UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

EDMUND MICHALOWSKI,	)	
	)	14-cv-00899
Plaintiff,	)	
	)	Hon. Joan Lefkow
DAN RUTHERFORD, individually, and	)	
KYLE HAM, individually,	)	
	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF DAN RUTHERFORD'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT AT LAW

On February 10, 2014, Plaintiff Edmund Michalowski initiated this lawsuit by filing a Complaint against Defendants Dan Rutherford ("Rutherford" or the "Treasurer"), the current Treasurer for the State of Illinois who was then a Republican candidate for Illinois Governor, and his Chief of Staff Kyle Ham ("Ham"), in which Michalowski claims that Rutherford and Ham engaged in conduct that violated Michalowski's First and Fourteenth Amendment rights. At the outset, the Treasurer denies that the conduct Michalowski described in the Complaint occurred as set forth therein or that the Treasurer violated Michalowski's rights, and observes that this lawsuit was filed on the eve of the Republican gubernatorial primary election. Setting aside the suspect timing of this lawsuit and the motive behind it, Michalowski's claims against Rutherford must be dismissed with prejudice because they fail as a matter of law. ***First***, Michalowski does not allege a plausible claim that he either exercised a recognized First Amendment right or that Rutherford discriminated against him for doing so. ***Second***, Michalowski does not allege any facts demonstrating that he was discriminated against because of his gender or sexually harassed in violation of the Fourteenth Amendment. ***Third***, Rutherford is entitled to qualified immunity because the Complaint does not show that he violated any of Michalowski's "clearly established" constitutional rights.

PLAINTIFF'S ALLEGATIONS[1]

A. Political Retaliation (Count I)

Michalowski alleges that he worked for the Office of the Illinois State Treasurer (the "Treasurer's Office") from January 2011 until he "was forced to resign" in early 2014. (¶¶10, 69.) He states he joined the office as Deputy Director of Community Affairs and was promoted to Director of Community Affairs in March 2011. (¶¶10, 15.) He further claims that his responsibilities increased in December 2011 to include managing the marketing department. (¶¶24-25.) Rutherford operated the "Dan Rutherford Campaign Committee," and also served as the state chairman for the Mitt Romney presidential campaign. (¶¶17-18.) Michalowski alleges that both Defendants forced him to engage in political activity for the Rutherford and Romney campaigns, which he contends was outside of his job duties as Director of Community Affairs. (¶¶19-23.)

Michalowski claims he was promised a raise on several occasions but never received one. (¶¶16, 26-27.) He further alleges that employees who were active in the Rutherford campaign for Governor of Illinois "received high raises and promotions" (¶33); however, he does not allege that he was entitled to the same raises or promotions or that any of these employees were similarly situated to him. Michalowski alleges that in 2012, Ham informed him that he would receive a promotion to either Deputy Chief of Staff or General Counsel of the Treasurer's Office. (¶27.) While he alleges that he never received a "promotion" (¶32), he does not allege that he applied, or otherwise requested that he even be considered, for either position, nor does he allege that the Treasurer ever discussed with him anything concerning a "promotion" or promised him one.

Michalowski alleges that in July 2012, Rutherford asked him about the status of his political work, whether he was ready "to go through $ projections," and asked another person to help

[1] The Complaint is cited herein as (¶__.) On a motion to dismiss, the Court must treat factual allegations contained in the Complaint as true but need not take conclusory allegations into account. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

Michalowski "nail down some of these fundraising attempts. . . ." (¶¶28-30.) He alleges that the Treasurer "continually berated" him for not "getting the job done" (¶31), and claims that on one occasion in 2013, Rutherford screamed to another employee that Michalowski was "'useless to him' because he had not helped him sufficiently politically." (¶34.) Michalowski does not allege that he ever publicly or privately objected to doing the political work, nor does he assert that he raised any concerns that the political work was interfering with his community relations or marketing work for the Treasurer's Office. Instead, he alleges in conclusory fashion that, "[b]y not supporting Defendants' political activity to Defendants' apparent satisfaction, Plaintiff was engaged in the exercise of First Amendment rights." (¶73.)

