

1
2
3 Before: WINTER, LYNCH, and DRONEY, *Circuit Judges*.
4
5

6 Appeal from orders of the United States District Court for the
7 District of Connecticut (Alvin W. Thompson, *Judge*) denying the
8 defendant police supervisors' motions for summary judgment in the
9 plaintiffs' employment discrimination action brought pursuant to 42
10 U.S.C. § 1983. We agree with the district court that Defendant
11 Carlone is not entitled to qualified immunity on Plaintiff Raspardo's
12 hostile work environment claim. We conclude, however, that the
13 defendants are protected by qualified immunity in all other respects.
14 Accordingly, we **AFFIRM** in part, **REVERSE** in part, and
15 **REMAND**.
16

17
18 ALEXANDRIA L. VOCCIO, Howd
19 & Ludorf, LLC, Hartford,
20 Connecticut, *for Defendant-*
21 *Appellant John Carlone.*
22

23 JOSEPH W. MCQUADE, Kainen,
24 Escalera & McHale, P.C.,
25 Hartford, Connecticut, *for*
26 *Defendant-Appellant Anthony*
27 *Paventi.*

28 IRENA J. URBANIAK (Joseph E.
29 Skelly, Jr., *on the brief*), Office of
30 the Corporation Counsel, City of
31 New Britain, New Britain,

1 Connecticut, *for Defendants-*
2 *Appellants.*

3 NORMAN A. PATTIS, The Pattis
4 Law Firm, LLC, Bethany,
5 Connecticut, *for Plaintiffs-*
6 *Appellees.*

7
8
9 DRONEY, *Circuit Judge:*

10
11 Plaintiffs-Appellees (the “plaintiffs”), two former and one
12 current female New Britain police officers, brought suit in the
13 United States District Court for the District of Connecticut against
14 the City of New Britain, its police department, the police union, and
15 five individual police supervisors under Title VII of the Civil Rights
16 Act of 1964, 42 U.S.C. § 2000e-2, 42 U.S.C. § 1983, and other federal
17 and state laws. The plaintiffs alleged that the five supervisors
18 discriminated against them on the basis of sex by creating a hostile
19 work environment and disparate treatment. Those individual
20 defendants moved for summary judgment on the basis of qualified
21 immunity, but the district court (Alvin W. Thompson, J.), denied

1 their motions.¹ The five individual defendants contend here, as they
2 did before the district court, that they are entitled to qualified
3 immunity. For the reasons that follow, we AFFIRM in part and
4 REVERSE in part the district court's denial of the individual
5 defendants' motions for summary judgment and REMAND for
6 proceedings consistent with this opinion.

BACKGROUND

9 **I. The Plaintiffs' Claims of Sexual Harassment and Disparate**
10 **Treatment**

11 The New Britain Police Department (“NBPD” or the
12 “department”) hired Plaintiff Gina Spring on January 28, 2005, and
13 Plaintiffs Jennifer Raskardo and Needasabrina Russell in August of

¹ Carlone filed his own motion for summary judgment, and the four other individual defendants moved collectively for summary judgment in a separate motion. The district court issued its orders deciding the two motions on the same day, March, 29, 2012, but addressed Carlone's motion for summary judgment in one order and the remaining defendants' motion in another order. Carlone's notice of appeal was docketed on April 24, 2012 on docket 12-1686; the other defendants' notice of appeal was docketed on May 1, 2012 on docket 12-1870. Thus, although the district court docket number is identical for all of the defendants, the defendants' appeals generated two appellate dockets, which are considered here in tandem.

1 2006. Spring resigned from the NBPD on August 21, 2008, when she
2 accepted a position with the City of Torrington Police Department.
3 Russell went on Family and Medical Leave Act (“FMLA”) leave in
4 2008 and never returned to active duty, ultimately leaving the NBPD
5 permanently in 2010. Raspardo remained an NBPD officer at the
6 time of the filing of this suit. The five defendants in this appeal were
7 at all times supervisory police officers in the NBPD.

8 The plaintiffs’ claims against these defendants are best
9 understood by dividing them into two categories. First, each of the
10 plaintiffs alleges that John Carlone, a sergeant in the NBPD and their
11 direct supervisor, sexually harassed them through inappropriate
12 jokes, comments, and other behavior, including unwanted physical
13 contact with Raspardo and Russell, which created a hostile work
14 environment. Second, the plaintiffs allege that the four other
15 individual defendants created a hostile work environment and
16 subjected them to disparate treatment by making inappropriate

1 comments, failing to adequately report or investigate Carlone's
2 harassing behavior, and disciplining the plaintiffs more harshly for
3 violations of NBPD policies than male officers. Most of the events
4 occurred between early 2007 and early 2008.

5 We first address the claims against Carlone before turning to
6 the claims against the four other defendants.

7 *A. The Plaintiffs' Claims Regarding Carlone*

8 1. Spring's Claims

9 Spring complains principally of two incidents involving
10 Carlone. First, in 2007, Carlone and Spring responded separately to
11 a police call concerning a report of a naked woman. En route to the
12 scene, Carlone sent Spring a message via his mobile data terminal
13 ("MDT")² that she "would be perfect" for responding to the call.
14 Carlone then sent Spring additional messages, the substance of
15 which she could not recall at the time of discovery in this action, but

² The MDT system allows officers to communicate with each other by way of text messages sent through computer systems in their cars.

1 that she also thought were inappropriate. Spring did not respond to
2 the messages and had no issues with Carlone at the scene. Second,
3 throughout her time under Carlone's supervision, Carlone gave
4 Spring rides in his police cruiser while she was walking a beat.
5 During these occasions, Carlone asked questions about Spring's
6 dating history, which she found uncomfortable, but she did not
7 otherwise perceive Carlone's actions to be inappropriate.

8 While she was under Carlone's supervision, Carlone would
9 also call Spring "Brown Eyes" and sing the song "Brown Eyed Girl"³
10 around her, but Spring did not interpret this as harassment at the
11 time. Spring now asserts that this nickname refers to "a female who
12 participates in anal sex."⁴ Defs.' App. 116.

13 Spring never observed Carlone act inappropriately with other

³ "Brown Eyed Girl" is a copyrighted romantic song by Van Morrison.

⁴ Spring also learned after Carlone was placed on leave that Defendant Paventi had previously ordered Carlone not to give rides to female police officers in his patrol vehicle, that Carlone had called her "Brown Eye" in an MDT message to another male officer, and that Carlone had commented to others on the size of her breasts and her sexual proficiency.

1 female officers and does not allege that he had any physical contact
2 with her. Spring never made a formal administrative complaint
3 with the department. She filed a complaint with the Connecticut
4 Commission on Human Rights and Opportunities ("CHRO") in
5 September of 2008, while Carlone was under investigation by the
6 NBPD for his misconduct.

7 2. Raspardo's Claims

8 Raspardo details four principal incidents. First, in the
9 summer of 2007, after responding to a call, Carlone asked Raspardo
10 if she had plans for the night. She told him that she did not, and
11 Carlone asked her if she was "planning to go out drinking or have
12 sex with [her] boyfriend," who was also an officer in the
13 department. Raspardo asked if she was free to go and left
14 immediately. Second, during that same summer, Carlone told
15 Raspardo that her uniform was too big and should be more form-
16 fitting. Third, at some point in 2007, Carlone approached Raspardo
17 in the roll call room where she was writing a report and attempted

1 to massage her shoulders. When Raspardo shrugged her shoulders,
2 indicating that she was uncomfortable, Carlone stopped. Fourth, in
3 April of 2008, Raspardo approached the main police desk (where
4 Carlone was sitting) to sign a report. Carlone removed a magazine
5 from a drawer and showed Raspardo a picture of a woman wearing
6 law enforcement tactical gear; the woman's clothing was tight, and
7 the photograph was focused on her buttocks. Carlone then passed
8 the photo around to other male officers and said that the woman's
9 buttocks looked like Raspardo's buttocks. Raspardo told Carlone
10 that his comment was not funny and left immediately.

11 Raspardo also represents that Carlone made inappropriate
12 comments to her while she was on field training from January to
13 April of 2007, but she fails to provide any specific details about these
14 comments. Finally, Raspardo also claims that Carlone "said things
15 [of a sexual nature] that made [Raspardo] uncomfortable and
16 angry." Pl. Carlone's App. 4. Specifically, Raspardo asserts that

1 Carlone “made references to [her] body parts on at least over ten
2 occasions.” *Id.* at 5. In a statement provided during the NBPD
3 investigation of Carlone in May 2008, Raspardo explained:

4 Mainly Sergeant Carlone would make comments about
5 my butt. These comments were random. Sometimes it
6 was when we were one on one and sometimes it was
7 when people were passing by. These comments made me
8 feel disrespected, angry, and embarrassed. The comments
9 were inappropriate. I took these comments as sexual in
10 nature and not related to work in any way. I would say
11 things like “that isn’t funny” or just walk away.

12
13 *Id.* When questioned about Carlone’s comments at her deposition
14 and in interrogatories, Raspardo confirmed that Carlone made them
15 while he was her supervisor between 2007 and 2008, but she could
16 provide few additional details.

17 Raspardo does not allege that Carlone sexually propositioned
18 her, and she never observed Carlone sexually harass other female
19 officers. Although *Russell* stated that she heard Carlone make other
20 offensive comments about Raspardo’s body and her dating history,
21 Raspardo concedes that she learned of these additional comments

1 only after Chief William Gagliardi (“Gagliardi”) placed Carlone on
2 administrative leave in May 2008 while the NBPD was investigating
3 him. Raspardo did not report Carlone’s conduct to the NBPD until
4 after he had been placed on leave. She did not lodge an internal
5 complaint with the NBPD concerning the alleged sexual harassment,
6 but she did complete a sworn statement during the department’s
7 investigation of Carlone in May of 2008, which included his
8 inappropriate conduct toward her. Raspardo ultimately filed a
9 complaint with the CHRO in September of 2008.

10 3. Russell’s Claims

11 Carlone did not move for summary judgment as to Russell’s
12 sexual harassment claim in the district court. Thus, Russell’s claim
13 against Carlone is not before us. Russell’s complaints regarding his
14 behavior have some relevance, however, with relation to her claims
15 against the other defendants, and are considered in that context.

16 Prior to joining the NBPD, Russell had a consensual sexual
17 relationship with Carlone, which ended when she learned that he

1 was married. When Carlone learned that Russell had been hired by
2 the NBPD, he congratulated her and told her that she could now
3 “drive him around and he [could] do sexual things to [her].” Pl.
4 Carlone’s App. 31. Russell told Carlone that this would not happen.
5 Once Russell became an officer under Carlone’s supervision,
6 Carlone began making inappropriate and lewd comments regarding
7 her body and appearance. Carlone’s comments about Russell’s body
8 soon became much more frequent and sexually explicit. Carlone
9 then began reprimanding and disciplining Russell harshly for
10 alleged work performance issues. Carlone also started a rumor that
11 Russell was having a sexual relationship with another officer and
12 embarrassed her in front of other officers several times. In July of
13 2007, Carlone forced Russell to perform a sexual act. Carlone’s
14 sexual harassment of Russell and criticism of her performance as an
15 officer continued for some period after this. Russell reported her
16 allegations against Carlone in May 2008, but did not file a formal

1 internal complaint with the department concerning any alleged
2 sexual harassment. Russell filed a complaint with the CHRO in
3 September of 2008.

4 4. Reports of Carlone's Behavior and Department
5 Investigation

6 As mentioned above, Spring, Raspardo, and Russell did not
7 initially report sexually harassing conduct by Carlone to the NBPD.
8 In late April 2008, however, another officer, Armando Elias,
9 reported that Carlone made an inappropriate racial comment to him.
10 The department immediately began an investigation of Carlone's
11 conduct toward his subordinate officers. During the course of this
12 investigation, on May 2, 2008, Russell reported Carlone's
13 inappropriate behavior, including the July 2007 sexual act. As a
14 result, the department consulted with the State's Attorney's Office,
15 and a criminal investigation into Russell's allegations commenced.
16 Defendant Gagliardi placed Carlone on administrative leave on May
17 6, 2008, pending the outcome of the investigation. Although

1 Raspardo did not disclose any misconduct toward her when
2 authorities initially questioned her during the Carlone investigation,
3 she eventually reported her complaints soon after Russell came
4 forward with her allegations and made an official statement to the
5 department. Spring made several statements concerning Carlone
6 during the department's investigation, and may have attempted to
7 file an internal complaint concerning the alleged sexual harassment,
8 but she ultimately never did so. None of the plaintiffs filed a formal
9 NBPD complaint utilizing the department's internal reporting
10 procedure.

