt. Ellis's agreement that Ellis would delete any video evidence showing Officer Pruitt in the nude. (*Id.*) However, viewing the evidence in Plaintiff's favor a reasonable jury could infer that Lt. Kreher had no intention of assisting Plaintiff facilitate her complaint with the Office of Professional Standards, but was only interested in disciplining Officers Pruitt, Mercure, and Ellis for what he viewed as inappropriate conduct. As explained more later, Lt. Kreher's failure, as Plaintiff's supervisor, to take any action in response to Plaintiff's complaint was a violation of her right to a non-discriminatory work environment.

Defendant Kreher further argues that he cannot be held liable for following the Department's standard practice of transferring the 8mm surveillance tape from the clock radio to the Homeland Security Unit for transfer to DVD for evidence preservation. Thus, Lt. Kreher contends he could not have known that by following standard departmental protocols he was violating clearly established law on Plaintiff's rights by transferring surveillance video for preservation, when he did not know what was on the video footage. This Court previously disagreed with Defendant, finding in the prior summary judgment order that in his capacity

as the head of the vice unit, Lt. Kreher would have known that the clock radio video footage captured images of a prostitution sting and therefore likely involved some sexual acts or nudity. Indeed, Plaintiff and the other vice officers involved testified that going into the sting, they knew that this particular suspect would not "do business" with potential customers, i.e. talk about money for sex – until the parties to the transaction were nude. Despite this knowledge, Lt. Kreher handed the tapes over to the Police Department Homeland Security Unit male investigator for video conversion with no directions regarding confidentiality in handling. After hearing about the Homeland Security officers' locker room like group video viewing, Lt. Kreher took no action to protect the integrity of the officers in his unit or direct any of the officers to maintain confidentiality regarding the video tape images. As Officer Mercure testified, news of the video "spread through the department like a high school room" and that "it seemed like the whole department was joking about it." (Mercure Dep. at 101-102; Ex. 1 to Mercure Dep.) Officer Mercure observed that this was the first time he knew of an incident within vice being leaked out and, in his view one of the top reasons was that Officer Pruitt was nude in the video. (*Id*. at 105.)

Finally, with respect to Plaintiff's allegation that Lt. Kreher added insult to injury by forcing her to watch the video in front of 4 male officers, Defendant asserts that "showing a surveillance video from an undercover detail in the presence of the two undercover officers who were present during the detail and the sergeant who was in [the] direct chain of supervision cannot show that

Defendant Kreher should have known he was violating Plaintiff's clearly established rights." (Reply at 10-11.) Essentially, Defendant argues that Plaintiff has no basis to complain because she knew the purpose of the meeting was to discuss Officer Mercure's actions and Sergeant Dingle was present for the meeting as the new Vice Unit supervisor. Once again, Defendants rehash a position already rejected by this Court when the evidence is viewed properly at summary judgment. In its prior order, the Court concluded: "While Defendants may view this as an entirely appropriate management conference, a reasonable jury could find that Lt. Kreher's insistence on subjecting Plaintiff to the re-play of the graphic video in front of her male colleagues and supervisor, including a new sergeant she had never met before, was a sexually abusive and hostile act." (Doc. 138 at 11.) The Court further found that "Lt. Kreher showed the video of her nudity in front of other male officers, refused her request to stop the video, and then paused the video while her bare breasts where on the screen. A reasonable jury could infer that Lt. Kreher's actions were willful or reckless or the contrary." (*Id.* at 20.)

In declining to adopt the R&R and denying Defendants' Motion for Summary Judgment on Plaintiff's Title VII claim, this Court noted that Plaintiff's version of the evidence, if construed in the most favorable light to her, shows a severe, disturbing, and deeply humiliating picture. *See Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982) (noting that requiring that "a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work

and make a living can be as demeaning and disconcerting as the harshest of racial epithets"). Taking into account the totality of the evidence and the specific factual circumstances of the case, the Court found that Plaintiff presented sufficient evidence upon which a reasonable jury could determine that she was subjected to a sexually hostile work environment. Because of her status as a public employee, Plaintiff has likewise submitted evidence to support a finding that Defendants' discriminatory conduct constitutes a constitutional violation under the Equal Protection.

