IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

UNITED STATES OF AMERICA, Plaintiff, v. WYOMING MILITARY DEPARTMENT, Defendant.	Case No. 2:16-CV-055-SWS

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This matter arises out of an action for sexual harassment under Title VII of the Civil Rights Act of 1964, as amended. The United States alleges the Wyoming Military Department discriminated against Amanda Dykes when she was subjected to sexual harassment by her direct supervisor, Don Smith, then Director of the Wyoming Youth Challenge Program. Plaintiff also contends Amanda Dykes was constructively discharged when WMD failed to take corrective action regarding Don Smith's behavior. Defendant denies Amanda Dykes was subjected to a hostile or abusive work environment due to the low severity and frequency of the alleged misconduct. Additionally, Defendant denies Amanda Dykes was constructively discharged and says she failed to reasonably mitigate her damages following her resignation.

The matter was tried to the Court on July 24th through July 27th, 2017. Having considered the evidence presented at trial and other materials submitted by the parties, the Court FINDS and CONCLUDES as follows.

FINDINGS OF FACT

1. As a female, Amanda Dykes is a member of a protected group.

2. Dykes began her employment at the Wyoming Youth Challenge Program ("WYCP"), a program operated by the Wyoming Military Department ("WMD"), on November 14, 2005, as a Cadre Shift Supervisor. She was an employee of the State of Wyoming.

3. On August 1, 2009, she was promoted to Commandant at WYCP, responsible for managing approximately 27 employees and supervising the entire WYCP Cadre team.

4. Don Smith began his employment as the Director of WYCP on November 16, 2009.

5. From when Smith was hired as the Director of WYCP, Dykes reported directly to Smith.

6. Colonel Shelly Campbell served as Smith's direct supervisor. As a supervisor in the chain of command, Col. Campbell was designated to receive complaints from Dykes.

7. During all relevant times, State of Wyoming Executive Order 2000-4 (an anti-discrimination policy) applied to all state employees, including those employed at WYCP. The Policy prohibits discrimination, including sexual harassment.

8. Lori Cole and Tammy Connor were Human Resource Office ("HRO") employees and were designated to receive workplace complaints verbally or in written form from WYCP employees.

A. Don Smith's Harassment of Amanda Dykes

9. Smith began sending Dykes non-work-related emails to both her personal and work email accounts in October 2010. Smith's emails increased in frequency in the spring of 2011, corresponding with his marital problems at home.

10. Smith began composing songs and poetry for and about Dykes in December 2010. Smith acknowledges he was inspired by Dykes to write the song "My Soul Belongs to This Land," in which he recorded and posted a YouTube video and produced a CD he later gave to Dykes. At least three poems, "Mountain Girl," "She," and "Friendship" were also written by Smith for and about Dykes.

11. Smith did not write personal emails, songs, or poetry for any other employees at WYCP.

12. Smith made comments about Dykes' physical features in the presence of Dykes and/or her assistant, Amanda McDaniel.

13. Dykes received at least one personal email on her personal email account from Smith in February 2011, three such emails in March 2011, and two in April 2011.

14. Smith's emails to Dykes expressed feelings he had for her including an April 22, 2011 email Smith entitled "Friends," which reads in part:

I need to share something, it's in black and white… here it is:

> I know that you don't feel the same way about me, that I do about you… you couldn't… you have such a great family and you're so devoted to them. John [Dykes' husband] is a lucky man. […] You're a great friend, and a wonderful person, and a magnificent lady, and I am proud to call you my friend. I respect you, and I care for you deeply. That will be so for eternity.
>
> Some day, I hope to meet another "someone," with your sense of humor and upbeat personality. […]
>
> I don't want to seem weird, or unprofessional, but there is a love that I have for you as a person, and as a friend in my life. Not as interloper, or a Cad…[...]
>
> Anyway, you know that I would do anything for you, and I would accept any consequence from you if I were wrong.[…]

[Pl.'s Ex. 18 (ellipses inside brackets indicate omitted portions, additional ellipses in original).]

15. Smith sent Dykes an email on May 26, 2011, entitled "Maybe I do have the words…" that reads in part:

> First, I hope you're feeling better.
>
> Second, I would like you to respond. Please write to me. Please don't wait, write soon, it hurts too much mkt [sic] to hear from you, just say what you think, I can take it. I want to know. You know that I won't think differently about you no matter what you say. I wouldn't blame you if you wanted to beat me up. I would let you. Tell me whatever you want to tell…
>
> Here's the deal Amanda, I am embarrassed about my feelings for you, because they are so strong. I haven't felt this way about anyone before. You have changed this old man, I don't even recognize myself. I just want to be nice, and good, and honest. AND, I want to make you proud of those changes. I want to be kind... I don't know why, but I do.
>
> […] I am so ashamed Ma'am, and I would do 'anything' to make it right in my own eyes, I would do 'everything that you say' to make it right for you.

> [...] You are a good mother, and I know how John must feel about having you as the matriarch of his family and the mother of his daughters.

[Pl.'s Ex. 33 (ellipses inside brackets indicate omitted portions, additional ellipses in original).]

16. Dykes asked Smith to stop writing her personal emails, songs, and poems, and keep their communication focused on work-related topics. But for two brief, perfunctory responses, Dykes did not respond to Smith's personal emails. [Pl.'s Ex. 17, 20.]

17. On two occasions, Smith told Dykes that he "loved" her. On one occasion, Smith also told Amanda McDaniel that he "loved" Dykes.

18. Smith began making extended visits to Dykes' office in the spring of 2011. These visits would often last hours at a time. During these visits, Smith would draw Dykes into conversations about his personal emails and engage in non-work-related discussions about his personal life. Dykes had her own office on the second floor of an office building on the WYCP campus in which she worked alone. Smith did not spend nearly as much time in anyone else's office discussing non-work-related matters as he did in Dykes' office.

19. Smith's extended visits made Dykes uncomfortable, and she made efforts to avoid Smith's visits. These efforts included monitoring closed-circuit TV to see when Smith was walking towards her office so she could leave before he arrived. Dykes also asked her assistant, Amanda McDaniel, and another subordinate, Melinda Antes, to

interrupt Smith's office visits, or would request McDaniel to be present to avoid meetings alone with Smith in her office.

20. Smith's extended office visits interfered with Dykes' ability to complete her work duties.

21. On June 3, 2011, Smith told Dykes that his therapist suggested that Smith had allowed himself to develop a crush on her. Later that day, Dykes attempted to contact Tammy Connor in the HRO to discuss Smith's conduct. Connor was out on leave that week, and Dykes subsequently contacted Lori Cole in the HRO. During their June 3, 2011 conversation, Cole suggested Dykes document workplace rules of conduct with Smith.

22. Dykes then told Smith she had contacted HRO who suggested Dykes and Smith adopt workplace rules. Smith agreed and memorialized the following rules on a post-it note that he had prepared: (1) stick to work place topics; (2) time spent should be prompt; and (3) no personal writing.

23. At 11:31 PM that same day, Smith sent Dykes an email entitled "Not Writing to Ya'..." stating in part:

> I know I shouldn't write, but, Sharing a Facebook chat transcript between me and Tammy [Connor]... Just trying to keep you up to date...
>
> I really did need to clear my head, so here goes...
>
> Ma'am, if John [Dykes' husband] wants to beat me up I will accept that. I will take any punishment to keep our friendship. Or, If I need to explain I will. Say the word... You are my friend.

[Pl.'s Ex. 35 (all ellipses in original).] Smith's late-night June 3, 2011 email also included a copy of a lengthy Facebook chat transcript between himself and Tammy Connor from HRO discussing personal matters about their respective families and upbringings. The email Smith sent to Dykes ended with:

> So anyway Amanda… just FYI. Check with Tammy [Connor] if you need to… but you're my friend, you're a strong co-worker, and I don't want to spoil anything.