Without alleging that Rutherford offered or promised Michalowski a raise or a promotion, or knew about or committed any retaliatory conduct, Michalowski nevertheless asserts the conclusion that "Defendants" unlawfully retaliated against him for exercising his First Amendment rights by failing to promote him, failing to give him a promised raise, belittling him in front of colleagues, failing to investigate his claims, and treating him differently from other employees. (¶74.)

B. Gender Discrimination, Sexual Harassment, and Retaliation (Count II)

In Count II, Michalowski claims that Rutherford discriminated against him because of his gender, retaliated against him for complaining, and created a hostile work environment through certain specific incidents that subjected Michalowski to "unwarranted scrutiny and criticism." (¶35.) Michalowski alleges that he raised some incidents with Ham verbally (¶¶40-41, 49, 55), but he does not allege that he reported any alleged incidents to the Treasurer's Office Director of Human Resources, EEO Officer, or the Office of Executive Inspector General.

Michalowski identifies certain incidents he contends occurred over a span of three years, nearly all of which occurred months apart from any other alleged incident:

- April 2, 2011 – Michalowski alleges he was supposed to stay overnight in the guest room

at Rutherford's residence, when Rutherford purportedly "grabbed at Plaintiff's genital area" before Michalowski "forced the Treasurer off of him" and then immediately left. (¶¶36-39.)

- July 24, 2011 – Michalowski alleges that another employee sent Michalowski a text stating that the Treasurer had asked Michalowski to wear a tank top. (¶42) Michalowski does not provide the context for that message, nor does not say he reported this incident to the Treasurer, Ham or anyone else.

- August 2011 – Michalowski alleges that Rutherford saw Michalowski in a bar, complained that he was not talking to him, and pulled him aside and said "if you go home with me, you can have anything you want in the office." (¶¶43-47.)

- August 20, 2012 – Michalowski alleges that Rutherford approached him at a reception and asked him to go up to his hotel room. Michalowski contends that after he refused, Rutherford became angry and said "you just said no to the Treasurer." (¶¶52-54.)

- December 4, 2013 – Michalowski alleges that Rutherford approached him at a party, rubbed his shoulders, and told him "you need a full body massage." (¶56.) He also contends that later that week, Rutherford told another employee that he could see his chest through his shirt and t-shirt and allegedly said "shake it baby, shake it." (¶57.) Michalowski does not allege that he reported either incident to anyone.

- January 31, 2014 – Michalowski alleges that, at a press conference, Rutherford allegedly stated that there is "no truth to [Michalowski's] allegations . . . and no factual support." (¶66.) Michalowski acknowledges that his name was not revealed during the press conference, but vaguely contends that unnamed "intermediaries" leaked his name to the press "to harass, retaliate and intimidate [him] from coming forward." (¶68.)

Michalowski does not allege that he was demoted, reassigned, had his salary decreased or that his employment was terminated. Rather, he claims he was "forced to resign" as a result of Defendants' conduct. (¶69.) Michalowski filed this suit just over a month before the Illinois primary in which Rutherford was seeking the Republican nomination for Governor.

ARGUMENT

It is well-settled that a plaintiff's obligation to allege sufficient grounds for relief under Rule 8(a) "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. The plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—

but it has not "show[n]"—'that the pleader is entitled to relief.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (quoting Fed. R. Civ. P. 8(a)(2)). Removing all conclusory allegations, as the Court must, the Complaint fails to state a claim for relief and must be dismissed with prejudice.

I. COUNT I FAILS TO STATE A CLAIM FOR VIOLATION OF ANY FIRST AMENDMENT RIGHT.

To state a claim against Rutherford for political retaliation in violation of the First Amendment, Michalowski must allege facts showing that: "(1) his speech was constitutionally protected, (2) he has suffered a deprivation likely to deter speech, and (3) his speech was at least a motivating factor in the employer's action." *Swetlik v. Crawford*, 738 F.3d 818, 825 (7th Cir. 2013); *Massey v. Johnson*, 457 F.3d 711, 716 (7th Cir. 2006). The Complaint does not properly plead these elements.

A. Michalowski Does Not Allege That He Engaged in Protected Activity.

The First Amendment protects public employees when they are acting as private citizens addressing matters of public concern. *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006); *Connick v. Myers*, 461 U.S. 138, 143 (1983). To establish that he engaged in protected conduct, Michalowski must show that: (1) he was speaking or acting as a private citizen; (2) his speech or conduct addressed a matter of public concern; and (3) his interest in addressing a public concern was not outweighed by the state's interest in promoting effective and efficient public service. *Swetlik*, 738 F.3d at 825. Courts look to the content, form, and context of the speech or conduct to determine if it relates to an unprotected personal interest rather than an issue of public concern. *Connick*, 461 U.S. at 147-48.

