

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARY MARTIN,	:	
	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	NO. 98-CV-5765
	:	
CITY OF PHILADELPHIA, et al.,	:	
	:	
Defendants.	:	

MEMORANDUM

R.F. KELLY, J.

JANUARY , 2000

Presently before this Court is Defendants' Motion for Summary Judgment. On October 30, 1998, Plaintiff filed a Complaint against all Defendants, alleging unlawful arrest and unlawful detention; assault and battery; intentional infliction of emotional distress; malicious prosecution; defamation; violation of her constitutional rights as protected by 42 U.S.C. § 1983; and seeking punitive damages and attorneys fees.¹ In her response to the summary judgment motion, Plaintiff has withdrawn her claims for intentional infliction of emotional distress and assault and battery. For the reasons which follow, Defendant's summary judgment motion is granted in part and denied in part with respect to the remaining claims.

¹ Four months after the close of discovery, and after responding to Defendants' Motion for Summary Judgment, Plaintiff filed a Motion to Amend the Complaint which this Court denied by Order dated November 30, 1999.

I. BACKGROUND

At the time of the incidents giving rise to this lawsuit, Plaintiff was employed by the City of Philadelphia Police Department ("Police Department" or "Department"). On November 1, 1996, Plaintiff worked as a Clerk Typist II in the Department's Records Information Unit ("RIU"). Her duties included contacting out of state police departments, doing computer and record checks, and prisoner processing. Although she claims there was no "particular procedure the unit followed," Plaintiff concedes that she was not permitted to run criminal record checks for personal use.

The parties' versions of the events leading up to this lawsuit significantly diverge. Plaintiff's rendering of the events is as follows. On approximately October 30th or 31st, 1996, Plaintiff claims that she received a request by telephone from what she assumed was the Philadelphia District Attorney's Office for a record check on an individual named Russell Davis. She claims to have written the information she received concerning the individual on a piece of scrap paper. She then furnished the party on the telephone with criminal information concerning the individual. Plaintiff maintains that local calls received in the RIU were not recorded, and that therefore she did not log the information she received during the phone call on a worksheet.

Although the individual's file had to be "converted" pursuant to the phone call, Plaintiff claims she had to put aside this particular job because police processing was very heavy at that time and took priority over other job duties; therefore, ostensibly on November 1, 1996,² she printed the court history of this individual so that his folder would be ready for conversion when she was later able to return to it. However, later, when she retrieved the individual's folder, also ostensibly on November 1, 1996, she learned that another clerk had already retrieved the information concerning Russell Davis. Accordingly, Plaintiff claims she threw away the court history she had retrieved. Plaintiff also admits to having printed out information from the police system concerning Russell Davis on November 1, 1996, which she also claims to have thrown away.

At the end of her shift on November 1, 1996, as she prepared to leave work, she removed expungement papers relating to one of her own earlier criminal arrests from her desk and placed them in her pocket. She then proceeded to leave the workplace. Before she could exit the RIU, Defendant Corporal Patricia Moebius, an RIU supervisor, stopped her at the exit door and, as Defendant Moebius and another Defendant, Officer Blase Contino, stood outside the door, Officer Moebius questioned

² Plaintiff's deposition testimony concerning the dates on which the above events occurred is imprecise, to say the least.

Plaintiff about the papers she had placed in her pocket.

Plaintiff maintains that the only papers she had in her pocket were her own expungement papers. She further claims that in response to Defendant Moebius' inquiry, she pulled the papers out of her pocket, but kept them in her hand. Without even looking at the papers, Defendant Moebius then told Plaintiff that it was illegal to take personal information off a computer unit and told her to go to the office of Defendant Harry Giordano, the Commanding Officer of the RIU. Plaintiff claims she did not respond to Defendant Moebius' statement, but reported to Defendant Giordano's office where she waited outside with her papers for approximately fifteen to twenty minutes while Defendant Moebius spoke with Defendant Giordano. She claims that during this time, pursuant to Defendant Moebius' instruction, Defendant Contino "watched" her and, and verbally stopped her when she tried to leave by saying, "Come back here." Plaintiff claims that when she finally entered Defendant Giordano's office, he stated, "This is police business," and threatened that he could have her arrested and/or transferred out of the unit. Plaintiff claims Defendant Giordano then began yelling at her. Plaintiff asked to leave the office, but was not permitted to at that time because Defendant Moebius continued to ask her questions for a few minutes about the record she had been checking before attempting to leave for work, which Defendant