[Pl.'s Ex. 35 (all ellipses in original).] Dykes interpreted this email as a threat to stop contacting HRO about her complaints against Smith because he had a personal relationship with Connor, one of the HRO employees. Smith acknowledges that he and Connor were personal friends.

24. The next evening (June 4, 2011), Smith sent Dykes another email, entitled "Help…," that reads in part:

> OK, I know I shouldn't write. But I need to express feelings. Right now you're all I have…
>
> First: I held on to my feelings about you because they were the only "good" feelings I had. I thought that if I liked someone, I had a reason to keep going. You've been good to me. I like you a lot. I'm sorry if that is wrong. I would not intrude in your relationship with John, but I do like you. But, I would never interlope.
>
> […] My counselor said that I need to set boundaries and I think that I have done that by telling you how I feel about you. […] I know that crushes are silly. I apologize for holding on to this one.
>
> […] You have been good to me, and I have liked you as a friend, and I am apologetic for crossing the line in our friendship.

[Pl.'s Ex. 36 (ellipses inside brackets indicate omitted portions, additional ellipses in original).]

25. When Dykes returned to work on Monday, June 6, 2011, she emailed Smith: "Sir, After the conversation we had on Friday in which you told me you had a crush on me, we laid out rules for you to follow. You gave me a hand written note of what they where [sic]." [Pl.'s Ex. 51.] Dykes then listed the three rules and continued:

> I do not feel like you have followed those rules by Emailing me twice over the weekend on my personal Email Account, and coming to my office to talk to me about the situation this morning.
> At this time I feel very uncomfortable with you. I do not wish to be alone in a room with you, if we need to have one on one conversations about work they need to be with someone else in the room or with the office door open. If there are any violations of this I will contact State HR.

[*Id.*] Dykes blind carbon-copied Lori Cole on the email. Smith responded to Dykes' email, saying that he agreed. [*Id.*]

26. At some point following this June 6, 2011 workplace agreement between Dykes and Smith, Smith attempted to enter Dykes' office again. When Dykes reminded him of their agreement not to be alone, he pointed to a large stick in Dykes' office she had confiscated from a cadet, and Smith told her she could "beat him off of her" if necessary. Smith then closed the door and stood in front of it blocking her exit.

27. On June 7, 2011, Smith wrote a "Memorandum for Record" with the subject line: "Working Relationship with Commandant and Director at WYCP." [Pl.'s Ex. 39.] Dykes received this memorandum and a copy was placed in Smith's file. In it, Smith confessed to having violated their workplace agreement.

28. On June 8, 2011, at approximately 1:12 PM, Cole sent Dykes a follow-up email with "Hello" as the subject line. [Pl.'s Ex. 52.] Cole asked Dykes how she was

doing and whether the situation between her and Smith had improved. Dykes responded the same day:

> I still feel like there is just something not right.... I would like for you to let Tammy know just because I still am f[ee]ling uncomfortable and his behaviors are very odd.
> Something that I did not mention is that twice he has said that he loves me, and then would pause and state just as a friend not in a weird way. He has also given me songs, and poems that he has written for me, and it just makes me feel like some lines are crossed. I don't know how to react. Amanda McDaniel came to me with some concern over his behavior toward me a few weeks ago, so I don't think that it is just me blowing things out of proportion. This just makes me not want to be here any more.

29. On the morning of June 9, 2011, Smith once again visited Dykes in her office, closed the door, and read her a two-page letter that he drafted regarding his personal feelings for her. In it, he lamented that Dykes had offered a boundary between them of the Grand Canyon, while he believed that Fish Creek—an intermittent/ephemeral stream located in Platte County, Wyoming—would be "better." [*See* Pl.'s Ex. 52.]

30. At approximately 9:11 AM on June 9, 2011, Dykes emailed Cole again to report that morning's intrusion:

> I feel like Don violated the rules he had set out this morning by coming in my office shutting the door behind him and reading a letter that He had written me. The letter was all about feelings and his friendship with me. I told him that I would be contacting HR, and Tried to call Tammy [Connor], and she did not answer. Please let me know how I should proceed. I feel very uncomfortable with this situation, help me please. [Sic throughout.]

[Pl's Ex. 52.] Around 1:15 PM that day, Cole forwarded all of Dykes' emails to Tammy Connor but took no further action. [Pl.'s Ex. 46.]

31. Dykes expected that once she complained to HRO, steps would be taken to investigate her claim, including that state human resource personnel would visit Camp Guernsey to interview relevant witnesses.

32. On June 10, 2011, Dykes convened a management meeting to discuss back-up plans if Smith did not attend graduation due to his erratic behavior. At the end of the session, Dykes told the staff that Smith had been sending her poetry, songs, and emails, and was making her feel uncomfortable and preventing her from doing her job.

33. After the June 10, 2011 meetings, Robyn Huber, the WYCP Budget Specialist, went back to her office and immediately telephoned Tammy Connor, Smith's personal friend in HRO, to report what Dykes had said at the meeting.

34. Sometime on June 10 or June 11, 2011, while Dykes was home alone, she believes Smith drove by her house. This prompted Dykes to contact a Platte County law enforcement officer to ask about getting a protective order against Smith.

35. During the remainder of June and into July 2011, Dykes had little contact with Smith because WYCP was on vacation for several weeks, which was followed by a period where she was not in her office because she was spending time with the cadets.

36. In August 2011, however, Smith again began spending more time in Dykes' office. Because no corrective action had been taken by HRO, Dykes went up the chain of command and contacted Col. Campbell, Smith's supervisor, via e-mail. On August 29, 2011, Dykes sent an email to Col. Campbell, entitled "Concerns," requesting a meeting to discuss the concerns she had with Smith's behavior. Col. Campbell

happened to be headed to Camp Guernsey that same day for a previously-scheduled trip and agreed to meet with Dykes while there. [Pl.'s Ex. 57.]

37. Dykes met with Col. Campbell on August 30, 2011, where they discussed Smith's conduct toward Dykes, his work performance, his mental health, and how Smith made Dykes feel uncomfortable.

38. Col. Campbell then went to lunch with Smith on August 31, 2011, and instructed Smith to keep his relationship with Dykes "professional."

39. Following his lunch meeting with Col. Campbell, Smith sent Dykes an email from his work email account to her work email account entitled "Meeting," which stated Col. Campbell had "suggested that you and I plan to meet when we have an opportunity, so that we can talk about your concerns." [Pl.'s Ex. 02.] Dykes responded that she had previously outlined her concerns to Smith and they had not changed. [*Id.*] Smith forwarded this email exchange to Col. Campbell and Tammy Connor. [*Id.*]

40. Dykes' meeting with Col. Campbell was a complaint of sexual harassment against Smith pursuant to the statewide Policy.

41. Dykes reasonably believed Col. Campbell's instruction for Smith and Dykes to meet to discuss the problems indicated that Col. Campbell had no intention of taking any further action on the matter herself.

42. Shortly after the email exchange on August 31, 2011, Col. Campbell left Dykes a voicemail but took no further action because Col. Campbell believed working out the issue between themselves "was my expectation of supervisors."

43. At no point did Lori Cole, Tammy Connor, Col. Campbell, or any other WMD or WYCP employee generate any record of Dykes' complaint, attempt to separate Smith from Dykes, interview Dykes, interview Smith, or interview known witnesses. WMD took no corrective action in response to Dykes' complaint, and Smith was never disciplined for his conduct toward Dykes.

