

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

JOHN KEATING and : CIVIL ACTION
JAMES GALLOWAY :
 :
v. :
 :
BUCKS COUNTY WATER & :
SEWER AUTHORITY, BENJAMIN :
JONES, JOHN BUTLER and KEREN :
McILHINNY : NO. 99-1584

MEMORANDUM and ORDER

Norma L. Shapiro, S.J.

December 29, 2000

Plaintiffs John Keating ("Keating") and James Galloway ("Galloway") are employees of the Bucks County Water & Sewer Authority ("Authority"). Plaintiffs, alleging discriminatory treatment based on their perceived political affiliation, filed this action against the Authority, Authority Director Benjamin Jones ("Jones"), Authority Chairman Keren McIlhinney ("McIlhinney"), and Authority operations manager John Butler ("Butler") under 42 U.S.C. §§ 1983 and 1985; plaintiffs also brought various state law tort claims. Pending are defendants' motion for summary judgment on all seven counts of plaintiffs' amended complaint and plaintiffs' motion for leave to further amend the complaint. For the reasons set forth below, defendants' summary judgment motion will be granted in part and denied in part and plaintiffs' motion for leave to amend their complaint will be denied.

BACKGROUND

Plaintiffs Keating and Galloway worked as operators at King's Plaza, one of the Authority's sewage treatment plants. Subsequent positions in the "ADS department" required them to work in or around other Authority plants. Defendant McIlhinney, Chairman of the Authority, was also Vice-Chairman of the Bucks County Republican Committee. Her son, Charles McIlhinney, was a Republican candidate for the Pennsylvania House of Representatives in 1998.

On October 19, 1998, an electrical failure at the Authority's Green Street plant resulted in a sewage spill into a nearby waterway. The Authority investigated the spill and determined the cause was a breaker switch moved to the "off" position. An engineer consulted by the Authority determined the switch had been manually moved to the "off" position, either intentionally or inadvertently. The switch was in a locked area of the plant.

Suspected sabotage was reported to the Doylestown Police, who referred the matter to the Bucks County District Attorney's office ("D.A."). When the D.A. investigated, Jones named three employees as possible sabotage suspects, one of whom was Keating. The D.A. then interviewed Keating, Galloway, and other Authority employees. Keating agreed to take a lie detector test. The D.A. concluded the investigation without finding any evidence of criminal activity.

Following the spill but prior to the completion of the

District Attorney's investigation, the Authority issued a press release including the following statements:

The Bucks County Water and Sewer Authority is looking into the possibility that a malfunction at the Green Street Waste Water Treatment Plant on Monday evening was the result of sabotage.

. . .
Benjamin Jones, executive director of the authority, said that someone used a key to enter the control building and flipped a circuit breaker to the off position.

. . .
Jones said that the Authority has retained security guards to protect its three wastewater treatment plants during the off hours. "It is strange that we never had any of these problems until sewage treatment became a public issue several weeks ago," he said.

The Kings Plaza Plant had a malfunction last week and the Authority will now take a closer look at that. "At the time, some of our people thought it was done deliberately but we thought we were just becoming paranoid," Jones said. "But now we are not so sure."

Pls.' Opp. to Mot. for Summ. J. ("Pls.' Opp.") Ex. H.

Jones was listed as the "contact person" on the release.

A newspaper article reported that Jones suspected the spill was politically-motivated sabotage. Pls.' Opp. Ex. M. A Bucks County Detectives report also stated Jones' belief that the spill was the result of Democratic sabotage. Pls.' Opp. Ex. N.

Another newspaper article (by the same reporter) stated that Jones believed a current or former employee of the plant was probably responsible for the spill. Pls.' Opp. Ex. I.

