2000 WL 33739179
United States District Court, S.D. Ohio, Eastern Division.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,
v.
INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, Local 109, Defendant.

No. C–2–98–339. | Aug. 18, 2000.

Opinion

OPINION AND ORDER

GRAHAM, District J.

***1** This is an action filed under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e–2(c)(1) and (3), and Title I of the Civil Rights Act of 1991, by the Equal Employment Opportunity Commission ("EEOC") against the International Association of Firefighters, Local 109 ("the union") on behalf of Anita Stickle, a union member and assistant fire chief employed by the city of Newark, Ohio. The complaint alleges that since July 1, 1992, the union has engaged in practices unlawful under Title VII. Specifically, it is alleged that the union discriminated against Assistant Chief Stickle, caused or attempted to cause the city of Newark to discriminate against Ms. Stickle on the basis of her sex, and failed to oppose known sexual discrimination committed against her by employees of the city of Newark.

This matter is before the court on the cross motions for summary judgment filed by the plaintiff and the defendant.

The procedure for granting summary judgment is found in Fed.R.Civ.P. 56(c), which provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The evidence must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.,* 398 U.S. 144 (1970). Summary judgment will not lie if the dispute about a material fact is genuine, "that is, 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). However, summary judgment is appropriate if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). *See also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574 (1986).

The Sixth Circuit Court of Appeals has recognized that *Liberty Lobby, Celotex* and *Matsushita* effected "a decided change in summary judgment practice," ushering in a "new era" in summary judgments. *Street v. J.C. Bradford & Co.,* 886 F.2d 1472, 1476 (6th Cir.1989). The court in *Street* identified a number of important principles applicable in new era summary judgment practice. For example, complex cases and cases involving state of mind issues are not necessarily inappropriate for summary judgment. *Id.* at 1479. In addition, in responding to a summary judgment motion, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment." ' *Id.* (quoting *Liberty Lobby,* 477 U.S. at 257). The nonmoving party must adduce more than a scintilla of evidence to overcome the summary judgment motion. *Id.* It is not sufficient for the nonmoving party to merely " 'show that there is some metaphysical doubt as to the material facts." ' *Id.* (quoting *Matsushita,* 475 U.S. at 586). Moreover, "[t]he trial court no longer has a duty to search the entire record to establish that it is bereft of a genuine issue of material fact." *Id.* That is, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact.

***2** The court will first address issues raised by the defendant which do not go to the merits of the plaintiff's claims. The defendant argues that it is entitled to summary judgment on the issue of monetary damages. On December 27, 1996, Ms. Stickle filed a sex discrimination action against the city of Newark and various individual officials in the Court of Common Pleas of Licking County, Ohio. The union was not named as a defendant. In that action, Ms. Stickle asserted state law claims under the provisions of Ohio Revised Code §§ 4112.02 and 4112.99. In March and April of 1997, the parties to the state court action negotiated a settlement agreement

which included the payment of $200,000 to Ms. Stickle by the city of Newark.

The defendant relies on Ohio Revised Code § 2307.32(f), which addresses the proportionate share of tortfeasors who are found to be jointly liable. However, the union was not a defendant in the state court action, and there is no indication that the Ohio statute was intended to limit the liability of defendants on federal claims, even assuming that the state could do so. Section 2307.32(f) would not bar an award of monetary damages in this case.

The defendant also notes 42 U.S.C. § 1981a(b), which places limits on the amount of compensatory and punitive damages which can be recovered in a Title VII case. Under 42 U.S.C. § 1981a(b)(3)(A), the sum of the amount of compensatory damages for future pecuniary losses, nonpecuniary losses such as emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life, and punitive damages potentially awardable against the union, an employer with fewer than 101 employees, cannot exceed $50,000. This limit applies to each defendant in the lawsuit as a whole, not to each individual claim asserted by the plaintiff. *Hudson v. Reno,* 130 F.3d 1193, 1199–1201 (6th Cir.1997). The EEOC asserts that it is seeking on Ms. Stickle's behalf actual compensatory damages in the amount of $15,030.26 and $50,000 total in nonpecuniary compensatory and punitive damages.

There is support for the proposition that Title VII does not authorize a double recovery for compensatory damages where recovery for the same damages has been obtained under state law. *See Passantino v. Johnson & Johnson Consumer Products,* 982 F.Supp. 786, 789 (W.D.Wash.1997) (plaintiff not entitled to a double recovery of compensatory damages on federal claims where plaintiff was awarded such damages on state claims), *aff'd in part, rev'd in part on other grounds,* 212 F.3d 493 (9th Cir.2000); *Luciano v. Olsten Corp.,* 912 F.Supp. 663, 675 (E.D.N.Y.1996) (instructing jury not to award double compensation for a single monetary damage or injury). However, § 1981a(b)(3) does not limit the amount of damages recoverable under state law. *Hemmings v. Tidyman's, Inc.,* 65 F.Supp.2d 1157, 1162 (E.D.Wash.1999). Further, state law is irrelevant to the issue of the amount of punitive damages available for a federal claim. *Hennessy v. Penril Datacomm Networks, Inc.,* 69 F.3d 1344, 1352 (7th Cir.1995).

***3** The settlement in state court would not bar a punitive damages award against the union up to the $50,000 cap. The court cannot determine from the present record which portion, if any, of the $200,000 settlement award in state court consisted of compensatory damages which the EEOC now seeks to recover in this case. It may be that the compensatory damages sought by the EEOC in this case relate solely to alleged conduct on the part of the union. Absent information indicating that Ms. Stickle would be receiving a double recovery in compensatory damages for the same injuries already compensated in state court, summary judgment on this ground is not appropriate.

The defendant also argues that the claims brought by the EEOC in this case are barred by the failure of Ms. Stickle to utilize the grievance procedure contained in the various collective bargaining agreements by which her employment is and has been governed. The defendant relies on *Austin v. Owens–Brockway Glass Container, Inc.,* 78 F.3d 875, 885–86 (4th Cir.1996), in which the court held that the plaintiff was required to pursue her gender and disability discrimination claims under the grievance procedure contained in the collective bargaining agreement before proceeding to court where that agreement specifically mandated arbitration of such claims.

The reasoning in *Austin* was rejected by the Sixth Circuit Court of Appeals in *Penny v. United Parcel Service,* 128 F.3d 408 (6th Cir.1997). The court looked for guidance from the decisions of the Supreme Court in *Alexander v. Gardner–Denver Co.,* 415 U.S. 36 (1974) (holding that a prior arbitral decision does not divest federal courts of jurisdiction over actions brought under Title VII) and *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20 (1991) (holding that an agreement to submit age discrimination claims to arbitration may be binding). The Sixth Circuit concluded that the case before it was controlled by *Gardner–Denver,* and held that an employee whose only obligation to arbitrate is contained in a collective bargaining agreement retains the right to obtain a judicial determination of his rights under the Americans with Disabilities Act ("ADA").[1] *Penny,* 128 F.3d at 412, 414.

[1] While the defendant contends that *Penny* is not controlling because it involved a claim under the ADA rather than Title VII, the court sees no basis for distinguishing between these types of claims in resolving the issue of whether exhaustion of contract remedies is required. *See Pryner v. Tractor Supply Co.,* 109 F.3d 354, 363 (7th Cir.1997) (contract does not consign enforcement of statutory rights under 42 U.S.C. § 1981, Title VII or ADA to union-controlled grievance procedure).

The Supreme Court again addressed this issue in *Wright v. Universal Maritime Service Corp.,* 525 U.S. 70 (1998). While declining to resolve the question of whether a union can validly negotiate a waiver of an employee's right to a judicial forum for discrimination claims, the Court held that the general arbitration provision in the collective bargaining agreement before it was not sufficient to require the plaintiff to use the arbitration procedure to litigate his ADA claim. *Id.* at 77, 80. Rather,

if a union is authorized to waive its members' rights to a judicial forum to litigate their statutory discrimination claims, such a waiver must be "clear and unmistakable." *Id.* at 80.

In *Bratten v. SSI Serv., Inc.,* 185 F.3d 625, 631 (6th Cir.1999), the court held that the statutory claim provided by a discrimination statute must be specifically mentioned in the collective bargaining agreement for it to "even approach *Wright's* 'clear and unmistakable' standard." The court further noted that including a provision in a collective bargaining agreement that prevents discrimination against employees under a federal statute is not the same as requiring union members to arbitrate such statutory claims. *Id* at 631–32. *See also Kennedy v. Superior Printing Co.,* 215 F.3d 650 (6th Cir.2000).

***4** The collective bargaining agreements relevant to this case are included as Exhibit A–2 to the defendant's motion for summary judgment. Section 4.1 of the agreements governing 1989 to 1994 and Section 3.1 of the agreements governing 1995 to 2000 contain a nondiscrimination clause stating that the provisions of the agreement "shall be applied equally to all employees in the bargaining unit without discrimination as to age, sex, marital status, race, color, creed, national origin, or political affiliation." Under Section 7.1 of the 1989 to 1994 agreements and Section 6.1 of the 1995 to 2000 agreements, these agreements provide for "final and binding arbitration of grievances," but "[f]or matters not subject to arbitration the parties retain common law, constitutional, and statutory rights."

The agreements here contain no specific requirement that an employee file a grievance relative to a statutory discrimination claim, nor is Title VII specifically mentioned in these agreements in conjunction with the arbitration provisions. The court concludes that this is not sufficient to constitute a "clear and unmistakable" waiver of statutory rights, and the claims brought by the EEOC are not barred by Ms. Stickle's failure to pursue her remedies under the grievance procedure in the collective bargaining agreements.