44. By September 2011, after Dykes had continuously rejected Smith's advances and complained to Col. Campbell, Smith's behavior changed. Smith became hostile toward Dykes. His hostility toward Dykes was exhibited during a staff meeting in September 2011. Prior to the meeting, Dykes and her assistant, Amanda McDaniel, met with Smith to discuss several issues, where Smith expressed support for Dykes' ideas. However, during the larger staff meeting, Smith openly disparaged Dykes' proposals.

45. Dykes left the staff meeting abruptly, called her husband to meet, and they drove around the camp discussing whether she could continue to work at WYCP. Dykes and her husband concluded that she should resign to escape Smith's behavior toward her.

46. Dykes submitted her letter of resignation to Smith on September 22, 2011 [Pl.'s Ex. 42], doing so only in the presence of a third-party so she would not have to face Smith alone. Dykes' last day at WYCP was September 30, 2011. Dykes remained on paid leave through October 20, 2011, which was the effective date of her resignation. [*See* Pl.'s Ex. 54, 55.]

B. <u>Amanda Dykes' Salary and Benefits as a WMD Employee</u>

47. Dykes' annual gross salary as Commandant at the time she left WYCP was $54,888, which included a $40-per-month longevity bonus for having been employed

with the State of Wyoming for over five years. [Pl.'s Ex. 83.] WMD also contributed $20 per month to her deferred compensation fund as part of her employment. [Pl's Ex. 87 at p. 3.]

48. Dykes obtained health insurance through her husband's employer-provided plan, though she was eligible to purchase such insurance through her employment. [*Id.*]

49. Dykes had a $50,000 term life insurance policy that was paid for entirely by the State of Wyoming. She could purchase additional life insurance benefits, such as dependent life insurance, but chose not to do so as a WMD employee. Dykes also had a $20,000 accidental death and dismemberment policy that was paid for entirely by the State of Wyoming. [*Id.*]

50. Dr. Jon Wainwright is the United States' expert witness on Dykes' economic losses. In calculating Dykes' salary had she remained employed at the WYCP beyond 2011, however, he based his estimates on the national estimates of the annual consumer price index for urban wage earners and clerical workers. This data did not consider Wyoming-specific or WMD-specific wage information during the timeframe in question. [*See* Pl.'s Ex. 87.]

C. Amanda Dykes' Employment Search History

51. Dykes applied for a Community Education Associate Director position with Eastern Wyoming College ("EWC") in late May 2011. Smith wrote a letter of recommendation for Dykes at her request.

52. Dykes applied for a Caseworker position with the Wyoming Department of Corrections in early June 2011, but later withdrew her name from consideration for the position because she intended to stay with WYCP. [Def's Ex. E.]

53. At the time of Dykes' resignation in September 2011, she had no pending job applications and had not accepted any other positions. After leaving WYCP, she immediately began looking for comparable employment opportunities, focusing on positions in human services because of her work experience with WYCP and St. Joseph's Children's Home. Dykes also considered jobs in business and finance because of her bachelor's degree in business administration.

54. While Dykes actively sought employment opportunities, many of the positions she found either earned substantially less than her prior salary as a Commandant or required advanced degrees, skills, or experience she did not possess.

55. Dykes met in person with representatives from Wyoming Workforce Services at least three times to discuss job opportunities, specifically October 2011, Spring 2012, and May 2014. A Wyoming Workforce Services Representative, Jeff Mueller, recommended she consider a career in the healthcare field.

56. Dykes applied for a Social Services Manager II position with the Wyoming Department of Families on February 19, 2012. [*See* Def's Ex. V.]

57. From summer 2013 to spring 2014, Dykes took online courses and continued to search for employment.

58. In the fall of 2013, Dykes applied for admission into the University of Wyoming bachelor of science nursing accelerated program ("BRAND"). She was accepted into the BRAND program in April 2014.

59. Dykes again visited with Jeff Mueller at Wyoming Workforce Services on May 6, 2014, to discuss her difficulty finding work at a comparable salary in the same geographical area. She was struggling financially and sought information from Mueller on whether she had any other options before committing to the BRAND program. [Def's Ex. W.]

60. Around May 21, 2014, Dykes paid her first tuition check and enrolled as a full-time student in the BRAND program. [*See* Def's Ex. O at p. 3.] Due to its accelerated nature, the BRAND program discourages students from working while in the program. Dykes did not seek employment while enrolled in the BRAND program.

61. Dykes received a bachelor's degree in nursing from the University of Wyoming in August 2015. At that time, she also enrolled in the Doctor of Nursing Practice ("DNP") program at the University of Wyoming. She has been a graduate student in the DNP program since the fall semester of 2015. [*See* Def's Ex. O at p. 1.]

62. The University of Wyoming discourages DNP students from working while pursuing a DNP. Dykes anticipates graduating with a DNP in 2019.

CONCLUSIONS OF LAW

A. Hostile Work Environment

63. Title VII prohibits an employer from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of

employment, because of such individual's … sex." 42 U.S.C. §2000e-2(a)(1). Sexual harassment in the form of a hostile work environment is a form of sex discrimination prohibited by Title VII. *Kramer v. Wasatch County Sheriff's Office*, 743 F.3d 726, 737 (10th Cir. 2014) (citing *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 672 (10th Cir. 1998)).

64. To establish that a sexually-hostile work environment existed, a plaintiff must prove: "(1) she is a member of a protected group; (2) she was subject to unwelcome harassment; (3) the harassment was based on sex; and (4) [due to the harassment's severity or pervasiveness], the harassment altered a term, condition or privilege of the plaintiff's employment and created an abusive working environment." *Harsco Corp. v. Renner*, 475 F.3d 1179, 1186 (10th Cir. 2007) (quoting *Dick v. Phone Directories Co., Inc.*, 397 F.3d 1256, 1262 (10th Cir. 2005)) (alteration in original). With respect to the fourth element, the objective severity of the harassment is judged from the perspective of a reasonable person in the plaintiff's position, considering all the surrounding circumstances. *Harsco Corp.*, 475 F.3d at 1187 (citing *Harris v. Forklift Sys.*, 510 U.S. 17, 21 (1993)).

Amanda Dykes is a woman who was subjected to unwelcome harassment.

65. Dykes is a woman and a member of a protected group.

66. "The existence of sexual harassment must be determined in light of 'the record as a whole' and [courts must examine] 'the totality of [the] circumstances, such as the nature of the sexual advances and the context in which the alleged incidents

occurred.'" *Gross v. Burggraf Constr. Co.*, 53 F.3d 1531, 1537 (10th Cir. 1995) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 69 (1986)).

67. Considering the totality of the circumstances, Dykes was subjected to harassment from her supervisor, and this harassment was unwelcome. Smith's stream of personal emails, frequent and lengthy office visits, declarations to both her and her assistant, McDaniel, that he "loved" Dykes and had a "crush" on her, the songs and poems he wrote for Dykes, and his failure to comply with self-imposed workplace rules of conduct constituted sexual harassment that created a hostile work environment for Dykes. Such endless and unwelcome romantic attention, both face-to-face and through writing, constitutes harassment and goes well beyond "ordinary socializing." *See Harsco Corp.*, 475 F.3d at 1186.

68. Where, as here, the harassing conduct is less extreme, courts have found it can still rise to an actionable level based on frequency. *See Morris v. City of Colo. Springs*, 666 F.3d 654, 665 (10th Cir. 2013) (less severe acts of harassment can rise to an actionable level when they are frequent or part of a pervasive pattern); *see also Cadena v. Pacesetter Corp.*, 18 F. Supp. 2d 1220, 1227 (D. Kan. 1998) (repeating two remarks on a regular basis could be sufficiently pervasive to be actionable).

