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

ERICA BANKS, ANDREA TONEY, DEMETRIA WIDEMAN and JESSICA WASHINGTON, Plaintiffs, v. CITY OF ATLANTA, GEORGIA and CHARLES EWING in his individual capacity, Defendants.	CIVIL ACTION FILE NO.: 1:19-cv-03946-WMR

ORDER

This case is currently before the Court on Defendant City of Atlanta's Motion for Summary Judgment. [Doc. 124]. Upon consideration of the parties' arguments, controlling authority, and all appropriate matters of record, the Court rules that the Defendant's Motion for Summary Judgment is GRANTED for the reasons set forth below.

I. FACTUAL BACKGROUND

Plaintiffs filed this lawsuit against the City of Atlanta and Charles Ewing, individually, asserting federal and state law claims arising out of alleged sexual harassment and gender discrimination. [*See* Doc. 36 – Amended Complaint]. In

regard to Defendant City of Atlanta, specifically, Plaintiffs assert claims under 42 U.S.C. § 1983 and Title VII.[1]

Plaintiffs are City of Atlanta employees who work in the Department of Aviation ("DOA"). [*See* Doc. 36, *generally*]. Defendant Charles Ewing had two terms of employment with the City of Atlanta, working in the DOA from 1996 to 2010 and again from 2015 until his forced retirement in May 2019. [Doc. 133 at 1-2 ¶¶1-2 and at 17 ¶47]. Plaintiffs contend that Ewing, during his employment, had frequently harassed them by making sexual comments, asking personal questions of a sexual nature, and making sexual advances. Additionally, each of the Plaintiffs allege that Ewing had touched them once in an inappropriate manner. [Doc. 36 at 3-8 ¶¶6-51].

From November 2010 until October 2018, the City of Atlanta had a Sexual Harassment Policy which defined and prohibited sexual harassment in the workplace and set forth the reporting procedure if an employee believed he or she suffered sexual harassment. [Doc. 133 at 2-3 ¶4; Doc. 124-13 at 1-2 ¶3]. The Policy was included in the Employee Handbook and was also available to employees via the

[1] Plaintiffs also asserted a state law claim against the City of Atlanta for negligent hiring, retention, and supervision, and a state law claim for attorneys' fees and expenses. [*See* Doc. 36 at 13-15 (Count IV and Count VI)]. According to Defendant City of Atlanta, however, Plaintiffs have agreed to dismiss the negligence claim on the basis of immunity. [*See* Doc. 124-1 at 2, n.3]. As Plaintiffs have not disputed this issue in their response brief [*see* Docs. 127 and 135, *generally*], the state law claims against the City of Atlanta in Counts IV and VI of the Amended Complaint are hereby deemed as DISMISSED.

City's intranet. Additionally, there was periodic training on the Policy. [Doc. 124-13 at 1-2 ¶3]. On October 19, 2018, the City implemented an updated Sexual Harassment Policy, which again defined sexual harassment and provided alternative ways for employees to report incidents of sexual harassment. [Doc. 133 at 3-4 ¶5].

Plaintiff Erica Banks

Ms. Banks began working for the City of Atlanta in 2008, and she was reassigned to a position in the DOA that reported directly to Ewing in April of 2016. [Doc. 127-10 at 15, 18-19]. During the time they worked together, Ewing made sexual comments to Ms. Banks, including: telling her that when he retires he is going to come back to her office and kiss her; asking her what color panties she was wearing; asking her to open her legs as she was sitting at her desk; asking if he could "kiss it" (referring to her vagina); complimenting her body and looks; inquiring as to her sex life; telling her stories of his sexual encounters; asking her out on dates; and propositioning her for sex. [Doc. 127-10 at 127-128, 134]. On one occasion, Ewing showed Ms. Banks a video on his cell phone of Cardi B having sex. [*Id*. at 129]. On another occasion, Ms. Banks was hugging Ewing for giving her some money to use for her upcoming vacation, and he grabbed her buttocks. [*Id*. at 130-132].