11 In June of 2008, Defendant Gagliardi demoted Carlone from
12 sergeant to patrol officer because he found that Carlone had "used
13 [his] supervisory position as Sergeant to engage in an inappropriate,
14 offensive and demeaning pattern of conduct against at least . . . two
15 officers who were working under [his] command." Defs.' App. 68 ¶
16 84, 109 ¶ 84. Although criminal charges did not result from the

1 investigation into Russell's allegations, Gagliardi recommended that
2 Carlone be terminated in October of 2008. Carlone retired to avoid
3 termination on January 31, 2009.

4 *B. The Plaintiffs' Claims Regarding the Other Individual*
5 *Defendants*

6 During the period at issue, Gagliardi served as the Chief of
7 Police of the NBPD, Anthony Paventi transitioned from lieutenant to
8 captain, Thomas Steck was a lieutenant, and Kenneth Panetta was a
9 sergeant. The plaintiffs allege that each of these defendants created
10 a hostile work environment and subjected them to disparate
11 treatment on the basis of sex by punishing them more harshly than
12 they punished similarly situated male officers for minor rule
13 infractions. The plaintiffs also allege that the department's
14 investigation into Carlone's inappropriate behavior was delayed and
15 inadequate, and that Gagliardi was grossly negligent in his
16 supervision of his subordinate officers, particularly Carlone.

17 We discuss below the claims made by the plaintiffs against

1 these four defendants.

2 1. Motor Vehicle Accidents

3 The plaintiffs' primary allegations against the remaining
4 defendants focus on their punishment for motor vehicle accidents
5 involving NBPD vehicles. On February 26, 2008, Spring was
6 involved in a motor vehicle accident in which she rear-ended
7 another vehicle. This incident was investigated by Defendant Steck
8 and various non-defendant police officers; a non-defendant officer
9 ultimately concluded that Spring was at fault and issued her a
10 written reprimand. As a result of this accident, the NBPD
11 suspended Spring's motor vehicle privileges until she completed
12 further driver training. Because of her loss of driving privileges,
13 Spring was required to "walk a beat" until she completed the driver
14 training program. Spring had previously sought assignment to the
15 fourth shift, which is from six in the evening until two in the
16 morning, believing that she would be able to drive her patrol car at
17 this time; after her motor vehicle privileges were revoked, however,

1 she was assigned to walk her fourth shift "beat." Spring asserts that
2 she was the only officer to ever walk a beat on the fourth shift and
3 suggests that the defendants discriminated against her on the basis
4 of sex by giving her this assignment. A non-defendant officer
5 explained in his deposition that, although some officers have been
6 assigned to "directed patrols" on the fourth shift during special
7 circumstances (for instance, when special events occur at night that
8 require increased patrolling), Spring was the only officer assigned to
9 the fourth shift without the special circumstances that justify a
10 directed patrol. Spring completed the requisite driver training
11 classes and returned to motor vehicle patrol duties on April 16, 2008.

12 Raspardo was involved in a serious motor vehicle accident on
13 March 14, 2008, which kept her out of work because of her injuries
14 until May 2, 2008. This accident resulted in severe damage to the
15 vehicles and occupants involved, including \$14,000 in damage to her
16 police vehicle and substantial damage to the other vehicle, which

1 rolled over with a mother and child inside who had to be taken to
2 the hospital for emergency treatment. The NBPD found Raspardo at
3 fault for this accident, a finding Raspardo does not appear to contest
4 in this appeal. Following the advice of her union representative,
5 Raspardo agreed to a four-day work suspension for this accident.⁵
6 As with Spring, Raspardo lost her driving privileges until she
7 completed a driver training program. For reasons that are not clear,
8 Raspardo did not complete the driver training program until
9 October 10, 2008, at which time she returned to normal patrol duties.
10 In the meantime, she walked a beat on the late-night fifth shift.
11 Raspardo, like Spring, asserts that she was the only officer ever
12 forced to walk a beat on this shift.⁶ Raspardo also alleges that
13 Defendant Paventi strictly monitored her to ensure that she was not

⁵ Raspardo asserted below that she only agreed to the suspension because Gagliardi told her that if she did not, she would likely be suspended for thirty days.

⁶ A non-defendant officer also testified in his deposition that Raspardo was the only officer required to walk a beat during that shift.

1 assigned a vehicle during this time, confirmed by Raspardo's direct
2 supervisor at the time, Lieutenant Masternak. She claims that
3 Defendant Steck took a similar interest in ensuring that she was not
4 allowed to operate a vehicle. Finally, Raspardo claims that during
5 the time she was assigned to walk her fifth shift beat, she was forced
6 to patrol on foot during a hurricane.

7 Finally, Russell describes a car accident in which she and an
8 "Officer Sloate" had a minor collision in their patrol cars. Russell
9 alleges that Carlone assisted Officer Sloate in writing and editing his
10 statement concerning the accident. She also alleges that, although
11 Officer Sloate indicated to her that he easily cleaned up the
12 superficial damage to his vehicle, Russell was "written up" and
13 given a "Supervisor's Warning" for the accident. Russell was also
14 "incidentally" assigned to "walk the beat" at this time. It appears
15 that a "Sergeant Woodruff" investigated this accident and that no
16 defendants other than Carlone were involved.

1 The three plaintiffs allege that male officers who were found
2 at fault for motor vehicle accidents were not disciplined as severely.
3 The comparative accident investigation reports that they presented
4 to the district court mainly involve minor incidents with no injuries
5 and limited property damage, and generally conclude by explaining
6 that a “Supervisor’s Warning” was issued or that driver retraining
7 was recommended. Most of the investigating officers who issued
8 these reports are not defendants in this case, and it is not clear from
9 the record whether the recommended punishments were actually
10 enforced. The plaintiffs also allege that it was common knowledge
11 that their NBPD superiors forced them to walk nighttime beats as
12 punishment and that other officers who were involved in similar
13 accidents were not required to walk these late patrols.⁷ The
14 plaintiffs admit, however, that at least one male officer (“Officer
15 Jared Barseleau”) was required to walk a patrol following car

⁷ The defendants maintain that all patrols are “walking beats,” but an internal NBPD memorandum demonstrates that patrol officers are assigned to use police cruisers 83% of the time.

1 accidents.

2 2. Sick Leave and Roll Call

3 Spring and Raspardo also claim that these NBPD superiors
4 treated them more harshly regarding their use of sick time and their
5 tardiness than they treated male officers for committing the same
6 infractions. For example, Spring alleges that Paventi strictly
7 enforced against her a department policy that an officer on sick leave
8 must inform the officer in charge any time the officer leaves her
9 home, and Raspardo and Spring point to several specific instances
10 where the individual defendants reprimanded the plaintiffs for
11 improper use of sick leave and miscommunications about use of sick
12 leave. These plaintiffs also assert that “[t]ardiness without discipline
13 is routine in the police department,” but that, despite this, they were
14 publicly reprimanded or “written up” for arriving ten minutes late
15 to their shifts. Defs.’ App. 135-36 ¶¶ 104-107, 61 ¶ 59, 107 ¶ 59.
16 They assert that similarly situated male officers were not punished
17 in this manner. They present no evidence aside from their own

1 statements, however, that specific male officers were treated
2 differently under similar circumstances.

3 Spring and Russell also claim that Panetta and Steck
4 reprimanded and criticized them for various minor infractions
5 during roll call. For example, Panetta singled out Russell and Spring
6 for not wearing their complete uniforms. The plaintiffs again claim
7 that these defendants did not reprimand male officers for similar
8 infractions, but fail to identify particular instances in which these
9 defendants treated specific male police officers more favorably. For
10 example, Spring alleges that her superiors removed her from the
11 Domestic Violence Reduction Team as punishment for abuse of sick
12 leave and did not place her back on that squad; a male officer was
13 similarly removed from a different squad for the same reason but
14 was eventually reinstated. It is unclear from the record, however,
15 who made these decisions and whether Spring and that male officer
16 are similarly situated.

1 The plaintiffs also make varied claims about discipline
2 imposed arbitrarily or for spurious reasons. They assert, for
3 instance, that Panetta reprimanded Russell on the radio (when other
4 officers could hear the exchange) and that Steck “wrote up”
5 Raspardo for not wearing her hat five minutes before the end of her
6 shift. They allege that male officers are not disciplined “on the air”
7 and are not “written up” for failing to wear their police hats.
8 Finally, they point to instances during which they were denied
9 “personal days” and incidents during which Paventi identified them
10 as “absent without leave” (“AWOL”) after miscommunications
11 about personal days; they assert that male officers were not treated
12 as harshly for similar infractions. Again, they do not provide
13 specific evidence concerning more favorable treatment of male
14 officers. Raspardo also complains of an incident in which her
15 superiors allegedly viewed an injury she suffered while on duty
16 with more skepticism than they viewed a similar injury suffered by

1 Defendant Steck, and an incident in which Defendant Steck ordered
2 Spring to pick up Raspardo and for Raspardo to act as the “initial
3 officer” on all calls, even though officers usually alternate this duty.

4 3. The Carlone Investigation

5 The plaintiffs also claim that the department did not timely or
6 adequately respond to “warning signs” regarding Carlone.
7 Although the city’s liability is not before us on this appeal, these
8 claims may be relevant to the supervisory liability claim against
9 Gagliardi and provide context for the claims against the other
10 individual defendants.

11 The Department twice investigated Carlone for alleged
12 inappropriate behavior before the events involving the plaintiffs
13 occurred. First, in 2006, Lieutenant Steck (not Defendant Steck) and
14 Defendant Paventi heard reports that Carlone was “dogging”⁸ an
15 “Officer Hayden.” This led to an investigation in which Hayden

⁸ “Dogging” apparently encompassed spending an excessive amount of time focusing on what Officer Hayden was doing and repeatedly going on her calls, calling her on the radio, and asking for her location.

1 told the department that she did not feel harassed by Carlone.
2 Nonetheless, Carlone's superiors ordered him not to offer rides to
3 Officer Hayden in his patrol car unless it was an emergency.

4 In the course of this investigation, Lieutenant Steck and
5 Defendant Paventi learned that Carlone had made a joke about a
6 female officer during roll call concerning the use of a vibrator.
7 Although the female officer told the investigating officers that she
8 was not offended by the comment, they referred the incident "up the
9 chain of command," and Gagliardi confronted Carlone about it,
10 ultimately issuing the discipline of "a verbal counseling." Carlone
11 assured Gagliardi that he would not make similar remarks in the
12 future.⁹

13 The Department investigated Carlone again in December 2006
14 for misusing the MDT messaging system. This investigation, in
15 which Defendant Paventi participated, determined that Carlone had

⁹ It appears that Carlone continued to pick Officer Hayden up in his patrol vehicle and that Paventi conducted a verbal counseling session to inform Carlone that he should stop doing this.

1 used the system to discuss personal matters with female civilian
2 dispatchers and police personnel, and on at least one occasion had
3 sent a message in which offensive language was used. Investigators
4 informed Gagliardi about Carlone's misuse of the MDT messaging
5 system, and Gagliardi suspended Carlone for two days, forced him
6 to forfeit two days of accrued holiday leave, and informed him that
7 any further violation of department rules and regulations may result
8 in more severe discipline.¹⁰ It was during this investigation that the
9 department first learned that Carlone had referred to Spring as
10 "Brown Eye" in an MDT message, but this was not reported to
11 Spring at the time.

12 4. Gagliardi's and Paventi's Comments

13 The plaintiffs assert that Gagliardi and Paventi also made
14 inappropriate sexual comments to and about them. Raspardo
15 alleges that when she met with Gagliardi before being hired,

¹⁰ Lieutenant Steck later stated in a deposition that he believed this punishment was insufficient and may have contributed to future misbehavior by Carlone.