The EEOC claims that Ms. Stickle was subjected to various forms of harassment because of her gender which resulted in the creation of a hostile work environment. The defendant argues that it is entitled to summary judgment on the basis that the evidence is insufficient to show that Ms. Stickle was subjected to a hostile work environment because of her sex.

To prove a sexually hostile work environment claim against her employer, a Title VII plaintiff is required to show that (1) she is a member of a protected class; (2) she was subject to unwelcomed sexual harassment; (3) the harassment was based on her sex; (4) the harassment unreasonably interfered with her work performance and created a hostile work environment; and (5) the employer knew or should have known of the charged harassment and failed to implement prompt and appropriate corrective action. *Harris v. Forklift Sys. Inc.,* 510 U.S. 17 (1993); *Fleenor v. Hewitt Soap Co.,* 81 F.3d 48, 50 (6th Cir.1996).

The discrimination "must be sufficiently severe or pervasive to alter the conditions of [the employee's] employment and create an abusive working environment." *Meritor Sav. Bank, FSB v. Vinson,* 477 U.S. 57, 67 (1986); *Davis v. Monsanto Chem. Co.,* 858 F.2d 345, 349 (6th Cir.1988). *See Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742, 752 (1998) (hostile work environment claim requires harassment that is severe or pervasive). Incidents which did not occur in the presence of the employee which the employee learns of second-hand or hostile comments which were not specifically directed to the employee may be considered in determining the existence of a hostile working environment. *Schwapp v. Town of Avon,* 118 F.3d 106, 111 (2d Cir.1997).

***5** In determining whether an environment is one that a reasonable person would find hostile or abusive and that the employee in fact did perceive to be so, a court must look at all of the circumstances, including 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. *Harris,* 510 U.S. at 23; *Abeita v. TransAmerica Mailings, Inc.,* 159 F.3d 246, 251 (6th Cir.1998). The objective severity of harassment should be judged from the perspective of a reasonable person in the employee's position, considering all the circumstances. *Oncale v. Sundowner Offshore Services, Inc.,* 523 U.S. 75, 81 (1998).

Harassing conduct need not be motivated by sexual desire to support an inference of discrimination of the basis of sex. *Oncale,* 523 U.S. at 80. Likewise, the conduct in question need not take the form of sexual advances or other incidents with clearly sexual overtones. *McKinney v. Dole,* 765 F.2d 1129, 1138–39 (D.C.Cir.1985). *See Andrews v. City of Philadelphia,* 895 F.2d 1469, 1485–86 (3d Cir.1990) (nonsexual conduct such as destruction of property and use of derogatory and insulting terms when referring to women can contribute to hostile work environment); *Lipsett v. University of Puerto Rico,* 864 F.2d 881, 905 (3d Cir.1988) (verbal attack challenging capacity of women to be surgeons which was charged with anti-female animus contributed to hostile environment; *Hall v. Gus Construction Co.,* 842 F.2d 1010, 1014 (8th Cir.1988) (intimidation and hostility toward women because they are women can result from conduct other than explicit sexual advances); *Bell v. Crackin Good Bakers, Inc.,* 777 F.2d 1497, 1503 (11th Cir.1985) (threatening, bellicose, demeaning, hostile or

offensive conduct).

There is evidence in this case of alleged incidents of harassment which involved overtly sexual overtones. These included the attachment of a sanitary pad to a clipboard used by Ms. Stickle in a medical supply cabinet, at least three sex-related comments or drawings on posted items which contained some reference to Ms. Stickle, and at least ten instances when pornographic magazines were found in the common areas of the station. Other alleged events included instances where the firefighters under Ms. Stickle's command acted in a disrespectful manner. There is also evidence of alleged threats, such as the placing of a doll with its throat torn in Ms. Stickle's turnout coat and threats to run over her with fire department vehicles. Bleach was used repeatedly at the station even though the personnel had been ordered not to use bleach for cleaning because Ms. Stickle had an allergic reaction to it.

The defendant has produced evidence that practical jokes were common at the fire stations, and that both men and women firefighters were the targets of such pranks as cigarette butts being placed in boots, or the short-sheeting of beds. The defendant further argues that some instances relied on as examples of discrimination, such as the alleged interference with Ms. Stickle's radio communications, the writing of derogatory comments on orders, or the fact that a tire on Ms. Stickle's car was damaged on one occasion, are insufficient to establish a discriminatory motive because the perpetrators were never identified and because male firefighters experienced similar problems.

***6** The court finds that genuine issues of fact exist which create a jury question and preclude summary judgment on the issue of whether Ms. Stickle was subjected to a hostile work environment by the city of Newark. However, even assuming that a hostile work environment existed, whether the union contributed to that hostile environment or is otherwise accountable for its existence presents a separate issue. In order to prevail on its Title VII claims in this case, the EEOC must demonstrate that the requirements for union liability have been satisfied.

The EEOC contends that the defendant union, through its officers, discriminated against Ms. Stickle on the basis of her sex, caused or attempted to cause the city to discriminate against her, and acquiesced in the city's creation of a hostile work environment. The EEOC seeks to hold the union liable under Title VII's provisions relating to labor organization practices. Under Title VII, it is unlawful for a labor organization

> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

42 U.S.C. § 2000e–2(c)(1) and (3).

Under § 2000e–2(c)(1), a union can be liable for its own acts of discrimination, for example, by making the deliberate choice of refusing to process grievances involving discrimination claims, *Goodman v. Lukens Steel Co.,* 482 U.S. 656 (1987); *McDonald v. Santa Fe Trail Transportation Co.,* 427 U.S. 273 (1976); by participating in the establishment of rules for an apprenticeship program which operate to discriminate, *Donnell v. General Motors Corp.,* 576 F.2d 1292 (8th Cir.1978); or by discriminating in job referrals, *Alexander v. Local 496, Laborers' International Union of North America,* 177 F.3d 394 (6th Cir.1999). However, the mere fact that an employee who is also a union member engages in acts of discrimination does not result in liability on the part of the union; rather, the plaintiff must present evidence that the employee was acting within the scope of his authority as a union representative or as an agent of the union while engaging in the alleged harassing behavior. *Badlam v. Reynolds Metals Co.,* 46 F.Supp.2d 187, 201–02 (N.D.N.Y.1999)

Under § 2000e–2(c)(3), a union can be held liable for causing or attempting to cause the employer to discriminate. Some courts have broadened this section in its scope of application to hold a union jointly and severally liable under Title VII for "acquiescing in the discriminatory practices of the employer." *See, e.g., Howard v. International Molders and Allied Workers Union, AFL–CIO–CLC,* 779 F.2d 1546, 1548 (11th Cir.1986). However, there is disagreement as to whether the union may be held liable for mere passivity or the failure to act to remedy discrimination by the employer where no grievance has been filed by the employee. The Supreme Court in *Goodman* declined to resolve this "rather abstract observation," resting its decision instead on the evidence of direct discrimination which violated § 2000e–2(c)(1), which presented a case "much stronger than one of mere acquiescence" because the unions made a deliberate choice not to process grievances. *See Goodman,* 482 U.S. at 665–666.

***7** Some courts, in applying the acquiescence theory of liability, have imposed an affirmative duty on the union to combat discrimination in the workplace. *See Howard,* 779 F.2d at 1548 (concluding that union violated § 2000e–2(c)(3) for failing to take reasonable steps to ensure compliance with Title VII by employer even though no grievance filed); *Goodman v. Lukens Steel Co.,* 777 F.2d 113, 126 (3d Cir.1985) (citing cases for premise that union has affirmative duty to combat discrimination); *Bonilla v. Oakland Scavenger Co.,* 697 F.2d 1297, 1304 (9th Cir.1982) (union has affirmative obligation to oppose

employment discrimination); *Gray v. Greyhound Lines, East,* 545 F.2d 169, 174 n. 15 (D.C.Cir.1976) (union may be held responsible in some circumstances for employer's discriminatory practices if it has not taken affirmative action); *Egger v. Local 276, Plumbers and Pipefitters Union, AFL–CIO,* 644 F.Supp. 795 (D.Mass.1986) (union has affirmative duty to alleviate sex discrimination in employment); *Chrapliwy v. Uniroyal, Inc.,* 458 F.Supp. 252, 283 (N.D.Ind.1977) (union's duty to alleviate sex discrimination in employment applies whether or not employee complains to union about discriminatory conduct).

Other courts have expressed doubt about the theory of liability through mere passive acquiescence. *See Martin v. Local 1513 and Dist. 118 of the Int'l Assoc. of Machinists and Aerospace Workers,* 859 F.2d 581, 584 (8th Cir.1988); *Badlam,* 46 F.Supp.2d at 200 n .7 ("It is questionable whether mere acquiescence is sufficient to support a Title VII claim against a Union."); *Benn v. Florida East Coast Railway Co.,* No. 97–4403–CIV (unreported), 1999 WL 816811 (S.D.Fla.1999) (more than mere passivity required); *Catley v. Graphic Com. Int'l Union, Local 277–M,* 982 F.Supp. 1332, 1344 (E.D.Wis.1997) (rejecting "mere passivity" or "mere acquiescence" theory).