69. Smith's behavior was not welcomed by Dykes, who went to lengths to avoid Smith, enlisting subordinates to interrupt meetings and monitoring the closed-circuit televisions to avoid Smith as he approached her office. Dykes told others, including Amanda McDaniel, numerous times that Smith's advances were unwelcome. Dykes specifically asked Smith to stop writing her personal emails, songs, and poems, to

limit his contact with her to only work-related visits, and to stick only to work-related matters in their meetings. Aside from two perfunctory, non-encouraging responses, Dykes did not reply to Smith's personal emails. *See, e.g., Hurde v. Jobs Plus-Med*, 299 F. Supp. 2d 1196, 1213 n.20 (D. Kan. 2004) (unwelcome prong "easily satisfied" where plaintiff told harasser on at least two occasions that he did not approve of the offensive comments); *Ratts v. Bd. of Cty. Comm'rs, Harvey Cty.*, 141 F. Supp. 2d 1289, 1305 (D. Kan. 2001) (same where plaintiff remarked that she found the comments inappropriate).

70. Smith acknowledged his conduct toward Dykes was unwelcome as his emails contain admissions that his behavior was inappropriate and unwanted including such comments as: "OK, I know I shouldn't write. But I need to express feelings. I'm gonna burst. Right now you're all I have...." [Pl's Ex. 36; *see also* Pl.'s Ex. 35.] *See Bragg v. Office of the Dist. Att'y*, 704 F. Supp. 2d 1032, 1060 (D. Colo. 2009) (hostile work environment existed in part because harasser occupied plaintiff for hours both in person and by phone with details of his personal life even though plaintiff repeatedly told harasser to stop and that she had work to do).

71. When Smith refused to curb his behavior, Dykes sought help from HRO and Smith's direct supervisor, Col. Campbell. Such efforts are clear evidence that Smith's behavior was unwelcome. *See Walker v. United Parcel Serv. of Am., Inc.*, 76 Fed. App'x 881, 887 (10th Cir. 2003) (unpublished) (conduct subjectively unwelcome because plaintiff complained of some incidents to a union steward and two different supervisors); *Rahn v. Junction City Foundry, Inc.*, 152 F. Supp. 2d 1249, 1257 (D. Kan.

2001) (that plaintiff complained of the behavior to management clearly shows it was unwelcome).

72. While the extent to which Smith's conduct caused Dykes' to suffer specific stress-related physical symptoms is debatable, there is evidence Dykes was made physically and emotionally uncomfortable by Smith's conduct in the form of stress and anxiety.

Don Smith's harassment was based on Amanda Dykes' sex.

73. "A hostile work environment may be created by conduct that is not of a sexual nature, so long as the conduct is sufficiently pervasive and would not occur but for the sex of the employee." *Schrader v. E.G. & G., Inc.*, 953 F. Supp. 1160, 1168–69 (D. Colo. 1997) (citing *Hicks v. Gates Rubber Co.*, 833, F.2d 1406, 1415 (10th Cir. 1987)).

74. Smith's conduct was based on his attraction to Dykes as a woman, and his attention to her coincided with the collapse of his own marriage. Smith told her twice he loved her and told McDaniel he loved Dykes. Smith told Dykes he had a "crush" on her and that he needed to set boundaries to "break the crush." Smith made comments about Dykes' physical features, and McDaniel repeatedly described Smith as "obsessed" and "infatuated" with Dykes.

75. By any reasonable reading, Smith's personal emails to Dykes reveal a romantic attraction based on Dykes' sex. For example, Smith referred to his "love" for Dykes, praised Dykes as a "woman" and a "mother," and noted how "lucky" Dykes' husband was to have her. Smith also apologized for seeming like a "cad" or "interloper" in her marriage, acknowledged "cross[ing] the line," and offered to let Dykes' husband

"beat [Smith] up." He made similar statements to Dykes in person in her office, praising her personal qualities and complimenting both her and her "lucky" husband. *See Harsco Corp.*, 475 F.3d at 1186 (an inference of gender-based harassment is "easy to draw" when the conduct involves "explicit or implicit" proposals of sexual activity); *Bragg*, 704 F. Supp. 2d at 1057 (finding that romantic advances are plainly based on sex).

76. Smith never behaved in this manner toward any male subordinates. *Dick v. Phone Directories Co.*, 397 F.3d 1256, 1264 (10th Cir. 2005) (sex discrimination can be inferred where a harasser treats men and women differently). There is no evidence to suggest Smith wrote songs, poems, or personal emails to anyone else at WYCP.

Smith's harassment of Dykes was pervasive and altered the conditions of employment to create an abusive working environment.

77. The conduct in question must be severe or pervasive enough to create both an "'objectively hostile or abusive work environment—an environment that a reasonable person would find hostile'—and an environment the victim-employee subjectively perceives as abusive or hostile." *Smith v. Norwest Fin. Acceptance, Inc.*, 129 F.3d 1408, 1413 (10th Cir. 1997) (quoting *Harris v. Forklift Systems*, 510 U.S. 17, 21–22 (1993)).

78. Any harassment or other unequal treatment of an employee that would not occur but for the sex of the employee may, if sufficiently patterned or pervasive, comprise an illegal condition of employment under Title VII. *See Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1415 (10th Cir. 1987). Even less-severe acts of harassment can rise to an actionable level when they are frequent or part of a pervasive pattern of objectionable behavior, particularly when the alleged misconduct is that of a supervisor.

Schweitzer–Reschke v. Avnet, Inc., 874 F. Supp. 1187, 1193 (D. Kan. 1995).

79. Whether harassment is severe or pervasive is determined from the perspective of a reasonable person in the complaining party's position, "considering all the circumstances," including "the frequency of the 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." *Harsco Corp.*, 475 F.3d at 1186 (citing *Harris*, 510 U.S. at 23).

80. Smith's actions were sufficiently pervasive that a reasonable person would view the environment as objectively hostile or abusive. Smith's stream of at least twenty-six personal emails, frequent and lengthy office visits, declarations to both her and her assistant that he "loved" Dykes and had a "crush" on her, and the songs and poems he wrote for Dykes constituted pervasive, intense romantic attention that a reasonable person would find hostile or abusive. *See Brandau v. State of Kan.*, 968 F. Supp. 1416, 1419 (D. Kan. 1997) (a reasonable person could find that telling plaintiff he "loved" her, even qualifying it with "in a fatherly way," kissing her, and expressing hope to "make love" to her, sufficiently severe or pervasive); *Lauderdale v. Texas Dep't of Criminal Justice*, 512 F.3d 157, 161–64 (5th Cir. 2007) (supervisor's comments to plaintiff, including telling her she was beautiful and that he loved her, asking about her marital status, stating that his "heart was broken and he might hang himself," and suggesting that they go to Las Vegas to "snuggle" met the pervasiveness requirement sufficient to survive summary judgment).

81. Smith's behaviors seriously interfered with Dykes' ability to perform her job as Commandant. Smith spent countless hours in Dykes' office reading her poems and songs; discussing his personal feelings, including his feelings about Dykes; and attempting to get Dykes to engage in these discussions and emails. Dykes could not complete her work duties due to Smith's constant attention and was reduced to arranging with coworkers to run interference for her or even leaving her office if she saw Smith coming via the closed-circuit monitors.

82. After Dykes confronted Smith and later reported his conduct to his supervisor in late August 2011, Smith's behavior toward Dykes turned hostile.

83. In evaluating whether an alleged harasser's actions were severe or pervasive, it is the victim's subjective belief that is at issue, as opposed to the harasser's subjective belief. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21–22 (1993). Dykes reasonably believed Smith's unwanted attention was sufficiently pervasive to create a hostile working environment and interfered with Dykes' ability to perform her duties as Commandant.

The Wyoming Military Department is vicariously liable for Don Smith's misconduct.

