IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PAMELA J. MORASH,	:	
Plaintiff	:	
v.	:	CIVIL NO. JFM-04-2260
ANNE ARUNDEL COUNTY, et al.	:	
Defendants	:	

MEMORANDUM

Plaintiff Pamela J. Morash ("Morash") has brought this action in the Circuit Court for Anne Arundel County against Defendants Anne Arundel County ("County"), Anne Arundel County Police Department ("Department"), Chief of Police P. Thomas Shanahan ("Shanahan"), and Police Captain William F. Rothenbecker ("Rothenbecker") alleging sexual harassment in violation of 42 U.S.C. § 2000e-5, claims under 42 U.S.C. § 1983, and various state law tort claims. All of the claims arise from an incident between Morash and Rothenbecker that occurred in March 2003 when Morash was an employee of the Department. Defendants removed the action to this court on the basis of federal question jurisdiction. Presently pending are defendants' motions to dismiss or for summary judgment. For the reasons discussed below, defendants' motions will be granted.

I. FACTS & PROCEDURAL HISTORY

Morash was employed as a police officer by the Department from September 1, 2001 until her resignation on September 15, 2003. During that time, Shanahan was the Chief of Police of the Department.

On Friday, March 14, 2003, Morash traveled to the Eastern District Station to obtain a newly issued badge. At the station, Rothenbecker, a Department captain and the commanding officer of the Eastern District, told Morash that she was "stuck up" because she had not been to his office to say hello and accused her of ignoring him. Rothenbecker then grabbed Morash and led her into the station lobby. There, he told her that they were going to "go at it" and that he would take off his badge and fight her. As the conversation in the lobby continued, Rothenbecker questioned Morash about the status of her relationship with her boyfriend, asked for her cell phone and private line telephone number, and told her that he had wanted her to drive his police vehicle while he was on vacation. Then, Rothenbecker, after stating that what he was about to say could result in his termination, said, "I am totally attracted to you and have been for a very long time. I think we could have a lot of fun together. I hope you feel the same way about me soon."

Morash was shocked by the incident. She became frightened, nervous, and uncomfortable. As she walked away, Rothenbecker said, "I hope I didn't make you uncomfortable." Morash began to cry and walked to her car where she continued to cry. Morash was made physically ill at the thought of returning to the station on Monday, March 17, 2003. Nonetheless, on that day she was able to attend a court appearance and to remain on duty for the duration of her shift. The facts do not indicate whether she worked or was scheduled to work on March 18 or 19, 2003. She worked through the day on Thursday, March 20, 2003 but was extremely distressed. Due to her distress, Morash was unable to work on Friday, March 21, 2003 or for the rest of the weekend. On Monday, March 24, 2003, she sought professional counseling.

Morash complained of Rothenbecker's conduct to the Department's Internal Affairs

Section and to the Equal Employment Opportunity Commission ("EEOC"). Four days after she filed her complaint with the internal affairs division, Rothenbecker was suspended from the police force. Defs.' Mem. in Supp. at 3. This suspension was lifted on July 1, 2003, when Rothenbecker was transferred to the Special Operations Unit where he would have no contact with Morash. *Id.* Throughout this period, Morash continued to work intermittently in the Eastern District.

On August 28, 2003, Morash was diagnosed by her physician with anxiety, depression, and post-traumatic stress disorder. From the time Morash made her complaint until she left the Department she was ostracized by other members of the Department who knew that Rothenbecker had been removed from duty on the basis of her complaint. On September 1, 2003, Rothenbecker retired from the Department. *Id.* On September 15, 2003, Morash resigned her position with the Department. On June 11, 2004, she filed this suit.

II. CLAIMS AGAINST THE DEPARTMENT

Under Maryland law, the Department is an agency of the County and lacks legal capacity to be sued. *See Champ v. Baltimore County*, No. CIV.A.HAR 93-4031,1994 WL 395735, at *2 (D. Md. June 14, 1994); *see also Clea v. Baltimore*, 312 Md. 662, 668, 541 A.2d 1303, 1305 (1988). Therefore, the claims against the Department will be dismissed.