Thus, having concluded that the evidence is sufficient to establish a violation of Plaintiff's constitutional rights, the question remains whether Defendants could have reasonably believed that their conduct was lawful, in light of clearly established law.

B. Whether Defendants Were on Notice of Clearly Established Law

Defendants argue that "the fact that a plaintiff has alleged the violation of a right that is clearly established does not automatically establish that the alleged actions actually violated that right, or does it establish that the officer could not have believed his actions to be lawful at the time." (Reply at 5.) Thus, Defendants contend Plaintiff bears the burden "to show that Defendant[s]' alleged actions violated a clearly established right, and that he could not have

believed that his conduct was lawful."[30] (*Id.*) Defendants misconstrue the qualified immunity standard.

Contrary to Defendants' framing of the qualified immunity analysis, Defendants' motion for qualified immunity must be denied if Plaintiff meets her burden of showing that the facts alleged make out a violation of a constitutional right that was clearly established in a concrete factual context "so as to make it obvious to a reasonable government actor that his action would violate federal law." *Fils*, 647 F.3d at 1291.

The court conducts a two-part inquiry to assess whether Plaintiff has met this burden.[31] First, the court considers whether, taken in the light most favorable to the Plaintiff, the facts alleged show the Defendants' conduct violated a constitutional right. *Id.* (citing *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002)). Second, "[i]f a constitutional right would have been violated under the plaintiff's version of the facts, the court must then determine whether the right was clearly established." *Id.* "A clearly established right is one that is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" *Mullenix v. Luna*, --- U.S. ----, 136 S.Ct. 305, 308 (2015) (quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012)); *Taylor v. Barkes*, ---

[30] Plaintiffs do not dispute that Sgt. Ellis and Lt. Kreher acted in their discretionary capacity. (Pl.'s Resp. at 5.) Therefore, to proceed on her claim Plaintiff must establish that Ellis and Kreher are "not entitled to qualified immunity by showing that the facts alleged make out a violation of a constitutional right and that the constitutional right was clearly established at the time of [Defendants'] conduct." *Perez v. Suszczynski*, 809 F.3d 1213, 1218 (11th Cir. 2016) (citing *Hadley v. Gutierrez*, 526 F.3d 1324, 1329 (11th Cir. 2008)).

[31] Addressing the two prongs of the qualified immunity test in this order, while not mandatory, may in many circumstances "best facilitate the fair and efficient disposition of [the] case." *See Pearson v. Callahan*, 555 U.S. 223, 242 (2009).

U.S. ----, 135 S. Ct. 2042 (2015) ("To discharge [the burden . . . to demonstrate that the defendant violated "clearly established" law], the plaintiff must establish that the relevant law has "earlier been developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant's place, that 'what he is doing' violates federal law.").

Thus, Defendants' contention that Plaintiff bears the burden "to show that Defendant's alleged actions violated a clearly established right, *and* that he could not have *believed that his conduct was lawful*" is wrong. (Reply at 5) (emphasis added). If the law is clearly established, it provides notice to all reasonable government actors in the defendant's place that the alleged conduct violates federal law. *E.g.*, *Taylor*, 135 S.Ct. at 2044; *Mullenix*, 136 S.Ct. at 308; *Crawford-El v. Britton*, 523 U.S. 574, 591 (1998) ("If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct.") Qualified immunity is based on an "objectively reasonable" standard and the Defendants' subjective beliefs are irrelevant.[32] *Anderson v. Creighton*, 483 U.S. 635, 641 (1987) (noting that a government actor's subjective beliefs about the legality of his conduct are irrelevant to qualified immunity analysis); *Davis v. Scherer*, 468 U.S. 183, 191 (1984) (recognizing that qualified immunity is evaluated under a purely objective standard without consideration for the government actor's

[32] While evidence of improper motive is irrelevant to the qualified immunity analysis, "it may be an essential component of the plaintiff's affirmative case." *Crawford–El*, 523 U.S. at 589; *Koch v. Rugg*, 221 F.3d 1283, 1295–96 (11th Cir. 2000).

subjective belief); *Perez*, 809 F.3d at 1219-20 (stating that to accept the defendant's argument would require the court to determine "reasonableness" based on the defendant's subject beliefs).