Moebius thought she had taken. Plaintiff claims that Defendant Moebius questioned her "like a cop that's arresting somebody," and that it scared her. Plaintiff asked Defendant Moebius if she wanted to check her pocketbook, but Defendant Moebius declined. Defendant Giordano then ordered Plaintiff out of the office.

After November 1, 1996, Plaintiff was reassigned to work at the Identification Unit in the Department. She had no discussions with any of the Defendants until November 12, 1996.

Defendants' version of the events in question differs appreciably. Defendants claim that on November 1, 1996, Defendant Moebius observed plaintiff take a piece of scrap paper from her handbag and type information from it into her computer. Defendant Moebius claims that she thought this was unusual because RIU employees generally worked from standard size police documents, and because Plaintiff seemed to be extracting a lot of information from the computer without having any police documents in front of her.

Defendant Officer Tanya Geisler also claims to have been surprised to observe Plaintiff printing a large amount of information from her computer, especially since it was the end of her shift. Defendant Geisler further claims that Plaintiff did "not have any folder out" and "her coat and her purse were ready to leave." Geisler also claims that she saw Plaintiff leave the RIU with a printout and return shortly thereafter with her hands

empty.

As Plaintiff proceeded to leave for the day, Defendant Moebius and Defendant Contino followed her out the door and stopped her in the hallway. Defendants claim that Defendant Moebius asked Plaintiff what she had done with the computer printouts, and Plaintiff responded that they were in her pocket and then handed Defendant Moebius a printout. Plaintiff then allegedly stated that the subject of the printout was "one of [her] tenants."

Defendants allege that the printout Plaintiff showed Defendant Moebius was a criminal history check, or "Master Name Index" concerning an individual with several aliases, including Russell Davis, Terry Jenkins, and Terry Moore. This individual can be uniformly identified by his Police Photo Number ("PPN"), which is 570098. PPN 570098's residence as listed in several Court documents such as bench warrants and documents relating to bail, is 5715 Woodland Avenue in Philadelphia, PA. Plaintiff's husband owns the property located at 5715 Woodland Avenue in Philadelphia, PA.

Defendants do not materially dispute Plaintiff's characterization of the events which occurred next, culminating in Plaintiff's finally leaving for the day, i.e., the meeting in Defendant Giordano's office. However, Defendant Geisler, who claims to have earlier witnessed Plaintiff leave the RIU with a

printout in her hands and return with her hands empty, testified that at the end of Plaintiff's shift, she, Defendant Geisler, retrieved from the women's restroom a "Court History" printout for PPN 570098.³

As a result of the incidents which occurred on November 1, 1996, Defendant Detective John McIver commenced a criminal investigation against Plaintiff. Plaintiff does not dispute that Defendant McIver did not know Plaintiff and was randomly assigned to the investigation. Defendant McIver interviewed Defendants Moebius, Contino, and Geisler. He also collected the "Master Name Index" for PPN 570098 allegedly recovered by Defendant Moebius, and the "Court History" for PPN 570098 allegedly recovered by Defendant Geisler from the RIU restroom. Based upon the information he obtained during the criminal investigation, Defendant McIver decided to seek a warrant for Plaintiff's arrest. He swore out an Affidavit of Probable Cause, which he then presented to the Philadelphia District Attorney's Office for approval. On November 12, 1996, Assistant District Attorney Warren Kampf approved the Affidavit. Later that day, the Affidavit was approved by Bail Commissioner Rebstock and converted into a valid warrant. Pursuant to the warrant,

³ Plaintiff attempts to dispute this fact by claiming that Defendant Geisler "could [not] have retrieved any papers from a trash can because [Plaintiff] never went to the bathroom with any papers."