Justice Powell, joined by Justices Scalia and O'Conner, examined the issue of "mere passivity" in his dissenting opinion in *Goodman* and concluded that "[§ 2000e–2(c)], the provision of Title VII governing suits against unions, does not suggest that the union has a duty to take affirmative steps to remedy employer discrimination." *Goodman,* 482 U.S. at 687 (Powell, J., concurring in part and dissenting in part). He opined that § 2000e–2(c)(1) "prohibits direct discrimination by a union against its members; it does not impose upon a union an obligation to remedy discrimination by the employer." *Id.* at 688. Justice Powell went on to state:

> Moreover, § 703(c)(3) specifically addresses the union's interaction with the employer, by outlawing efforts by the union "to cause or attempt to cause an employer to discriminate against an individual in violation of this section." § 2000e–2(c)(3). If Congress had intended to impose on unions a duty to challenge discrimination by the employer, it hardly could have chosen language more ill suited to its purpose. First, "[t]o say that the union 'causes' employer discrimination simply by allowing it is to stretch the meaning of the word beyond its limits." (Citation omitted). Moreover, the language of § 703(c)(3) is taken *in haec verba* from § 8(b)(2) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(b)(2). That provision of the NLRA has been held not to impose liability for passive acquiescence in wrongdoing by the employer. Indeed, well before the enactment of Title VII, the Court held that even encouraging or inducing employer discrimination is not sufficient to incur liability under § 8(b)(2). *Electrical Workers v.. NLRB,* 341 U.S. 694, 703, 71 S.Ct. 954, 959, 95 L.Ed. 1299 (1951).

***8** *Id.*

As the court stated in *Catley,* 982 F.Supp. at 1344, "Sound policy reasons underlie the reluctance to extend Title VII liability to unions based on mere acquiescence in unlawful conduct by employers." As Justice Powell noted, dissenting in *Goodman,* 482 U.S. at 688–89:

> A union, unlike an employer, is a democratically controlled institution directed by the will of its constituents, subject to the duty of fair representation. Like other representative entities, unions must balance the competing claims of its constituents. A union must make difficult choices among goals such as eliminating racial discrimination in the workplace, removing health and safety hazards, providing better insurance and pension benefits, and increasing wages.... Union member's suits against their unions may deplete union treasuries, and may induce unions to process frivolous claims and resist fair settlement offers....

It can also be argued that the "acquiescence" theory conflicts with *Penny* and like cases discussed above which protect the right of the employee to choose whether he wishes to pursue his remedies under the collective bargaining agreement or to file an administrative complaint and seek judicial review of his discrimination claim. It seems inequitable to penalize the union under Title VII for not filing a grievance alleging discrimination, even where the employee has decided he does not want to use the grievance procedure, while at the same time honoring the employee's right to choose to forego the grievance procedure.

In fact, some courts have found no liability on the part of the union where the employee made no effort to inform the union of the discrimination allegation. *See Dominguez v. Hotel, Motel, Restaurant & Misc. Bartenders Union, Local No. 64,* 674 F.2d 732, 733 (8th Cir.1982) (no union liability where employee did nothing to advise union of employer's allegedly discriminatory practices); *Benn,* 1999 WL 816811 at *10 (employee must first ask union to file a formal grievance before union can be liable for intentionally avoiding asserting discrimination claims); *Badlam,* 46 F.Supp.2d at 201 (where employee filed no written grievance or did not otherwise request the union

to pursue grievance in regard to allegedly discriminatory conduct, union has no obligation to take further action on behalf of the employee). *See also Carter v. Chrysler Corp.,* 173 F.3d 693, 704 (8th Cir.1999) (finding no union liability where union officials investigated employee's informal complaints of discrimination, employee filed no formal grievance, and failed to show that union refused to file a grievance it thought had merit).

Here, Ms. Stickle filed no formal grievance with the union concerning the allegedly hostile work environment. Stickle Dep., p. 462–463. She acknowledged during her deposition that she did not ask the union to take any steps to eliminate the harassment, Stickle Dep ., p. 475, and that she made no informal complaints to union officers concerning the alleged acts of harassment against her. *See, e.g.,* Stickle Dep., pp. 99, 117, 200, 213, 227, 295, 307, 314–315, 342, 481, 490. She also testified that she was familiar with the nondiscrimination clause in the collective bargaining agreements, that she had filed grievances on other matters with which the union helped her, and that she was aware that harassment could be the subject of a grievance. Stickle Dep., pp. 432, 464–465, 468. Under the reasoning of cases such as *Martin, Dominguez, Badlam,* the union could not be held liable under an acquiescence theory in this case, since Ms. Stickle never filed a discrimination grievance and never communicated the sexual harassment problems she was allegedly experiencing to the union.[2]

[2] The Sixth Circuit's statement in *Farmer v. ARA Services, Inc.,* 660 F.2d 1096, 1104 (6th Cir.1981) concerning union liability "for acquiescing in the discriminatory practices of the employer" does not compel a contrary result here. That statement must be considered in the context of the facts of that case. In *Farmer,* grievances were actually filed by union members and these grievances were not acted upon as required under the terms of the collective bargaining agreement. *Id.* at 1101. The district court in that case found that the union failed to fairly process these grievances. *Id.* at 1102. Since no such grievances were filed by Ms. Stickle in this case, *Farmer* is distinguishable. Further, the union in *Farmer* was found to have negotiated a provision in the collective bargaining agreement which discriminated against female members. No such provision exists in the collective bargaining agreements in this case.

***9** This court agrees with those courts above which have concluded that a showing of mere passivity or acquiescence in the face of discrimination by an employer is not sufficient to establish liability on the part of the union where no grievance or other complaint of discrimination has been filed by the employee with the union. The EEOC may not rely on the "mere passivity" theory to support its § 2000e–2(c)(3) claim.

Even assuming *arguendo* that the union has an affirmative duty to combat discrimination in the workplace in the absence of a formal grievance or other complaint of discrimination filed by an employee, proof of inaction on the part of the union, without more, is not sufficient to establish that the union acquiesced in discriminatory conduct. "Acquiescence requires (1) knowledge that prohibited discrimination may have occurred and (2) a decision not to assert the discrimination claim." *York v. American Tel. & Tel. Co.,* 95 F.3d 948, 956–57 (10th Cir.1996). A union may be held liable if it purposefully acts or refuses to act in a manner which causes the employer to discriminate. *Hardison v. Trans World Airlines, Inc.,* 527 F.2d 33, 42 (8th Cir.1975), *rev'd on other grounds,* 432 U.S. 63 (1977). This is consistent with the principle that "a union's liability depends on its 'responsibility for the discrimination." ' *Philbrook v. Ansonia Bd. of Educ.,* 757 F.2d 476, 487 (2d Cir.1985) (quoting *EEOC v. Enterprise Assoc. Steamfitters Local No. 638,* 542 F.2d 579, 586 (2d Cir.1976).

The defendant union argues as a threshold issue that the claims filed against it by the EEOC on behalf of Ms. Stickle are barred by her failure to timely file an administrative complaint with the EEOC against the union. The defendant notes that Ms. Stickle acknowledged in her deposition that she knew she could have filed a charge against the union when she filed her discrimination charge against the city with the Ohio Civil Rights Commission on August 18, 1995, but that she decided not to file a charge against the union at that time after consulting with her attorneys. Stickle Dep., p. 498. The court will address the defendant's limitations argument as it applies to the claim of direct discrimination under § 2000e–2(c)(1) and to the claim that the union directly caused or attempted to cause the city to discriminate under § 2000e–2(c)(3). Although the court has stated above that the EEOC's § 2000e–2(c)(3) claim, insofar as it is based on a mere passivity theory, is not legally supported and therefore should be dismissed, the court will, in the alternative, also consider whether the continuing violation theory would apply to such a claim in this case.

A Title VII plaintiff must file a charge of discrimination with the EEOC within one hundred and eighty days of the occurrence of the alleged unlawful employment practice. 42 U.S.C. § 2000e–5(e); *E.E.O .C. v. Commercial Office Products Co.,* 486 U.S. 107 (1988). Where the complainant files a complaint with a state agency in a deferral state, such as Ohio, the time limit for filing a charge with the EEOC is extended to three hundred days. *Alexander,* 177 F.3d at 407. As with a private suit, a Title VII action filed by the EEOC under 42 U.S.C. § 2000e–5(f) must be based on a timely charge filed with the EEOC by an aggrieved party. *E.E.O.C. v. Harvey L. Walner & Associates,* 91 F.3d 963, 968 (7th Cir.1996) (action filed by EEOC requires a timely charge of

discrimination). The limitations period for Title VII actions "begin to run in response to discriminatory *acts* themselves, not in response to the continuing *effects* of past discriminatory acts." *Dixon v. Anderson,* 928 F.2d 212, 216 (6th Cir.1991) (emphasis in original) (citing *Delaware State College v. Ricks,* 449 U.S. 250, 258 (1980)).

***10** The time limits for filing a Title VII action are not jurisdictional but are in the nature of a statute of limitations, which may be subject to equitable tolling. *Brown v. Crowe,* 963 F .2d 895 (6th Cir.1992); *Brown v. Mead Corp.,* 646 F.2d 1163 (6th Cir.1981). However, the Supreme Court has cautioned against reading the timely filing requirement out of Title VII through liberal application of the doctrine of equitable tolling, and has approved the use of equitable principles only under limited circumstances. *Baldwin County Welcome Center v. Brown,* 466 U.S. 147 (1984); *Puckett v. Tennessee Eastman Co.,* 889 F.2d 1481, 1487 (6th Cir.1989).