Confoundingly, Plaintiff points only to cases involving racial discrimination in support of her assertion that Defendants violated clearly established law. Nonetheless, the constitutional right to be free from unlawful sex discrimination and sexual harassment in public employment is clearly established. *Cross v. State of Alabama*, 49 F.3d 1490, 1503-1504, 1507-08 (11th Cir. 1995) ("Appellees also alleged a violation of their equal protection rights under the United States Constitution pursuant to 42 U.S.C. § 1983, based upon Stricklin's sexual harassment. Appellees have a constitutional right to be free from unlawful sex discrimination and sexual harassment in public employment.") (citing *Davis v. Passman*, 442 U.S. 228, 235 (1979) ("The equal protection component of the Due Process Clause thus confers on petitioner a federal constitutional right to be free from gender discrimination. . . ."); *Braddy v. Florida Dept. of Labor and Employment Sec.*, 133 F.3d 797, 802-03 (11th Cir. 1998) (affirming denial of supervisor's qualified immunity); *see also Faragher v. City of Boca Raton*, 166 F.3d 1152, 1153 (11th Cir. 1999) (affirming and reinstating district court judgment in favor of plaintiff on Title VII and equal protection claims in *Faragher v. City of Boca Raton*, 864 F. Supp. 1552 (S.D. Fla. 1994)). This Eleventh Circuit authority provided Defendants Ellis and Kreher with fair notice that their conduct would violate Plaintiff's right to be free from discriminatory harassment on the job.

Snider v. Jefferson State. Comm. College, 344 F.3d 1325, (11th Cir. 2003) ("Since at least 1979 it has been established that the Equal Protection Clause provides 'a constitutional right to be free from unlawful sex discrimination and sexual harassment in public employment.'").

In *Cross*, female employees of an Alabama state mental health facility brought a sexual harassment suit under Title VII and § 1983 against the state of Alabama and several officials as a result of the demeaning and humiliating treatment they suffered at the hands of Larry Stricklin, the director of the facility. 49 F.3d 1490. The Eleventh Circuit found that the following evidence was sufficient to establish sexual harassment/hostile work environment and a violation of equal protection: Stricklin made passes at female plaintiff which included hugs, winks, and stroking of her hand; put his arm around another female plaintiff; told sexual and dirty jokes that were offensive to the women; commented on another female employee's body; yelled, was verbally abusive, demeaning, and belittling toward women; and was harder on the women in the office than he was on men. *Id.* at 1494-1500, 1507 (holding that the plaintiffs presented sufficient evidence that Stricklin discriminated against them because of their gender, and that such discrimination created "a work environment abusive" for female employees).

The *Cross* plaintiffs also brought claims against J. Michael Horsley, the Commissioner of the Alabama Department of Mental Health and Mental Retardation, and R. Emmett Poundstone, the Associate Commissioner for the

mental illness division of the Department, for their failure to take action in response to plaintiffs' complaints about Stricklin's harassing conduct. Stricklin's behavior was viewed by his superiors as poor management rather than sexual harassment. On appeal following a jury trial finding each of the defendants liable, the Eleventh Circuit affirmed the district court's rejection of Horsley's qualified immunity defense on the plaintiffs' § 1983 claim:

> The relevant question is whether a reasonable person in Horsley's position as Commissioner could have believed that doing nothing in response to knowledge of a subordinate director's sexual harassment and discrimination and the creation of a hostile work environment at a facility was lawful, in light of clearly established law. Horsley's subjective beliefs are irrelevant. We conclude that a reasonable person in Horsley's position could not have believed doing nothing in light of Stricklin's conduct was lawful, in light of the clearly established law that sexual harassment and discrimination was an infringement of legal rights.

Id. at 1503, 1507-08 (internal citations omitted) (finding that plaintiffs presented sufficient evidence that Horsley and Poundstone knew or should have known of Stricklin's discriminatory treatment of female employees, yet failed to take prompt action to remedy the hostile work environment Stricklin's conduct created). The Court held that because Stricklin's sexual harassment resulted in a violation of the plaintiffs' equal protection rights and Horsley and Poundstone were on notice of the need to correct Stricklin's discrimination of female employees, but failed to do so, they were liable pursuant to section 1983. *Id.* at 1507-08 (stating that plaintiffs "have a constitutional right to be free from unlawful sex discrimination and sexual harassment in public employment").