1 Gagliardi told her that if she was hired “he was going to have a
2 sexual harassment problem with her.” Defs.’ App. 114 ¶ 16.
3 Paventi, who appears to have been informally responsible for
4 creating nicknames for NBPD officers,¹¹ referred to Raspardo as “J
5 Lo,” a commonly used nickname for the celebrity Jennifer Lopez,
6 which Russell and others understood to be a reference to Raspardo’s
7 buttocks. He also called Spring “Tiki,” which Spring believed was a
8 sexualized reference to the swinging hips of dashboard tiki dolls.
9 Finally, Paventi referred to Spring, and perhaps other female
10 officers, as “Rock Stars.” Spring interpreted this nickname as a
11 reference to a strip club named “Rock Star” in a nearby town. The
12 name’s meaning is somewhat unclear, however, because one of
13 Paventi’s own nicknames for himself was “Rock Star.”¹²

¹¹ Paventi’s nicknames for female police officers who are not plaintiffs in this suit included “Shuffler,” “Hm,” “Boom Boom,” “Spider,” and “Woo Woo,” and he appears to have had nicknames for many of the male NBPD officers as well. Pl. Gagliardi’s App. 334-40.

¹² At this stage, we accept the plaintiffs’ characterization.

1 5. Gagliardi Denies Light Duty

2 In 2006, Spring requested to be put on “light duty” following
3 elective eye surgery and a car accident. Gagliardi denied this
4 request. Spring asserts that certain male officers were assigned to
5 “light duty” following injuries. She provides no details or specific
6 evidence concerning these officers.

7 Russell also appears to allege that Gagliardi denied her
8 request to be put on “light duty” in 2010, pursuant to the Family
9 Medical Leave Act, following her report of Carlone’s harassment.
10 She provides no details concerning this incident and does not
11 identify male officers who were treated more favorably.

12 6. Explicit Photos of Spring

13 In May 2006, a “Sergeant Saccente” reported a rumor that an
14 NBPD officer was showing sexually explicit photographs of a female
15 NBPD officer to emergency medical services (“EMS”) employees.
16 The incident was investigated in early 2007, and it was determined
17 that the photographs were of Spring and that the male officer who

1 showed the photographs was her former boyfriend, Officer Stralzka,
2 also an officer in the NBPD. Although Paventi eventually
3 interviewed EMS employees, investigators did not ultimately take
4 any disciplinary action against Stralzka. The plaintiffs allege that
5 the NBPD's response to these allegations was inadequate.

6 7. Use of Videos in Training

7 At a mandatory training session on April 10, 2008, a "Sergeant
8 Pearson" showed a mixed group of male and female officers,
9 including plaintiffs Russell and Spring, three sexually explicit videos
10 that were irrelevant to the session's subject matter. None of the
11 individual defendants were present at this training session.
12 Supervisors in the department learned of the videos in the fall of
13 2008, and Defendant Paventi conducted an investigation. Paventi
14 eventually confiscated two of the videos, and it appears that they
15 were not used in future training.

1 8. Paventi's Investigation of Allegations of Russell's
2 Poor Performance

3 Russell alleges that Paventi investigated alleged poor
4 performance by her and other police officers who responded to two
5 particular police calls and unfairly discredited her version of events
6 in retaliation for reporting Carlone's sexual misconduct. She asserts
7 that in these instances, Paventi credited the accounts of the male
8 officers involved rather than accepting Russell's explanation. It is
9 unclear from the record whether these allegations were formalized
10 in a performance evaluation or resulted in disciplinary action
11 because the allegation is made in a conclusory fashion and no other
12 materials are submitted to substantiate it.

13 9. Paventi's Calls to Spring's New Employer

14 Spring alleges, with no evidentiary support in the record, that
15 after she left the NBPD in 2008 to join the Torrington Police
16 Department, Paventi called her new supervisor in Torrington. She
17 asserts that Paventi informed him that Spring had called out sick

1 from her duties at the NBPD in order to attend the Torrington Police
2 Department swearing-in ceremony, that she abused sick time, and to
3 “watch out” for her because she was suing the NBPD for sexual
4 harassment. Spring does not allege that this phone call affected her
5 employment at the Torrington Police Department.

6 10. Paventi’s Allegation that Raspardo Deleted a Report

7 Raspardo alleges that in February of 2010, almost two years
8 after she reported her allegations of sexual harassment, Paventi
9 informed Defendant Steck that Raspardo purposely deleted a police
10 report she had completed, lied about deleting the report, and then
11 “undeleted” the report. Raspardo’s assertion regarding Paventi’s
12 role in this incident, however, appears to be based on speculation;
13 the incident is not substantiated in the record, and no further details
14 are given about it.¹³

¹³ Although Raspardo makes this claim on appeal, it was not included in her Rule 56.1 statement below. We thus do not address it further.

11. Raspardo's Knowledge of Spanish

On May 2, 2010, approximately two years after Raspardo made her initial complaints concerning sexual harassment, Defendant Panetta submitted a report to his superiors stating that he had observed Raspardo, who previously represented that she did not speak Spanish, speaking Spanish while on a call.¹⁴ He wrote in this report that "there is reason to believe that she has been insubordinate in lying directly to her supervisor about her ability to utilize the Spanish language at work." Pl. Gagliardi's App. 342. Panetta requested to review Raspardo's departmental background investigation in order to determine if Raspardo had any proficiency in Spanish. This led to an investigation in which Gagliardi and Paventi were involved. Raspardo does not appear to have been disciplined for the incident, but she filed a NBPD administrative complaint of harassment against Panetta and submitted a letter to

¹⁴ Apparently, it would have been an advantage to the NBPD to utilize officers who spoke Spanish in certain situations.

1 Gagliardi, alleging that Gagliardi pursued the investigation into her
2 Spanish-speaking abilities in order to punish her for filing her sexual
3 harassment suit against the Department. The plaintiffs do not
4 provide further details regarding the incident.

5 **II. Procedural History**

6 After exhausting state administrative proceedings that apply
7 only to their Title VII claims,¹⁵ the plaintiffs filed suit in the United
8 States District Court for the District of Connecticut against the City
9 of New Britain, the NBPD, the police union, and the five individual
10 defendants. The plaintiffs asserted claims against the city and its
11 police department under Title VII, 42 U.S.C. § 1983, and Connecticut
12 law.¹⁶ The plaintiffs asserted claims under 42 U.S.C. § 1983 and

¹⁵ The plaintiffs initiated proceedings before the CHRO in September of 2008. Like the Equal Employment Opportunity Commission, the CHRO is an avenue for exhaustion of remedies in Connecticut, and the CHRO is authorized to issue “right to sue” letters. Because the claims in this appeal concern 42 U.S.C. § 1983, administrative exhaustion is not required. *Annis v. Cnty. of Westchester*, 36 F.3d 251, 254-55 (2d Cir. 1994).

¹⁶ The plaintiffs failed to assert claims against the police union in their revised amended complaint, thus removing it as a defendant.

1 Connecticut law against the five individual defendants.

2 Carlone and the other individual defendants separately
3 moved for summary judgment as to the § 1983 claims, asserting the
4 defense of qualified immunity and arguing that the plaintiffs failed
5 to adduce evidence establishing a hostile work environment or
6 disparate treatment. As mentioned above, Carlone did not move for
7 summary judgment as to Russell's hostile work environment claims
8 under § 1983 against him.

9 In an order dated March 29, 2012, the district court (Alvin W.
10 Thompson, *J.*) addressed Carlone's motion for summary judgment.
11 The district court concluded as to Raskardo's and Spring's 42 U.S.C.
12 § 1983 claims that genuine issues of material fact existed precluding
13 summary judgment on the basis of qualified immunity. The district
14 court did not identify these issues of material fact. The district court
15 did, however, grant summary judgment to Carlone on Russell's,
16 Raskardo's, and Spring's state law claims on the basis that these

1 claims had been withdrawn.

2 The district court also denied in a separate order the
3 remaining individual defendants' motion for summary judgment as
4 to qualified immunity. The district court concluded that genuine
5 issues of material fact existed, but did not identify the factual issues
6 which precluded a grant of qualified immunity. The district court
7 also granted summary judgment to these defendants on the
8 plaintiffs' state law claims because the state statutes at issue did not
9 provide causes of action against these defendants.¹⁷

10 Carlone appealed from the district court's denial of his motion
11 for summary judgment, arguing that he was entitled to qualified
12 immunity from Raspardo's and Spring's hostile work environment
13 claims. The remaining individual defendants filed a similar appeal,
14 claiming qualified immunity on the plaintiffs' § 1983 hostile work

¹⁷ The City of New Britain and the NBPD also moved for summary judgment on the claims against them. That motion was granted as to certain state law claims but denied as to the federal claims, including those brought under Title VII. That ruling is not before us on this appeal.

1 environment, retaliation, and disparate treatment claims.¹⁸ The
2 plaintiffs' remaining claims, such as their Title VII claims against the
3 City of New Britain, remain pending in the district court.

4 DISCUSSION

5 The issue in this appeal is whether the five individual
6 defendants are entitled to qualified immunity from the plaintiffs'
7 hostile work environment and disparate treatment claims under 42
8 U.S.C. § 1983.

9 We review *de novo* a district court's denial of a public official's
10 motion for summary judgment on the basis of qualified immunity.
11 *Poe v. Leonard*, 282 F.3d 123, 131 (2d Cir. 2002). In evaluating a
12 motion for summary judgment, "courts may not resolve genuine
13 disputes of fact in favor of the party seeking summary judgment."
14 *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (per curiam). Because

¹⁸ Although the defendants challenged the district court's ruling as to the plaintiffs' retaliation claims in their appeal, the plaintiffs failed to present any substantive argument on retaliation in their briefs. Thus, we consider these claims abandoned.

1 this appeal is before us following the denial of the defendants'
2 motions for summary judgment, the facts considered below are
3 either undisputed or resolved in favor of the plaintiffs. *See id.*

4 **I. Qualified Immunity**

5 *A. Appellate Jurisdiction*

6 The doctrine of qualified immunity “protects federal and state
7 officials from . . . unnecessary and burdensome discovery or trial
8 proceedings.” *Coollick v. Hughes*, 699 F.3d 211, 219 (2d Cir. 2012)
9 (internal quotation marks omitted). Qualified immunity “is both
10 important and completely separate from the merits of the action,
11 and this question c[annot] be effectively reviewed on appeal from a
12 final judgment because by that time the immunity from standing
13 trial will have been irretrievably lost.” *Plumhoff v. Rickard*, 134 S. Ct.
14 2012, 2019 (2014). Thus, although denials of motions for summary
15 judgment are generally not appealable, a district court’s denial of a
16 defendant’s motion for summary judgment on the ground of
17 qualified immunity is immediately appealable under the collateral

1 order doctrine if the district court's denial of that motion turned on a
2 legal question. *Id.* at 2018-19; *see also Demoret v. Zegarelli*, 451 F.3d
3 140, 148 (2d Cir. 2006); *Poe*, 282 F.3d at 131. For example, when a
4 district court rejects a defendant's assertion of qualified immunity
5 on a motion for summary judgment because it concludes that the
6 law the defendant allegedly violated was "clearly established," that
7 order may be appealed immediately. *See Salim v. Proulx*, 93 F.3d 86,
8 89 (2d Cir. 1996); *cf. Johnson v. Jones*, 515 U.S. 304, 313-18 (1995)
9 ("*Jones*") (holding that there is no appellate jurisdiction over a
10 district court's denial of a defendant's motion for summary
11 judgment where the defendant challenges whether the plaintiffs
12 have set forth sufficient evidence to create genuine issues of material
13 fact).