At her deposition, Ms. Banks testified that, prior to May of 2019, there was only one time when she told management anything about Ewing. She testified that,

in March 2017, the general manager of the DOA, Roosevelt Council, had called her and asked her what she thought about Ewing. [Doc. 127-10 at 66-67]. When Ms. Banks asked Council what he meant, Council said that two non-employees (concessionaires at the airport) had told him that Ewing had sexually harassed them. [*Id.* at 67]. Although Ms. Banks confirmed that Ewing had said some inappropriate things to her, she qualified her statement by indicating that "he's kinda harmless[.]" [*Id.*] Ms. Banks further testified that she was aware that she could have reported Ewing's inappropriate behavior toward her to Human Resources, but did not do so until May of 2019 when she heard that another employee, Demetria Wideman, had made a complaint to management regarding Ewing's sexual harassment. [*Id.* at 136, 147, 34-46]. Ms. Banks provided no explanation as to why she waited so long to report Ewing's inappropriate behavior. [*See* Doc. 127-10, *generally*].

Plaintiff Demetria Wideman

Ms. Wideman began working for the City of Atlanta in 2008 [Doc. 127-9 at 6], and she was assigned to work in the DOA's concessions division along with Ewing. [*Id.* at 12-13]. While they worked together during Ewing's first term of employment, Ewing wrote a number on a white board representing the amount of money he would pay to have sex with her. [*Id.* at 14, 61]. Ewing also frequently made sexual comments to Ms. Wideman, including: telling her graphic stories about his sexual exploits; telling her stories about other people's sexual exploits; inquiring

as to her sex life; and propositioning her for sex. [*Id*. at 22, 25, 61; Doc. 127-11 at 88]. Ms. Wideman concedes that she never complained to any member of management about Ewing's sexual behavior during his first term of employment. [Doc. 127-9 at 14, 19].

When Ewing returned for his second term of employment, Ms. Wideman was assigned to another division in the DOA. Ms. Wideman asked for and was promoted to a position that reported directly to Ewing in late 2016. [Doc. 127-9 at 19, 22-23, 85-86]. For a short time, Ewing did not make any inappropriate comments to Ms. Wideman, but his inappropriate sexual behavior ultimately resumed. Ewing began making comments to Ms. Wideman, such as: telling her about sexual antics he observed while in the military overseas; asking her whether her sexual needs were being met while she was going through a divorce; referring to her breasts as "her girls" when she was wearing a low-cut dress; asking her out for drinks; and comparing her to other women to whom he was attracted. [Doc. 127-9 at 61-62; Doc. 127-11 at 88-89]. Ms. Wideman concedes that she ignored his comments and tolerated his behavior during this time. [Doc. 127-9 at 62]. Up to this point, Ms. Wideman had not reported Ewing's behavior to human resources or any member of City management. [Doc. 127-9 at 27]. Ms. Wideman provided no explanation as to why she waited so long to report Ewing's inappropriate behavior. [*See* Doc. 127-9, *generally*].

However, on April 30, 2019, an incident occurred which finally led Ms. Wideman to report Ewing's inappropriate conduct. Ms. Wideman had been participating in a fundraiser for a charitable organization, and Ewing handed her a financial contribution that satisfied Ms. Wideman's fundraising goal. According to Ms. Wideman, she hugged Ewing and he kissed her on the cheek. When Ewing asked Ms. Wideman for a direct kiss, she declined, and he grabbed her face and kissed her directly on the lips. [Doc. 127-9 at 63; Doc. 127-11 at 89]. The next day, on May 1, 2019, Ms. Wideman reported all of Ewing's acts of sexual harassment to Paul Brown, the City's Assistant General Manager for the DOA. [Doc. 127-9 at 27, 64; Doc. 127-11 at 89].