84. When the harasser is a supervisor, an employer is vicariously liable for the supervisor's harassment of a subordinate unless it can establish the affirmative defense set forth in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) (the "*Faragher/Ellerth* defense").

85. Don Smith was Amanda Dykes' direct supervisor and the Director of WYCP.

86. WMD conceded at the summary judgment stage that it cannot establish the *Faragher/Ellerth* defense. Therefore, WMD is vicariously liable for Smith's harassment of his subordinate.

Amanda Dykes was constructively discharged from her employment due to the hostile work environment.

87. "Constructive discharge, like actual discharge, is a materially adverse employment action." *Rennard v. Woodworker's Supply, Inc.*, 101 F. App'x 296, 308–09 (10th Cir. 2004) (quoting *EEOC v. Univ. of Chicago Hosps.*, 276 F.3d 326, 331 (7th Cir. 2002)). It occurs "when an employer, through unlawful acts, makes working conditions so intolerable that a reasonable person in the employee's position would feel forced to resign." *Exum v. U.S. Olympic Comm.*, 389 F.3d 1130, 1135 (10th Cir. 2004). The standard is objective; neither the plaintiff's subjective experience nor the employer's subjective intent are relevant. *Rennard*, 101 F. App'x at 309 (10th Cir. 2004) (quoting *Jeffries v. Kansas*, 147 F.3d 1220, 1233 (10th Cir. 1998)).

88. "Essentially, a plaintiff must show that she had no other choice but to quit." *Id.* A resignation is involuntary where "the totality of the circumstances indicate [the lack of an] opportunity to make a free choice." *Narotzky v. Natrona Cty. Mem'l Hosp. Bd. of Trustees*, 610 F.3d 558, 566 (10th Cir. 2010) (quoting *Parker v. Bd. of Regents of Tulsa Jr. Coll*, 981 F.2d 1159, 1162 (10th Cir. 1992)).

89. Dykes sought to stop Smith's harassment by contacting HRO by phone and by email. When no corrective action was taken there, she went up the chain of command to make a report to her harasser's supervisor, Col. Campbell. None of her efforts were

successful, though, so Dykes was left with a supervisor who continued to harass her and whose conduct turned hostile after she continually rejected his advances and complained to his superior.

90. The Court has little difficulty concluding these circumstances, in total, were objectively intolerable to a reasonable person. By August 2011, Dykes had suffered months of Smith's lengthy office visits, inappropriate emails, poems, songs, and desperate attempts to draw Dykes into conversations about his personal life. Smith's behavior then escalated when it became clear Dykes would not reciprocate and had complained to Smith's supervisor. Smith turned vindictive, undermining Dykes at meetings and criticizing her work product, thus preventing Dykes from performing her job duties in any meaningful way.

91. Dykes made multiple complaints to HRO and sought help by going up the chain of command. In June 2011, Dykes even wrote in an email to Lori Cole, a human resource officer, saying, "I feel very uncomfortable with this situation, help me please." However, WMD and HRO took no action to help. *Compare Strickland v. United Parcel Serv., Inc.*, 555 F.3d 1224, 1229 (10th Cir. 2009) (workplace situation objectively intolerable where plaintiff was subject to increased scrutiny following her medical leave, complained twice to human resources and attempted to complain to her harasser's supervisor, but no action was taken) *with Hirschfeld v. N.M. Corr. Dep't*, 916 F.2d 572, 578 (10th Cir. 1990) (no constructive discharge where the plaintiff resigned four months after the last incident of harassment and employer had previously taken immediate

corrective action by investigating the complaint, interviewing the plaintiff, placing the harasser on leave, and demoting the harasser after investigation).

92. Additionally, Dykes' September 2011 resignation came almost immediately following a staff meeting where she walked out due to the hostile behavior Smith exhibited towards her in the presence of her peers and employees. Delaying resignation for a period of months can contradict an allegation that employment conditions were intolerable. *Green v. Brennan*, 136 S.Ct. 1769, 1782 (2016). But here, Dykes resigned only about three weeks after complaining to Col. Campbell, which was more than long enough for Col. Campbell to take action to remedy Smith's misconduct and long enough for Dykes to see that no such remedial action was being taken.

93. Inaction on the part of the employer provides support for a constructive discharge claim. *See, e.g., Strickland v. United Parcel Serv., Inc.*, 555 F.3d 1224, 1229 (10th Cir. 2009). Given Dykes' continued efforts to report Smith's misconduct to HRO and up the chain of command without any remedial action being taken, a reasonable person would be left with the conclusion that resignation is the only option left to escape the harasser.

94. Whether the harassing behavior interferes with the victim's ability to do her job is "critical [] to the question of whether a reasonable person would feel compelled to resign." *Bragg*, 704 F. Supp. 2d at 1060. Smith's unwelcome advances seriously interfered with Dykes' ability to perform her job. Multiple times a week, Smith would spend up to four hours a day in Dykes' office discussing his personal thoughts and feelings, reading her poetry and songs, asking her to respond verbally to personal emails

he had sent the night before, praising Dykes' personal qualities, and otherwise engaging in non-work-related behavior. Because of this conduct, she was unable to finish all her work during normal office hours.

95. Despite multiple complaints, Dykes received no indication that WMD and/or HRO would take any action to protect her from her supervisor. After entering a workplace contract with Dykes and agreeing not to be alone in a room with her with the door closed, Smith immediately broke that contract, entering her office and closing the door behind him. When Dykes protested, Smith pointed to a stick and told her she could use it to "beat him off of her." Dykes immediately informed HRO that Smith had broken their contract, putting HRO on notice that Smith was unable or unwilling to respect the boundaries Dykes set for him. [*See* Pl.'s Ex. 53.] Despite this, no action was taken by HRO.

96. Around this same time, Dykes believes Smith drove by her house when her husband was not home, making Dykes so fearful she spent the weekend with her parents. She even contacted a sheriff's deputy about securing a protective order against Smith. When Dykes eventually turned in her resignation letter, she did so only after waiting for an opportunity when a third-party management witness would be present so as not to be alone in a room with her supervisor.

97. Dykes had no reasonable alternative to resignation to escape Smith's harassment. She made multiple efforts to report Smith's conduct to no avail. Staff that worked with Dykes at WYCP were aware that Smith's poems and songs made Dykes uncomfortable, and upon hearing this prior to the June 2011 cadet graduation, Robyn

Huber contacted Tammy Connor, at HRO, about the concerns. Yet WMD took minimal action to stop the harassment, doing nothing more than when Col. Campbell told Smith to "keep it professional" during a lunch meeting. Dykes did not need to make more complaints to human resources or a second complaint to Col. Campbell for her workplace situation to be objectively intolerable.

98. Even when Dykes submitted her letter of resignation, WMD made no effort to attempt to correct the problem or invite Dykes to return. *See, e.g., Fischer v. Forestwood Co.*, 525 F.3d 972, 982 (10th Cir. 2008) (finding no constructive discharge where plaintiff's supervisor asked him to reconsider his decision to leave the employer and plaintiff later sought reinstatement in the company); *Exum v. U.S. Olympic Committee*, 389 F.3d 1130, 1136 (10th 2004) (same where employer provided plaintiff alternatives to quitting and offered to investigate his complaints).

99. Dykes' subjective willingness to temporarily stay to help transition the cadets is irrelevant. The objective standard in a constructive discharge analysis "cuts both ways—just as an employee's subjective feelings that her working conditions were intolerable is not controlling in the constructive discharge analysis, neither is an employee's desire to continue working despite conditions so intolerable any reasonable employee would have long since quit." *EEOC v. PVNF*, 487 F.3d 790, n.10 (10th Cir. 2007).