A public employee's speech or conduct is ***not*** protected under the First Amendment if it "is driven more by "office politics than . . . matters of public concern." *Klug v. Chicago Sch. Reform Bd. of Trustees*, 197 F.3d 853, 857-58 (7th Cir. 1999). Ultimately, the critical determination is whether the individual was speaking "more like a citizen or a disgruntled employee whose statements are primarily of personal interest." *Coburn v. Trustees of Ind. Univ.*, 973 F.2d 581, 585 (7th Cir. 1992).

Distilled to its essence, Count I alleges that Michalowski "engaged in the exercise of free speech" by "not supporting Defendants' political activity to Defendants' apparent satisfaction." (¶¶19-22, 73.) Michalowski does not allege that he: (i) exercised any free speech rights by actively complaining about being "forced" to engage in political activities, or that he resisted engaging in those activities; (ii) raised any issue of public concern; (iii) actually disagreed with Rutherford's political views or the views that he was purportedly being "forced" to advance; or (iv) was deterred from expressing his own views.[2] Nor does Michalowski allege that the political work he was supposedly "forced" to perform in any way interfered with his job as Director of Community Affairs.[3] At most, Michalowski alleges that he performed the requested political work, but just not to Rutherford's "apparent satisfaction." (¶73.) As such, Michalowski's allegations do not identify any protected speech or conduct.

Moreover, Michalowski's allegations are more in line with those of a "disgruntled public employee" speaking on an issue of "personal interest" by complaining of issues related to "office politics" than those of a citizen raising an issue of public concern. *See Klug*, 197 F.3d at 857-58 (affirming dismissal of First Amendment claim based upon teacher's transfer from position as dean of students because it was a matter of "office politics," not public concern). Therefore, Michalowski has failed to allege that he engaged in any conduct protected by the First Amendment.

---

[2] The Treasurer is not aware of any case holding that the First Amendment is implicated by compelled political work alone, in the absence of any complaint about the political work or any disagreement with the political point of view. *Cf. Drager v. Village of Bellwood*, No. 12 C 9569, 2013 WL 4501413 (N.D. Ill. 2013) (employee complained about compelled political work interfering with his ability to complete his required public work).

[3] This is in stark contrast to the plaintiff in *Wallace v. Benware*, 67 F.3d 655 (7th Cir. 1995), who, after declaring a bid for sheriff in an upcoming election, suffered active harassment and retaliation at the direction of his supervisor, the current sheriff and his opponent in the election. *Id.* at 656-660. The Seventh Circuit held that while an elected official had the right to dismiss a politically disloyal subordinate, that official did not have the right to subject his subordinate "to harassment designed specifically to hinder or to disrupt … the performance of his duties." *Id.* at 662. Here, Michalowski not only fails to allege that the Treasurer's actions impeded his job performance in any way, he also fails to allege any speech or conduct for which he suffered retaliation or harassment in the first instance.

B. Michalowski Does Not Allege Any Causal Link Between His Purported First Amendment Activity and Any Alleged Deprivation.

Even if the Complaint did sufficiently allege engagement in protected activity, Count I still fails because Michalowski does not allege, beyond mere conclusions, any causal link between his purported First Amendment conduct and any supposed adverse action by Rutherford. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (requiring protected conduct to be a "motivating factor" for retaliation); *Greene v. Doruff*, 660 F.3d 975, 979 (7th Cir. 2011) (considering whether the protected conduct was a "sufficient cause" for the retaliation). Even if the Court assumes that Rutherford could be responsible for some deprivation of right by virtue of his role as Treasurer and therefore Michalowski's ultimate supervisor, Michalowski does not allege that Rutherford took any action that was linked in any way to Michalowski's supposed failure to do political work to "Defendants' apparent satisfaction." (¶73.) Indeed, Michalowski does not allege that he ever complained to Rutherford about being "forced" to do political work or that the Treasurer had any reason to believe that Michalowski was not performing the political work voluntarily. Therefore, there is simply no plausible basis to conclude that Michalowski's alleged First Amendment conduct motivated Rutherford to take any adverse action against him.