14 When a district court denies a defendant's motion for
15 summary judgment because it finds that genuine factual disputes
16 preclude granting the defendant qualified immunity, immediate

1 appellate review may also be available. *See Behrens v. Pelletier*, 516
2 U.S. 299, 312-13 (1996) (clarifying that, even where a district court
3 denies a defendant’s motion for summary judgment on the ground
4 that material issues of fact exist precluding a grant of summary
5 judgment, such a decision is appealable when the appellate court
6 “resolve[s] a dispute concerning an ‘abstract issu[e] of law’ relating
7 to qualified immunity”); *see also Scott v. Harris*, 550 U.S. 372, 380
8 (2007); *Terebesi v. Torres*, Nos. 12-3867, 12-3868, 12-3870, 12-3898, 12-
9 3903, 12-3990, 2014 WL 4099309, at *7 (2d Cir. Aug. 21, 2014).

10 We have held that “a district court’s mere assertion that
11 disputed factual issues exist[] [is not] enough to preclude an
12 immediate appeal.” *Salim*, 93 F.3d at 89. Immediate appeal is
13 available from fact-related rulings “as long as the defendant can
14 support an immunity defense on stipulated facts, facts accepted for
15 purposes of the appeal, or the plaintiff’s version of the facts that the
16 district judge deemed available for jury resolution.” *Id.* at 90; *see also*

1 *Terebesi*, 2014 WL 4099309, at *7; *Poe*, 282 F.3d at 132; *Jemmott v.*
2 *Coughlin*, 85 F.3d 61, 65-66 (2d Cir. 1996).

3 The individual defendants here contend that, even when all
4 disputed factual issues are resolved in favor of the plaintiffs, they
5 are entitled to qualified immunity. We thus need not resolve any
6 disputed facts or weigh the sufficiency of the evidence as prohibited
7 by *Jones*, 515 U.S. at 319-20, to determine if the plaintiffs suffered
8 actionable sexual harassment or disparate treatment. Whether the
9 defendants' conduct, as examined by viewing the evidence
10 presented at summary judgment in a light favorable to the plaintiffs,
11 violated the plaintiffs' Fourteenth Amendment rights to equal
12 protection (through sexual harassment or disparate treatment) is a
13 question of law. We therefore have appellate jurisdiction to
14 determine whether the defendants violated the plaintiffs'
15 constitutional rights based on the plaintiffs' version of the facts. *See*
16 *Jemmott* 85 F.3d at 65-67 (finding appellate jurisdiction over district

1 court's denial of defendants' motion for summary judgment in
2 plaintiff's Title VII and 42 U.S.C. § 1983 hostile work environment
3 and grossly negligent supervision claims); *Poe*, 282 F.3d at 132
4 ("Despite the District Court's assertion that a genuine dispute exists
5 as to whether a reasonable supervisor would have supervised [the
6 offending party] differently, this dispute is essentially a legal one.").
7 Although this analysis requires us to perform a "detailed evidence-
8 based review of the record," *Jones*, 515 U.S. at 319, the Supreme
9 Court in *Jones* explicitly recognized that such an examination is
10 especially important for the purposes of resolving qualified
11 immunity at an early stage in the proceedings where the district
12 court has denied a defendant's motion for summary judgment on
13 the ground of qualified immunity without explanation. *Id.*

14 *B. The Standard for Qualified Immunity*

15 In deciding "questions of qualified immunity at summary
16 judgment, courts engage in a two-pronged inquiry." *Tolan*, 134 S.
17 Ct. at 1865. The first prong "asks whether the facts, taken in the

1 light most favorable to the party asserting the injury . . . show the
2 officer's conduct violated a federal right[,] . . . [and] [t]he second
3 prong of the qualified-immunity analysis asks whether the right in
4 question was clearly established at the time of the violation." *Id.* at
5 1865-66 (internal citations, alterations, and quotation marks
6 omitted). Officials operating under color of state law¹⁹ are thus
7 entitled to summary judgment when they can establish that either
8 "(1) a constitutional right was [not] violated or (2) the right was not
9 clearly established [at the time of the violation]." *Royal Crown Day*
10 *Care LLC v. Dep't of Health & Mental Hygiene of City of N.Y.*, 746 F.3d
11 538, 543 (2d Cir. 2014) (internal citation and quotation marks
12 omitted); *see also Coollick*, 699 F.3d at 219. As to the first question, if
13 the evidence construed in the light most favorable to the plaintiffs
14 fails to establish as a matter of law that the defendant violated the
15 plaintiff's constitutional rights, qualified immunity is warranted.

¹⁹ It is undisputed that the individual defendants here were at all times operating under color of state law.

1 *Saucier v. Katz*, 533 U.S. 194, 201 (2001), *abrogated in part on other*
2 *grounds by Pearson v. Callahan*, 555 U.S. 223, 236 (2009). If, however,
3 the evidence does demonstrate a violation of the plaintiff's
4 constitutional rights, the second question is whether that
5 constitutional right was "clearly established" at the time the official
6 engaged in the conduct. *Saucier*, 533 U.S. at 201. Answering this
7 second inquiry requires determining whether a reasonable official
8 would understand that his conduct violated the constitutional right
9 in question. *Id.* at 202 (citing *Anderson v. Creighton*, 483 U.S. 635, 640
10 (1987)). A court may consider these two questions in either order,
11 and if it determines that one prong is not satisfied, it need not reach
12 the other. *See Pearson*, 555 U.S. at 236; *see also Coollick*, 699 F.3d at
13 219-20.

14 *C. Individual Liability in § 1983 Hostile Work Environment Claims*

15 The first prong of qualified immunity analysis requires us to
16 determine whether a reasonable jury could conclude that the
17 evidence presented by the plaintiffs establishes that each individual

1 defendant violated their constitutional right to be free from a hostile
2 work environment and disparate treatment on the basis of sex. That
3 task, in turn, requires us to determine the liability of individual
4 defendants under 42 U.S.C. § 1983, which entails an examination of
5 the intersection between Title VII sex discrimination jurisprudence
6 and § 1983's requirement of individual liability.

7 1. Liability for Non-Supervisory Conduct

8 Although plaintiffs frequently bring hostile work
9 environment claims against their employers under Title VII, 42
10 U.S.C. § 2000e-5(e), which does not create liability in individual
11 supervisors and co-workers who are not the plaintiffs' actual
12 employers, *Spiegel v. Schulmann*, 604 F.3d 72, 79 (2d Cir. 2010), state
13 and local officials can be held individually liable under 42 U.S.C.
14 § 1983 for violating the Equal Protection Clause of the Fourteenth
15 Amendment by discriminatory acts against those who work under
16 them. Public employees have "a clear right, protected by the
17 Fourteenth Amendment, to be free from discrimination on the basis

1 of sex in public employment.” *Back v. Hastings on Hudson Union Free*
2 *Sch. Dist.*, 365 F.3d 107, 117 (2d Cir. 2004). We have held that the
3 Equal Protection Clause protects such employees from sex-based
4 workplace discrimination, including hostile work environments and
5 disparate treatment. *See Demoret*, 451 F.3d at 149; *Patterson v. County*
6 *of Oneida*, 375 F.3d 206, 226 (2004); *Jemmott*, 85 F.3d at 67-68.

7 To establish a hostile work environment claim under the Title
8 VII framework, a plaintiff must show that the “workplace is
9 permeated with discriminatory intimidation, ridicule, and insult that
10 is sufficiently severe or pervasive to alter the conditions of the
11 victim’s employment and create an abusive working environment.”
12 *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (internal citations
13 and quotation marks omitted). This standard has both objective and
14 subjective components: the conduct complained of must be severe or
15 pervasive enough that a reasonable person would find it hostile or
16 abusive, and the victim must subjectively perceive the work

1 environment to be abusive. *Id.* at 21-22; *Alfano v. Costello*, 294 F.3d
2 365, 374 (2d Cir. 2002). The incidents complained of “must be more
3 than episodic; they must be sufficiently continuous and concerted in
4 order to be deemed pervasive.” *Alfano*, 294 F.3d at 374 (internal
5 quotation marks omitted). There is no “mathematically precise
6 test,” however, for deciding whether an incident or series of
7 incidents is sufficiently severe or pervasive to alter the conditions of
8 a plaintiff’s working environment. *Harris*, 510 U.S. at 22-23. Instead,
9 courts must assess the totality of the circumstances, considering
10 elements such as “the frequency of the discriminatory conduct; its
11 severity; whether it is physically threatening or humiliating, or a
12 mere offensive utterance; and whether it unreasonably interferes
13 with an employee’s work performance.” *Id.* at 23. The effect of
14 identified incidents on the employee’s psychological well-being is
15 also relevant, though not determinative. *Id.*

16 Although we have long recognized that Title VII-based hostile

1 work environment claims by government employees are actionable
2 under § 1983, *see Patterson*, 375 F.3d at 225-27, we have not specified
3 in our prior decisions the role of individual responsibility required
4 for a defendant in a § 1983 case involving claims of sex-based
5 harassment by multiple defendants, nor have we charted
6 supervisory liability in this context.

7 This case demonstrates how hostile work environment claims
8 that may readily be brought against employers under Title VII do
9 not always fit easily within the context of individual liability under
10 § 1983. The Title VII framework often requires courts to consider the
11 workplace conduct of multiple employees and supervisors in
12 determining whether the plaintiff has experienced a hostile work
13 environment. *See, e.g., Oncale v. Sundowner Offshore Servs., Inc.*, 523
14 U.S. 75, 77 (1998) (describing the harassing actions taken by
15 employees both jointly and individually which could contribute to a
16 hostile work environment in a Title VII case). Hostile work

1 environment claims under Title VII thus look to the circumstances of
2 the plaintiff's employment, and hold the *employer* liable when the
3 misconduct in the workplace is so severe as to alter the terms and
4 conditions of the plaintiff's employment. *See Harris*, 510 U.S. at 21.

5 Section 1983, however, applies by its terms only to individual
6 "persons" responsible for violating plaintiffs' rights.²⁰ In order to
7 overcome a government official's claim to qualified immunity and
8 "establish individual liability under § 1983, a plaintiff must show . . .
9 that the defendant caused the plaintiff to be deprived of a federal
10 right." *Back*, 365 F.3d at 122; *see also Ashcroft v. Iqbal*, 556 U.S. 662,
11 676 (2009). If a defendant has not *personally* violated a plaintiff's
12 constitutional rights, the plaintiff cannot succeed on a § 1983 action
13 against the defendant.

14 Our few prior decisions addressing multi-defendant § 1983

²⁰ 42 U.S.C. § 1983 (imposing liability only on "person[s]" who violate plaintiffs' constitutional rights). *Monell v. Department of Social Services* defines municipalities as "persons" under § 1983. 436 U.S. 658, 690 (1978); *see also Matusick v. Erie Cnty. Water Auth.*, 757 F.3d 31, 42 (2d Cir. 2014). The plaintiffs' *Monell* claim is not at issue in this appeal.

1 hostile work environment cases have denied qualified immunity to
2 defendants whose conduct, considered alone, was sufficiently severe
3 or pervasive to alter the conditions of the plaintiff's employment.
4 For example, in *Patterson v. County of Oneida*, we upheld qualified
5 immunity for defendants who had not participated in the acts of
6 harassment of which the plaintiff complained, but remanded for
7 trial in the case of defendants whose separate discriminatory acts
8 could be found by a jury to be "sufficiently humiliating to alter the
9 conditions of [the plaintiff's] employment." 375 F.3d at 229-30.
10 Similarly, in *Jemmott v. Coughlin*, we recognized that "[e]ach
11 individual defendant's alleged conduct towards [the plaintiff], if
12 proven, did [separately] amount to 'severe and pervasive'
13 harassment, which therefore violated [the plaintiff's] clearly
14 established rights," precluding a grant of qualified immunity. 85
15 F.3d at 67.