Defendant McIver arrested Plaintiff on November 12, 1996.⁴

Plaintiff was charged with Unlawful Access to Stored Communications, 18 Pa.C.S.A. § 5741; Theft, 18 Pa.C.S.A. § 3921; Unlawful Use of Computer, 18 Pa.C.S.A § 3933; Receiving Stolen Property, 18 Pa.C.S.A. § 3925; and Criminal Attempt, 18 Pa.C.S.A. § 901, but was acquitted of all charges after a trial. However, Plaintiff's photograph was displayed in the security area of the Police Administration Building, indicating that she was not to be allowed in the building, for approximately one year after the alleged November 1, 1996 "arrest." Based on the above alleged incidents, Plaintiff now brings this lawsuit.

II. STANDARD OF REVIEW

"Summary judgment is appropriate when, after considering the evidence in the light most favorable to the nonmoving party, no genuine issue of material fact remains in dispute and `the moving party is entitled to judgment as a matter of law.'" Hines v. Consolidated Rail Corp., 926 F.2d 262, 267 (3d Cir. 1991) (citations omitted). "The inquiry is whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one sided that one party must, as

⁴ The manner in which Plaintiff was arrested on November 12, 1996 is disputed, Plaintiff claiming a variety of indignities and Defendant maintaining that the arrest was entirely routine. However, as Plaintiff has abandoned any claim with respect to this arrest that she might have previously been pursuing (See Pl.'s Resp. to Defs.' Mot. For Summ. J. at 22), it is not necessary for this Court to detail each version.

a matter of law, prevail over the other." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). The moving party carries the initial burden of demonstrating the absence of any genuine issues of material fact. Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358, 1362 (3d Cir. 1992), cert. denied, 507 U.S. 912 (1993). Once the moving party has produced evidence in support of summary judgment, the nonmovant must go beyond the allegations set forth in its pleadings and counter with evidence that demonstrates there is a genuine issue of fact for trial. Id. at 1362-63. "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted.'" Estate of Zimmerman v. SEPTA, 168 F.3d 680, 684 (3d Cir. 1999) (citation omitted).

III. DISCUSSION

In her Response to Defendant's Motion for Summary Judgment, Plaintiff states that although "the Defendants seek to focus the Court's attention on the Plaintiff's arrest of November 12, 1996. . .that arrest is not the arrest in question; rather, the arrest of November 1, 1996 is the one to which objection is being made." Pl.'s Resp. to Defs.' Mot. For Summ. J. at 22. Therefore, to the extent that any of Plaintiff's claims were ever based on the arrest which occurred on November 12, 1996, she has

abandoned those claims and they are therefore dismissed. As a result, all of Plaintiff's claims relate solely to the events that took place on November 1, 1996. We will address each of Plaintiff's claims individually.

A. Malicious Prosecution

Plaintiff asserts a claim for malicious prosecution under 42 U.S.C. § 1983, alleging that Defendants Moebius, Geisler, Contino, Giordano, Cleary and McIver violated her Fourth and Fourteenth Amendment rights. "A civil rights claim for malicious prosecution is actionable under section 1983." Telepo v. Palmer Twp., 40 F.Supp.2d 596, 609 (E.D.Pa. 1999). However, the law governing the basis upon which a section 1983 malicious prosecution claim may be brought is evolving. In Albright v. Oliver, 510 U.S. 266 (1994), the United States Supreme Court explored the parameters of the malicious prosecution tort, stating that if a malicious prosecution violated a constitutional right, it was most likely a Fourth Amendment right. Id. Following Albright, many courts have construed malicious prosecution claims to be exclusively based on the Fourth Amendment. Id. However, in Torres v. McLaughlin, 163 F.3d 169 (3d Cir. 1998), the United States Court of Appeals for the Third Circuit ("Third Circuit") declined to follow this proposition, construing Albright more broadly and holding that "a section 1983 claim may be based on a constitutional provision other than the

Fourth Amendment." Torres, 163 F.3d at 172. However, the Third Circuit made clear that claims which are covered under a specific constitutional provision may not be based on substantive due process. Id. Accordingly, we must determine whether Plaintiff's claim is governed by an explicit constitutional provision, thereby precluding a malicious prosecution claim based upon the Fourteenth Amendment.