100. Even if Dykes had left WYCP for any other reason, such as another position or to go back to school—contentions she flatly denies—her subjective view of the situation is irrelevant. The relevant question is whether a reasonable person in her

situation would have felt compelled to resign. *See Sholl v. Plattform Advert, Inc.*, 438 F. Supp. 2d 1303, 1313–14 (D. Kan. 2006) (rejecting the argument that because plaintiff found another job before she resigned, she was not constructively discharged). The Court easily concludes a reasonable person in Dykes' position, having already endured several months of harassment and seeing no relief forthcoming from human resources or the harasser's supervisor, would have felt it necessary to resign in order to end the harassment and hostility. Amanda Dykes was constructively discharged.

B. Damages

101. The remedy in a Title VII action is whatever relief is necessary "to make persons whole for injuries suffered on account of unlawful employment discrimination." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). The statute "requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination." *Id.* at 421 (quoting 118 Cong. Rec. 7168 (1972)).

102. Courts have "wide discretion" to fashion such "make-whole" relief, which potentially includes injunctive relief, 42 U.S.C. §2000e-5(g)(1), as well as an award of back pay. *Albemarle Paper Co.*, 422 U.S. at 421 (holding that back pay should be granted unless such an award would "frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination").

Amanda Dykes is entitled to reasonable back pay.

103. In determining back pay for constructive discharge, a court typically

estimates what a plaintiff would have made had he or she not been constructively discharged up until the time of trial. A court then subtracts from that amount any earnings she received that mitigated her damages. *EEOC v. Sandia Corp.*, 639 F.2d. 600, 627 (10th Cir. 1980); *Eichenwald v. Krigel's, Inc.*, 908 F. Supp. 1531, 1564 (D. Kan. 1995). The statute reduces allowable back pay awards by any amount earnable by a discharged plaintiff with reasonable diligence, which means that a plaintiff has a duty to mitigate his or her damages, presumably by seeking employment elsewhere. *United States v. Lee Way Motor Freight*, 625 F.2d 918, 936–38 (10th Cir. 1979).

104. The United States seeks back pay to the time when Dykes completed the BRAND program. An award of back pay to Dykes is appropriate from October 21, 2011, the day following her last day of pay [Pl.'s Ex. 54], through May 2014, when she committed to the BRAND program by submitting a tuition check and began the associated coursework [Def's Ex. O]. The back pay award should take into account the state employee salary increases occurring in July 2013. Dr. Wainwright's analysis demonstrates that Dykes would have received state employee salary increases of zero percent (0.0%) in July 2012, and one percent (1.0%) in July 2013 had she remained with WYCP. [Pl's Ex. 87 at p. 5.] Therefore, Dykes' back pay award should reflect that increase from July 2013 through May 2014.

105. Dykes' normal monthly salary paid her for 173.20 hours of work. For October 2011, though, she only received a partial month's payment for 111.44 hours. [Pl.'s Ex. 83.] She's still owed for 61.76 hours for October 2011. Dykes' lost gross salary is as follows:

October 2011: $26.1778 per hour x 61.76 hours = $1,616.74
November 2011 through June 2013: $4,574.00 x 20 months = $91,480.00
July 2013 through May 2014: $4,619.34 x 11 months = $50,812.74

These amounts include Dykes' $40-per-month longevity bonus. [*See* Pl.'s Ex. 83.] They also include the taxes that were normally deducted from Dykes' pay every month. [*See id.*] Specifically, $192.95 was deducted for FICA, $385.45 for federal income tax, and $66.62 for Medicare tax. [*Id.*] The Court has not deducted these taxes from the award of back pay because such awards received from Title VII claims are included as "gross income" and subject to taxation by the Internal Revenue Service. *See United States v. Burke*, 504 U.S. 229, 241-42 (1992).

106. This back pay award is still incomplete, however, because it does not include the employer's contributions to Dykes' deferred compensation account and retirement plan. "An award of back pay compensates a plaintiff for lost wages **and benefits**" during the timeframe at issue. *Goico v. Boeing Co.*, 347 F. Supp. 2d 986, 990 (D. Kan. 2004) (emphasis added); *see also Gaworski v. ITT Comm. Finan. Corp.*, 17 F.3d 1104, 1111 (8th Cir. 1994) (affirming district court's award of employer's matching contributions to plaintiff's 401(k) account as part of back pay award); *Buonanno v. AT&T Broadband, LLC*, 313 F. Supp. 2d 1069, 1083 (D. Colo. 2004) (including employer's matching contributions to plaintiff's 401(k) account in a Title VII action).

107. Dykes' make-whole relief should include these employer contributions because they are part of what she lost when she was constructively discharged. Those additional amounts, taken from Plaintiff's Exhibit 83, are:

Deferred Compensation Match:

$20/mo. x 31 months = $620.00

Employer-Matching Retirement Account Contributions:
October 2011 (partially-unpaid): $191.81
November 2011 through June 2013: $580.44 per month
$580.44 per month x 20 months = $11,608.80
July 2013 through May 2014: $586.20 per month (due to 1.0% raise)
$586.20 per month x 11 months = $6,446.00

108. Finally, in the proper case, "a district court is authorized to grant prejudgment interest on a back pay award." *Daniel v. Loveridge*, 32 F.3d 1472, 1478 (10th Cir. 1994) (citing *Loeffler v. Frank*, 486 U.S. 549, 557-58 (1988)). Prejudgment interest in a Title VII case "is an element of complete compensation" in back pay awards. *Loeffler*, 486 U.S. at 558.

109. The Court finds an award of prejudgment interest is warranted in this case to make Dykes whole and reimburse her for the lost time value of her back pay. Prejudgment interest "does not accrue until the victim actually sustains monetary injury." *Reed v. Mineta*, 438 F.3d 1063, 1066 (10th Cir. 2006). Here, Dykes' "monetary injuries were incrementally inflicted from the date of [her] termination" through the end of the timeframe at issue "as each pay period passed and [Dykes] went unpaid." *Id.* at 1067.

110. In calculating the interest owed on the award of back pay, the Court borrows the formula set forth by the Tenth Circuit in *Reed*, which is:

$\Sigma\ Pmt_1[\ (1+i)^{n}-1] + Pmt_2[\ (1+i)^{n-1}-1] + Pmt_3[\ (1+i)^{n-2}-1] + \ldots$
Pmt = Amount claimant would have been paid per pay period
i = Interest Rate Per Period
n = Number of Compounding Periods

Id. at 1067 n.4. The Court applies the prejudgment interest rate of 7.0% per annum (0.58% per month) from Wyoming's state statutes. Wyo. Stat. Ann.§ 40-14-106(e). Pmt_1 is the remainder of pay due for October 2011, which is

$1,616.74 (unpaid salary with longevity bonus)
\+ $191.81 (unpaid employer-matching retirement contributions)

$1,808.55 (total owed for October 2011)

Then each month's payment for November 2011 through June 2013 will be:

$4,574.00 (salary with longevity bonus)
\+ $580.44 (employer-matching retirement contributions)
\+ $20.00 (deferred compensation matching)

$5,174.44 (owed each month for 20 months)

Then each month's payment for July 2013 through May 2014 will be:

$4,619.34 (salary with longevity bonus plus 1.0% raise)
\+ $586.20 (employer-matching retirement contributions)
\+ $20.00 (deferred compensation matching)

$5,225.54 (owed each month for 11 months)

Finally, "n" is 69 because there were 69 pay periods (months) between Dykes' official last day of employment (October 2011) and the trial in this matter (July 2017). The beginning of the mathematical formula is shown here:

$$\Sigma\ Pmt_1[\ (1+i)^{n}-1] + Pmt_2[\ (1+i)^{n-1}-1] + Pmt_3[\ (1+i)^{n-2}-1] + \ldots$$

$$\Sigma\ \$1{,}808.55[(1.0058)^{69}-1] + \$5{,}174.44[(1.0058)^{68}-1] + \$5{,}174.44[(1.0058)^{67}-1] \ldots$$

$$\Sigma\ \$1{,}808.55[1.490-1] + \$5{,}174.44[1.482-1] + \$5{,}174.44[1.473-1] \ldots$$

$$\Sigma\ \$1{,}808.55[.490] + \$5{,}174.44[.482] + \$5{,}147.44[.473] \ldots$$

$$\Sigma\ \$886.19 + \$2{,}494.08 + \$2{,}447.51 \ldots$$

The Court's complete interest calculation table is attached to this Order. The total amount of prejudgment interest owed is $58,874.53.