In *Braddy*, the plaintiff's supervisor, Lynch, made sexual advances and comments toward her, struck her on the rear, arranged stuffed animals on his desk so they appeared to be copulating, displayed photographs of women in revealing swimsuits, spoke about pornography, and denied Braddy compensatory time after she rejected his advances. 133 F.3d 797, 799-800. Braddy filed suit against Lynch under § 1983 for discrimination on the basis of race and sex in violation of her Fourteenth Amendment equal protection rights. *Id.* at 801. The Eleventh Circuit held "[w]e do not hesitate to determine that Lynch's conduct pushed him from beneath the protective umbrella of qualified immunity. If a jury believes Braddy's allegations, including the allegation that Lynch followed Braddy down an office hall, bull whip in hand, and said "this is my sexual fantasy for you," then a jury could very reasonably find that Lynch's behavior was clearly and obviously in violation of existing federal law." *Id.* at 802-03.

Similarly, in *Faragher* the Eleventh Circuit affirmed the judgment entered in favor of female lifeguard on equal protection and Title VII claims against her male supervisors for sex discrimination and creating a sexually hostile work environment by repeatedly subjecting her to uninvited and offensive touching, making lewd remarks, and speaking of women and their bodies in offensive terms. *Faragher*, 76 F.3d 1155, 1162 (11th Cir. 1996); *Faragher*, 524 U.S. at 780.[33] During her intermittent seasonal employment as a lifeguard,[34] Faragher

[33] The City of Boca Raton appealed the district court's liability findings under Title VII, but did not raise any arguments on appeal relating to the Faragher's equal protection claim. The 11th Circuit upheld the district court's finding that the conduct at issue was sufficient to establish a

was subject to unwelcome sexual harassment in the form of uninvited touching by Terry, the Chief of Marine Safety, who would put his arm around her with his hand on her buttocks and by Captain Silverman and in the form of disparaging comments about her body, describing her to another employee as "male-like" because she had no breasts. *Faragher v. City of Boca Raton*, 864 F. Supp. 1552, 1556-57, 1562 (S.D. Fla. 1994); *Faragher*, 524 U.S. at 782. Captain Silverman also once tackled Faragher and made vulgar comments such as, "If you had tits I would do you in a minute," and flicked his tongue at her. *Faragher*, 76 F.3d at 1158; *Faragher*, 524 U.S. at 782; *Faragher*, 864 F. Supp. at 1557-58, 1562. As the Eleventh Circuit described it:

> While some of the conduct might be characterized as "mere offensive utterance," other conduct was physically threatening (for example, being tackled by Silverman) and humiliating (for example, Silverman's comments about Faragher's body, the terms he used to describe women, and his pantomime of oral sex).

76 F.3d at 1162. The Eleventh Circuit in *Faragher* had "no trouble concluding that Terry's and Silverman's conduct ... was severe and pervasive enough to create an objectively abusive work environment," and noted that "the record suggests that it might have been clear error for the district court, having credited Faragher's testimony, to find otherwise." 76 F.3d at 1162. Notably, the district court, whose judgment was ultimately affirmed, found that:

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hostile work environment, but the Court found that the City could not be held liable under an agency theory for the conduct of its employees. Faragher appealed this issue to the U.S. Supreme Court which reversed the Eleventh Circuit's decision that the City of Boca Raton was not liable for the conduct of Faragher's supervisors.

[34] Plaintiff Faragher had worked mostly on a part-time and summer basis while attending college from 1985 to 1990. 864 F. Supp. 1552, 1556 (S.D. Fla. 1994). She resigned her position to attend law school.

> Terry's and Silverman's conduct unreasonably interfered with Faragher's work performance by promoting an environment where female lifeguards were considered fair game for uninvited touching and offensive remarks. The Court has recognized that the level of camaraderie among the lifeguards in the Marine Safety Section bordered on boisterousness due to the disproportionate ratio of female (4-6) to male (40-45) lifeguards and the cramped quarters where the lifeguards were often running into each other. Camaraderie, however, is not synonymous with the lack of respect evidenced by Terry's and Silverman's conduct toward their female co-workers, including Faragher.