The EEOC argues that the claims in this case are timely under the "continuing violation" theory, an equitable exception to the timely filing requirement. *See West v. Philadelphia Electric Co.,* 45 F.3d 744, 754 (3d Cir.1995). This doctrine creates an equitable exception to the time limits for the filing of an administrative complaint when the unlawful behavior is deemed ongoing, and allows a plaintiff to allege otherwise time-barred acts. *Provencher v. CVS Pharmacy, Div. of Melville Corp.,* 145 F.3d 5, 14 (1st Cir.1998).

The purpose of the doctrine is to permit the inclusion of acts whose character as discriminatory acts was not apparent at the time they occurred. *Speer v. Rand McNally & Co.,* 123 F.3d 658, 663 (7th Cir.1997); *Martin v. Nannie & Newborns, Inc.,* 3 F.3d 1410, 1415 n. 6 (10th Cir.1993). There is no continuing violation unless it would have been unreasonable to expect the plaintiff to sue before the time period ran on the defendant's conduct. *Galloway v. General Motors Serv. Parts Operations,* 78 F.3d 1164, 1166 (7th Cir.1996). *See also Jackson v. Quanex Corp.,* 191 F.3d 647, 668 (6th Cir.1999) (continuing violation recognized where the plaintiff reasonably did not become aware of the need to vindicate her rights until after some time elapsed and she discovered she was the victim of a continuing policy or pattern of discrimination).

There are two categories of continuing violations recognized by the Sixth Circuit: a series of related discriminatory acts and an established policy of discrimination. *Alexander,* 177 F.3d at 408. The first category of continuing violations arises "where there is some evidence of present discriminatory activity giving rise to a claim of a continuing violation; that is where an employer continues presently to impose disparate work assignments or pay rates between similarly situated groups." *Dixon,* 928 F.2d at 216. *See also Haithcock v. Frank,* 958 F.2d 671, 677–678 (6th Cir.1992) (serial continuing violation occurs where there is an ongoing and interconnected series of discriminatory acts, one of which falls within the limitations period).

The plaintiff must show that the timely acts are linked to the untimely acts by similarity, repetition or continuity. *Provencher,* 145 F.3d at 15; *Webb v. Cardiothoracic Surgery Associates of North Texas, P.A.,* 139 F.3d 532, 537 (5th Cir.1998) (plaintiff must prove a series of related acts); *Koelsch v. Beltone Electronics Corp.,* 46 F.3d 705, 707 (7th Cir.1995) (plaintiff must prove sufficient nexus between time-barred and timely acts).

***11** In determining whether the alleged incidents of discrimination constitute a continuing violation, as opposed to being discrete, unrelated acts, it is necessary to look at: (1) subject matter, that is, whether the violations constitute the same type of discrimination; (2) frequency; and (3) permanence, that is, whether the nature of the violations should trigger an employee's awareness of the need to assert her rights and whether the consequences of the act would continue even in the absence of a continuing intent to discriminate. *Mascheroni v. Board of Regents of Univ. of Cal.,* 28 F.3d 1554, 1561 (10th Cir.1994); *Sabree v. United Broth. of Carpenters & Joiners Local No. 33,* 921 F.2d 396, 402 (1st Cir.1990) (citing *Berry v. Board of Supervisors of Louisiana State Univ.,* 715 F.2d 971 (5th Cir.1983)).

Courts have held that even where the plaintiff alleges a violation within the limitations period, there is no continuing violation if the plaintiff was or should have been aware that she was being unlawfully discriminated against while the earlier acts, now untimely, were taking place. *Provencher,* 145 F.3d at 14; *Webb,* 139 F.3d at 537 (no continuing violation where events outside period should have put plaintiff on notice that she was a victim of sexual harassment without necessity of learning additional facts); *Galloway,* 78 F.3d at 1166 (no continuing violation unless it would have been unreasonable to expect plaintiff to sue before the time period ran on defendant's conduct, such as where conduct would constitute or be recognized as harassment only in light of events which occurred later).

The second type of continuing violation, or systemic violation, arises "where there has occurred a longstanding and demonstrable policy of discrimination.... unrelated incidents of discrimination will not suffice to invoke this exception; rather there must be a continuing over-arching policy of discrimination." *Dixon,* 928 F.2d at 217. This type of violation occurs where a longstanding and continuous policy of discrimination is shown to exist in regard to general practices or policies such as hiring, promotion, training or compensation. *Provencher,* 145 F.3d at 14; *Haithcock,* 958 F.2d at 678. To prove the

existence of a systemic continuing violation, a plaintiff must show more than the existence of discriminatory treatment in her case. *Haithcock,* 958 F.2d at 679.

In order to invoke either of the "continuing violation" theories, the plaintiff must show that one of the discriminatory acts occurred within the limitations period, or that the discriminatory policy or practice continued into the limitations period. *Alexander,* 177 F.3d at 408. *See also Hull v. Cuyahoga Valley Joint Vocational Sch. Dist. Bd. of Ed.,* 926 F.2d 505, 510–11 (6th Cir.1991) (doctrine applies where plaintiff challenges unlawful practice that continues into limitations period); *Dixon,* 928 F.2d at 216 (at least one of the discriminatory acts in a series of related discriminatory acts must have occurred within the relevant limitations period).

***12** In this case, Ms. Stickle filed a charge of sex discrimination against the union with the Ohio Civil Rights Commission on December 20, 1996. According to this court's calculations, the three-hundred day period extends back to approximately February 24, 1996. Before discrimination claims based on acts which occurred prior to that date may be pursued, it must be shown that an act of discrimination which was part of a series of related discriminatory acts occurred within the three-hundred-day period, or that the policy or practice of discrimination upon which the claim is based extended into that period.

Here, the union's liability depends on proof that the union, through individuals acting in their capacity as union officers or agents, knowingly discriminated against Ms. Stickle, or knowingly caused or attempted to cause the city to discriminate against her by acquiescence in the city's discriminatory practices or otherwise. The union cannot be held liable for the discriminatory acts or policies of the city or city employees of which it had no knowledge. A discriminatory act or policy perpetrated by one individual or entity during the limitations period cannot serve as an anchor for the application of the continuing violations theory against an independent entity which has no knowledge of or involvement with that act or policy. *Cf. Allen v. Denver Public School Bd.,* 928 F .2d 978, 984 (10th Cir.1991) (alleged discriminatory nonpromotion involving a different school and different decision makers was unrelated to alleged pattern of continuing discrimination at another school where plaintiff was later employed and was untimely).

This court concludes that it is not enough for the EEOC to show merely that some act of sexual harassment committed by some person occurred during the limitations period, or that the city permitted some discriminatory policy or practice to continue into the limitations period. In order to establish a continuing violation as to the union, the act of discrimination occurring within the limitations period or the policy or practice extending into the limitations period must be one attributable to the union or, at the very least, one within the knowledge of the union.

The EEOC has identified various acts of alleged discrimination on the part of the union under § 2000e–2(c)(1), as well as evidence of acts purportedly showing that the union caused or attempted to cause the city to discriminate or acquiesced in discrimination by the city in violation of § 2000e–2(c)(3). These acts occurred over a span of eighteen years, since Ms. Stickle began her employment with the Newark Fire Department in 1979, and most occurred prior to the relevant limitations period.

The court will first examine the evidence of the alleged acts of discrimination relevant to each theory of union liability to determine whether a reasonable trier of fact could find that these acts constituted discrimination based on sex. The court will also analyze whether these acts occurred within the limitations period, and whether they can properly be considered related incidents for purposes of applying the continuing violations doctrine. The court will also discuss the issue of whether the union had notice of any acts of discrimination during the limitations period.

Acts of Discrimination Directly Committed by the Union—42 U.S.C. § 2000e–2(c)(1)

***13** The alleged acts of discrimination purportedly committed by the union in violation of § 2000e–2(c)(1), as gleaned from Ms. Stickle's declaration, include: 1) a vote in late 1979 to exclude Ms. Stickle and another female firefighter from the union, Stickle Decl. ¶ 5; 2) an October 20, 1992 letter from a union steward requesting that Ms. Stickle exchange sleeping quarters with Captain Walsh because of the proximity of Ms. Stickle's room to the men's rest room, Stickle Decl. ¶ 17; 3) the union's opposition to her grievance in the summer of 1993 concerning a modification in the summer uniform which the firefighters were required to pay for pursuant to an agreement with the city, Stickle Decl. ¶ 32; 4) the October, 1994 selection by the union of Don Brown as firefighter of the year when Ms. Stickle had been chosen as firefighter of the year that year by Chief Whittington, Stickle Decl. ¶ 41; 5) the December 29, 1994 negotiation between the city and the union of a memorandum of understanding providing for the reassignment of one assistant chief to the staff position of EMS Coordinator, Stickle Decl. ¶ 44–45; and 6) the opposition by the union of Ms. Stickle's grievance concerning an alleged inappropriate charge of overtime hours to her overtime card filed on July 24, 1995 and the union's subsequent failure to correct her overtime card when Chief Whittington found in her favor, Stickle Decl. ¶ 60.

1) Ms. Stickle testified in her deposition that in late 1979, the union initially voted not to admit her and another female firefighter into the union. Stickle Dep., p. 67.

Another woman firefighter was admitted. Stickle Dep., p. 70. She said she was informed by Roy Gay, a union officer, that the two women "were voted out of the union", that is, they were not allowed to become members. *Id.,* p. 68. He allegedly informed her of this after the vote. *Id.* He allegedly told the two women to reapply, and when they refused to do so, he stated he would send in the paperwork for the re-application himself. *Id.* p. 72. Ms. Stickle discovered that she had subsequently been admitted into the union when the union dues were taken from her paycheck several months later, whereas others who were admitted into the union at the time her admission was denied had union dues deducted. *Id.,* p. 73; Second Stickle Decl., ¶ 6.