111. The Court notes that it used Dykes' gross salary plus the value of her benefits to determine the back pay award and amount of interest. This is because, as noted above, awards of back pay are taxable, so she will owe taxes on this judgment. Therefore, the Court has not deducted any taxes from her gross pay in its calculations. Additionally, she should receive interest on the value of her unpaid benefits (e.g., employer's contributions to retirement account) because she would have been receiving interest (or gain) on those amounts had they been deposited into her retirement account.

112. In summary, the back pay award is as follows:

Gross Unpaid Salary (Oct. 2011 – May 2014, including longevity bonus and 1.0% pay raise in July 2013): $143,909.48

Value of Unpaid Benefits (employer's contributions to deferred compensation and retirement accounts): $18,246.61

Prejudgment Interest Owed on these Amounts (through June 2017, the last full month before trial): $58,874.53

TOTAL BACK PAY AWARD: **$221,030.62**

An award of front pay is not warranted here because it would only be based on improper speculation.

113. Front pay "is simply money awarded for lost compensation during the period between judgment and reinstatement or in lieu of reinstatement." *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 846 (2001). "Awards of front pay should be evaluated under the standards applied to all Title VII relief: whether the award will aid in

ending illegal discrimination and rectifying the harm it causes." *Thornton v. Kaplan*, 961 F. Supp. 1433, 1438 (D. Colo. 1996) (quoting *Shore v. Federal Exp. Corp.*, 777 F.2d 1155, 1159 (6th Cir. 1985)).

114. It is unreasonable to assume Dykes would have worked at WYCP until she retired. At the time of her resignation, she was approximately 30 years old, requiring her to remain with WYCP for approximately another 25 years until she became eligible for retirement under the state's "Rule of 85" (age plus years of service). While Dykes noted it was "possible" she would have remained at WYCP for her career, such uncertainty renders any award of front pay too speculative. *See Davis v. Combustion Eng'g, Inc.*, 742 F.2d 916, 923 (6th Cir. 1984) ("the award of front pay to a discriminatorily discharged 41 year old employee until such time as he qualifies for a pension might be unwarranted"); *Wulf v. City of Wichita*, 883 F.2d 842, 873–74 (10th Cir. 1989) (noting the speculative nature of front pay awards, but finding it reasonable to assume the plaintiff would have worked another eight years until his retirement). Dykes actively sought out and applied for job opportunities outside WYCP even prior to Smith's arrival, which supports the conclusion that it is improper speculation to assume Dykes would have remained at WYCP for her entire career.

115. Further, the Court finds the award of back pay by itself completes the "make whole" purposes of Title VII. *See Shore*, 777 F.2d at 1159 ("if the trial court determines that an award of back pay does not fully redress a Title VII plaintiff's injuries, and reinstatement is not possible, an award of front pay is sometimes appropriate in order to effectuate fully the 'make whole' purposes of Title VII"). Upon committing to the

accelerated nursing program, Dykes changed her career path to nursing, and it would not be equitable to require Defendant to pay her salary after that point.

Amanda Dykes did not fail to mitigate her damages.

116. "[W]rongfully discharged claimants have an obligation to use reasonable efforts to mitigate their damages." *EEOC v. Sandia Corp.*, 639 F.2d. 600, 627 (10th Cir. 1980). "A claimant is required to make only reasonable exertions to mitigate damages, and is not held to the highest standards of diligence. It does not compel him to be successful in mitigation. It requires only an honest good faith effort." *United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918, 938 (10th Cir. 1979).

117. "[O]nce a violation has been demonstrated and back pay has been awarded, the employer has the burden of showing that the discriminatee did not exercise reasonable diligence in mitigating damages caused by the employer's illegal action." *Id.* at 937. To meet this burden, "the defendant must establish (1) that the damage suffered by [claimant] could have been avoided, i.e. that there were suitable positions available which plaintiff could have discovered and for which he was qualified; and (2) that plaintiff failed to use reasonable care and diligence in seeking such a position." *Sandia Corp.*, 639 F.2d at 627 (quoting *Sias v. City Demonstration Agency*, 588 F.2d 692, 696 (9th Cir. 1978)).

118. WMD has not met its burden on either prong because it cannot show there were suitable positions available which Dykes could have discovered and for which she was qualified, and Dykes used reasonable diligence in seeking a suitable position. A "suitable" position must afford "virtually identical promotional opportunities,

compensation, job responsibilities, working conditions, and status as the position from which the . . . claimant has been discriminatorily terminated." *EEOC v. W. Trading Co.*, 291 F.R.D. 615, 620 (D. Colo. 2013) (quoting *Sellers v. Delgado Comm. College*, 839 F.2d 1132, 1138 (5th Cir. 1988)).

119. Dykes' position of Commandant was the third-highest position in the WYCP. The Commandant supervised approximately 27 employees in the "cadre" staff. She was also responsible for creating and implementing policies for both cadets and staff, managing day-to-day duties "on the floor" with the cadets, overseeing disciplinary actions or rewards, and staff scheduling. The position works closely with the Director of the program and has a great deal of autonomy, responsibility, and authority.

120. WMD has not identified any comparable positions available that Dykes failed to discover. The job openings put forth by WMD largely involve different lines of work with far lower salaries and dissimilar duties. *See Giandonato v. Sybron Corp.*, 804 F.2d 120, 123 (10th Cir. 1986) (a Title VII claimant's duty to mitigate does not require them to "go into another line of work, accept a demotion, or take a demeaning position") (quoting *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231–32 (1982)).

121. WMD suggested Dykes should have applied for one or more other positions at WYCP after she resigned (ostensibly after Smith was also discharged). However, Dykes was not obligated to apply for any positions at WYCP after her constructive discharge, even if they could have conceivably been "suitable positions." Further, in the absence of an affirmative offer of reinstatement or reemployment, it is impossible to know if WMD would have in fact reemployed Dykes. It's unreasonable to

require a Title VII claimant to reapply to the employer from which she was constructively discharged in order to mitigate her damages.

122. Moreover, even if WMD had affirmatively offered Dykes an unconditional offer of re-employment, she would have not been obligated to take the position for purposes of mitigating her damages. *See Herrera v. Int'l Broth. Of Elec. Workers Union*, 228 F. Supp. 2d. 1233, 1245–47 (D. Colo. 2002) (where plaintiff alleges constructive discharge for harassment, she may have "valid reasons" for refusing reinstatement). Factors regarding the suitability of reinstatement include whether (1) "plaintiff could return to work without an atmosphere of hostility; (2) the employer had a custom or habit of condoning or permitting sexual harassment to occur in the workplace; (3) the employer has established and maintained over a period of years a continuing sexually discriminatory policy respecting employment actions; and (4) the relationship between the parties has been irreparably damaged." *Id.* at 1246. Dykes would not have been required to accept an offer of employment or reinstatement at WMD, even if offered, because she would still be working closely with Col. Campbell and her HRO representatives would remain Lori Cole and Tammy Connor, all of whom had ignored her sexual harassment complaints. With little to no action taken on Dykes' five complaints, her employer had demonstrated a willingness to permit harassment, and the relationship between Dykes and WMD was irreparably damaged.