864 F. Supp. 1552, 1562 (S.D. Fla. 1994).

The Court acknowledges that because of the nature of Plaintiff's job as an undercover vice cop – requiring her to engage suspects in acts of sexual solicitation on camera while on duty – this case is unique in many ways compared with the "typical" Title VII/equal protection sexual harassment/hostile work environment claim.[35] However, this aspect of Plaintiff's employment is not a basis to require her to meet a heightened standard of proof that she was subject to unwanted and humiliating harassment of a severe and pervasive sexual nature in violation of her clearly established constitutional right to equal protection in the workplace.[36]

In terms of the legal implications under governing law, Sgt. Ellis's conduct here (viewed from Plaintiff's perspective of the evidence) in taking advantage of

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[35] Indeed, the Court noted in its prior Order that "none of the cited cases deal with anything that resembles distribution of video images of the plaintiff in a nude or partial nude state in a sexual context or an employer's failure to protect the plaintiff from the humiliation of other employees' video viewing and widespread discussion of the plaintiff's nudity, body, and sexual engagement in a closely knit, male dominated work environment." (Order at 9.)

[36] Even the Magistrate Judge recognized that "it cannot be argued that plaintiff invited sexual harassment simply by accepting a position in Vice, a unit charged with investigating prostitution." (R&R, Doc. 131 at 66, n.90.)

Plaintiff in a compromising position during the prostitution sting, spreading the word through the department about Plaintiff's nice "full frontal" view, and handling of the key fob footage of the undercover operation is sufficiently comparable to the sexually charged conduct, demeaning remarks, and unwanted offensive touching found actionable in *Cross*, *Braddy*, and *Faragher*. And with respect to Lt. Kreher's conduct toward Plaintiff and his refusal to consider her grievances, the Eleventh Circuit clearly held under similar facts to those presented here that "a supervisory government official who does nothing in response to knowledge of a subordinate's sexually harassing conduct is not entitled to qualified immunity." *Cross*, 49 F.3d at 1503 (holding that supervisor should have known that failing to take action in response to complaints that subordinate made unwelcome sexual overtures and other derogatory remarks of a sexual nature to co-workers was liable for unlawful sexual harassment). The evidence when properly viewed on summary judgment in the light most favorable to Plaintiff, demonstrates that despite Lt. Kreher's knowledge of Plaintiff's complaints about Sgt. Ellis and the dissemination of the video among the male officers, Lt. Kreher failed to take any remedial action. After learning of Plaintiff's complaint, Kreher failed to properly investigate the circumstances surround the missing key fob footage, he told Plaintiff he would not request an OPS control number, and he subjected Plaintiff to a public viewing of the nude footage in front of other male officers. It can be reasonably inferred from this evidence that Lt. Kreher failed to take appropriate action in response to Plaintiff's complaints

and affirmatively contributed by his own conduct to the sexually harassing hostile environment. Under Plaintiff's version of the facts and clearly established governing law, no reasonable supervisor in Lt. Kreher's position could have believed that doing nothing, and in Kreher's case exacerbating the humiliation, in response to Plaintiff's allegations was lawful.

Accordingly, even considering the particular circumstances of this case, the case law was sufficiently clear that it would have been obviously to any reasonable supervisor in Ellis's and Kreher's positions that their conduct was unlawful. *See Cook v. Gwinnett County Sch. Dist.*, 414 F.3d 1313, 1320 (11th Cir. 2005) ("[A]fter *Hope*, we have emphasized that 'general statements of the law are perfectly capable of giving clear and fair warning to officials even where the very action in question has [not] previously been held unlawful.'"). No reasonable supervisory official in Defendants' positions could believe that as part of the bargain for her employment in the police department's vice unit Plaintiff should expect to be the source of sexual titillation, jokes, and unwanted and humiliating focus on her body by her male coworkers in connection with her appearance in what essentially amounts to a "sex tape" recorded in the course of her official duties.