Gerald Baumgartner, former union president, states in his affidavit that the union did not reject or delay Ms. Stickle's application for membership in the union and did not vote to deny membership to Ms. Stickle. Defendant's Memorandum Contra, Ex. A, Baumgartner Affid., ¶ 5. He testified that a vote would not be held to exclude a member, and that an employee would be admitted upon application if the employee was in good standing. Baumgartner Dep., p. 86.

The court concludes that Ms. Stickle's testimony is sufficient to create a genuine issue of fact as to whether the union discriminated against her by not immediately awarding her union membership.

***14** 2) The next item is the October 20, 1992 request for Ms. Stickle to change rooms due to the proximity of her room to the men's rest room. Ms. Stickle acknowledged that the towel rack and the first sink in the bathroom were visible from her room. Stickle Dep. 231. Ms. Stickle speculated that the request for the move was prompted by a dispute with a firefighter, the nature of which she did not recall. Stickle Dep., p. 230. However, there is no evidence that this request was motivated by a desire to harass Ms. Stickle due to her gender. She testified that the rooms were similar. Stickle Dep., p. 231. Indeed, she was never required to change rooms because a partition was eventually built around the rest room. The request to change rooms is insufficient to raise a reasonable inference of a motive to discriminate on the basis of sex.

3) The next alleged act of discrimination on the part of the union involved the union's opposition to Ms. Stickle's 1993 grievance concerning the new summer uniform shirts. Ms. Stickle did not like the new shirts, which resembled golf shirts, and objected to the fact that the firefighters would be required to pay for the new shirts, whereas the city was normally required to pay for uniforms. The rest of the union membership favored the new shirts, even if the firefighters were required to pay for them. Defendant's Memorandum Contra, Ex. B, Keefe Affid., ¶ 4. A union's duty of fair representation does not oblige it to take action on every grievance brought by every member. *York,* 95 F.3d at 956 (citing *Vaca v. Sipes,* 386 U.S. 171, 191–92 (1967)). The fact that the union decided to back the position of the vast majority of its members on the question of the new shirts rather than to support Ms. Stickle's grievance is not sufficient to raise a genuine issue of fact on whether this decision constituted discrimination against Ms. Stickle. These circumstances simply do not permit a reasonable inference that the union acted as it did because of Ms. Stickle's sex.

4) The next alleged act of discrimination is the fact that the union membership voted to name Don Brown as firefighter of the year in October of 1994. According to the affidavit of Gerald Baumgartner, former union president, Exhibit A to defendant's memorandum contra, ¶ 13, the union decided to elect its own firefighter of the year in 1994 because the chief had declined to name anyone for this honor the previous year. The selection of Don Brown as firefighter of the year was made before the chief announced his selection of Ms. Stickle as firefighter of the year. *Id.* Ms. Stickle admitted that there were other years when more than one person was named as firefighter of the year. Stickle Dep., pp. 387–388. No reasonable trier of fact could conclude from these circumstances that the union intended to discriminate against Ms. Stickle on the basis of her sex by choosing Don Brown as firefighter of the year. In fact, at one point in her deposition, Ms. Stickle stated that she did not feel that the selection of Don Brown was an act of gender discrimination. Stickle Dep., p. 389. Rather, she was upset by the fact that after the chief's selection of her as firefighter of the year, someone wrote on a blackboard, "CONGRATULATIONS DON BROWN THE *REAL FIREFIGHTER* OF THE YEAR!", which she considered a comment demeaning to her. *Id.,* p. 390. However, there is no evidence attributing this blackboard comment to the union.

***15** 5) The next alleged act of discrimination is the December, 1994 memorandum of understanding concerning the consolidation of four platoons into three and the transfer of one assistant chief to the staff position of EMS Coordinator. Ms. Stickle contended that this memorandum targeted her for transfer to the staff position, which was a noncommand position with different hours and fewer benefits, because she was acting as the EMS Coordinator at the time in addition to holding the position of assistant chief. However, the consolidation provided for in this memorandum involved the reassignment of many employees. Although the evidence shows that the union may have anticipated that Ms. Stickle might be transferred to the position, it does not explain why the union would make significant concessions involving many other employees for the purpose of engineering Ms. Stickle's reassignment to a staff position. Further, the memorandum of understanding did not specify who would be assigned to the staff position; rather, that decision was left entirely up to the

city, acting through Chief Whittington, a supporter of Ms. Stickle. Defendant's Motion for Summary Judgment, Ex. A, Keefe Affid., ¶ 7; Whittington Decl. Ms. Stickle was initially assigned to the staff position, but the chief reconsidered this decision, and a male assistant chief was transferred to the staff position. This memorandum of understanding is insufficient to create a genuine issue of fact on the question of discriminatory intent.

6) The next alleged act of discrimination by the union involved the union's failure to change Ms. Stickle's overtime card after she filed a grievance in 1995 and successfully challenged the charging of eighteen hours overtime to her card. The overtime cards are maintained by the union to assure that all employees have an equal opportunity to work overtime; thus, employees with fewer overtime hours credited on their cards will be called first for overtime assignments. Ms. Stickle alleged that the union had erroneously noted on her card that she had worked eighteen hours of overtime when in fact she had declined and had not worked those overtime assignments. There is no evidence that Ms. Stickle ever suffered any adverse consequences, such as the denial of subsequent overtime assignments, as a result of the failure to change her card immediately.

Gregory Keefe, the current union president, testified in his deposition that he agreed that the card should be changed, but he believed that only the fire chief had the authority to restore the hours. Keefe Dep., p. 468. There is no evidence that the union ever took a different position in regard to its ability to change the overtime cards of male firefighters. Ms. Stickle maintained that Chief Whittington's 1995 memoranda concerning her grievance were sufficient to direct the union to make the change, whereas Keefe stated he was willing to correct the card but needed the chief's approval. Stickle Dep., p. 426–430; Keefe Dep., p. 468. It is not clear when the card was changed, although Ms. Stickle thought the hours may have been credited to her after the entry of the consent decree in March of 1997 in the state court action against the city. The evidence may create a factual dispute as to who has the authority to change the card, but this factual dispute is insufficient to raise an inference of discrimination. There is no evidence that in this matter Ms. Stickle was treated differently than any similarly situated male firemen. The evidence would not permit a reasonable trier of fact to find that the failure of the union to change the cards was an act of discrimination.

***16** The above acts occurred prior to the commencement of the limitations period on February 24, 1996. The refusal to change the overtime card or the effects of that refusal may have continued into the limitations period. However, the fact that the effects of discrimination continue into the limitations period is not sufficient to establish a continuing violation. *Dixon,* 928 F.2d at 216. The union would have had knowledge as to whether the card had been changed. However, Ms. Stickle was also aware well before the commencement of the limitations period that union officer Tom O'Brien refused to change the card, claiming that he had no authority to do so. Stickle Dep., pp. 424–430. While the court has concluded that the evidence is insufficient to show that the failure to correct the card was an act of discrimination, Ms. Stickle believed otherwise. Ms. Stickle referred to this incident during her deposition as one example of where the union did not act in her interest, as reflected in her notes. Stickle Dep., p. 413. This was a discrete act of alleged discrimination, and Ms. Stickle should have filed a complaint concerning this incident at the time. In other words, this act satisfied the criteria for permanence, that is, the nature of the violations should have triggered Ms. Stickle's awareness of the need to assert her rights, since she knew the consequences of the act would continue even in the absence of a continuing intent to discriminate. *Mascheroni,* 28 F.3d at 1561.

Even assuming that the above acts constitute discrimination by the union under § 2000e–2(c)(1), they are insufficient to constitute a series of related discriminatory acts comprising a serial continuing violation. Rather, they are discrete, unrelated acts. *See Mascheroni,* 28 F.3d at 1561. The acts are diverse in nature, and for the most part involve different individuals acting under different circumstances. They are not linked by similarity, repetition or continuity. *Provencher,* 145 F.3d at 15. The acts are sporadic and occurred over a period of more than fifteen years.

Ms. Stickle's careful documentation of all of these incidents as they happened demonstrates that she believed, following each of these incidents, that she was the victim of discrimination, and that she was aware of her need to assert her rights. *See Sabree,* 921 F.2d at 402 (plaintiff who believed, at every turn, that he was being discriminated against had obligation to file promptly or lose his claim). Ms. Stickle stated she knew that she could have filed a charge against the union when she filed her discrimination charge against the city on August 18, 1995, but she decided not to file a charge against the union at that time after consulting with her attorneys. Stickle Dep., p. 498. This case is not one which would serve the purpose of the continuing violations doctrine, since the above acts appeared to Ms. Stickle as being further examples of discrimination on the part of the union at the time they occurred, and it was reasonable to expect Ms. Stickle to sue before the limitations period expired. *See Speer,* 123 F.3d at 663; *Galloway,* 78 F.3d at 1166.