Plaintiff Jessica Washington

Ms. Washington was a City of Atlanta employee who had been reassigned to the DOA in May of 2016. [Doc. 127-12 at 43-46]. Although Ewing was not in Ms. Washington's chain of command, she did interact with him while at work. [*Id*. at 46-47]. When Ewing visited Ms. Washington, he would make comments about her looks and things of a sexual nature, including commenting on the size of her backside. [Doc. 127-17 at 18, 20 (Depo. transcript pp. 16, 18)]. His sexual comments included: telling Ms. Washington that if she were "his," he would take care of her; stating that if he was twenty-years younger, she would not have to worry about a

thing; telling her stories of sexual encounters while he was in the military; and asking her questions about her sexual life. (*Id.* at 20 (Depo. transcript p. 18); Doc. 127-12 at 65-66, 77]. Ms. Washington concedes that, up to this point, she had not reported Ewing's behavior to human resources or any member of City management. [Doc. 127-12 at 25]. Ms. Washington contends that she did not complain because she generally believed that women who report sexual harassment can sometimes be ostracized. [Id.]

On April 30, 2019, an incident occurred during an industry conference which finally led Ms. Washington to report Ewing's inappropriate conduct. During this event, Ewing approached Ms. Washington and began commenting on his finances; he told her that if she ever needed any help, all she had to do was tell him. Ewing then put his arm around her waist and slid his hand down to rub her left buttock, telling her that money was not an issue. [Doc. 127-12 at 31-32, 37]. When she left the event and returned to her office, Ms. Washington informed a coworker what had transpired. [*Id*. at 30]. On May 1, 2019, Ms. Washington, at her coworker's insistence, reported Ewing's sexual harassment and the other incidents of inappropriate behavior to Brown, the Assistant General Manager for the DOA. [Doc. 127-12 at 30; Doc. 127-17 at 26-27; Doc. 127-12 at 70-72].

Plaintiff Andrea Toney

Ms. Toney began working for the City of Atlanta in 2004, and she was reassigned to a position in the DOA which reported directly to Ewing in January of 2019. [Doc. 127-5 at 16-20, 24]. During the time they worked together, Ewing frequently made sexually suggestive comments to Ms. Toney, including: asking her if she ever wore sexual costumes for her husband; telling her that if she knew what he was thinking, there would be a sexual harassment case on him; telling her that she should wear heels more often because they really showed the form and shape of her legs; asking her about her sex life; suggesting that one day she was going to come into this office and "lay everything on the table;" asking if she was "ready yet;" asking her if she was going to surprise her husband with sex and a sexy outfit for his birthday and then following up later to ask her what she had done so for his birthday; and telling her about other people's sexual encounters. [*Id*. at 38-47; *see also* Doc. 138 at 25 ¶58]. On one occasion, Ewing asked Ms. Toney for a hug, and she accepted. During this hug, Ewing rubbed her back and let the hug linger for too long. [Doc. 127-5 at 20-23]. Ms. Toney concedes that she did not report Ewing's inappropriate behavior to human resources or any member of City management up to this point. [*Id*. at 28, 39, 41, 69-74]. Ms. Toney contends that she did not complain about Ewing's behavior earlier because she did not believe that "anything would really be done about it" [*id*. at 28, 39] and that she did not have confidence in the

DOA's HR department because of her initial experience with HR during the hiring process. [*Id*. at 76].[2] However, after learning that Ms. Washington had filed a complaint against Ewing, Ms. Toney decided to step forward and report her account of Ewing's inappropriate behavior to management on or about May 8, 2019. [*Id*. at 50-53; *see also* Doc. 133 at 10 ¶24].

Post-report actions taken by the City of Atlanta

Immediately after Plaintiffs reported Ewing's sexual harassment to management in early May 2019, the City put Ewing on administrative leave and promptly investigated their complaints. [Doc. 127-7 at 77; Doc. 133 at 16-17 ¶¶42-44; Doc. 127-11 at 84-94]. At the conclusion of its investigation, the City determined that Ewing's conduct violated the City's sexual harassment policy. [Doc. 127-11 at 18 (Depo. transcript p. 16) and at 93]. Consequently, on May 23, 2019, the City required Ewing to resign or retire in lieu of termination in exchange for his signing a release of any claims against the City. [Doc. 127-7 at 51-54 (Depo. transcript pp. 49-51) and at 78; *see also* Doc. 133 at 47].

[2] When asked to explain, Ms. Toney that HR did not communicate effectively and provided poor service when she was transitioning from a different position within the City to a position in the DOA. [Id. at 76-78].