16 Thus, our prior cases have established only that when a

1 plaintiff alleges that multiple individual defendants have engaged in
2 uncoordinated and unplanned acts of harassment, each defendant is
3 only liable under § 1983 when his own actions are independently
4 sufficient to create a hostile work environment. We therefore cannot
5 say that it is clearly established law that an individual defendant has
6 violated a plaintiff's equal protection rights if he has not personally
7 behaved in such a way as to create an atmosphere of severe or
8 pervasive harassment. Accordingly, absent such behavior, an
9 individual defendant is entitled to qualified immunity.²¹ See also
10 *Grillo v. N.Y.C. Transit Auth.*, 291 F.3d 231, 234 (2d Cir. 2002) ("In
11 order to survive a motion for summary judgment on his . . . equal

²¹ Jointly planned or perpetrated acts of harassment, of course, may be attributed to each of the defendants. See, e.g., *Dwares v. City of New York*, 985 F.2d 94, 99 (2d Cir. 1993) (permitting a § 1983 suit to proceed against defendant-police officers where plaintiffs alleged that the officers conspired with attackers who injured plaintiffs), *abrogated on other grounds by Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 167-68 (1993). As plaintiffs have not argued that the defendants acted in concert, we have no occasion here to consider the extent of the evidence required to establish such joint action. We caution, however, that conspiracies may exist even if their members have not expressly agreed to engage in joint behavior, and may be inferred from the actions of multiple parties who are aware of, and intentionally commit acts to further, a common project.

1 protection . . . claims, [the plaintiff] must come forward with at least
2 some credible evidence that the actions of the *individual appellees*
3 were motivated by racial animus or ill-will.” (emphasis added)). *But*
4 *cf. Reynolds v. Barrett*, 685 F.3d 193, 204-06 (2d Cir. 2012) (holding
5 that, because liability under § 1983 requires personal involvement by
6 a defendant, the “pattern-or-practice framework,” which
7 demonstrates that a pattern of discrimination exists in the aggregate
8 at a corporate entity, is “ill-suited to the task of identifying which
9 individual defendants engaged in purposeful discrimination” and
10 cannot be imported into the § 1983 context).²²

11 2. Supervisory Liability

12 Individual liability under § 1983 in hostile work environment
13 claims may also involve supervisory liability. In addressing the
14 “federal analog” of § 1983 *Bivens* actions, the United States Supreme
15 Court in *Ashcroft v. Iqbal* confirmed that liability for supervisory

²² We note that the plaintiffs sue the individual defendants in their individual capacities only.

1 government officials cannot be premised on a theory of *respondeat*
2 *superior* because § 1983 requires individual, personalized liability on
3 the part of each government defendant. 556 U.S. 662 (2009).
4 Instead, “[b]ecause vicarious liability is inapplicable to . . . § 1983
5 suits, a plaintiff must plead that each Government-official
6 defendant, through the official’s own individual actions, has
7 violated the Constitution.” *Id.* at 676. Thus, “each Government
8 official . . . is only liable for his or her own misconduct.” *Id.* at 677;
9 *see also Hayut v. State Univ. of N.Y.*, 352 F.3d 733, 753 (2d. Cir. 2003)
10 (“It is well settled . . . that the doctrine of respondeat superior
11 standing alone does not suffice to impose liability for damages
12 under section 1983 on a defendant acting in a supervisory
13 capacity.”). Prior to *Iqbal*, we held that:

14 The personal involvement of a supervisory defendant may
15 be shown by evidence that: (1) the defendant participated
16 directly in the alleged constitutional violation, (2) the
17 defendant, after being informed of the violation through a
18 report or appeal, failed to remedy the wrong, (3) the
19 defendant created a policy or custom under which

1 unconstitutional practices occurred, or allowed the
2 continuance of such a policy or custom, (4) the defendant
3 was grossly negligent in supervising subordinates who
4 committed the wrongful acts, or (5) the defendant
5 exhibited deliberate indifference to the rights of [plaintiffs]
6 by failing to act on information indicating that
7 unconstitutional acts were occurring.

8
9 *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995); *see also Back*, 365

10 F.3d at 127; *Hayut*, 352 F.3d at 753. In addition to satisfying one of
11 these requirements, a plaintiff must also establish that the
12 supervisor's actions were the proximate cause of the plaintiff's
13 constitutional deprivation. *Poe*, 282 F.3d at 134. Finally, as with
14 individual liability, in the § 1983 context, a plaintiff must establish
15 that a supervisor's behavior constituted intentional discrimination
16 on the basis of a protected characteristic such as sex. *Patterson*, 375
17 F.3d at 226.

18 As relevant here, "gross negligence" denotes a higher degree
19 of culpability than mere negligence. *Poe*, 282 F.3d at 140 n.14, 146. It
20 is "the kind of conduct where the defendant has reason to know of

1 facts creating a high degree of risk of . . . harm to another and
2 deliberately acts or fails to act in conscious disregard or indifference
3 to that risk.” *Id.* (internal citations, alterations, and quotation marks
4 omitted). A supervisor is protected by qualified immunity so long
5 as reasonable officials could disagree about whether the supervisor’s
6 action was grossly negligent in light of clearly established law. *See*
7 *id.* at 146 (“[T]he legal inquiry necessitated by the defense of
8 qualified immunity . . . requires that a court determine whether,
9 under the plaintiff’s version of the facts, reasonable officers in the
10 defendant’s position could disagree as to the legality of his
11 actions.”).

12 The standard of gross negligence is satisfied where the
13 plaintiff establishes that the defendant-supervisor was aware of a
14 subordinate’s prior substantial misconduct but failed to take
15 appropriate action to prevent future similar misconduct before the
16 plaintiff was eventually injured. *See, e.g., Johnson v. Newburgh*

1 *Enlarged Sch. Dist.*, 239 F.3d 246, 255 (2d Cir. 2001) (“*Johnson*”)
2 (holding that, where complaint alleged defendant-supervisors were
3 aware teacher assaulted students on four occasions prior to his
4 assault of the plaintiff, “a jury could find the [s]upervisors
5 personally involved in the unconstitutional deprivation on the basis
6 that they were . . . grossly negligent in supervising” the teacher);
7 *Meriwether v. Coughlin*, 879 F.2d 1037, 1047-48 (2d Cir. 1989)
8 (affirming finding of supervisory liability when evidence showed
9 that supervisors knew or should have known that plaintiff-inmates’
10 reputations as alleged planners of a violent insurrection would
11 expose them to extreme hostility from the guards, yet took no
12 precautions for the inmates’ safety); *see also Poe*, 282 F.3d at 146
13 (holding that the plaintiff failed to raise a triable issue regarding the
14 defendant-supervisor’s alleged gross negligence where the
15 supervisor failed to review his subordinate’s personnel history and
16 was aware of inappropriate, though not sexually provocative,

1 demands the employee had made to other women).

2 A supervisor is not grossly negligent, however, where the
3 plaintiff fails to demonstrate that the supervisor knew or should
4 have known of a problematic pattern of employee actions or where
5 the supervisor took adequate remedial steps immediately upon
6 learning of the challenged conduct. *See, e.g., Hayut*, 352 F.3d at 753;
7 *Colon*, 58 F.3d at 873. A plaintiff pursuing a theory of gross
8 negligence must prove that a supervisor's neglect caused his
9 subordinate to violate the plaintiff's rights in order to succeed on her
10 claim. *Poe*, 282 F.3d at 140.

11 We have not yet determined the contours of the supervisory
12 liability test, including the gross negligence prong, after *Iqbal*. 556
13 U.S. at 676-77; *see Reynolds*, 685 F.3d at 205-06 n.14 (casting doubt on
14 the continuing vitality of each prong of the supervisory liability
15 test). We need not decide this question here because, as explained
16 below, Gagliardi did not act with gross negligence in his supervision

1 of Carlone, and the other tests for supervisory liability are not
2 satisfied.

3 *D. Raspardo's and Spring's Hostile Work Environment Claims*
4 *Against Carlone*

5 We conclude that the first prong of the test for qualified
6 immunity with relation to Defendant Carlone is satisfied as to
7 Spring. Carlone did not create a hostile work environment for
8 Spring and therefore did not violate her constitutional right to equal
9 protection. In light of this conclusion, we need not reach the second
10 question of whether a reasonable officer would have understood
11 Carlone's conduct as sufficient to constitute a hostile work
12 environment. Thus, we conclude that Carlone is entitled to qualified
13 immunity on Spring's § 1983 hostile work environment claim and
14 reverse the decision of the district court.

15 Raspardo's hostile work environment claim is more
16 substantial. Ultimately, the four principal incidents of Carlone's
17 behavior alleged by Raspardo, including unwanted physical contact

1 and comments of a sexual nature in front of other officers, when
2 combined with the “over ten occasions” on which Carlone allegedly
3 made comments about Raspardo’s body during the same one-year
4 period, are sufficient to permit a jury to find a hostile work
5 environment. We also conclude that Carlone’s conduct was clearly
6 established as unlawful sexual harassment at the time of the events
7 in question and that objectively reasonable officers would not
8 disagree that Carlone’s conduct constituted sexual harassment.
9 Carlone has thus failed to establish qualified immunity as to
10 Raspardo. We therefore affirm the district court’s denial of qualified
11 immunity to Carlone on Raspardo’s hostile work environment
12 claim.

13 1. Spring’s Claims

14 Spring’s claims against Carlone rest primarily on two
15 incidents. The first is the 2007 police call concerning a naked
16 woman. As mentioned, Carlone sent Spring a message saying she
17 would “be perfect” for the call and then sent additional messages

1 that Spring found offensive. Spring did not respond directly to the
2 messages and had no issues with Carlone at the scene. Second,
3 throughout her time under Carlone's supervision, Carlone gave
4 Spring rides in his police cruiser while she was walking a patrol. On
5 these occasions, Carlone would sometimes ask Spring about her
6 dating history, which she found uncomfortable, but she did not
7 otherwise perceive Carlone's actions to be inappropriate. Spring
8 subsequently learned that Carlone had been instructed not to pick
9 up female officers in his cruiser, but she did not regard these
10 interactions as inappropriate at the time. Finally, Carlone referred to
11 Spring as "Brown Eyes" on a number of occasions.

12 This conduct falls short of the standard required for a hostile
13 work environment claim. While Carlone's comments in the MDT
14 message may have been offensive, they appear to have been isolated
15 and were not as substantial as events that we have found sufficient
16 to create a hostile work environment in prior decisions. *Compare*

1 *Alfano*, 294 F.3d at 374 (noting that, as a general rule, “episodic”
2 incidents will not be sufficient to establish a hostile work
3 environment), *with Howley v. Town of Stratford*, 217 F.3d 141, 149, 154
4 (2d Cir. 2000) (finding that a single incident created a hostile work
5 environment when the plaintiff’s co-worker went on a lengthy,
6 vulgar tirade against the plaintiff in the presence of a large group of
7 co-workers). Spring did not regard Carlone giving her rides in his
8 cruiser as inappropriate at the time. As a matter of law, these
9 incidents, as well as the use of the nickname, spread over more than
10 a year, were not “sufficiently severe or pervasive to alter the
11 conditions of [Spring’s] employment and create an abusive working
12 environment.” *Alfano*, 294 F.3d at 373 (internal quotation marks
13 omitted).

14 Spring supports her claim by also pointing to various
15 comments Carlone made to others about her body or dating life
16 outside of Spring’s presence. However, Spring admits that she did

1 not learn of any of these comments until after Carlone had been
2 placed on administrative leave and Spring had resigned from the
3 NBPD. Had Spring learned of these comments while she was
4 employed at the NBPD and while Carlone was still her supervisor,
5 perhaps they would have supported Spring's hostile work
6 environment claim against Carlone.

7 That Spring never learned of these remarks while employed
8 by the NBPD makes her situation unlike others involving comments
9 made outside the plaintiff's presence. *See Schwapp v. Town of Avon*,
10 118 F.3d 106, 111 (2d Cir. 1997) ("[T]he fact that a plaintiff learns
11 second-hand of a racially derogatory comment or joke by a fellow
12 employee or supervisor . . . can impact the work environment.");
13 *Torres v. Pisano*, 116 F.3d 625, 633 (2d Cir. 1997) ("The fact that many
14 of [the plaintiff's supervisor's] statements were not made in [the
15 plaintiff's] presence is, in this case, of no matter; an employee who
16 knows that her boss is saying things of this sort behind her back may

1 reasonably find her working environment hostile.”).

2 Construing the incidents cited by Spring generously in her
3 favor, we hold as a matter of law that Carlone’s behavior did not
4 create a sufficiently abusive working environment for Spring. Thus,
5 Carlone is entitled to qualified immunity as to her hostile work
6 environment claim.