In his deposition, Jones denied he had specifically blamed the spill on a politically-motivated employee, but acknowledged that in answering the questions of the D.A. detectives, he stated

that it "could have been" a disgruntled employee and could have been related to Charles McIlhinney's campaign. Pls.' Opp. Ex. D at 37-38. Jones denied telling a newspaper reporter that the spill was connected to a political campaign, or that he suspected an employee was involved. Pls.' Opp. Ex. D at 39. He acknowledged stating the person responsible had a key or key access, but he told the reporter that others besides present and past Authority employees had keys. Pl.'s Opp. Ex. D. at 39-40. He objected to the article's assertion that he suspected an Authority employee intentionally caused the spill. Pls.' Opp. Ex. D. at 40.

Plaintiffs claim defendants perceived them as Democrats and for that reason "fingered" them as suspected saboteurs. In his affidavit, Keating stated, "it was generally known around the Authority" that he was "fingered" because McIlhinney saw him at a Democratic booth at the Wrightstown Grange Fair in August, 1998. Pls.' Opp. Ex. A. Galloway stated that "[m]anagement well knew that I was a Democratic party member, and that members of my family were active Democratic party activists." Pls.' Opp. Ex. B. Neither plaintiff averred that he had personal knowledge of defendants' reason for suspecting him.

Although the crux of their complaint is the alleged "fingering" of plaintiffs following the Green Street plant spill, plaintiffs also gave other examples of adverse treatment by the Authority because of their membership (or perceived membership)

in the Democratic party, or their refusal to engage in improper conduct in the operation of the Kings' Plaza plant. Those examples include moving plaintiffs' workspace to the "pole barn," described as an "underheated cold area," Defs.' Mot. Ex. E at 192; Pls.' Opp. Ex. A, "repeated harassment," and "baseless discipline." Pls.' Opp. Ex. A, B. Keating has received five or six reprimands in the last ten years, Defs.' Mot. for Summ. J. ("Defs.' Mot.") Ex. E at 118., and one three-day suspension after his second reprimand, Defs.' Mot. Ex. E at 65. Galloway testified that Charles Ott, one of his supervisors, reprimanded him once in 1995 and once in 1996.

DISCUSSION

Summary judgment may be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A defendant moving for summary judgment bears the initial burden of demonstrating there are no facts supporting the plaintiff's legal claim; then the plaintiff must introduce specific, affirmative evidence there is a genuine issue for trial. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-324 (1986). "When a motion for summary judgment is made and supported as provided in [Rule 56], an adverse party may not rest upon the mere allegations or denials of the adverse party's

pleading, but the adverse party's response, by affidavits or as otherwise provided in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

The court must draw all justifiable inferences in the non-movant's favor. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). A genuine issue of material fact exists only when "the evidence is such that a reasonable jury could return a verdict for the non-moving party." Id. at 248. The non-movant must present sufficient evidence to establish each element of its case for which it will bear the burden at trial. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986).

Affidavits opposing summary judgment motions must "be made on personal knowledge." Fed. R. Civ. P. 56(e). Affidavits based on "on information and belief" are inadequate and must be disregarded. See Automatic Radio Mfg. Co. v. Hazeltine Research, 339 U.S. 827, 831 (1950); Lowe v. Philadelphia Newspapers, Inc., 594 F.Supp. 123, 126 (E.D. Pa. 1984). Portions of affidavits containing inadmissible hearsay should also be disregarded. See, e.g., Bowdoin v. Oriel, No. Civ. A. 98-5539, 2000 WL 134800, at *3 (E.D. Pa. Jan. 28, 2000)(granting summary judgment on a civil conspiracy claim based in part on the insufficiency of an affidavit submitted in opposition to the motion containing hearsay statements by an alleged co-conspirator); Fowler v.

Borough of Westville, 97 F. Supp.2d 602, 607 (D.N.J. 2000).

Plaintiffs' Amended Complaint includes seven counts: (I) Malicious Prosecution; (II) Denial of Substantive Due Process; (III) Equal Protection - Retaliation; (IV) Procedural Due Process; (V) Libel and Slander; (VI) Invasion of Privacy; and (VII) Conspiracy. Defendants move for summary judgment on all counts.

I. Plaintiffs' Affidavits

Defendants challenge the affidavits submitted by plaintiffs in opposition to defendants' motion as insufficient under Fed. R. Civ. P. 56 because they are based on "information and belief" rather than on the personal knowledge of the affiant.