II. COUNT II FAILS TO STATE A CLAIM FOR GENDER DISCRIMINATION OR SEXUAL HARASSMENT.

Even if the events alleged in the Complaint actually occurred (which they did not), Count II fails because the Complaint does not include any facts showing gender discrimination or sexual harassment, including the existence of a hostile work environment. Moreover, to the extent the Complaint alleges "retaliation" against Michalowski for complaining about being mistreated, section 1983 claims based on the Equal Protection clause do not provide relief for alleged retaliation.

A. Michalowski Does Not Allege Facts Showing that He was Discriminated Against Because of His Sex.

To allege discrimination under the Equal Protection Clause on the basis of a protected trait,

Michalowski must allege that he: (1) is a member of a protected class; (2) is similarly situated to members of the unprotected class; (3) suffered an adverse employment action; and (4) was treated differently from members of the unprotected class. *Andrews v. CBOCS West, Inc.*, 743 F.3d 230, 234 (7th Cir. 2014); *see also Williams v. Seniff*, 342 F.3d 774, 788, n. 13 (7th Cir. 2003) (same). When an equal protection claim is brought under § 1983, courts require proof of "intent to discriminate." *Seniff*, 342 F.3d at 788. Michalowski's gender discrimination claim fails as a matter of law because the Complaint is entirely devoid of allegations establishing any of these elements.

1. Michalowski is not a member of a protected class and does not allege Rutherford was motivated to discriminate against men.

Michalowski does not allege that he is a member of a protected class, and therefore he cannot satisfy the first prong of a gender discrimination claim. Consequently, Michalowski's gender discrimination claim under § 1983 "is even more difficult to satisfy . . . because, instead of the first prong, [he] must identify background circumstances – something 'fishy' – demonstrating that the defendant was motivated to discriminate against employees in his class." *Oakley v. Cowan*, 187 Fed. Appx. 635, 638-639 (7th Cir. 2006); *see also Gore v. Indiana University*, 416 F.3d 590, 592 (7th Cir. 2005); *Phelan v. City of Chicago*, 347 F.3d 679, 684-685 (7th Cir. 2003) (stating that, under the heightened standard, non-minority plaintiffs must show direct evidence of discrimination). Although Michalowski includes a conclusory assertion that he was subjected to a "long-standing pattern of discrimination based upon his sex (male)" (¶35), the Complaint is lacking of any allegations showing "something fishy" that would show that Rutherford was motivated to discriminate against Michalowski because he is a man.

2. Michalowski was not treated differently than similarly situated members of the opposite class.

Count II also fails because Michalowski alleges absolutely no facts suggesting that other similarly situated employees who were members of the opposite class, here women, were treated

more favorably than him because of their sex. Indeed, Michalowski fails to identify ***any*** similarly situated employees. *Banks v. Chicago Bd. of Educ.*, 2013 WL 951111, *13 (N.D. Ill. 2013) (finding that plaintiff did not make out a prima facie case of discrimination because she failed to identify similarly situated employees who were treated better.) Furthermore, Michalowski fails to allege that Rutherford routinely discriminated against males in the Treasurer's Office, that women were treated more fairly because of their sex or even that he was treated differently because of his sex. Thus, Michalowski cannot satisfy the second and fourth factors of a sex discrimination claim.

3. Michalowski suffered no adverse employment action.

Finally, Michalowski's sex discrimination claim fails because he suffered no adverse employment action. An adverse employment action is "something more disruptive than a mere inconvenience or an alteration of job responsibilities;" it is a "significant change in the claimant's employment status," including termination, denying a promotion, or reassignment to a position with significantly different job duties or benefits. *Rhodes v. Illinois Dep. of Trans.,* 359 F.3d 498, 504 (7th Cir. 2004); *see also Smart v. Ball State Univ.,* 89 F.3d 437, 441 (7th Cir. 1996) ("[W]hile adverse employment actions extend beyond readily quantifiable losses, not everything that makes an employee unhappy is an actionable adverse action."). Michalowski alleges, in a wholly conclusory manner, that he was "denied raises and promotions," "treated differently in the terms and conditions of his employment" and eventually "forced to resign." (¶¶69, 88.) None of these bare assertions are sufficient to allege an adverse employment action.