In Count VI of her Complaint, alleging a violation of section 1983, Plaintiff claims that "[a]t no time material hereto did Defendants have a valid warrant to permit the **stop, search and detention** of Plaintiff on November, 1996 (sic). The **detainment and search** of Plaintiff. . .[was] done without probable cause. . . ." Pl.'s Compl. at 9 (emphasis added).

Based on the language in her section 1983 claim, we conclude that Plaintiff's section 1983 malicious prosecution claim is rooted in the Fourth Amendment right to be free from unreasonable seizure of the person, rather than the Fourteenth Amendment. See Singer v. Fulton County Sheriff, 63 F.3d 110, 116 (2d Cir. 1995), cert denied, 517 U.S. 1189 (1996).⁵ Accordingly,

⁵ In Count IV of her Complaint, alleging malicious prosecution, Plaintiff asserts that "Defendants knowingly and maliciously caused criminal charges to be brought against the Plaintiff, knowing there was no basis for probable cause to support the arrest or the filing charges." Pl.'s Compl. at 7. Plaintiff also asserts that "as a result of this malicious prosecution committed by defendants (sic), the Plaintiff was forced to sacrifice considerable time and expense to defend the criminal prosecution. . . ." Id. at 8. However, as this claim is

because Plaintiff's claim is governed by the explicit text of the Fourth Amendment, it may not be construed as grounded in substantive due process. Having established the nature of Plaintiff's malicious prosecution claim under section 1983, we now address its merit.

In order to state a prima facie case for a section 1983 malicious prosecution claim, a plaintiff must establish the following elements of the common law tort: (1) the defendants initiated a criminal proceeding; (2) without probable cause; (3) with malice; and (4) the proceedings were terminated in favor of the plaintiff. Hilfirty v. Shipman, 91 F.3d 573, 579 (3d Cir. 1996). Because this claim is based upon the Fourth Amendment, the plaintiff must also establish a deprivation of liberty which is consistent with the concept of "seizure." Gallo v. City of Philadelphia, 161 F.3d 217 (3d Cir. 1998); Singer, 63 F.3d at 116; Mateiuc v. Hutchinson, No.Civ.A. 97-1849, 1998 WL 240331, at *2 (E.D.Pa. May 14, 1998).

Moreover, the common law cause of action for malicious prosecution is generally limited to actions for damages for confinement imposed pursuant to the legal process. Heck v. Humphrey, 512 U.S. 477, 484 (1994). Accordingly, any seizure alleged to be in violation of the Fourth Amendment must be made

based upon the now abandoned November 12, 1996 arrest claims, it is dismissed.

pursuant to "legal process." See Calero-Colon v. Betancourt-Lebron, 68 F.3d 1, 4 (1st Cir. 1995); Singer, 63 F.3d at 117; Mateiuc, 1998 WL 240331, at *3. "Legal process" generally means a warrant or subsequent arraignment. Torres v. McLaughlin, No. 96-5865, 1996 WL 680274, at *3 (E.D.Pa. Nov. 21, 1996); Mateiuc, 1998 WL 240331, at * 3. Therefore, a post-arraignment seizure could give rise to a malicious prosecution claim. Moreover, "an unlawful arrest pursuant to a warrant could be the basis for a malicious prosecution claim. . . .[a] wrongful warrantless arrest, in contrast . . . could not support a claim for malicious prosecution." Mateiuc, 1998 WL 240331, at *3. (citations omitted).