III. FEDERAL CLAIMS

A. Title VII

Morash alleges discrimination on the basis of sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000, *et seq*. Pursuant to 42 U.S.C. § 2000e-5, Morash filed a charge with the EEOC. The EEOC was unable to conclude that there had been a violation of the

applicable statutes and informed Morash of its determination by a letter mailed September 4, 2003. Defs.' Ex. 3. In this letter, the EEOC advised her that a Title VII suit must be filed within ninety days of receipt of the letter or the right to sue would be lost. *Id.* Morash filed suit on June 11, 2004, more than nine months after receipt of her right to sue letter.

The ninety-day notice period has been strictly construed. *See, e.g., Harvey v. New Bern Police Dep't*, 813 F.2d 652, 654 (4th Cir. 1987) (barring suit filed ninety-one days after notice); *Boyce v. Fleet Fin., Inc.*, 802 F. Supp. 1404, 1411 (E.D. Va.1992) (barring suit filed ninety-two days after notice). Morash argues that this court should apply the doctrine of equitable tolling, but makes no allegation of extraordinary circumstances that would support the application of that doctrine. *See Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990) (extraordinary circumstances exist where a claimant has pursued remedies during the statutory period by filing a defective pleading or where a defendant has induced or misled a plaintiff into allowing the filing deadline to pass). Because tolling is inappropriate and the suit was filed after the statutory period expired, the Title VII claims will be dismissed.

B. Section 1983

Morash claims that the defendants violated her constitutionally protected rights, privileges or immunities and that Morash is entitled to a remedy pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1983. Although Morash's complaint does not specifically identify the federally protected right she is invoking, she apparently claims that the defendants violated her right to equal protection guaranteed by the Fourteenth Amendment. *Cf. Beardsley v. Webb*, 30 F.3d 524, 529 (4th Cir. 1994) ("[i]ntentional sexual harassment of employees by persons acting under color of state law violates the Fourteenth Amendment and is actionable under section

1983.”).

Courts apply the standards developed in Title VII sexual harassment litigation to similar claims brought under section 1983. *Id.* (citing *Boutros v. Canton Reg’l Transit Auth*., 997 F.2d 198, 202-03 (6th Cir. 1993); *Trautvetter v. Quick*, 916 F.2d 1140, 1149 (7th Cir. 1990)). To state a claim for harassment based on a hostile work environment, among other things, a plaintiff must allege that harassment was sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere. *See, e.g., Talley v. Farrell*, 156 F. Supp. 2d 534, 540-41 (D. Md. 2001). To determine if this element is satisfied, courts look at all the circumstances, including the frequency of the conduct, the severity, whether the conduct is physical or merely verbal, and whether it unreasonably interferes with the employee’s work performance. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993).

In *Riley v. Buckner*, 1 Fed. Appx. 130 (4th Cir. 2001), the court had to address a factually similar section 1983 sexual harassment claim. In *Riley*, the plaintiff alleged that the judge (1) made sexually suggestive comments about female employees and attorneys; (2) made comments that were veiled propositions for sexual intercourse; (3) kept sexually explicit materials in plain view; and (4) constantly communicated to the plaintiff with profanity and suggestive and sexually explicit language. *Id.* at 132. She also asserted a specific claim that the judge made an obscene gesture while shouting an expletive at the plaintiff. *Id.* The court held that these allegations were “sufficient, though barely, to state an equal protection claim under section 1983 that survives a motion to dismiss.” *Id.*

The conduct Morash alleges falls well short of that which the *Riley* court found “barely” sufficient. Morash only alleges specific facts about a single incident with Rothenbecker. This

incident was isolated and public. It involved minimal physical contact and, in comparison to *Riley*, a milder verbal exchange. Morash also makes a more general claim that she "was ostracized and treated with scorn by co-workers and supervisors" who had learned of her complaint to internal affairs. Morash makes no specific factual allegation about the nature, severity, or pervasiveness of this treatment. Such allegations alone are insufficient to state a claim based on a hostile work environment against the County, Rothenbecker, or Shanahan.