For a failed promotion to constitute an adverse action, Michalowski must allege that he was qualified for the position he claims he was denied, that he applied for it, and that he was rejected for that position. *Johnson v. General Bd. of Pension & Health Benefits of United Methodist Church*, 733 F.3d 722, 728 (7th Cir. 2013). Here, Michalowski alleges only that Ham informed him he would receive "a promotion to either Deputy Chief of Staff or General Counsel," that he did not receive either

position, and that "employees who were 'active' in the Rutherford Committee" received unspecified promotions. (¶¶27, 32-33.) Michalowski fails to allege that: (i) he ever expressed any interest in these positions, let alone applied for them; (ii) he was qualified for either position; (iii) he was *actually rejected* for either position; (iv) any employee who worked for the Rutherford Committee received the positions; or (v) Rutherford had anything to do with the fact that he did not receive either position.

As for receiving a raise, Michalowski alleges only that he did not receive a pay raise while "employees who were 'active' in the Rutherford Committee received high raises." (¶33.) Michalowski fails to identify any such employees, much less allege that these employees were similarly situated to him, less qualified than him or even that they received the pay raises *because* they actively worked on for the Rutherford Committee. *See Robinson v. Honeywell, Micro Switch Div.*, 53 Fed. Appx. 379, 381 (7th Cir. 2002) (employee's bare allegations that failure to give raise was motivated by racial discrimination not enough to support finding of adverse action).

To the extent Michalowski's allegations that he was "forced to resign" are intended to plead a constructive discharge theory, Plaintiff has failed to do so. (¶69.) Proving constructive discharge requires a plaintiff to show that "he was forced to resign because his working conditions, from the standpoint of the reasonable employee, had become unbearable." *See Chapin v. Fort-Rohr Motors, Inc.*, 621 F.3d 673, 679 (7th Cir. 2010). Because a plaintiff is ordinarily "expected to remain on the job while seeking redress for his employer's discriminatory actions," constructive discharge requires a stronger showing than that required for a hostile work environment claim. *Id.*; *Taylor v. W. & S. Life Ins. Co.*, 966 F.2d 1188, 1198-99 (7th Cir. 1992) (constructive discharge found where supervisor brandished a firearm and held it to the plaintiff's head). Accordingly, where a plaintiff fails to make a hostile work environment claim, a constructive discharge claim will likewise fail. *Chapin*, 621 F.3d at 679. Because Michalowski has failed to plead a hostile work environment claim, he also fails to

plead that his alleged "forced resignation" qualifies as constructive discharge.[4]

B. Michalowski Does Not Allege Facts Showing That He Was Subjected to an Objectively Hostile Work Environment.

Count II's allegations that Michalowski was subjected to allegedly "hostile and abusive conditions" from which the Treasurer failed to protect him presumably intends to assert a hostile work environment claim. (¶87.) To proceed under § 1983 based on a hostile work environment theory, a plaintiff must demonstrate that defendants not only created a hostile work environment, as required under Title VII, "but also that they intended to harass plaintiff" because of his gender. *Trautvetter v. Quick*, 916 F.2d 1140, 1149 (7th Cir. 1990). Thus, a plaintiff's burden for a sexual harassment claim under § 1983 exceeds that under Title VII in that plaintiff must demonstrate that the defendant had a discriminatory intent. *Id.* The Complaint does not meet either the threshold Title VII requirements or the additional intent requirement for a § 1983 claim. As to the latter, nowhere in the Complaint does Michalowski allege that Rutherford intended to harass Michalowski *because he is a man*, and thus, his hostile work environment claim fails on that basis alone.

To make a claim for hostile work environment under Title VII, Michalowski must show that he was subjected to harassment, and that the conduct was "sufficiently severe or pervasive to alter the conditions of [his] employment and create an abusive working environment." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986). This requires conduct that was both subjectively and objectively offensive. *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998). Courts look to whether an environment is sufficiently hostile or abusive by "looking at all 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

[4] In this regard, Michalowski apparently bases his constructive discharge claim on his allegation that an unidentified Rutherford "intermediary" leaked his name to the press. Even if this act could constitute intimidation at the level necessary to state a constructive discharge claim, which it clearly does not, the allegation lacks the specificity required by *Twombly* and must be disregarded.

employee's work performance." *Id.* (citation omitted). "Title VII does not prohibit 'genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex.'" *Id.* "[S]imple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the "terms and conditions of employment." *Id.* (internal citations omitted.) Indeed, vulgar language and even some physical contact, is not objectively hostile. *Adusumilli v. City of Chicago*, 164 F.3d 353, 361-62 (7th Cir. 1998).