In the instant case, the alleged "arrest" which Plaintiff claims gave rise to criminal charges being brought against her was not made pursuant to a warrant or subsequent to an arraignment. As such, Plaintiff has failed to make out a claim for malicious prosecution under section 1983. See Singer, 63 F.3d at 113-117 (plaintiff's arrest could not serve as predicate deprivation of liberty for malicious prosecution claim because it occurred prior to his arraignment and without a warrant, and therefore was not pursuant to legal process); Mateiuc, 1998 WL 240331, at *3 (plaintiff could not meet Fourth Amendment seizure requirement for malicious prosecution claim based on warrantless arrest).

As a result, Plaintiff's claim with regard to the November 1, 1996 "arrest" is cognizable, if at all, only as a claim of false arrest. Singer, 63 F.3d at 117 ("Typically, a warrantless deprivation of liberty from the moment of arrest to the time of arraignment will find its analog in the tort of false arrest. . . while the tort of malicious prosecution will implicate post-arraignment deprivations of liberty"); Simmons v. Poltrone, No. Civ.A. 96-8659, 1997 WL 805093, at *7 (E.D.Pa. Dec. 17, 1997)(explaining that in malicious prosecution, the aggrieved party is arrested pursuant to valid legal process which is "sued out" maliciously and without probable cause, whereas in false arrest the aggrieved party is arrested without legal authority and therefore deprived of his liberty without legal justification, and holding that the differences between the torts are such that both causes of action cannot exist on the same facts); Mateiuc, 1998 WL 240331, at *3 (stating that a wrongful warrantless arrest could result in a claim for false arrest, although not a claim for malicious prosecution). Accordingly, Defendants' Motion for Summary Judgment is granted with respect to this claim as to all Defendants.

B. False Arrest

We now consider whether Plaintiff has made out a claim for false arrest under section 1983. The crux of Plaintiff's false arrest claim is that Defendants Moebius, Geisler, Contino,

Cleary, Giordano and McIver unlawfully arrested her by "stop[ping] and detain[ing] her for the purpose of investigation and interrogation without a warrant or probable cause." Compl. at 6. Plaintiff further asserts that "the conduct of the Defendants was intended to culminate and did in fact result in such apprehension of Plaintiff's person, forcing her to submit to defendants (sic) custody and unreasonable interrogations, detention, and harassment. . . ." Id.

At the outset, we note, and Plaintiff does not dispute, that neither Defendant McIver nor Defendant Cleary was even present during the events which took place on November 1, 1999, which Plaintiff claims constituted the unlawful arrest. Rather, Defendant McIver did not arrive on the scene until sometime after Plaintiff left work on November 1, 1996, when he was assigned to commence the criminal investigation. Defendant Cleary was also not present and was not even notified of the events in question until Defendant Giordano contacted him sometime after plaintiff left. Plaintiff simply could not have been falsely arrested by two individuals who were not even within her presence at the time, and who did not become involved in this case until after the incidents allegedly constituting the false arrest had already transpired. Accordingly, summary judgment is granted in favor of these two Defendants.

With respect to the remaining Defendants, in order to

establish a claim under section 1983, a plaintiff has the burden of establishing a violation of a right or privilege guaranteed under the Constitution or laws of the United States by someone acting under color of state law.⁶ Kis v. County of Schuylkill, 866 F.Supp. 1462, 1469 (E.D.Pa. 1994). Plaintiff claims an unlawful seizure in violation of the Fourth Amendment. “[A] seizure occurs when a reasonable person would believe that he or she is not ‘free to leave.’” United States v. Kim, 27 F.3d 947, 951 (3d Cir. 1994) (citations omitted).

Moreover, in a §1983 action based on a claim of false arrest, “[t]he central issue in determining liability . . . is ‘whether the arresting officers had probable cause to believe the person arrested had committed the offenses.’” Id. (quoting Dowling v. City of Philadelphia, 855 F.2d 136, 141 (3d Cir. 1988)). Whether the person actually committed the charged offense is irrelevant. Id.