7 2. Raspardo’s Claims

8 Raspardo cites four principal incidents to support her hostile
9 work environment claim against Carlone. In 2007, Carlone asked
10 Raspardo if she was “planning to go out drinking or have sex with
11 [her] boyfriend,” another officer in the department, told Raspardo
12 that her uniform should be more “form fitting,” and attempted to
13 massage Raspardo’s shoulders. In early 2008, Carlone showed
14 Raspardo a suggestive photograph of a woman wearing tactical gear
15 in a magazine which was focused on the woman’s buttocks and
16 passed the photo around to other male officers who were also
17 present, saying that the woman’s buttocks looked like Raspardo’s.

1 Raspardo told Carlone that his comments were not funny or ignored
2 him and left immediately during these incidents.

3 Raspardo also stated in a sworn statement to the NBPB
4 during its investigation of Carlone that Carlone, her direct
5 supervisor at the time, “made references [of a sexual nature] to [her]
6 body parts on at least over ten occasions,” particularly concerning
7 her buttocks, often in front of other officers, which made her “feel
8 disrespected, angry, and embarrassed.” Pl. Carlone’s App. 4-5. She
9 reiterated these allegations in her later deposition testimony and
10 interrogatory answers.

11 The four principal incidents, including unwanted touching
12 and vulgar comments in front of other officers, when combined with
13 the “over ten” additional comments about Raspardo’s body, all over
14 a period of just one year, would be amply sufficient to permit a jury
15 to find a sexually hostile work environment. *See Raniola v. Bratton*,
16 243 F.3d 610, 618-20 (2d Cir. 2001) (observing that numerous

1 incidents of vulgar name calling and workplace sabotage could
2 create a hostile work environment); *Carrero v. N.Y.C. Housing Auth.*,
3 890 F.2d 569, 578 (2d Cir. 1989) (holding a supervisor's constant
4 unwelcome attempts to touch and kiss the plaintiff sufficient to
5 establish a hostile work environment). The evidence presented by
6 Raspardo, if true, demonstrates that Carlone violated her
7 constitutional right to equal protection through this sexual
8 harassment.

9 Raspardo's right to be free from severe or pervasive sexual
10 harassment was also clearly established at the time of Carlone's
11 conduct in 2007 and 2008. This Court has repeatedly held that
12 public employees have the right to be free from discrimination based
13 on their sex, and we have made Title VII hostile work environment
14 claims available under § 1983. *See Demoret*, 451 F.3d at 149; *Patterson*,
15 375 F.3d at 226; *Back*, 365 F.3d at 117; *Jemmott*, 85 F.3d at 66-67. We
16 also cannot accept Carlone's contention that an objectively

1 reasonable police officer would believe that this conduct was not
2 clearly sexual harassment. *See Jemmott*, 85 F.3d at 67; *see also Royal*
3 *Crown Day Care LLC*, 746 F.3d at 545. Carlone has failed to establish
4 either that he did not violate Raspardo's constitutional right to equal
5 protection or that the right was not clearly established at the time of
6 his conduct; he is thus not entitled to qualified immunity. We
7 therefore affirm the district court's denial of Carlone's motion for
8 summary judgment on the basis of qualified immunity as to
9 Raspardo's hostile work environment claim.

10 *E. The Hostile Work Environment Claims of Russell, Raspardo, and*
11 *Spring Against the Remaining Defendants*

12 Carlone's conduct was clearly sex-based. By contrast, the
13 plaintiffs' evidence against the remaining four individual
14 defendants presents conduct that, with few exceptions, does not
15 appear to be tied to the plaintiffs' sex. Thus, in addition to
16 considering whether the acts of a particular defendant were
17 sufficient to create a hostile work environment for a particular

1 plaintiff, we must consider whether the plaintiffs have alleged and
2 presented evidence from which a reasonable jury could conclude
3 that the conduct was caused by intentional discrimination based on
4 sex. See *Patterson*, 375 F.3d at 226 (“[A]lthough in certain
5 circumstances a Title VII claim may be established through proof of
6 a defendant’s mere negligence, without a showing of discriminatory
7 intent, a plaintiff pursuing a . . . denial of equal protection under
8 § 1983 must show that the discrimination [based on a protected
9 characteristic] was intentional.” (internal citation omitted)); *Back*, 365
10 F.3d at 118 (“To make out . . . a claim [for sex discrimination in
11 violation of the Fourteenth Amendment under § 1983], the plaintiff
12 must prove that she suffered purposeful or intentional
13 discrimination on the basis of gender.”).

14 We must also apply supervisory liability analysis to Gagliardi,
15 who was the Chief of the NBPD at the time of the plaintiffs’ alleged
16 harassment, to determine whether he violated the plaintiffs’

1 constitutional rights on that basis.²³ See *Hayut*, 352 F.3d at 753; *Colon*,
2 58 F.3d at 873; see also *Iqbal*, 556 U.S. at 676.

3 For the reasons that follow, we conclude that the remaining
4 individual defendants, including Gagliardi, are entitled to qualified
5 immunity on all of the plaintiffs' hostile work environment claims.
6 Because the first prong of the qualified immunity test is satisfied
7 with respect to these defendants, we need not reach the question of
8 whether reasonable officers would have perceived each individual
9 defendant's conduct as objectively sufficient to create a hostile work
10 environment for the plaintiffs.

11 1. Claims Against Steck and Panetta

12 The plaintiffs' evidence against defendants Steck and Panetta

²³ The other defendants are also supervisors, but the plaintiffs have not clearly asserted supervisory-based claims as to them. Although the plaintiffs suggest in their brief that Defendant Paventi was grossly negligent in his supervision of Carlone, both their briefs and the record focus on Gagliardi's supervisory negligence as Chief of Police and provide minimal substantive arguments, few allegations, and little evidence concerning Paventi's supervision of Carlone; we thus only perform the applicable supervisory liability analysis with relation to Gagliardi.

1 requires only brief discussion. The plaintiffs assert that each of these
2 two defendants reprimanded them for tardiness, not properly
3 maintaining their uniforms, and miscommunications over their use
4 of sick leave and personal days. Raspardo also alleges that Panetta
5 initiated an investigation into whether she lied to the NBPD about
6 her inability to speak Spanish after he heard her speak Spanish to a
7 child while on a call,²⁴ and Russell alleges that Panetta reprimanded
8 her over the radio when other officers could hear the exchange. The
9 plaintiffs claim generally, without providing much detail, that Steck
10 and Panetta did not act similarly toward male officers who
11 committed the same offenses.

12 We cannot conclude that the defendants' conduct was
13 motivated by the plaintiffs' sex. We have previously recognized that
14 plaintiffs may present circumstantial proof that "adverse treatment
15 that was not explicitly sex-based was, nevertheless, suffered on

²⁴ Raspardo does not deny that she spoke in Spanish to the child. Rather, she asserts that she only spoke a few basic words—the limit of her knowledge.

1 account of sex.” *Raniola*, 243 F.3d at 621-22; *see also Moll v. Telesector*
2 *Res. Grp., Inc.*, Nos. 12-4688-cv, 13-0918-cv, 2014 WL 3673357, at *4
3 (2d Cir. July 24, 2014) (holding, in the Title VII context, that the
4 district court erred in failing to consider sex-neutral conduct in light
5 of facially sex-based conduct); *Alfano*, 294 F.3d at 377 (holding, in the
6 Title VII context, that “to the extent that the plaintiff relies on facially
7 neutral incidents to create the quantum of proof necessary . . . she
8 must have established a basis [at trial] from which a reasonable fact-
9 finder could infer that those incidents were infected by
10 discriminatory animus”).

11 Here, however, the only evidence the plaintiffs offer to
12 connect Steck’s and Panetta’s reprimands to the plaintiffs’ sex is the
13 plaintiffs’ own affidavits, which provide one-sentence descriptions
14 of occasions on which male officers (often not identified by name)
15 allegedly committed similar infractions without a reprimand. Even
16 construing this evidence generously in favor of the plaintiffs, their

1 comparisons fail to establish that Steck and Panetta singled out the
2 plaintiffs for adverse treatment based on their sex. *See Scott*, 550 U.S.
3 at 380. Steck and Panetta did not individually violate the plaintiffs'
4 constitutional rights by creating a hostile work environment.
5 Therefore, they are entitled to qualified immunity on the plaintiffs'
6 hostile work environment claims.

7 2. Claims Against Paventi

8 Defendant Paventi presents a closer case. Unlike Steck and
9 Panetta, the plaintiffs present evidence that Paventi engaged in some
10 conduct that was facially sex-based. He used the nickname "J Lo"
11 for Raspardo, which Russell and others took as a reference to the
12 celebrity Jennifer Lopez and Raspardo's buttocks, and he called
13 Spring "Tiki," which Spring and other unidentified members of the
14 department believed was a sexualized reference to the swinging
15 hips of dashboard tiki dolls. Paventi also referred to Spring and
16 other female officers as "Rock Stars" or "Rock Star," which Spring
17 interpreted as a reference to a strip club named "Rock Star" in a

1 nearby town. While the meaning of these nicknames is subject to
2 dispute, for purposes of this appeal we must accept the plaintiffs'
3 interpretation. *See Jemmott*, 85 F.3d at 66. Paventi's use of these
4 nicknames means it would be possible to conclude that his actions
5 were based on the plaintiffs' sex. *See Raniola*, 243 F.3d at 621-23.

6 Nonetheless, Paventi is entitled to qualified immunity because
7 Paventi's behavior toward the plaintiffs was not sufficiently severe
8 or pervasive to violate clearly established law. Spring and Russell
9 have presented few specific allegations and minimal facts
10 concerning actions taken by Paventi against them, and the few
11 instances they have cited, such as reprimanding Spring for misusing
12 sick leave, crediting other officers' complaints of Russell's poor
13 performance, and identifying them as "absent without leave" after
14 miscommunications about personal days, are insufficient as a matter
15 of law to establish a hostile work environment. *See Demoret*, 451
16 F.3d at 150 (holding that a supervisor's close monitoring of

1 plaintiff's work, mild rudeness to her, failure to take advantage of all
2 of her abilities, and reassignment of some of plaintiff's
3 responsibilities to other employees was not so severe as to be
4 abusive).

5 The plaintiffs make several other unrelated claims against
6 Paventi, including failing to timely investigate a complaint that an
7 NBPD officer was showing sexually explicit photographs of Officer
8 Spring to EMS employees, being aware of inappropriate videos used
9 during training but failing to take timely action, being involved in
10 an investigation of whether Raspardo spoke Spanish, and making
11 negative comments about Spring to her new employer. These
12 isolated incidents, even when construed generously in the plaintiffs'
13 favor, are insufficient as a matter of law to create a hostile work
14 environment.

15 Raspardo and Spring claim that Paventi took a
16 disproportionate interest in ensuring that they not operate police

1 vehicles while their driving privileges were suspended following car
2 accidents for which non-defendant officers found them at fault and
3 assigned them to driver retraining.²⁵ We see no basis upon which to
4 conclude that these actions by Paventi created a hostile work
5 environment. *See Demoret*, 451 F.3d at 150 (holding that a
6 supervisor's close monitoring of plaintiff's work "was not so severe
7 as to be abusive"). Paventi was merely enforcing disciplinary orders
8 that plaintiffs concede were justified. Therefore, even in light of this
9 evidence, Paventi is entitled to qualified immunity on their hostile
10 work environment claims.

11 3. Claims Against Gagliardi

12 The plaintiffs' claims against then-Chief of the NBPD,
13 Gagliardi, raise somewhat different issues. They bring claims
14 against Gagliardi alleging that his individual actions created a

²⁵ Spring and Raspardo both lost driving privileges following automobile accidents in which they were found to be at fault, but neither has presented evidence that Paventi was involved in the evaluation of their fault in the accidents or their loss of driving privileges.

1 hostile work environment, and they also claim that he failed to
2 properly supervise or investigate the conduct of subordinate police
3 officers who allegedly sexually harassed them, particularly Carlone.