IV. STATE LAW CLAIMS

A. Article 24 Due Process

Morash alleges that the County violated her rights, privileges or immunities protected by the Due Process Clause in Article 24 of the Maryland Declaration of Rights. Md. Code Ann., Const. Art. 24. The Due Process Clause of Article 24 embodies the concept of equal protection of the laws to the same extent and in like manner as the Equal Protection Clause of the Fourteenth Amendment. *Murphy v. Edmonds*, 325 Md. 342, 354, 601 A.2d 102, 107 (1992); *see also Manikhi v. Mass. Transit Admin.*, 360 Md. 362-63, 758 A.2d 95, 111 (2000) (applying this rationale in a sexual harassment context). As described in Part III.B., *supra*, Morash does not make sufficient factual allegations to state a claim for sexual harassment under the Equal Protection Clause of the Fourteenth Amendment. Thus, she also fails to state a claim under Article 24 of the Maryland Declaration of Rights.

B. Common Law Tort Claims Against the County

Counts Four through Nine of Morash's complaint allege various state law tort claims against the County. These claims are barred by the doctrine of governmental immunity. County governments are entitled to governmental immunity from suit for common law tort claims based

governmental activities. *Pavelka v. Carter*, 996 F.2d 645, 648 (4th Cir. 1993); *see also Martino v. Bell*, 40 F. Supp. 2d 719, 721-22 (D. Md. 1999) (holding that a county may not be named directly in a common law tort suit). Orderly maintenance of a police force is a governmental act. *See, e.g., Taylor v. Prince George's County*, 377 F. Supp. 1004, 1007 (D. Md. 1974) ("Maryland counties act in a governmental fashion. . . when they employ, supervise, pay, and discharge police officers.").

C. Claims Against Shanahan and Rothenbecker

Count Four seeks to state a claim against Shanahan and Rothenbecker for intentional infliction of emotional distress. To state a claim for intentional infliction of emotional distress, a plaintiff must allege (1) intentional or reckless conduct; (2) outrageous and extreme conduct; (3) a causal connection between the wrongful conduct and emotional distress, and (4) severe emotional distress. *See, e.g., Harris v. Jones*, 281 Md. 560, 566, 380 A.2d 611, 614 (1977). Outrageous conduct is that which is truly opprobrious and exceeds all bounds usually tolerated by society. *See Kentucky Fried Chicken Nat'l Mgmt. Co. v. Weathersby*, 326 Md. 663, 670, 607 A.2d 8, 11 (1992) (citations omitted). It is for the court to determine whether the defendants' conduct may reasonably be regarded as extreme and outrageous. *Harris,* 281 Md. at 569, 380 A.2d at 615.

Morash's complaint does not allege conduct by Rothenbecker or Shanahan that a reasonable person could find rises to this high standard of extreme and outrageous conduct. With respect to Rothenbecker, Morash alleges an isolated, predominantly verbal incident of a short duration in a public place that Rothenbecker could not reasonably have known would have resulted in the severe emotional distress suffered by Morash. As to Shanahan, Morash alleges

that he tolerated a hostile work environment. As described in Part III.B., *supra*, Morash has not made sufficient allegations to support this claim. To the contrary, the defendants' unrefuted evidence leads to the conclusion that Shanahan acted expeditiously to suspend and reassign Rothenbecker when he learned of the incident. *See* Defs.' Ex. 1. Morash's allegations cannot support a claim of intentional infliction of emotional distress.

Counts Five, Six, and Seven each allege intentional torts, but they do not appear to allege any intentional behavior by Shanahan. Without an allegation of any intentional act by Shanahan, he cannot be held liable for these intentional torts and these claims will be dismissed.