“Probable cause is proof of facts and circumstances that would convince a reasonable, honest individual that the

⁶ Defendants argue that Plaintiff has failed to meet her burden under section 1983 because the police officers who allegedly “arrested” her were not acting under color of state law, but rather as supervisors in the employment context. We agree that the mere fact that a plaintiff happens to be employed by a police department cannot, in itself, transform every unfavorable transaction she has with her supervisors into a colorable constitutional violation. However, because there are disputed facts in this case with regard to whether the Defendants were acting as police officers, or merely within the employment context, we decline to decide that issue at this time.

suspected person is guilty of a criminal offense. 'Probable cause does not depend on the state of the case in point of fact but upon the honest and reasonable belief of the party prosecuting.'" Telepo, 40 F.Supp.2d at 609 (citations omitted). Moreover, while probable cause requires more than suspicion, it does not require police to have evidence beyond a reasonable doubt. Id. Further, generally, "the determination that probable cause exists for a warrantless arrest is fundamentally a factual analysis that must be performed by the officers at the scene. . . .It is the function of the court to determine whether the objective facts available to the officers at the time of arrest were sufficient to justify a reasonable belief that an offense [had been] committed." Sharrar v. Felding, 128 F.3d 810, 818 (3d Cir. 1997). However, "in a § 1983 action, the issue of whether there was probable cause to make an arrest is usually a question for the jury, but 'where no material fact exists and where credibility conflicts are absent, summary judgment is appropriate.'" Id. Moreover, the probable cause question is for the jury only if there is sufficient evidence whereby a jury could reasonably conclude that the police officers lacked probable cause to arrest. Id.; Telepo, 40 F.Supp.2d at 609.

In the instant case, the record reveals numerous credibility conflicts relating to the issue of probable cause, the resolution of which is essential to the adjudication of this

claim.

First, the facts are in dispute as to whether the detainment of Plaintiff constituted an "arrest" actionable in a false arrest claim, i.e., whether Plaintiff felt she was not "free to leave." Defendant Moebius testified that Plaintiff was not at any time on November 1, 1996 under arrest or being restrained. Moebius Dep. at 49. However, Plaintiff claims that Defendant Moebius told Defendant Contino to "watch" Plaintiff while Defendant Moebius talked with Defendant Giordano in his office. Pl.'s Resp. to Defs.' Mot. For Summ. J. at 2. She also claims that while she was waiting to be let into Defendant Giordano's office, she attempted to leave, but that Defendant Contino verbally stopped her by saying, "Come back here." Martin Dep. at 163. Defendant Contino, however, testified that while he and Plaintiff were waiting, he "didn't say a word," but merely shook his head. Contino Dep. at 62. Plaintiff also asserts that she "felt [she] had no choice" but to comply when told to go into Defendant Giordano's office. Martin Dep. at 164. Further, while Defendant Moebius claims that Plaintiff asked to leave to go to a doctor's appointment and was allowed to leave (Moebius Dep. at 53), Plaintiff claims although she said she had a doctor's appointment, she was not permitted to leave at that time because Defendant Moebius continued to ask her questions. Martin Dep. at 165. Plaintiff claims that Defendant Moebius "started

questioning her like a cop getting ready to arrest somebody for something," and that it scared her. Id. at 153. She further claims that Defendant Moebius' tone alerted her that she was being accused of theft. Id. at 154. Finally, Plaintiff claims she did not leave the office until she was ordered to by Defendant Giordano. Id. at 153-154, 163-164. The above disputed facts are material to the determination of whether Plaintiff was "arrested," i.e., whether she felt she was not free to leave, and therefore preclude the granting of summary judgment.