Current posture of this case

Based on the foregoing, Plaintiffs have asserted claims under 42 U.S.C. § 1983 and Title VII against the City of Atlanta [*see* Doc. 36], and the matter is now before the Court on the City's Motion for Summary Judgment. [Doc. 124].

II. LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 56, summary judgment is proper when the record evidence shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). An issue will be considered "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). "The court may not weigh evidence to resolve factual disputes—if a genuine issue of material fact is found, summary judgment must be denied." Hutcherson v. Progressive Corp., 984 F.2d 1152, 1155 (11th Cir. 1993). On summary judgment, the Court will view the evidence and any inferences that may be reasonably drawn in the light most favorable to the non-movant. Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-159 (1970).

The moving party bears the burden of demonstrating that there is no genuine issue of material fact that should be decided at trial. Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991). If the moving party carries this initial burden,

the burden shifts to the non-moving party to demonstrate that there is an issue of material fact that precludes summary judgment. Id. Then, summary judgment is only appropriate if the non-moving party fails to present sufficient evidence sufficient to create a genuine issue of material fact as to an essential element of its claim. Celotex Corp., 477 U.S. at 323.

III. DISCUSSION

A. Plaintiffs' § 1983 Claim

42 U.S.C. § 1983 provides that a "person who, under color of any statute, ordinance, regulation, [or] custom . . . subjects any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured[.]" To prevail on their § 1983 claim in this case, Plaintiffs must show that they were deprived of a federal right and that such deprivation occurred under the color of some official policy or law. Griffin v. City of Opa-Locka, 261 F.3d 1295, 1303 (11th Cir. 2001); Arrington v. Cobb Cty., 129 F.3d 865, 872 (11th Cir. 1998).

However, a municipality cannot be held liable under § 1983 on a respondeat superior theory for the actions of its employees. See Monell v. Dept. of Soc. Servs. of City of NY, 436 U.S. 658, 691 (1978). To hold a municipality liable under § 1983, a plaintiff must establish that his or her rights were violated pursuant to "custom" or "policy" of the municipality. Monell, 436 U.S. at 694. The Eleventh Circuit has held

that "a municipality's failure to correct the constitutionally offensive actions of its employees can rise to the level of a custom or policy [under Monell] 'if the municipality tacitly authorizes these actions or displays deliberate indifference' towards the misconduct." Griffin, 261 F.3d 1308.

In the instant case, Plaintiffs seek to hold the City of Atlanta liable under § 1983 because it failed to take adequate measures to ensure an environment free from sexual harassment. Essentially, they contend that the City had a "custom" or "widespread practice" of ignoring Ewing's inappropriate conduct towards other employees. However, Plaintiffs have failed to come forth with sufficient evidence to support their contention.

Although Plaintiffs have submitted ample evidence to show that Ewing had a general reputation among the lower level, non-managerial employees as being a "fresh old man" who made inappropriate comments and gestures [*see citations to evidence in* Doc. 127 at 2-7, 10-11], Plaintiffs have not presented any evidence to show that management officials were aware of Ewing's prior conduct of sexual harassing employees before the Plaintiffs reported their complaints to management in May of 2019.

Other than certain employees' previously unreported personal accounts of Ewing's behavior towards them, as well as his general reputation among the lower level non-managerial employees, Plaintiffs rely on four instances to support their

contention that City management had been aware of Ewing's prior sexual harassment. In the first instance, Paul Brown, the assistant general manager for the DOA, testified that he had heard two rumors that Ewing had consensual sexual encounters with two women while at work. [Doc. 127-15 at 16-17 (Depo. transcript pp. 14-15)]. However, Brown was not informed as to who those women were, nor was he sure whether the two women were even employees. [*Id*.] In any event, there is no evidence that the two women were sexually harassed or that they made any complaints to City management about such incidents.