Union Action Causing or Attempting to Cause the City to Discriminate—42 U.S.C. § 2000e–2(c)(3)

***17** As support for the claim that the union caused or attempted to cause the city to discriminate against Ms.

Stickle in violation of § 2000e–2(c)(3), the EEOC, in its motion for summary judgment, p. 49, lists various events, including: 1) the alleged efforts of Gerald Baumgartner, then union president, to have Mary Beth Wishon, the city's personnel director, investigate Ms. Stickle's use of overtime or compensatory time in 1992, Stickle Dep., p. 328, Stickle Decl. ¶ 13; 2) the investigation by a subordinate officer, Captain Hurst, of Ms. Stickle's handling of the April 14, 1996 Wilson Garden fire, Stickle Decl., ¶ 64; 3) the union's efforts to secure the removal from the station of surveillance cameras which were ordered installed as part of the consent decree entered on March 27, 1997 in Ms. Stickle's state court action against the city; 4) the investigation into Ms. Stickle's alleged insubordination in refusing to attend a meeting with Assistant Chief Hurst and Firefighter Powell concerning her filing of a report on October 29, 1996 concerning a break-in at the assistant chief's office at the fire station, Stickle Decl., ¶ 69; 5) the December 29, 1994 negotiation between the city and the union of a memorandum of understanding providing for the reassignment of one assistant chief to the staff position of EMS Coordinator referred to above, Stickle Decl. ¶ 44–45; 6) the union's negotiation of a provision in the 1998 collective bargaining agreement stating that the union would share equally with the city the responsibility of applying the nondiscrimination provision of the agreement "provided that a grievance is filed alleging a violation of this section", Defendant's Motion for Summary Judgment, Ex. A–2; and 7) the fact that Captain Hurst, a union officer, called on April 25, 1996 to verify her attendance at a conference in Dublin, Ohio, Stickle Decl., ¶ 66.

1) The first of these incidents involved the alleged request of then union president Baumgartner to Mary Beth Wishon, the city's personnel director, to investigate Ms. Stickle's use of overtime and compensatory time. Ms. Stickle testified at her deposition that Ms. Wishon investigated her use of compensatory time at Baumgartner's request, but she does not explain the factual basis for her opinion that the investigation was at Baumgartner's request. Stickle Dep., p. 328. Baumgartner denies this allegation. Defendant's Memorandum Contra, Ex. A, Baumgartner Affid., ¶ 11. Ms. Wishon stated that she did not recall who requested the investigation, but that the purpose of the investigation was cutting back on the amount of compensatory time, and that all the assistant chiefs were investigated. Plaintiff's Memorandum Contra, Attach. 2–3E, Wishon Affid.

A letter from Thomas G. St. Pierre, Newark Safety Director, dated August 21, 1992, states that Ms. Wishon investigated Ms. Stickle's use of overtime by conducting a review of Ms. Stickle's records in order to dispel "unmerited accusations" but does not indicate the source of these accusations. Stickle Decl., Ex. 12. The only support for the belief that the union was responsible for requesting the investigation is the speculative opinion of Thomas St. Pierre, former safety director, whose only stated basis for his opinion was that Ms. Wishon had strong union ties and that Baumgartner was in her office nearly every day. St. Pierre Decl., ¶ 15. The letter states that "[Ms. Wishon's] review of the records proved the lack of merit and the recklessness of such accusations." *Id.* There is no evidence that Ms. Stickle suffered any adverse consequences as a result of this investigation. The evidence here is insufficient to create a genuine issue as to whether the union or a union officer was involved in the request for an investigation, or that discriminatory intent was the motivation behind any such request.

***18** 2) As to the investigation of Ms. Stickle by Captain Hurst concerning her handling of the Wilson Garden fire, there is no evidence that Captain Hurst was acting in his capacity as a union officer at the time. James Hurst stated in his affidavit that any investigation of Ms. Stickle was done in his role as an officer of the fire department, not in his role as a union officer. Defendant's Memorandum Contra, Ex. C, Hurst Affid., ¶ 3.

There is also no evidence that the investigation was motivated by an intent to discriminate against Ms. Stickle because of her sex, as opposed to being the result of bona fide complaints concerning her performance. Hurst denied that the investigation was done because of Ms. Stickle's gender. *Id.*

Ms. Stickle objected to the investigation on the basis that it was inappropriate for a subordinate officer to investigate an assistant chief. At ¶ 10 of her second declaration, she also expresses the opinion that she had engaged in no conduct on that occasion that would justify an inquiry, although no evidence has been cited which would support her conclusory opinion that the investigation was frivolous.

Hurst states in his affidavit that he was ordered by the Chief of the Newark Fire Department to investigate an incident involving Ms. Stickle, and that it was not unusual for an inferior officer to investigate a superior officer. Defendant's Memorandum Contra, Ex. C, Hurst Affid., ¶ 3. Ms. Stickle and former chief Whittington state in their second declarations that they had no recollection of a subordinate officer or assistant chief investigating an assistant chief. Second Stickle Decl., ¶ 5; Second Whittington Decl., ¶ 2. However, this does not establish that it was improper for Chief McKenna to order Hurst to conduct the investigation. There is no evidence that there was any departmental regulation which prohibited a subordinate officer from investigating a superior officer at the request of the chief.

Baumgartner, a former union president and an individual who would presumably be familiar with the contents of the collective bargaining agreement, stated in his affidavit

that it would be appropriate for a subordinate officer to investigate an assistant chief if ordered to do so. Defendant's Memorandum Contra, Ex. A, Baumgartner Affid., ¶ 15. In a memorandum dated June 6, 1996 addressed to Chief McKenna, Safety Director Robert White noted that Hurst "was a logical choice, he being a staff officer who has previously conducted investigations." Plaintiff's Memorandum Contra, Attach. 2–17. White concluded that Ms. Stickle used bad judgment in not sending additional units, but agreed with her viewpoint that not all units should be dispatched, thereby leaving the city unprotected. *Id.* The memorandum simply states that this "was a learning experience" and makes no reference to discipline of any kind.

There is no evidence that Hurst was unfair or did anything inappropriate in his handling of the investigation of the Wilson Garden fire, that his findings were adverse to Ms. Stickle, or that Ms. Stickle was disciplined as a result of this investigation. There is no evidence that in being investigated by a subordinate officer, Ms. Stickle was treated differently than similarly situated male officers. The evidence concerning this investigation is insufficient to raise a genuine issue of fact on the question of whether it was motivated by sex discrimination.

***19** 3) Based upon the evidence, the union's efforts to secure the removal of surveillance cameras would not support a finding by a jury that the union did so with the intent to cause or attempt to cause the city to discriminate against Ms. Stickle. Keefe testified in his deposition that the cameras were installed as a result of the consent order entered in Ms. Stickle's civil action against the city, which directed that the cameras remain in place for one year. Keefe Dep., p. 312. According to Keefe, after the year had expired, the union requested that the cameras be removed since no incidents had been recorded. *Id.* After another six months, the cameras were removed. *Id.* They were reinstalled in December of 1998 after an incident in which a wife of one of the firefighters came to the station and had some type of confrontation with Ms. Stickle. *Id.,* pp. 315–316.

The union's request to remove the cameras occurred after the year had expired. Thus, the union was not trying to interfere with the enforcement of the consent decree. The presence of surveillance cameras in the station presents obvious privacy concerns. A jury could not reasonably infer that the request to remove the cameras was motivated by a desire to promote sex discrimination as opposed to expressing a legitimate concern over balancing the privacy of the firefighters against the effectiveness of the cameras.

4) The circumstances which lead to a charge of insubordination against Ms. Stickle began with a break-in at the assistant chief's office when Ms. Stickle, in her report to the police, named two firefighters as being present at the station when she discovered the break-in. Union President Baumgartner complained to Safety Director Robert White that Ms. Stickle had named a union member, William Powell, in the report. Stickle Decl., ¶ 69. Ms. Stickle refused to attend a meeting with Assistant Chief Hurst and William Powell unless her attorney was present at the meeting. Stickle Dep., p. 519, 525–526. Hurst complained to White that this constituted insubordination by Ms. Stickle. Stickle Dep., p. 518.

In a memorandum dated November 7, 1996, Robert White stated that Chief McKenna asked Assistant Chief Hurst to schedule a meeting with Ms. Stickle and Mr. Powell to resolve the problem. Plaintiff's Memorandum Contra, Attach. 2–14. Mr. White informed Ms. Stickle that this was not an "investigation", and that her refusal to attend the meeting "has done nothing except create more distance between you and your unit." In a memorandum to Ms. Stickle dated November 21, 1996, White scheduled a meeting on November 25, 1996 to discuss the matter, but denied Ms. Stickle's request to have counsel present on the basis that the meeting was not a disciplinary hearing or an investigation, but rather "an internal matter to resolve issues." *Id.* After the November 25th meeting, Ms. Stickle was charged with insubordination due to her refusal to attend the meeting with Hurst. On January 3, 1997, White sent a memorandum to Ms. Stickle indicating that while she was not guilty of insubordination, she did violate Division of Fire Rules and Regulation 202.06, Disagreement with Order, and was given a written warning. Plaintiff's Memorandum Contra, Attach. 2–18. According to the EEOC's reply memorandum, p. 12, the discipline imposed as a result of the alleged insubordination was subsequently dropped.

***20** Ms. Stickle did not deny that she refused to attend the meeting or that she ignored an order. She acknowledged that she had requested to have an attorney present at the meeting before she would attend. Stickle Dep., p. 519. There is no evidence that male firefighters ignored similar orders but were not charged with disciplinary violations, or that male firefighters were permitted to have counsel present during a meeting scheduled to discuss internal affairs rather than disciplinary matters. The evidence is insufficient to create a genuine issue of fact as to whether the officials involved were motivated by a gender bias or to demonstrate that the investigation into her alleged refusal to obey an order was a pretext for sex discrimination.