4 As described above, a supervisor cannot be held liable under a
5 theory of *respondeat superior* for the constitutional torts of his
6 subordinates; he must be personally involved in a constitutional
7 violation in order to generate liability under § 1983. *Iqbal*, 556 U.S. at
8 676. Prior to *Iqbal*, we held that “personal involvement” included, as
9 relevant here, “direct participation in the alleged violation[,] . . .
10 gross negligence in the supervision of subordinates who committed
11 the wrongful acts[,] and failure to take action upon receiving
12 information that constitutional violations are occurring.” *Patterson*,
13 375 F.3d at 229; *see also Back*, 365 F.3d at 127 (citing *Colon*, 58 F.3d at
14 873); *Hayut*, 352 F.3d at 753. We conclude that, even viewing the
15 relevant evidence produced by the plaintiffs generously, Gagliardi is
16 not individually liable for violating the plaintiffs’ rights under §

1 1983. He neither created a hostile work environment through his
2 own direct actions nor was grossly negligent in his supervision or
3 investigation of subordinate officers who allegedly harassed the
4 plaintiffs on the basis of sex.

5 Although the plaintiffs claim that Gagliardi created a hostile
6 work environment through his direct actions, the record is devoid of
7 specific allegations or evidence. The only meaningful conduct
8 involves Raspardo. Gagliardi suspended Raspardo for four days
9 following a car accident in which she admitted to being at fault.
10 Gagliardi was also apparently involved—though Raspardo does not
11 explain how—in the investigation into whether Raspardo had lied
12 about her knowledge of Spanish. Finally, Gagliardi told Raspardo
13 when she was first interviewed that if she were hired by the NBPD,
14 “he was going to have sexual harassment problems with [her].”
15 Defs.’ App. 207. These three incidents are not sufficient to create a
16 genuine dispute as to whether he created a hostile work

1 environment. Gagliardi is thus entitled to qualified immunity on the
2 plaintiffs' direct claims.

3 The plaintiffs' primary allegation against Gagliardi, however,
4 is that he allowed other NBPD officers, particularly Carlone, to
5 sexually harass the plaintiffs. This claim reaches a substantially
6 broader range of conduct because it encompasses treatment of the
7 plaintiffs, and others in the NBPD, by Gagliardi's subordinates.

8 Gagliardi may not be held liable under § 1983 for grossly
9 negligent supervision of his subordinates unless those subordinates
10 have actually violated a plaintiff's constitutional rights. *Poe*, 282
11 F.3d at 134 ("Because the establishment of both the violation and the
12 defense depend upon evaluating the harm inflicted and the
13 individual responsibility of the accused public official, both the
14 subordinate's and the supervisor's actions (or lack thereof) are
15 relevant."). We concluded above that Steck, Panetta, and Paventi
16 did not sexually harass the plaintiffs. We also held, on the basis of

1 the evidence presented, that a jury could conclude that Carlone
2 sexually harassed Raspardo and presumably Russell,²⁶ but not
3 Spring. Even if Carlone's misconduct did not amount to sexual
4 harassment, however, his treatment of all NBPD officers and
5 personnel is relevant to the extent Gagliardi was aware of it with
6 respect to Spring and any other female officers and personnel, not
7 just Russell and Raspardo. We nonetheless conclude, as explained
8 below, that Gagliardi is entitled to qualified immunity because
9 Gagliardi did not, as a matter of law, violate the plaintiffs'
10 constitutional rights by failing to adequately supervise Carlone's
11 interactions with them or by failing to adequately investigate and
12 respond to reports concerning Carlone's allegedly improper
13 behavior prior to his sexual harassment of Russell and Raspardo.

14 Under our pre-*Iqbal* case law, a failure to supervise
15 subordinates and adequately inquire into complaints concerning

²⁶ This assumption is necessary where, as here, Carlone did not move for summary judgment with respect to Russell's claim of sexual harassment against him.

1 their behavior can yield supervisory liability in certain
2 circumstances. *Id.* at 141. As we have explained, “for a supervisor
3 to be liable under section 1983 for his failure to inquire, he must first
4 have been on notice that his subordinate was prone to commit some
5 unconstitutional or unacceptable behavior. Such notice could be
6 actual (for example, awareness of prior [constitutional] deprivations
7 in a related context), or it could be constructive” *Id.* In order to
8 defeat a police supervisor’s claim of qualified immunity, a plaintiff:

9 must allege sufficient facts to raise a triable issue of fact as
10 to whether [the supervisor] knew or should have known
11 that there was a high degree of risk that [the harasser]
12 would behave inappropriately with a woman during his
13 assignment, but either deliberately or recklessly
14 disregarded that risk by failing to take action that a
15 reasonable supervisor would find necessary to prevent
16 such a risk, and that failure caused a constitutional injury.

17
18 *Id.* at 142. The issue on appeal from a denial of qualified immunity
19 then, is whether a plaintiff “has . . . proffer[ed] sufficient evidence to
20 meet this standard.” *Id.*

21 The only evidence Russell and Raspardo identify suggesting

1 that Gagliardi had reason to know that Carlone may have posed a
2 risk of sexually harassing them is that the department previously
3 investigated Carlone following allegations concerning improper
4 comments and behavior toward female officers and personnel.
5 However, the department's 2006 investigation into allegations that
6 Carlone was harassing Officer Hayden concluded when Hayden
7 explained that she did not feel that Carlone had behaved
8 inappropriately. During the course of this investigation, it was also
9 discovered that Carlone made an inappropriate joke about a female
10 officer during roll call. Upon further investigation, the woman
11 officer confirmed that Carlone had made the inappropriate comment
12 but stated that she did not feel offended by it. Gagliardi and Paventi
13 disciplined Carlone through verbal counseling after these
14 investigations, and Paventi ordered Carlone not to pick up female
15 officers in his patrol vehicle. When Carlone continued to do so,
16 Paventi gave him another verbal warning. A December 2006

1 investigation also revealed that Carlone inappropriately used the
2 MDT messaging system, an infraction for which Gagliardi
3 suspended Carlone for two days and ordered Carlone to surrender
4 two days of accrued holiday time.

5 These prior incidents of misconduct by Carlone were not
6 sufficient to put Gagliardi on notice that Carlone was likely to
7 sexually harass Russell and Raspardo. *Cf. Johnson*, 239 F.3d at 255
8 (holding that supervisors' knowledge of four assaults by a teacher
9 prior to his assault of the plaintiff could constitute grossly negligent
10 supervision). The nature of these incidents and of Gagliardi's
11 response would not permit a reasonable jury to find "gross
12 negligence or deliberate indifference," or to conclude that
13 Gagliardi's response created "a high risk that [Carlone] would
14 violate [Russell's and Raspardo's] constitutional rights." *Poe*, 282
15 F.3d at 140. Russell and Raspardo also suggest that Carlone should
16 have been disciplined more harshly after these incidents and

1 conclude that the lack of such discipline ultimately led to Carlone's
2 sexual harassment of them. The fact that Gagliardi did not fire
3 Carlone earlier surely permitted Russell's and Raspardo's
4 harassment to occur, but this is an insufficient basis to conclude that
5 Gagliardi was grossly negligent in not terminating Carlone earlier or
6 imposing other discipline.

7 There is also no evidentiary basis to conclude that Gagliardi
8 knew that Carlone was sexually harassing Russell or Raspardo and
9 impermissibly allowed this harassment to continue. The plaintiffs
10 did not report sexual harassment of them by Carlone until after
11 Gagliardi had already placed Carlone on administrative leave.
12 Indeed, neither Russell nor Raspardo claims that Gagliardi was
13 aware of Carlone's behavior toward her before that time. Nor have
14 they presented any evidence suggesting that Gagliardi created or
15 allowed to continue any policy of sexual harassment or otherwise
16 witnessed or approved of acts of sexual harassment of other female

1 officers by Carlone.

2 It is undisputed that once Gagliardi became aware of
3 allegations of Carlone's improper racial remarks to Officer Elias, he
4 placed Carlone on administrative leave until the conclusion of that
5 investigation. Gagliardi began a broader investigation into
6 Carlone's conduct and contacted the prosecutor's office once he
7 learned of Carlone's sexual misconduct involving Russell. Finally,
8 shortly after the investigation began, Gagliardi demoted Carlone
9 from Sergeant to Patrol Officer on the ground that he "used [his]
10 supervisory position . . . to engage in an inappropriate, offensive and
11 demeaning pattern of conduct against at least . . . two officers who
12 were working under [his] command." Defs.' App. 68 ¶ 84, 109 ¶ 84.
13 After the investigation concluded, Gagliardi recommended that
14 Carlone be terminated.

15 Gagliardi's response to Carlone's behavior prior to the events
16 complained of by the plaintiffs was not grossly negligent as a matter

1 of law, nor was his later investigation and ultimate discipline of
2 Carlone. *See, e.g., Hayut*, 352 F.3d at 753; *Colon*, 58 F.3d at 873. In
3 any event, “[r]easonable supervisors confronted with the
4 circumstances faced by [Gagliardi] could disagree as to the legality
5 of his inaction.” *Poe*, 282 F.3d at 146. Although Carlone’s behavior
6 toward Russell and Raspardo is surely offensive and regrettable,
7 “[t]o find [Gagliardi] ineligible for immunity solely because
8 [Carlone] acted unlawfully seems patently unfair as well as
9 illogical.” *Id.* at 134.

10 Gagliardi thus did not violate the plaintiffs’ constitutional
11 rights either directly or as a supervisor. He is entitled to qualified
12 immunity on the plaintiffs’ direct and supervisory liability claims of
13 sexual harassment.

14 *F. The Plaintiffs’ Disparate Treatment Claims*

15 Finally, the plaintiffs assert disparate treatment claims under
16 § 1983 against the individual defendants other than Carlone. Such a
17 § 1983 claim for sex discrimination is analyzed under the burden-

1 shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792
2 (1973), utilized in Title VII claims. *See Demoret*, 451 F.3d at 150-51.
3 The plaintiff must first establish a *prima facie* case by showing that:
4 “(1) she is a member of a protected class; (2) her job performance
5 was satisfactory; (3) she suffered adverse employment action; and
6 (4) the action occurred under conditions giving rise to an inference
7 of discrimination.” *Id.* at 151 (citing *McDonnell Douglas*, 411 U.S. at
8 802). Once the plaintiff makes such a showing, the burden shifts to
9 the defendant employer to provide a legitimate, non-discriminatory
10 reason for the action. *Id.* If the defendant is able to make such a
11 showing, “the burden shifts back to the plaintiff to prove
12 discrimination, for example, by showing that the employer’s
13 proffered reason is pretextual.” *Id.* Notably, in disparate treatment
14 cases brought pursuant to § 1983, “liability for an Equal Protection
15 Clause violation . . . requires personal involvement by a defendant,
16 who must act with discriminatory purpose.” *Reynolds*, 685 F.3d at

1 204.

2 Individual liability under § 1983 for disparate treatment
3 requires us to examine each individual defendant's actions to
4 determine whether he treated the plaintiffs disparately on the basis
5 of sex. *See id.* at 204-06. This task is especially difficult here where
6 the plaintiffs' allegations are not entirely clear as to which
7 supervisors disciplined them at particular times and for particular
8 conduct. Because most of the plaintiffs' allegations do not assert
9 adverse employment actions, however, we find it unnecessary to
10 examine each defendant separately and instead conclude that most
11 of the plaintiffs' claims fail on the third prong of the *McDonnell*
12 *Douglas prima facie* case.

13 As to that prong, "[a] plaintiff sustains an adverse
14 employment action if he or she endures a 'materially adverse
15 change' in the terms and conditions of employment." *Galabya v.*
16 *N.Y.C. Bd. of Educ.*, 202 F.3d 636, 640 (2d Cir. 2000). A materially

1 adverse change in working conditions “must be more disruptive
2 than a mere inconvenience or an alteration of job responsibilities.”
3 *Id.* (internal citation and quotation marks omitted). Examples of
4 actionable adverse employment actions include termination of
5 employment, a demotion evidenced by a decrease in wage or salary,
6 a less important title, a loss of important benefits, or significantly
7 reduced responsibilities. *See id.*; *see also Demoret*, 451 F.3d at 151.