In the second instance, Brown casually asked Ms. Wideman how she was doing, and she said that she was fine, but that "[Ewing] was is being [Ewing]." [Doc. 127-15 at 58 (Depo. transcript p. 56)]. Brown then asked Ms. Wideman what Ewing was doing, and she replied vaguely that he makes "inappropriate comments." [*Id*.] When Ms. Wideman did not elaborate, Brown told her to let him know right away if Ewing did anything [of a sexual nature]. [*Id*. at 59 (Depo. transcript p. 57)]. The next time Ms. Wideman reported anything to Brown about Ewing's behavior was in May of 2019. [*Id*. at 88 (Depo. transcript p. 86)].

In the third instance, Roosevelt Council, the general manager of the DOA, was informed by two non-employees (concessionaires) that Ewing had sexually harassed them at the airport. When Council contacted Ms. Banks to inquire into Ewing's general behavior, Ms. Banks informed him that Ewing had made

inappropriate comments to her, but that she felt that he was "kinda harmless." [Doc. 127-10 at 66-67]. In sum, Council's act of contacting Ms. Banks to follow up on the reports made by the two non-employees demonstrates the City's reasonable diligence in looking into Ewing's behavior, and Ms. Banks' assurance that Ewing was harmless downplayed Council's concerns.

In the fourth instance, Ms. Banks testified that a co-worker, Angela Fears, showed her a text message from Nedra Farrar-Swift, the former Director of Human Resources, wherein Ms. Farrar-Swift had allegedly stated "Yeah, he's been doing this. He did it to me." [Doc. 127-10 at 87]. However, Plaintiffs did not produce any of the text messages between Ms. Fears and Ms. Farrar-Swift, so it is impossible to ascertain the context of the Ms. Farrar-Swift's purported statement. Furthermore, Ms. Fears testified that she did not remember her text conversation with Ms. Farrar-Swift. [Doc. 127-6 at 11]. Lastly, Plaintiffs have presented no testimony from Ms. Farrar-Swift or any other evidence to support their contention that Ewing had sexually harassed her in the past. Thus, Plaintiffs' contention that the City was aware of Ewing's conduct because Ms. Farrar-Swift had also been sexually harassed by Ewing is not supported by sufficient evidence.

Here, the record shows that the City promulgated a Sexual Harassment Policy, trained its employees and new hires on the policy, and even updated its policy to provide for more reporting avenues, all of which demonstrates the City's clear stance

against sexual harassment in the workplace. The Court finds that Plaintiffs have failed to present sufficient evidence to create a genuine issue of material fact as to whether the City had a custom, policy, or widespread practice of ignoring complaints of sexual harassment. As the evidence shows that the City was not aware of Ewing's inappropriate conduct towards the Plaintiffs until they made their complaints to management in May of 2019 and the City properly acted on those complaints by taking prompt remedial action against Ewing, the Court concludes that the City is entitled to judgment as a matter of law on the Plaintiffs' § 1983 claim.

B. Plaintiffs' Title VII claim

Title VII of the Civil Rights Act of 1964 maintains that it is unlawful to discriminate against employees on the basis of "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). "Intangible forms of discrimination, such as being forced to work in a sexually hostile work environment, constitute actionable discrimination under Title VII." Walton v. Johnson and Johnson Servs., Inc., 347 F.3d 1272, 1279 (11th Cir. 2003). One of the elements of a Title VII hostile work environment claim is that the harassment must be "sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment." Walton, 347 F.3d at 1280. The environment must be subjectively perceived to be abusive, but that belief must be objectively reasonable as based on the frequency of the conduct; the severity of the conduct; whether the

conduct is physically threatening or humiliating and not a mere offensive utterance; and whether the conduct unreasonably interferes with the employee's job performance. Mendoza v. Borden, Inc., 195 F.3d 1238, 1246 (11th Cir. 1999).

Although an employer can be vicariously liable for a hostile work environment created by an employee who has supervisory or managerial authority over the plaintiff employee, an affirmative defense is available that could preclude such liability. Faragher v. City of Boca Raton, 524 U.S. 775, 780 (1998). An employer can assert such a defense by showing (a) that no tangible adverse employment action had been taken against the plaintiff employee and "that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." Faragher, 524 U.S. at 807; see also Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998).