Assuming that the conduct alleged relating to Count II even occurred, the Court must dismiss Michalowski's hostile work environment claim as a matter of law because he does not allege facts showing an objectively hostile work environment. First, Michalowski does not allege that the Treasurer ever made direct contact with an intimate body part; at most, he alleges that the Treasurer "grabbed *at* Plaintiff's genital area." (¶39 (emphasis added).) *See DiCenso v. Cisneros*, 96 F.3d 1004, 1009 (7th Cir. 1996) (conduct not severe because, among other things, defendant "did not touch an intimate body part"). Second, although Michalowski insinuates that the supposed invitations to the Treasurer's home and hotel room were unwanted advances, he does not allege that the Treasurer made any explicit sexual comments or requested any sexual activity. (¶¶45-47, 53-54.) To the extent that Michalowski is suggesting that he was "propositioned," such conduct is not considered objectively severe. *Scott v. Sears, Roebuck & Co.*, 798 F.2d 210, 211-14 (7th Cir. 1986) (conduct not objectively severe even though the plaintiff was subjected to propositions, lewd comments, and a slap on the buttocks). Third, Michalowski's claims that Rutherford "berated" him for not "getting the job done" and once told another employee that Michalowski was "useless to him" do not rise to the level of severity, even when taken in combination with Plaintiff's other allegations, to create a hostile work environment. *See Faragher*, 524 U.S. at 788.

Moreover, even if true, the incidents alleged occurred in relative isolation, separated by several months, and were not part of a continuous pattern of conduct. *Bilal v. Rotec Industries, Inc.*,

326 Fed. Appx. 949, 957-958 (7th Cir. 2009) (three incidents of verbal and "middle of the continuum" physical contact insufficient to constitute hostile work environment); *see also McPherson v. City of Waukegan,* 379 F.3d 430, 434, 439 (7th Cir. 2004) (supervisor pulling back plaintiff's shirt to see the type of bra she was wearing was insufficient to constitute hostile work environment because of the relative isolation of the incident); *Adusumilli*, 164 F.3d at 361–62 ("four isolated incidents in which a co-worker briefly touched her arm, fingers, or buttocks" was insufficient); *Koelsch v. Beltone Elecs. Corp.,* 46 F.3d 705, 706–08 (7th Cir. 1995) (one incident in which supervisor rubbed foot against plaintiff's leg and another where he grabbed plaintiff's buttocks was insufficient); *Weiss v. Coca–Cola Bottling Co.,* 990 F.2d 333, 337 (7th Cir. 1993) (two attempts by a supervisor to kiss the plaintiff, inquiries about personal life, requests for dates and unwanted touches were insufficient).

Michalowski's allegations, taken as a whole, amount to nothing more than minor, offhanded comments, at most "middle of the continuum" physical contact, and innuendo that lacks the severity and frequency to rise to the level of creating a hostile work environment under established Seventh Circuit precedent. *See, e.g.*, *Saxton v. AT&T, Inc.*, 10 F.3d 526, 528-29, 524 (7th Cir. 1993) (supervisor's conduct did not create an objectively hostile work environment where he made sexual advances toward plaintiff by rubbing her thigh, kissing her, and lurching at her from behind bushes); *Hilt–Dyson v. City of Chicago*, 282 F.3d 456, 463–64 (7th Cir. 2002) (allegations that a supervisor rubbed plaintiff's back, squeezed her shoulder, and stared at her chest during a uniform inspection while telling her to raise her arms and open her blazer isolated incidents that collectively did not create a sufficient inference of a hostile work environment). Accordingly, Count II should be dismissed with prejudice. *See Triplett v. Starbucks Coffee*, No. 10 C 5215, 2011 WL 3165576, at *5 (N.D. Ill. Jul. 26, 2011) (granting motion to dismiss with prejudice, and holding that one racially insensitive comment, a store policy requiring purchase of items before using the restroom, and two racially-based disciplinary actions were not sufficient to state hostile work environment claim).