123. Dykes' diligence in attempting to obtain positions is irrelevant given WMD's failure to identify suitable jobs. *Wilson v. Union Pac. R.R. Co.*, 56 F.3d 1226, 1232 (10th Cir. 1995). Nevertheless, Dykes' employment searches were sufficient. She

made reasonable and good faith efforts at securing employment from 2011 to 2014. Dykes' weekly job searches and applications from October 2011 to April 2014, updates to her resume, and her meetings with Wyoming Workforce Services, were sufficient for purposes of mitigating her damages.

124. Until May 21, 2014, Dykes actively sought employment, including a final visit to Wyoming Workforce Services on May 7, 2014 to see if any comparable jobs were available before she wrote her tuition check for the BRAND program. At that point, Dykes had exhausted her financial resources and yet not found any comparable employment. Jeff Mueller recalled how upset Dykes was at her inability to find work and again suggested she consider the nursing field due to the rural area in which she lived. Having exhausted every reasonable lead, Dykes logically decided to stop pursuing comparable employment and try another field that would offer a comparable salary. When Dykes wrote the tuition check to the BRAND program in May 2014, she committed herself to pursuing a career in nursing and removed herself from the labor market. As a result, Dykes' claim for back pay goes from the time of her resignation to May 2014. Until then, though, she reasonably attempted to mitigate her damages by actively seeking comparable employment. WMD has not carried its burden of demonstrating that Dykes failed to mitigate her damages, and the Court will not reduce the award of back pay.

C. Injunctive Relief

125. Part of the United States' enforcement responsibility includes obtaining prospective injunctive relief, in appropriate cases, to ensure compliance with Title VII.

See 42 U.S.C. §2000e-5(g)(1). In determining whether injunctive relief is warranted, the most important factor is "whether the facts indicate a danger of future violations." *EEOC v. Wal-Mart Stores*, 187 F.3d 1241, 1250 (10th Cir. 1999) (*quoting Roe v. Cheyenne Mountain Conference Resort*, 124 F.3d 1221, 1230 (10th Cir. 1997)).

126. WMD dropped the ball when it failed to take appropriate corrective action on Dykes' harassment complaints. However, it discharged Smith in March 2012 [Pl.'s Ex. 4], who was the primary source of problems. Additionally, based on the testimony and evidence at trial as well as this judgment, the Court is confident that WMD has ample motivation to ensure any future complaints are quickly investigated and timely remedied. WMD is, and should be, embarrassed by the multiple failures of HRO and Col. Campbell in this matter. The Court will decline to order injunctive relief, but WMD is encouraged to provide training to its personnel, in particular to its Human Resources Office, on how to adequately respond and investigate a harassment complaint from an employee.

CONCLUSION AND ORDER

127. Amanda Dykes was subjected to continuous harassment by her direct supervisor on the basis of her gender, and her complaints to those whose job it was to help fell on deaf ears. Her resignation was her only escape from the hostile work environment, and she was therefore constructively discharged from her employment. She is entitled to a back pay award totaling **$221,030.62**, and she did not fail to mitigate her damages. However, any additional back pay beyond May 2014 is not appropriate

because Dykes changed her career path at that time. Finally, an award of front pay and injunctive relief is not warranted.

IT IS THEREFORE ORDERED that judgment in favor of the United States and against the Wyoming Military Department shall be entered accordingly.

DATED this 21ST day of March, 2018.

Scott W. Skavdahl
United States District Judge

Attachment: Interest Calculation Table

UNITED STATES v. WYOMING MILITARY DEPARTMENT
District of Wyoming Case No. 16-CV-055-SWS

INTEREST CALCULATION TABLE

October 2011:	$\$1,808.55[(1.0058)^{69}-1] = \$1,808.55[.490] = \$886.19$
November 2011:	$\$5,174.44[(1.0058)^{68}-1] = \$5,174.44[.482] = \$2,494.08$
December 2011:	$\$5,174.44[(1.0058)^{67}-1] = \$5,174.44[.473] = \$2,447.51$
January 2012:	$\$5,174.44[(1.0058)^{66}-1] = \$5,174.44[.465] = \$2,406.11$
February 2012:	$\$5,174.44[(1.0058)^{65}-1] = \$5,174.44[.456] = \$2,359.54$
March 2012:	$\$5,174.44[(1.0058)^{64}-1] = \$5,174.44[.448] = \$2,318.15$
April 2012:	$\$5,174.44[(1.0058)^{63}-1] = \$5,174.44[.440] = \$2,276.75$
May 2012:	$\$5,174.44[(1.0058)^{62}-1] = \$5,174.44[.431] = \$2,230.18$
June 2012:	$\$5,174.44[(1.0058)^{61}-1] = \$5,174.44[.423] = \$2,188.79$
July 2012:	$\$5,174.44[(1.0058)^{60}-1] = \$5,174.44[.415] = \$2,147.39$
August 2012:	$\$5,174.44[(1.0058)^{59}-1] = \$5,174.44[.407] = \$2,106.00$
September 2012:	$\$5,174.44[(1.0058)^{58}-1] = \$5,174.44[.399] = \$2,064.60$
October 2012:	$\$5,174.44[(1.0058)^{57}-1] = \$5,174.44[.390] = \$2,018.03$
November 2012:	$\$5,174.44[(1.0058)^{56}-1] = \$5,174.44[.382] = \$1,976.64$
December 2012:	$\$5,174.44[(1.0058)^{55}-1] = \$5,174.44[.374] = \$1,935.24$
January 2013:	$\$5,174.44[(1.0058)^{54}-1] = \$5,174.44[.367] = \$1,899.02$
February 2013:	$\$5,174.44[(1.0058)^{53}-1] = \$5,174.44[.359] = \$1,857.62$
March 2013:	$\$5,174.44[(1.0058)^{52}-1] = \$5,174.44[.351] = \$1,816.23$
April 2013:	$\$5,174.44[(1.0058)^{51}-1] = \$5,174.44[.343] = \$1,774.83$
May 2013:	$\$5,174.44[(1.0058)^{50}-1] = \$5,174.44[.335] = \$1,733.44$
June 2013:	$\$5,174.44[(1.0058)^{49}-1] = \$5,174.44[.328] = \$1,697.22$
July 2013:	$\$5,225.54[(1.0058)^{48}-1] = \$5,225.54[.320] = \$1,672.17$
August 2013:	$\$5,225.54[(1.0058)^{47}-1] = \$5,225.54[.312] = \$1,630.37$
September 2013:	$\$5,225.54[(1.0058)^{46}-1] = \$5,225.54[.305] = \$1,593.79$
October 2013:	$\$5,225.54[(1.0058)^{45}-1] = \$5,225.54[.297] = \$1,551.99$
November 2013:	$\$5,225.54[(1.0058)^{44}-1] = \$5,225.54[.290] = \$1,515.41$
December 2013:	$\$5,225.54[(1.0058)^{43}-1] = \$5,225.54[.282] = \$1,473.60$
January 2014:	$\$5,225.54[(1.0058)^{42}-1] = \$5,225.54[.275] = \$1,437.02$
February 2014:	$\$5,225.54[(1.0058)^{41}-1] = \$5,225.54[.268] = \$1,400.44$
March 2014:	$\$5,225.54[(1.0058)^{40}-1] = \$5,225.54[.260] = \$1,358.64$
April 2014:	$\$5,225.54[(1.0058)^{39}-1] = \$5,225.54[.253] = \$1,322.06$
May 2014:	$\$5,225.54[(1.0058)^{38}-1] = \$5,225.54[.246] = \$1,285.48$

TOTAL INTEREST: $58,874.53