Count Five seeks to hold Rothenbecker liable for intrusion upon Morash's seclusion for unreasonably intruding in her personal affairs. The tort of intrusion upon seclusion protects the sanctity and integrity of physical areas that a person would naturally consider private and off-limits to outsiders. *New Summit Assocs. Ltd. P'ship v. Nistle*, 73 Md. App. 351, 360, 533 A.2d 1350, 1354 (1987) (citing *Cummings v. Walsh Construction Co.*, 561 F.Supp. 872, 884 (S.D. Ga. 1983)). Morash does not allege any violation of intimate physical space; Rothenbecker's conduct is alleged to have occurred in the open lobby of the Eastern District Station.

Count Six seeks to hold Rothenbecker liable for unreasonable publicity of private life. By definition, this claim requires some act of publication on the part of Rothenbecker. *See Talley*, 156 F. Supp. 2d at 544. Morash fails to allege any act of publication by Rothenbecker.

Count Seven alleges that Rothenbecker, as Morash's employer, breached his fiduciary duty to Morash to act as a role model and in good faith. It is not at all clear that Rothenbecker owed Morash any fiduciary duties at all. I need not reach that question, however, because, in Maryland, there is no independent tort of breach of a fiduciary duty. *Kann v. Kann*, 344 Md. 689,

713, 690 A.2d 509, 521 (1997); *see also McGovern v. Deutsche Post Global Mail, Ltd.*, No. CIV.JFM-04-0060, 2004 WL 1764088, at *12-13 (D. Md. Aug. 4, 2004) (discussing breach of fiduciary duty under Maryland law).

Count Eight seeks to hold Shanahan liable for Rothenbecker's actions under a theory of respondeat superior. A supervisor or employer may only be held liable for the tortious actions of an employee if those actions occurred "within the scope" of the employee's employment. *Williams v. Cloverland Farms Dairy, Inc.*, 78 F. Supp. 2d 479, 483 (D. Md. 1999) (citing *Sawyer v. Humphreys*, 322 Md. 247, 255, 587 A.2d 467, 470 (1991)). Actions taken out of "a desire to fulfill sexual urges may not be actuated by a purpose to serve the employer" and are outside the scope of employment. *Lewis v. Forest Pharm., Inc.*, 217 F. Supp.2d 638, 659 (D. Md. 2002) (citing *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742, 756, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998)). As alleged, Rothenbecker's actions were motivated by sexual urges and, therefore, did not occur within the scope of his employment. Morash's claim of respondeat superior liability will be dismissed.

Count Nine seeks to hold Shanahan liable for negligent training and supervision of Rothenbecker. This type of negligence claim is preempted by the Maryland Workers' Compensation Act, Md. Code Ann., Labor & Empl. §§ 9-501 *et seq. See, e.g., Demby v. Preston Trucking Co.*, 961 F.Supp. 873, 881 (D. Md. 1997). With the exception of injuries caused by an employer's deliberate intent to injure or kill a covered employee (i.e., intentional torts), the Act constitutes the exclusive method of compensation for workers injured by an employer's actions. *See* Maryland Workers' Compensation Act § 9-509. Employees of governmental units are covered employees, *Mazor v. State Dep't of Corrections*, 279 Md. 355, 365, 369 A.2d 82, 89

(1977), and reputational injuries are included in the class of harms covered by the statute. *Demby*, 961 F. Supp. at 881.[1]

For these reasons, Morash has failed to state any claim on which relief can be granted. Accordingly, the defendants' motions to dismiss will be granted. A separate order follows.

October 28, 2004
Date

/s/
J. Frederick Motz
United States District Judge

[1] Additionally, Shanahan is likely entitled to public official immunity from suit. *See generally Muthukumarana v. Montgomery County*, 370 Md. 447, 479-80, 805 A.2d 372, 391 (2002) (public official performing a discretionary act is entitled to immunity from suit in the absence of malice).

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ORDER

For the reasons stated in the accompanying Memorandum, it is hereby Ordered that:

1. Defendants' motions to dismiss (nos. 11 & 13) are granted; and

2. This action is dismissed.

October 28, 2004
Date

/s/
J. Frederick Motz
United States District Judge