Although Defendants cite no legal authority to support the substance of their arguments in the Reply, Defendants characterize their alleged harassing conduct as either justified under the circumstances or based on standard department protocols, rather than as being motivated by a discriminatory animus

toward Plaintiff based on her gender. Because a plaintiff must prove discriminatory motive or purpose in order to establish a violation of the Equal Protection Clause in the employment context,[37] the Eleventh Circuit has held that state officials:

> can be motivated, in part, by a dislike or hostility toward a certain protected class to which a citizen belongs and still act lawfully ...." [Thus] state officials act lawfully despite having discriminatory intent, where the record shows they would have acted as they, in fact, did act even if they had lacked discriminatory intent. . . . . At least when an adequate lawful motive is present, that a discriminatory motive might also exist does not sweep qualified immunity from the field even at the summary judgment stage. Unless it, as a legal matter, is plain under the specific facts and circumstances of the case that the defendant's conduct-despite his having adequate lawful reasons to support the act-was the result of his unlawful motive, the defendant is entitled to immunity. Where the facts assumed for summary judgment purposes in a case involving qualified immunity show mixed motives (lawful and unlawful motivations) and pre-existing law does not dictate that the merits of the case must be decided in plaintiff's favor, the defendant is entitled to immunity.

Foy v. Holston, 94 F.3d 1528, 1534-35 (11th Cir. 1996). Under this authority, however, a defendant is entitled to qualified immunity in a "mixed-motive" case or a "same decision" defense *only* where the record *indisputably* establishes that

[37] Such discriminatory intent should be inferred in the same manner as it is inferred under Title VII. *See Whiting*, 616 F.2d at 121; *see also Cross*, 49 F.3d at 1507-1508. As the Supreme Court explained in *Oncale v. Sundowner Offshore Services, Inc.*, "Courts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations." 523 U.S. 75, 1002 (1998). In such cases, "the act of sexual harassment itself creates an inference that the harasser harbors a sexually discriminatory animus towards the plaintiff." *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1246 (11th Cir. 1998). "Unless there is evidence to the contrary, ... [the court] also infer[s] that the harasser treats members of the non-preferred gender differently—and thus that the harasser harbors an impermissible discriminatory animus towards persons of the preferred gender." Id. (internal quotation marks omitted) (citing *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)) ("In the typical case in which a male supervisor makes sexual overtures to a female worker, it is obvious that the supervisor did not treat male employees in a similar fashion.").

the defendant in fact was motivated, at least in part, by lawful considerations. *Id.* at 1284 (citing *Stanley v. City of Dalton*, 219 F.3d 1280, 1296 (11th Cir. 2000)); *Ham v. City of Atlanta*, 386 F. App'x 899, 906 (11th Cir. 2010) ("[B]ecause the evidence, viewed in the light most favorable to Ham, shows that Rubin violated Ham's clearly established right to be free from employment discrimination on the basis of race, and because the record fails to indisputably show that Rubin's failure to appoint Ham to an Assistant Chief position was based, at least in part, on lawful considerations, the district court did not err in denying Rubin qualified immunity with respect to Ham's discrimination claims."); *Ezell v. Darr*, 951 F.Supp.2d 1316, 1337-38 (M.D. Ga. 2013) ("Although Darr would be entitled to qualified immunity on Plaintiffs' gender discrimination claims if there was indisputable evidence that his decisions were motivated at least in part by lawful considerations, there is no such indisputable evidence in this case. Here, Darr presents evidence, which if believed by the jury, could support his same decision defense; but that evidence does not indisputably establish that lawful reasons existed and that Darr was in fact motivated, even in part, by these reasons.")

While this authority clearly applies in the context of disparate treatment actions with tangible results, like hiring, firing, promotion, compensation, and work assignment, neither the Supreme Court nor the Eleventh Circuit have applied this rule in the context of sexual harassment hostile work environment claims. *See infra*. The Eleventh Circuit has not held that a mixed-motive analysis applies to a hostile work environment claim. *See McKitt v. Alabama*

Alcoholic Beverage Control Bd., 571 F. App'x. 867, 874 n.9 (11th Cir. 2014) ("We have not yet decided whether a mixed-motive analysis applies in a hostile work environment case."). In *Henson v. City of Dundee*, the Eleventh Circuit recognized that sexual harassment resulting in tangible job detriment to the subordinate employee is a form of sex discrimination under Title VII, and discussed the role of the *McDonnell Douglas-Burdine* burden shifting framework to such claims:

> The role of the prima facie case in disparate treatment litigation is to shift the burden of production to the employer after the employee has eliminated the most common nondiscriminatory reasons for the adverse treatment to which the employee has been subjected. This procedure serves to "progressively sharpen the inquiry into the elusive factual question of intentional discrimination," in a case where prohibited criteria and legitimate job related criteria often blend in the employment decision. In contrast, *the case of sexual harassment that creates an offensive environment does not present a factual question of intentional discrimination which is at all elusive . . . it should be clear that sexual harassment is discrimination based upon sex.*

Henson v. City of Dundee, 682 F.2d 897, 905 (11th Cir. 1982) (internal citations omitted) (emphasis added); *see also Stacks v. Sw. Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1326 (8th Cir. 1994) ("An employer could never have a legitimate reason for creating a hostile work environment."). Moreover, that the alleged harassing behavior by a supervisor is undertaken in the scope of his employment does not mean the conduct is based, at least in part, on an adequate lawful motive. As the Supreme Court recognized in *Faragher v. City of Boca Raton*, "a pervasively hostile work environment of sexual harassment is never (one would

hope) authorized, but the supervisor [and therefore the employer] is clearly charged with maintaining a productive, safe work environment." 524 U.S. 755, 797-98 (1998) (adopting Judge Barkett's rationale in her dissent in *Faragher v. City of Boca Raton*, 111 F.3d 1530, 1542 (11th Cir. 1997)). "In hostile environment sexual harassment cases the supervisor, though not authorized to create a sexually hostile environment, uses his authority 'to call [the victim] into his presence, to retain her in his presence over her objections, to use his responsibility to act as the voice of the employer to place her in a compromising position, and to take liberties with her personal privacy beyond the reach of a co-equal acquaintance, or a stranger.'" *Faragher*, 111 F.3d at 1542 (Barkett, J., dissenting) (citing David Benjamin Oppenheimer, Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed By Their Supervisors, 81 Cornell L.Rev. 66, 88 (1995)). For these reasons, the *Foy* analysis may be inapplicable in cases such as this one.

As the Court has already explained, the evidence in the record at this stage is not indisputable and a reasonable jury could find that the Defendants intentionally harassed Plaintiff on the basis of her sex and could reject the Defendants' proffered nondiscriminatory reasons. *See Alexander v. Fulton Cty.*, 207 F.3d 1303, 1321 (11th Cir. 2000), *overruled on other grounds by Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003) ("In this case, however, the jury squarely found that Sheriff Barrett intentionally discriminated against many white law enforcement officers on account of race, and, in so doing, unambiguously rejected

her proffered non-discriminatory reasons for her employment decisions. *Foy*, therefore, is inapposite. Based on a painstaking review of this record, we are satisfied that a reasonable jury could find Sheriff Barrett intentionally made race-based employment decisions in violation of Plaintiffs' clearly established rights. As a result, the district court properly denied the Defendants' motion for judgment as a matter of law because of qualified immunity.").

Accordingly, because genuine disputes of material fact exist that would permit a reasonable jury to find in favor of Plaintiff under clearly established law in this Circuit, the Court finds Defendants are not entitled to qualified immunity on Plaintiff's equal protection claims at this stage of the proceedings.

VI. CONCLUSION

For the foregoing reasons, the Court **DENIES** Defendants' Renewed Motion for Summary Judgment as to Qualified Immunity on Plaintiff's Equal Protection Claim brought pursuant to 42 U.S.C. § 1983 [Doc. 140]. As indicated previously by the Court, this case is consolidated with Plaintiff's companion case against the City of Atlanta for retaliation in Civil Action No. 1:15-cv-2925-AT. The parties are **DIRECTED** to file their consolidated pretrial order regarding all claims in both this case and in Civil Action No. 1:15-cv-2925-AT **WITHIN 45 DAYS OF THE DATE OF THIS ORDER.** The Clerk is **DIRECTED** to reopen this case and Civil Action No. 1:15-cv-2925-AT upon the filing of the pretrial order.

IT IS SO ORDERED this 20th day of August, 2021.

AMY TOTENBERG
UNITED STATES DISTRICT JUDGE