Further, even if Plaintiff was "arrested" by the Defendants on November 1, 1996, there exist disputed facts which are material to the determination of whether probable cause existed to arrest Plaintiff. For example, Defendants Moebius and Geisler have testified that Plaintiff's behavior on November 1, 1996 was unusual, in that she appeared to be extracting a lot of information from the computer while not working on any police-related business, (Defs.' Mot. For Summ. J. at 2-3), allegations which Plaintiff has yet to explain or refute. Further, the parties dispute whether Plaintiff removed the "Court History" for PPN 570098 from the RIU and discarded it in the restroom, or whether Defendant Geisler fabricated that story, as Plaintiff asserts. Additionally, while Plaintiff claims the only papers she had on her person upon attempting to leave the RIU were her

expungement papers, which Defendant Moebius never looked at when she confronted Plaintiff (Pl.s' Resp. to Defs.' Mot. For Summ. J. at 2), Defendant Moebius claims that she asked Plaintiff "What did you do with the printouts from the computer?" in response to which plaintiff showed her the papers, printouts of criminal information, and said they concerned one of her tenants. Moebius Dep. at 46. Plaintiff, on the other hand, denies making this statement and claims to have remained silent. Pl.'s Resp. to Defs.' Mot. For Summ. J. at 2. Further, Defendant Contino testified that he saw the papers Plaintiff had been carrying and had handed to Defendant Moebius, and that they were printouts of a criminal history, although he did not see whose, and that after Plaintiff left on November 1, 1996, Defendants Moebius and Giordano explained to him that the printouts had been criminal history checks. Contino Dep. at 55, 68. Defendant Contino also testified that Defendant Giordano was shown the papers Defendant Moebius allegedly took from Plaintiff before he spoke with Plaintiff, a fact which Plaintiff disputes. Contino Dep. at 59. Because the above disputed facts are essential to the determination of whether Defendants had reasonable cause to arrest Plaintiff, in the event that any arrest occurred, summary judgment on this claim is premature and therefore denied.

C. Defamation

Plaintiff next claims that Defendants Moebius, Geisler,

Contino, Giordano, Cleary and McIver defamed her by placing her photograph in the security lobby of the Police Administration building, indicating that she should not be permitted into the building, and leaving the photograph up "for approximately one year following Plaintiff's unlawful and malicious arrest." Compl. at 8. More specifically, Plaintiff claims that at sometime during November 1, 1996, the date of the alleged arrest, and November 1, 1997, she was acquitted of all charges against her stemming from the November 1, 1996 incident, and that Defendants failure to thereafter remove the photograph constituted defamation.

However, there remain questions of fact which are essential to the determination of which Defendants, if any, were responsible for displaying and/or failing to remove the photograph, whether those defendants were privileged to so display the photograph, and, if so, whether they abused such privilege. Therefore, Defendant's summary judgment Motion is denied with respect to this claim.⁷

⁷ We have noted Defendants' claim that because the arrest occurred on November 1, 1996, the statute of limitations for her defamation claim, which under Pennsylvania law is one year, expired on November 1, 1997, nearly one year before she filed her Complaint. Plaintiff fails to address this argument. However, we are not, at this time, able to determine whether Plaintiff's claim is time-barred. Plaintiff claims that the photograph was displayed for approximately one year after the "arrest" on November 1, 1996. However, if the initial display of the photograph was privileged, her cause of action would not have accrued, if at all, until the privilege was abused. Therefore, viewing the facts available to this Court in the light most

D. Plaintiff's "Claims" Against the City

Although Plaintiff names the City of Philadelphia as a Defendant in this case, none of the counts in the Complaint is asserted against the City. However, in her response brief to the summary judgment motion, Plaintiff contends that her claim against Defendant City of Philadelphia is for malicious prosecution under section 1983 for alleged violation of her Fourth Amendment rights.