There is also insufficient evidence to indicate that Hurst was acting in his capacity of union officer as opposed to his official capacity as an assistant chief in submitting the allegation to White. Hurst stated in his affidavit that any investigation of Ms. Stickle was done in his role as an officer of the fire department, not in his role as a union

officer. Defendant's Memorandum Contra, Ex. C, Hurst Affid., ¶ 3. Therefore, it cannot form the basis for a continuing violation on the part of the union.

5) The memorandum of understanding concerning the transfer of an assistant chief to a staff position has been discussed in connection with the alleged violations of § 2000e–2(c)(1) by the union. For the same reasons stated *supra,* this act does not raise a genuine issue of fact as to whether the union caused or attempted to cause the city to discriminate against Ms. Stickle under § 2000e–2(c)(3).

6) The next alleged act causing or attempting to cause the city to discriminate involves the negotiation of a new provision which was included in the collective bargaining agreement in 1998. This provision states that the union shares equally with the employer the responsibility for applying the nondiscrimination provision "provided that a grievance is filed alleging a violation of this section." Defendant's Motion for Summary Judgment, Ex. A–2, 1998 Contract, § 3.1.

As noted above, there are court decisions which support this position. *See Dominguez,* 674 F.2d at 733 (no union liability where employee did nothing to advise union of employer's allegedly discriminatory practices); *Badlam,* 46 F.Supp.2d at 201 (where employee filed no written grievance or did not otherwise request the union to pursue grievance in regard to allegedly discriminatory conduct, union has no obligation to take further action on behalf of the employee). The EEOC has produced no authority to support the view that such a provision would be illegal. Considering the unsettled state of the law as to whether a union has an affirmative duty to pursue discrimination claims on behalf of an employee who files no grievance, the court cannot say as a matter of law that the union would be precluded under Title VII from including a requirement in the collective bargaining agreement that the union be notified through the filing of a grievance of alleged discriminatory conduct before its duty to investigate is triggered, or that the inclusion of such a provision in the agreement constitutes discrimination.

***21** The court also notes that the union was also successful in including in § 3.1 express language authorizing the union to investigate charges of discrimination: "If such a grievance is filed, the Union may investigate the allegations raised in the grievance and may recommend that the employer take disciplinary action or other appropriate steps to remedy the discrimination." While there is some disagreement in the record as to whether the union would have had the authority to investigate charges of discrimination prior to this amendment of the collective bargaining agreement, the addition of this language clarified the right of the union to do so, thereby benefitting discrimination victims.

7) The next alleged act of discrimination is the fact that Hurst phoned to check on whether the plaintiff attended a conference in Dublin, Ohio. Again, Ms. Stickle objected to this because she felt it was inappropriate for a subordinate officer to be investigating her activities, and because she felt that she had done nothing to warrant investigation. As this court indicated previously, there is insufficient evidence to indicate that it was inappropriate for this inquiry to be conducted by a subordinate officer, and there is no evidence that Hurst's inquiries resulted in the filing of any charges against Ms. Stickle or the imposition of any discipline. This is insufficient to establish that Hurst's inquiry was improper or motivated by sex discrimination.

Acts 1) and 5) alleged in support of the § 2000e–2(c)(3) claim, those being the Wishon investigation of Ms. Stickle's overtime use and the memorandum of understanding concerning the EMS position, occurred prior to the limitations period. Alleged acts 2), 4) and 7), those being the investigations of Ms. Stickle concerning her handling of the Wilson Garden fire, her alleged insubordination in connection with the investigation into the break-in of the assistant chief's office, and her attendance at the conference, occurred during the limitations period. Alleged acts 3) and 6), those being the union's request to remove the surveillance cameras and the amendment of the collective bargaining agreement to require the filing of a discrimination grievance, occurred after the filing of Ms. Stickle's charge against the union.

In regard to the acts which occurred within the limitations period, the union would be deemed to have knowledge of these events because a union officer was involved in them. However, the court has found the evidence insufficient to create a genuine issue of fact as to whether such acts constituted sex discrimination, which precludes their being considered as an act of discrimination within the limitations period.

Even assuming that those acts did constitute discrimination by the union, they are insufficient to constitute a series of discriminatory acts related to acts outside the limitations period so as to comprise a serial continuing violation. Rather, they are discrete, unrelated acts. *See Mascheroni,* 28 F.3d at 1561. The acts are diverse in nature, and involve different circumstances. Further, Ms. Stickle believed by this time, as shown by her charge of discrimination filed against the city on August 18, 1995, that she was the victim of discrimination, and that she was aware of her need to assert her rights. *See Sabree,* 921 F.2d at 402 (plaintiff who believed, at every turn, that he was being discriminated against had obligation to file promptly or lose his claim). Ms. Stickle knew she could have filed a charge against the union when she filed her discrimination charge against the city on August 18, 1995, but she decided not to file a charge against the union at that time after consulting with her attorneys. Stickle Dep., p. 498.

The application of the continuing violations doctrine is not appropriate in this case.

***22** The alleged acts of discrimination which occurred after the filing of Ms. Stickle's charge were within the union's knowledge. However, the court has found insufficient evidence to support the claim that these acts constituted discrimination. In addition, the EEOC has offered no authority for the proposition that an act of discrimination occurring long after the relevant limitations period may be used to revive a claim based on a previous untimely charge, nor is there any evidence that these later events were ever the subject of the EEOC's investigation or conciliation procedures. *See Ang v. Procter & Gamble Co.,* 932 F.2d 540, 545 (6th Cir.1991)(judicial complaint must be limited to scope of EEOC investigation reasonably expected to grow out of charge of discrimination).

The court concludes that neither the acts cited which occurred during the limitations period, nor the acts which occurred after the filing of Ms. Stickle's charge are sufficient to constitute an act of discrimination within the limitations period sufficient to support the application of the continuing violations theory to the § 2000e–2(c)(3) claims.

Union Liability Under 42 U.S.C. § 2000e–2(c)(3) for Mere Acquiescence or Failure to Act

The EEOC contends that the union had an obligation to investigate whether Ms. Stickle was being subjected to a hostile work environment even in the absence of a grievance or other complaint to the union. Assuming *arguendo* that the union had an obligation to do so, and that the failure to do so constituted a policy or practice of acquiescence in the discriminatory conduct, it must be shown that the union knew of the harassment and decided not to investigate. *York,* 95 F.3d at 956–57. To establish a continuing violation, it must be shown that this policy or practice continued into the limitations period. *Hull,* 926 F.2d at 510–11.

The only evidence of any arguable knowledge on the part of the union of alleged discrimination during the limitations period is the evidence that Mark Brown, an officer of the union, became aware sometime in 1996 of Ms. Stickle's request for separate shower facilities for women. Brown Dep., p. 174. Ms. Stickle originally sent a memorandum to Chief Whittington containing this request on July 24, 1995. Stickle Decl., Ex. 62. Safety Director Robert White responded on August 1, 1995 that he agreed that the request was appropriate, but he could not predict when an expansion for the station would be started and invited Ms. Stickle to obtain cost estimates for any temporary facility that might be feasible. Stickle Decl., Ex. 63. Ms. Stickle sent another memorandum dated August 5, 1995 to the chief on this subject complaining about the proposed location for a temporary shower. Stickle Decl., ¶ 64. A letter of October 28, 1996 sent by Chief McKenna to Ms. Stickle states that no funds were allocated for the shower project that year, that construction bids had been submitted but were rejected as being too high, that new bids were to be submitted in November, and that in the meantime, a door had been moved to a location which allowed it to be locked to ensure privacy. Plaintiff's Memorandum Contra, Attach. 2–11. A shower was eventually installed at some time in 1997. Stickle Decl., ¶ 57. Thus the initial correspondence occurred in 1995, outside the limitations period, but the shower was not actually constructed until after the limitations period.

***23** There is no evidence that any of this correspondence was sent to the union at the time, or that Ms. Stickle ever requested the union to pursue the matter for her. According to Baumgartner, the union supported Ms. Stickle's request for separate shower facilities. Defendant's Memorandum Contra, Ex. A, Baumgartner Affid., ¶ 10. There is no evidence that the delay in providing the separate shower was due to anything other than lack of current funding or a delay in a station expansion project. During this period of shared facilities, the male firefighters were also deprived of gender-specific shower facilities. In light of all the evidence, a reasonable trier of fact could not conclude that the failure of the union in 1996 to second Ms. Stickle's request for separate shower facilities constitutes sex discrimination under Title VII. Further, Ms. Stickle was aware in 1995 that there might be some delay in providing separate shower facilities. She should have pursued her claim of discrimination at that time.

In this case, there is evidence sufficient to create a genuine issue of fact as to whether union officers were aware of alleged acts of sexual harassment committed prior to the three-hundred-day limitations period. However, while there is evidence of acts of sexual harassment which occurred during the limitations period, there is no evidence, other than that concerning the shower request discussed above, that the union had knowledge of any acts of discrimination or harassment which occurred during the limitations period.

There is no evidence that the union officers who would have been in a position to file a grievance on Ms. Stickle's behalf were aware of any acts of harassment after the filing by Ms. Stickle on August 18, 1995 of a charge of discrimination against the city, or that they had any reason to believe that any sexual harassment occurred after that date. Absent evidence that the union officers had heard reports of continuing harassment or had any reason to believe that the harassment did not cease, the union officers could have concluded that the filing of the charge with the Ohio Civil Rights Commission prompted the city

to evaluate its own policies and to vigorously enforce the city ordinance which prohibited sexual harassment.