If the harasser is a merely a coworker and not in a supervisory position over the plaintiff employee, the employer can be liable for its own negligence if the employer knew or should have known about the harasser's conduct and failed to stop it. Ellerth, 524 U.S. at 759.

The Eleventh Circuit, following Faragher and Ellerth, has routinely applied a high standard for Title VII claims. Whether that approach is adequate in a time of

changing social mores surrounding sexual harassment is irrelevant to this Court's application of longstanding Eleventh Circuit precedent.[3] If the Plaintiffs' evidence is insufficient to overcome the City's Faragher/Ellerth defense, there is no genuine issue of material fact for trial.

As noted earlier, Ewing had supervisory authority over Plaintiffs Banks, Wideman, and Toney at the time of their alleged harassment. As the record shows that no adverse employment action had been taken against any of the Plaintiffs, the City has properly raised a Faragher/Ellerth defense. Because the City bears the burden of proof on its affirmative defense, its status as the movant on summary judgment requires it to establish that there is no genuine dispute of material fact as to all of the elements of its affirmative defense and, concomitantly, that it deserves judgment as a matter of law. See Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1115 (11th Cir. 1993) ("The movant must show...on all the essential elements of its case on which it bears the burden of proof at trial, no reasonable jury could find for the non-moving party").

The first element of the Faragher/Ellerth defense requires an employer to show that it exercised reasonable care to prevent and promptly correct the sexual harassment. Fundamental to this element is the employer's dissemination of an anti-

[3] Plaintiffs argue in their brief that the Eleventh Circuit should reconsider its precedent. This may well be true. But, this Court is not in the position to change this precedent, but is merely charged with following it.

harassment policy. Madray v. Publix Supermarkets, Inc., 208 F.3d 1290, 1298 (11th Cir. 2000). Here, there is no dispute that the City promulgated a sexual harassment policy that was disseminated to employees which effectively provided avenues for reporting sexual harassment. It is also undisputed that, once the Plaintiffs reported their complaints to City management in May of 2019, the City exercised reasonable care promptly to correct the harassment by suspending Ewing, investigating their complaints, and effectively terminating his employment.

Although Plaintiffs contend that they had "reported" the harassment to management prior to May of 2019, their contention is without merit. Specifically, Ms. Banks' comment to Council that Ewing had made inappropriate comments to her does not indicate that she wanted Council to take action to stop Ewing's behavior. Rather, she merely mentioned that Ewing made inappropriate comments, without providing any detail, and then brushed off his conduct as being "kinda harmless." See Madray, 208 F.3d at 1300-01 (where employee's comment to a manager about an incident did not indicate that she wanted the manager to take action to stop the inappropriate behavior, the manager could not have been expected to take action to address the incident). The same can be said for Ms. Wideman's conversation with Brown during which she mentioned, without elaboration, that Ewing makes inappropriate comments. As Ms. Wideman chose not to provide details or explain the specific nature of his comments, nor did she ask Brown to take

any action to address Ewing's behavior, Brown could not reasonably have been expected to take any action.

For the above reasons, the Court concludes that the City has satisfied the first element of the Faragher/Ellerth defense.

The second element of the Faragher/Ellerth defense requires a showing that the plaintiff employee[s] unreasonably failed to take advantage of preventative or corrective opportunities provided by the employer. The Eleventh Circuit has created a demanding standard for what constitutes an unreasonable failure, holding that even a three-month delay in reporting a sexual proposition "is anything but prompt, early, or soon." Baldwin v. Blue Cross/Blue Shield of Ala., 480 F.3d 1287, 1307 (11th Cir. 2007); see also Walton v. Johnson & Johnson Servs., 347 F.3d 1272, 1289-91 (11th Cir. 2003) (unreasonable two-and-a-half-month delay). An unreasonable delay can arise as either "not using the procedures in place to promptly report any harassment and not taking advantage of any reasonable corrective measures the employer offers after the harassment is reported." Baldwin, 480 F.3d at 1306.