8 With the possible exception of the administrative discipline
9 Raspardo and Spring suffered as a result of their motor vehicle
10 accidents, none of the treatment complained of constitutes an
11 adverse employment action. *Compare Galabya*, 202 F.3d at 640-41
12 (holding that assignment to a different school or classroom was not
13 an adverse employment action), *and Wanamaker v. Columbian Rope*
14 *Co.*, 108 F.3d 462, 466 (2d Cir. 1997) (determining that loss of an
15 office and phone privileges was not a materially adverse
16 employment action), *with Terry v. Ashcroft*, 336 F.3d 128, 142-45 (2d

1 Cir. 2003) (deciding that a reasonable factfinder could conclude that
2 loss of firearm privileges and driving privileges for a law
3 enforcement officer was an adverse employment action). The
4 plaintiffs' remaining claims of unequal treatment, such as minor
5 reprimands for tardiness, improper attire, and miscommunications
6 regarding use of sick leave and personal days, are not adverse
7 actions and cannot give rise to a § 1983 claim on a theory of
8 disparate treatment.

9 Assuming that Raspardo's and Spring's claims regarding their
10 loss of driving privileges and requirement to walk their nighttime
11 patrols constitute adverse employment actions, *see Terry*, 336 F.3d at
12 145, they ultimately fail on the fourth prong of the *McDonnell*
13 *Douglas prima facie* case. So, too, with Russell's sanction concerning a
14 motor vehicle collision, a showing of disparate treatment "is a
15 recognized method of raising an inference of discrimination for the
16 purposes of making out a prima facie case." *Ruiz v. Cnty. of Rockland*,

1 609 F.3d 486, 493 (2d Cir. 2010). Raising such an inference, however,
2 requires the plaintiff to show that the employer treated him or her
3 “less favorably than a similarly situated employee” outside of the
4 protected group. *Graham v. Long Island R.R.*, 230 F.3d 34, 39 (2d Cir.
5 2000); *see also Mandell v. Cnty. of Suffolk*, 316 F.3d 368, 379 (2d Cir.
6 2003) (“A plaintiff relying on disparate treatment evidence must
7 show she was similarly situated in all material respects to the
8 individuals with whom she seeks to compare herself.” (internal
9 quotation marks omitted)).

10 A similarly situated employee is one “similarly situated in all
11 material respects” to the plaintiff. *Graham*, 230 F.3d at 39 (internal
12 quotation marks omitted). This does not mean that the plaintiff and
13 the compared co-employees must be identical. *Id.* at 40. In the
14 context of employee discipline, however, the plaintiff and the
15 similarly situated employee must have “engaged in comparable
16 conduct,” that is, conduct of “comparable seriousness.” *Id.* (internal

1 quotation marks omitted).

2 Here, the plaintiffs assert that male officers who were
3 involved in similar car accidents were treated more favorably
4 because the male officers were not disciplined as harshly as the
5 plaintiffs. We address each plaintiff's allegations concerning her
6 alleged unequally harsh treatment in turn.²⁷

7 Russell claims that she was treated unfairly after a minor
8 collision with an "Officer Sloate." She maintains that her patrol car

²⁷ We acknowledge that this Court has at times described the issue of whether an alleged comparator is sufficiently similarly situated to a plaintiff in the Title VII context as "a question of fact for the jury." *Mandell*, 316 F.3d at 379. As such, it is unsettled whether we can review a district court's determination that genuine disputes of material fact preclude granting summary judgment on a plaintiff's disparate treatment claims because of a lack of comparator evidence. Cf. *Plumhoff*, 134 S. Ct. at 2019 ("[D]eciding legal issues . . . is a core responsibility of appellate courts, and requiring appellate courts to decide such issues is not an undue burden."). We note again that Title VII frameworks do not always fit neatly into § 1983 claims. In the context of § 1983 claims, denying appellate review of the "factual question" of whether an alleged comparator is sufficiently similar to a plaintiff for the purposes of a disparate treatment claim would effectively insulate all such claims from review, exposing government officials to discovery and trial on only these claims. Thus, we may address it on appeal. Here, the complete absence of symmetrical comparator evidence compels the grant of summary judgment on these claims. See *Scott*, 550 U.S. at 380 (holding that this Court may resolve the legal question concerning the alleged constitutional violation, even if such resolution relies on a fact-bound inquiry, and need not accept plaintiffs' allegations where they are contradicted by the record).

1 did not collide with Officer Sloate's patrol car, and alleges that
2 Carlone assisted Officer Sloate in writing and editing his statement
3 concerning the accident. She admits that she received a
4 "Supervisor's Warning" from an Officer Woodruff, not a defendant
5 in this case, who investigated the accident. Defs.' App. 56 ¶ 47, 105-
6 106 ¶ 47. Russell does not allege that Officer Woodruff acted
7 improperly in his investigation or imposition of discipline, and this
8 type of punishment appears consistent with the other punishments
9 meted out for similar accidents. Russell also failed to file a grievance
10 concerning discipline imposed following this incident. Russell
11 appears to claim only that Carlone engaged in disparate treatment
12 by assisting Officer Sloate in writing and editing his statement. This
13 conduct does not constitute an adverse action, and there is no
14 allegation or evidence that Carlone failed to assist other officers in
15 writing and editing statements and thus acted disparately toward
16 Russell. Therefore, Russell has not established that Carlone treated

1 her disparately on the basis of sex in this instance.²⁸ Liability cannot
2 be imputed to Gagliardi without an underlying constitutional
3 violation. *See Poe*, 282 F.3d at 134, 142. Thus, the defendants have
4 not violated Russell's constitutional right to equal protection on this
5 basis and are entitled to qualified immunity.

6 As to Raspardo's claim, the undisputed evidence is that her
7 motor vehicle accident was extremely severe. The accident caused
8 \$14,000 of damage to her police vehicle and substantial damage to
9 the other vehicle involved, whose occupants were a mother and
10 child taken to the hospital for emergency care, and kept Raspardo
11 out of work with injuries until May 2, 2008. Raspardo does not
12 appear to contend on appeal that she was not at fault for this
13 accident or that the damage caused by the accident was not extreme;
14 instead, she argues that the suspension of her driving privileges and
15 requirement that she walk a beat constituted disparate treatment.

²⁸ We offer no conclusion as to this behavior in the context of Russell's sexual harassment claim against Carlone, which continues in the district court.

1 Raspardo has set forth no similarly situated comparator to permit
2 this Court to conclude that the defendants treated Raspardo
3 disparately on the basis of her sex following her car accident. The
4 accident reports submitted by plaintiffs delineating other incidents
5 describe accidents that occurred at low speeds and resulted in
6 minimal property and automobile damage and no injuries. The
7 accident reports presented, and the discipline for the officers
8 involved, are not sufficiently similar to Raspardo's serious accident
9 to support disparate treatment.²⁹ Raspardo has thus failed to
10 identify a sufficiently similar comparator to establish as a matter of
11 law that she was disparately treated following her accident. Because
12 there was no underlying constitutional violation, liability cannot be

²⁹ Raspardo alleges that an "Officer Bleau" drove through a red light, "totaling another car that had a family inside [the vehicle]," but that he never had to go to driver retraining or was disciplined. We cannot conclude from this vague statement that "Officer Bleau" was sufficiently similarly situated to Raspardo. Additionally, there is no evidence substantiating this claim in the record. Although we must view the facts in the light most favorable to the plaintiffs and take the allegations and facts as adduced by the plaintiffs, we need not accept conclusory allegations that are either contradicted by or lack support in the record. *See Scott*, 550 U.S. at 380.

1 imputed to Gagliardi or imposed on the other individual
2 defendants. Therefore, the defendants have not violated Raspardo's
3 constitutional rights and are entitled to qualified immunity on this
4 claim.

5 Spring's claim presents the closest case. Spring admits that
6 she was involved in an accident in her patrol car in February of 2008
7 when she struck the rear of a vehicle. After a "Sergeant Portalatin"
8 investigated the accident and determined (with the help of Spring's
9 own admission) that Spring was at fault for the accident, a "Captain
10 Beatty" issued Spring a written reprimand and informed her that
11 she must participate in driving training administered by the
12 department.³⁰ Spring admits that, after Beatty's reprimand, she
13 "could not operate a police car until that training was completed"
14 and that, "[a]s a result of being unable to operate a police car, [she]
15 had to walk a beat." Defs.' App. 61 ¶ 56, 107 ¶ 56. Spring does not

³⁰ It appears that Defendant Steck had limited involvement in this investigation and ensuing disciplinary action; Spring does not cite his behavior as objectionable.

1 appear to challenge the findings of fault, which were made by
2 officers who are not defendants. She instead contends that she was
3 forced to walk a patrol on the fourth shift in an area of high crime
4 and that her supervisors repeatedly ensured that she did not use a
5 police vehicle. She attributes this alleged punishment to Defendant
6 Paventi, who the evidence indicates gave specific instructions to the
7 supervisory staff that they would walk beats if post-accident beat
8 officers were found in patrol cars, and her direct supervisor, not a
9 defendant in this case, who interpreted Paventi's instruction as
10 applying to Spring. She emphasizes that she was the only officer
11 ever required to walk a beat on the late-night fourth shift. Because
12 Spring concedes that an "Officer Beatty" assigned the punishment in
13 this case and specifically told Spring that she would not be
14 permitted to drive a police vehicle and would have to walk a beat
15 until she completed driver retraining, we understand her to be
16 making a claim of unequal enforcement of penalties against Paventi.

1 Spring has failed, though, to identify a sufficiently similarly
2 situated male comparator with whom to compare Paventi's penalty
3 enforcement. Spring has identified no male officer who was
4 specifically admonished, as she admits she was, by a non-defendant
5 officer not to ride in a police vehicle and required to walk a beat, and
6 who was subsequently specifically permitted by Paventi to avoid
7 this punishment. Indeed, the alleged similar comparators, for the
8 most part, were not even supervised by Paventi, and Spring does
9 not claim that Paventi failed to enforce their punishments against
10 them or otherwise generally permitted post-accident officers to ride
11 in police vehicles during this time. Thus, even viewing the evidence
12 most favorably to Spring, Spring has failed to establish that Paventi
13 treated her more harshly with respect to enforcing her driver
14 retraining and walking a beat penalties assigned by another officer.³¹

³¹ Although the plaintiffs allege generally on appeal that male officers were not required to walk beats following car accidents, this assertion is partially contradicted by Spring's own admission that at least one male officer ("Officer Jared Barseleau") was required to walk a beat after being in car accidents, and

1 As such, Paventi did not violate Spring's constitutional rights and is
2 entitled to qualified immunity. Because we have held that there was
3 no underlying constitutional violation, there is also no supervisory
4 liability. *See Poe*, 282 F.3d at 134. Thus, Gagliardi is entitled to
5 qualified immunity on these claims.

6 Because the plaintiffs have not established that the individual
7 defendants treated the plaintiffs differently than they treated
8 similarly situated male officers, the defendants have not violated the
9 plaintiffs' constitutional rights as a matter of law, and the plaintiffs'
10 disparate treatment claims fail. The defendants are therefore
11 entitled to qualified immunity on these claims.³²

12 CONCLUSION

13 For the foregoing reasons, we AFFIRM in part and REVERSE

the undisputed evidence that beat officers were assigned police vehicles 83% of the time.

³² Because Russell and Spring have failed to provide any information about allegedly similarly situated comparators with reference to Gagliardi's denial of their requests for light duty, they have failed to establish disparate treatment on that basis and we need not address these allegations further.

1 in part the district court's denial of the individual defendants'
2 motions for summary judgment and REMAND for proceedings
3 consistent with this opinion. Except for Raspardo's hostile work
4 environment claim against Carlone, the five individual defendants
5 are entitled to qualified immunity on the § 1983 claims.

6 It is worth noting, once again, that this appeal only considers
7 the hostile work environment and disparate treatment claims
8 against the individual defendants under 42 U.S.C. § 1983. The
9 claims against the City of New Britain and its police department
10 under Title VII and § 1983 continue before the district court.
11 Russell's hostile work environment claim against Carlone under
12 § 1983 also remains pending in the district court as Carlone did not
13 seek summary judgment as to that claim.