The EEOC, at page 11–12 of its reply memorandum, notes various acts as evidence of the union's intent not to support or represent Ms. Stickle: 1) a complaint by the union in November of 1995 that Ms. Stickle was near the men's rest room when she was just adjusting a thermostat, Second Stickle Decl. ¶ 1; 2) union president Keefe's inquiry in 1997 as to why the discipline previously imposed on Ms. Stickle for insubordination in the office break-in incident investigation had not been carried out; 3) the union's filing of a grievance against the city in May of 1997 contending that all firefighters should receive the six weeks leave given to Ms. Stickle as part of her settlement with the city; and 4) the union's opposition in September of 1997 to an absolute ban on pornography in the fire stations.

***24** 1) The EEOC claims that a complaint in November of 1995 involving Ms. Stickle being near the men's rest room when she was merely adjusting a thermostat is further evidence of the union's lack of support of Ms. Stickle. The minutes of the union labor-management committee for November 9, 1995 include a notation concerning a complaint that a door into or next to the men's rest room was opened by Ms. Stickle while male firefighters were using the facility. O'Brien Dep., pp. 103–104. There is no evidence that this matter was ever investigated or pursued outside the forum of the meeting. If Ms. Stickle had observed a male firefighter opening a door to the women's rest room while it was in use, she probably would have complained. The evidence concerning this incident is insufficient to create a genuine issue as to whether sex discrimination was the motivation behind the complaint discussed at the meeting.

2) The EEOC also notes union president Keefe's inquiry in 1997 as to why the discipline previously imposed on Ms. Stickle for insubordination in the office break-in incident investigation had not been carried out. Again, Ms. Stickle did not contest the fact that she did not attend the meeting as ordered, and discipline was imposed by White, although, according to the EEOC, it was never carried out. Keefe's simple inquiry as to the reason for this is not sufficient to constitute an act of sex discrimination.

3) The EEOC cites as further evidence of discriminatory intent the union's filing of a grievance against the city in May of 1997 contending that all firefighters should receive the six weeks leave given to Ms. Stickle as part of her settlement with the city. President Keefe testified that it was "our belief that this was negotiated without going through the—the Negotiating Committee which represents all employees in the Bargaining Unit. We felt that, since it was granted to one, it should be granted to all." Keefe Dep., p 414. Keefe further testified that the grievance was denied, and that he did not expect it to be granted because "it was a big-ticket item." *Id.* at 415. The record contains insufficient facts to establish that the grievance was totally frivolous under the terms of the collective bargaining agreement. The filing of the grievance did not affect the award of six weeks leave to Ms. Stickle. This evidence falls short of demonstrating an intent to discriminate against Ms. Stickle by failing to support her.

4) The EEOC also relies on the union's opposition in September of 1997 to an absolute ban on pornography in the fire stations. At least one federal district court has agreed with the union's position. *See Johnson v. County of Los Angeles Fire Department,* 865 F.Supp. 1430 (C.D.Cal.1994)(holding that absolute ban on pornography in fire station violated First Amendment rights of firefighters). The EEOC cites no authority to the contrary. The fact that the union sought to assert its members' constitutional rights in opposing such an absolute ban cannot be construed as sex discrimination.

***25** None of the above acts supports the contention of the EEOC that the union was unwilling to pursue a discrimination grievance on Ms. Stickle's behalf if one had been filed. There is evidence that the union has always been willing to represent Ms. Stickle fairly in respect to grievances. Defendant's Memorandum Contra, Ex. B, Keefe Affid., ¶ 6. Since Ms. Stickle never filed a grievance alleging discrimination, it is pure speculation that the union would have refused to assist her in such a grievance. These acts are insufficient to establish that the union breached any duty of fair representation which it owed to Ms. Stickle. Further, none of these acts establishes any knowledge on the part of the union of acts of discrimination occurring within the limitations period, or any discriminatory policy or practice of the city or the union extending into the limitations period.

The EEOC argues that the defendant union should have acted after it received the December 10, 1997 Colley investigative report ordered as part of the consent decree in Ms. Stickle's state court action. *See* Pudvan Decl., Attach. B. This report was received by the defendant long after the charge was filed against it by Ms. Stickle on December 20, 1996, and there is no evidence that the EEOC ever investigated the defendant's failure to act following the receipt of this report. The union's receipt of the report in December of 1997 cannot be used to retroactively establish knowledge on the part of the union during the limitations period of acts of discrimination which allegedly occurred during that time.

The report addresses alleged acts of harassment which occurred from 1992 through 1995, outside the limitations period. The report contains a brief reference, without further discussion, to pornographic materials allegedly found by Ms. Stickle in a west station rest room on

September 6, 1997. The nature of these materials and the circumstances of their discovery are not reflected in the report. This reference is insufficient to establish the finding of these materials as an event contributing to a hostile work environment. The report also noted the alleged failure of an officer to provide her with information at a fire scene on October 21, 1997. Section J of the report indicates that Chief McKenna was in the process of conducting an investigation into the incident. While the author of the report speculates that the alleged conduct of the officer may have been in retaliation for Ms. Stickle's complaints of harassment, the results of the chief's investigation were still pending.

Both these instances occurred long after the limitations period in this case, and are insufficient to indicate that a hostile work environment continued at the station or to put the union on notice during the limitations period that a hostile work environment still existed. There is also no evidence that a separate union investigation into either of these incidents would have been appropriate or helpful to Ms. Stickle under the circumstances, particularly since Ms. Stickle never requested the union's assistance in these matters.

***26** After the filing of Ms. Stickle's charge, which received publicity in the local newspaper, then President Baumgartner attempted to find out information about her claims and was told her claims were in the hands of her attorneys. Defendant's Memorandum Contra, Ex. A, Baumgartner Affid., ¶ 7. The union concluded that Ms. Stickle wished to pursue her claims through the administrative process rather than under the contract. Defendant's Memorandum Contra, Ex. B., Keefe Affid., ¶ 6. The EEOC contends that the failure to advance Ms. Stickle's claims on the basis that a Title VII charge had been filed constitutes discrimination. However, this is not a case where the evidence shows that the union refused to process a grievance in retaliation for the filing of a Title VII charge. There is no evidence that Ms. Stickle wanted to pursue a grievance through the union procedure but was denied this opportunity. In this case, the union simply concluded from what it was told that Ms. Stickle did not want the union's help in this matter, a conclusion reinforced by the fact that Ms. Stickle had never filed a formal or informal complaint alleging sexual harassment with the union. The court further notes that there are no allegations of retaliation in the complaint in this case.

The EEOC further argues that the union had an obligation to protect Ms. Stickle from sexual harassment through the collective bargaining process. The union joined with the city in adopting a nondiscrimination policy, codified in a city ordinance in 1992. Defendant's Motion for Summary Judgment, Ex. A, Keefe Affid., ¶ 11. The collective bargaining agreements negotiated by the union contained a nondiscrimination provision. *See* Defendant's Motion for Summary Judgment, Ex. A–2. The contract was modified in 1998 to include a specific provision authorizing the union to investigate allegations of discrimination raised by a grievance. *Id.,* 1998 Contract, § 3.1. No provision of the collective bargaining agreements has been identified as having a discriminatory effect on Ms. Stickle. The EEOC does not clearly state what the union should have bargained for but failed to bargain for.

The EEOC has offered no authorities in support of the proposition that the negotiating table, rather than the Title VII administrative process or the courts, was the proper forum for litigating or resolving Ms. Stickle's particular individual claims against the city. Such a result might potentially put a union in the position of having to plan its negotiations around the conflicting interests of multiple employees with diverse discrimination claims. Provisions prohibiting discrimination were already contained in the collective bargaining agreements, and there is no evidence which would support the theory that the failure of the union to bargain for unspecified additional provisions benefitting Ms. Stickle constituted a continuing policy which violated Title VII.

Since the evidence does not support a finding that any union officer had knowledge of any acts of sex harassment or discrimination during the limitations period, there is no basis for a finding that any union policy or practice of failing to assert discrimination claims on behalf of its members in the face of discriminatory practices continued into the limitations period so as to form a basis for the application of the continuing violation theory against the union.

***27** The court has carefully reviewed the extensive arguments and evidentiary materials submitted in this case, including the memoranda of the parties and the deposition of Ms. Stickle, segments of depositions of other witnesses, declarations, affidavits and other documents submitted in support of the memoranda. Having done so, the court concludes that the evidence is insufficient to demonstrate the existence of a genuine issue of material fact that an act of discrimination attributable to the union was committed within the limitations period, or that the union caused or attempted to cause the city to discriminate against Ms. Stickle during that period.

The court concludes that Ms. Stickle's untimely charge of discrimination against the union is not subject to equitable tolling under the continuing violation theory. The evidence is insufficient to show that an act of discrimination in violation of § 2000e-(2)(c)(1) or (3) occurred during the limitations period which was connected to related acts occurring outside the limitations period or which constituted a discriminatory policy or practice continuing into the limitations period. In addition, applying the theory in this case would be contrary to its purpose, since Ms. Stickle knew she could

have filed a charge against the union when she filed her discrimination charge against the city on August 18, 1995, long before the limitations period, but she decided not to file a charge against the union at that time after consulting with her attorneys. Stickle Dep., p. 498.

In conclusion, the plaintiff's motion for summary judgment is denied. For the foregoing reasons, the defendant's motion for summary judgment is granted. The clerk will enter final judgment in favor of the defendant at plaintiff's costs.

Parallel Citations

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