C. The Equal Protection Clause Does Not Support a Retaliation Claim.

Michalowski also contends in passing that Rutherford retaliated against him "because he complained." (¶35.) Initially, the Treasurer notes that Michalowski does not allege that he ever filed any sort of formal complaint using the Office's EEO procedures. But even if he had, this claim must be dismissed with prejudice because the Equal Protection Clause does not provide a private cause of action for retaliation. *Boyd v. Ill. State Police*, 384 F.3d 888, 898 (7th Cir. 2004) ("[T]he right to be free from retaliation may be vindicated under the First Amendment or Title VII, but not the equal protection clause.") (collecting cases). In any event, Michalowski does not and cannot state a claim for retaliation against Rutherford under any theory because, as detailed above, Michalowski does not allege that Rutherford took any adverse action against him.

III. THE COMPLAINT MUST BE DISMISSED BECAUSE RUTHERFORD IS ENTITLED TO QUALIFIED IMMUNITY.

Because Michalowski has not identified an actionable constitutional violation arising from either the alleged "forced political activity" or as a result of any alleged discrimination or harassment, the Complaint must also be dismissed because Rutherford is entitled to qualified immunity as a matter of law. The defense of qualified immunity "is an immunity *from suit* rather than a mere defense to liability." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (emphasis added). And, "the driving force behind creation of" the doctrine "was a desire to ensure that insubstantial claims against government officials would be resolved prior to discovery." *Pearson v. Callahan*, 555 U.S. 223, 231-232 (2009) (internal quotation marks and citations omitted). Accordingly, the Supreme Court has repeatedly "stressed the importance of resolving immunity questions at the earliest possible stage," including on a motion to dismiss. *Id.* at 231-232.

In its simplest form, qualified immunity shields government officials performing discretionary functions "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have

known." *Id.* at 231-32 (internal quotation marks and citations omitted). To determine if qualified immunity applies, courts consider two factors: (1) whether a constitutional right has been violated under the facts alleged or shown; and (2) whether the particular right was "clearly established" at the time of the alleged violation. *Id.* at 232. Where the alleged wrongful conduct "falls into a gray area," such as whether it was sufficiently severe to constitute a hostile work environment, "the unlawfulness of an official's conduct is not clearly established." *Chambliss v. IDOC*, 05 C 4175, 2007 WL 518774, at *15 (S.D. Ill. 2007). If the right was not clearly established, qualified immunity applies to bar any claim that the right was violated. *Pearson*, 555 U.S. at 231-232.

Nothing in the Complaint indicates that Rutherford knew about or participated in any adverse action that was motivated by Michalowski's First Amendment conduct or that Michalowski actually engaged in any protected conduct amounting to a "clearly established right." Nor does the Complaint allege discrimination against Michalowski because of his gender, any adverse action that was taken against him or any sort of formal grievance filed by Michalowski about the alleged misconduct with the Treasurer's Office. Finally, taking Michalowski's claims of alleged inappropriate behavior by Rutherford as true, those actions, individually or collectively, did not reveal an environment of severe or pervasive harassment under controlling precedent. *See Chambliss*, 2007 WL 518774, at *15 (qualified immunity barred equal protection claim where plaintiff failed to establish conduct rising to the level of hostile work environment). Therefore, because Michalowski cannot demonstrate that Rutherford violated Michalowski's clearly established First or Fourteenth Amendment rights, Rutherford is entitled to qualified immunity as a matter of law.

CONCLUSION

Because the legal defects identified above cannot be cured by re-pleading, the claims against Rutherford should be dismissed with prejudice.

April 14, 2014

Respectfully submitted,

/s/ Daniel T. Fahner

Special Assistant Attorneys General
Robert L. Shuftan
Daniel T. Fahner
Bilal Zaheer
Edwards Wildman Palmer LLP
225 W. Wacker Drive, Suite 3000
Chicago, Illinois 60606
(312) 201-2543

CERTIFICATE OF SERVICE

Daniel T. Fahner, an attorney, hereby certifies that on April 14, 2014 a true and correct copy of the foregoing document was electronically filed with the Clerk of the Court for the Northern District of Illinois using the CM/ECF system, and was thereby served by e-mail notification upon all parties of record.

/s/ Daniel T. Fahner