Here, the evidence shows that Ms. Banks delayed complaining about Ewing's inappropriate conduct for almost three years, given her allegations that that the sexual harassment began in 2016 when she started working under Ewing. Ms. Wideman delayed complaining about Ewing's inappropriate conduct for at least five years, given that she began working with Ewing from 2008 through 2010 (during

Ewing's first term of employment) and then worked under Ewing from 2016 through 2019 (during Ewing's second term of employment), and she testified that Ewing harassed her during both terms of his employment. Further, Ms. Washington delayed her complaining about Ewing's inappropriate conduct for approximately three years, given her allegations that Ewing began harassing her shortly after she started working with him in 2016. Lastly, Ms. Toney was allegedly harassed by Ewing shortly after she began working under Ewing in January of 2019, and she waited almost five months before complaining about Ewing's inappropriate conduct.

Furthermore, Ms. Washington, who was not under the supervision of Ewing, also cannot prevail against the City under the "knew or should have known" standard that applies to sexual harassment between coworkers. Where the alleged harasser is merely a coworker of the plaintiff employee, and the employer maintains an effective policy against discriminatory harassment that is well known and provides adequate redress, "an employer is insulated from liability under Title VII for a hostile environment sexual harassment claim premised on constructive knowledge." Farley v. Am. Cast Iron Pipe Co., 115 F.3d 1548, 1554-55 (11th Cir. 1997). In this case, the evidence unequivocally shows that the City had a formal policy against sexual harassment which was known to employees and reinforced by training. Because Ms. Washington failed to take advantage of the policy's reporting procedures for years, the City is insulated from any liability based on constructive knowledge. When Ms.

Washington eventually reported her complaint to City management in May of 2019, the City acted effectively in removing Ewing from his employment.

As the evidence shows that the City had an effective sexual harassment policy that provided multiple avenues for reporting complaints and that all employees, including the Plaintiffs, had knowledge of and received training on that policy, the Court concludes that Plaintiffs have failed to establish a reasonable basis for their delay in reporting Ewing's inappropriate conduct. While the Eleventh Circuit recognizes that filing a sexual harassment complaint may be "uncomfortable, scary, or both," it explains that the problem of workplace discrimination "cannot be [corrected] without the cooperation of the victims." Walton, 347 F.3d at 1290-91. As Plaintiffs could have avoided most, if not all, of the alleged harassment by timely reporting it but failed to do so, vicarious liability cannot be imposed on the City. Id. at 1290 ("If the victim could have avoided harm, no liability should be found against the employer who had taken reasonable care, and if damages could reasonably have been mitigated no award against a liable employer should reward a plaintiff for what her own efforts could have avoided") (citing Faragher, 524 U.S. at 807)); see also Baldwin, 480 F.3d at 1306-07 (no vicarious liability imposed on the employer where victim of alleged harassment failed promptly to report the harassing conduct before it became severe or pervasive).

In sum, the Faragher and Ellerth decisions present victims of alleged harassment, such as the Plaintiffs, with a hard choice: assist in the prevention of the harassment by promptly reporting it to the employer, or lose the opportunity to impose vicarious liability on the employer based on the harassment. Baldwin, 480 F.3d at 1307. Here, the record shows that the Plaintiffs unreasonably failed to promptly report Ewing's inappropriate conduct before it became pervasive or arguably severe.[4]

For the above reasons, the City is entitled to summary judgment on Plaintiffs' Title VII claim.

IV. CONCLUSION

For the above reasons, IT IS HEREBY ORDERED that Defendant City of Atlanta's Motion for Summary Judgment [Doc. 124] is **GRANTED**. Plaintiffs' claims against Defendant Charles Ewing remain pending.

IT IS SO ORDERED, this 29th day of September, 2021.

William M. Ray II

WILLIAM M. RAY, II
UNITED STATES DISTRICT JUDGE

[4] Assuming, without deciding, that Ewing's alleged acts of touching Ms. Banks' on her buttocks, touching Ms. Washington on her buttocks, forcibly kissing Ms. Wideman on the lips, and rubbing Ms. Toney on the back during an unnecessarily prolonged hug satisfies the severity aspect of a hostile work environment claim, the Court is nevertheless constrained to conclude that Plaintiffs' Title VII claim must fail because the City has established both elements of the Faragher/Ellerth defense.