A municipality may not be held liable for the conduct of its employees based on the theory of respondeat superior. Monell v. Department of Soc. Servs. of the City of New York, 436 U.S. 658, 691 (1978); Beck v. City of Pittsburgh, 89 F.3d 966, 971 (3d Cir. 1996), cert. denied, 519 U.S. 1151 (1997); Abney v. City of Philadelphia, No.Civ.A. 96-08111, 1999 WL 360202, at *4 (E.D.Pa. May 26, 1999). However, the Monell court held that

[l]ocal governing bodies . . . can be sued under § 1983 . . . [in those situations where] the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted or promulgated by that body's officers. Moreover, . . . local governments . . . may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such custom has not received formal approval through the body's

favorable to the Plaintiff, it is at least conceivable that Plaintiff's claim accrued as late as October 30, 1997, which would render timely her October 30, 1998 complaint containing the defamation claim. However, because we have not been presented with adequate information to make a determination concerning whether this claim is time-barred, we decline to do so at this time.

official decisionmaking channels.

Monell, 436 U.S. at 690-691.

Moreover, as this Court explained in Abney, in order to hold the City of Philadelphia liable for a section 1983 malicious prosecution claim, a "plaintiff must prove (1) the existence of a 'policy' or a 'custom;' (2) that the 'policy' or 'custom' was administered by a 'policymaker' with 'deliberate indifference' to the rights of the public; and (3) proximate causation between the administration of the 'policy' or 'custom' and the violation of his rights." Abney, 1999 WL 360202, at *4 (citations omitted).

In her response to the summary judgment motion, Plaintiff alleges that "Defendants Moebius and Contino arrested the Plaintiff without probable cause, and Defendants Moebius, Geisler, Contino and Giordano caused to be issued a malicious prosecution." Plaintiff further alleges that Defendants Giordano and Cleary were policymakers for the City, and that they "evidenced an unwillingness to examine the accusation to determine that it was groundless." Moreover, Plaintiff contends that all defendants were acting under color of state law, and that their actions deprived her of her Fourth Amendment right to be free from unreasonable search and seizure. Finally, Plaintiff alleges that "the official policy of apathy and buckpassing, attributable to Defendant City, was the direct cause of her injuries."

It is the plaintiff's burden to show the existence of a policy, and that a policymaker is responsible for the policy or has acquiesced to the custom. Gallo v. City of Philadelphia, No. 96-3909, 1999 WL 1212194 (E.D.Pa. Dec. 17, 1999). "Policy is made when a decisionmaker possess[ing] final authority to establish municipal policy with respect to the action issues an official proclamation, policy, or edict." Id. (citing Andrews v. City of Philadelphia, 895 F.2d 1469, 1480 (3d Cir. 1990)). The plaintiff also has the burden of showing that the official policy or custom deprived him of the constitutionally protected right. Id. Moreover,

[p]roof of a single incident of unconstitutional activity is not sufficient to impose liability under Monell, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker. Otherwise the existence of the unconstitutional municipal policy, and its origin, must be separately proved. But where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the "policy" and the constitutional deprivation.

Hlywiak v. City of Philadelphia, No.Civ.A. 96-4241, 1997 WL 535179, at *3 (E.D.Pa. Aug. 6, 1997) (quoting City of Oklahoma v. Tuttle, 471 U.S. 808 (1985)).

In the instant case, Plaintiff has failed to provide any support for her summary conclusion that any of the Defendants, mid-level police officers, are "policymakers," i.e., individuals with the final authority to establish municipal

policy for the City of Philadelphia. Moreover, Plaintiff has failed to establish the existence of an official policy or custom other than her vague allegation of a policy of "apathy and buckpassing." Further, she has failed to establish how the proposed amorphous "policy of apathy and buckpassing," which is not of itself unconstitutional, was the direct cause of any constitutional injury, requiring that liability be imposed upon the City. Neither has she provided any evidence of such policy other than the single alleged incident which forms the basis for her Complaint. Therefore, Plaintiff has failed to provide sufficient proof to establish either fault on the part of the City of Philadelphia or causation between the "policy" and her alleged constitutional deprivation. As such, Summary Judgment is granted in favor of the City of Philadelphia on this claim.

An appropriate Order follows.