Plaintiff Keating's affidavit states, "[t]he matters stated in my Complaint are true and correct to the best of my knowledge, information and belief, based on what I have heard from others, as stated herein." Pls.' Opp. Ex. A. There is no statement that the affidavit is based on Keating's personal knowledge. Some averments are clearly based on personal knowledge and are appropriately considered under Fed. R. Civ. P. 56(e); it is not clear if others are based on personal knowledge or information and belief.

For example, paragraph 17 states, "[i]t was generally known around the Authority that the 'reason' I was fingered [was] because Keren McIlhinney had seen me at a Democratic booth at the Wrightstown Grange Fair in August, 1998. I do not know whether

this was part or all the reason." Pls.' Opp. Ex. B. Although the statement is based on a fact and is not merely conclusory, the assertion that it "was generally known," rather than known by the affiant, precludes the court from considering it on a motion for summary judgment. This statement does not establish that there will be admissible evidence of what was "generally known" at trial.

Keating also states, "I believed that I was fingered because I was perceived to be a Democrat . . . in an effort to get rid of me and obtain a political advantage." Pls.' Opp. Ex. B. Averments based on mere belief, rather than personal knowledge, must be disregarded. See Fowler, 97 F. Supp.2d at 607. All statements in Keating's affidavit based not on his personal knowledge, but on what he believes because he has heard it from others will be disregarded.

Plaintiff Galloway's affidavit also fails to state it is based on personal knowledge. Paragraph 20 states, "[t]he word throughout the Authority work force was that I was 'fingering' by Jones as a perpetrator [d]ue to my association with John Keating." Pls.' Opp. Ex. C. Paragraph 21 states that other individuals told Galloway that he and Keating were identified as perpetrators. Pls.' Opp. Ex. C. It is unclear whether other averments are based on Galloway's personal knowledge or on information and belief. Paragraphs 14-16 state, "[m]anagement well knew that I was a Democratic party member," and

"[m]anagement regarded me as a target, because of my political affiliation and because of my refusal to go on with the improper utilization of Kings Plaza." Pls.' Opp. Ex. C. In deciding defendants' summary judgment motion, the court may only consider those statements in the Keating and Galloway affidavits clearly based on personal knowledge and admissible at trial.

II. Federal Law Claims

A. Denial of Substantive Due Process

Plaintiffs' Section 1983 claim alleges all defendants but Butler violated their Fourteenth Amendment substantive due process rights. Under 42 U.S.C. §1983, the plaintiff must establish that (1) the conduct complained of was committed under color of state law, and (2) the conduct deprived the plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States. Parratt v. Taylor, 451 U.S. 527, 535 (1981). An individual's right not to have property taken without due process is violated by "[d]eliberate and arbitrary abuse of government power." Bello v. Walker, 840 F.2d 1124, 1129 (3d Cir. 1988), cert. denied, 488 U.S. 851, 488 U.S. 868 (1988) (municipal corporation's denial of developer's building permits for purely personal or political reasons, if proven, would constitute a violation of the developer's substantive due process rights).

Here there is no question that defendants acted under color of state law, but there is a question whether plaintiffs claim a property right entitled to substantive due process protection. A

property interest might entitle a plaintiff to procedural, but not substantive, due process protection. See Reich v. Beharry, 883 F.2d 239, 244 (3d Cir. 1989)("what constitutes a property interest in the procedural due process context might not constitute one in that of substantive due process.").

Plaintiffs must establish that the property interest of which defendants deprived them is a "fundamental" property interest worthy of substantive due process protection. See Nicholas v. Pennsylvania State University, 227 F.3d 133, 140, 142 (3d Cir. 2000)("tenured public employment is [not] a fundamental property interest entitled to substantive due process protection."). See also Woodwind Estates Ltd. v. Gretowski, 205 F.3d 118, 123 (3d Cir. 2000); DeBlasio v. Zoning Bd. of Adjustment for Twp. of West Amwell, 53 F.3d 592, 598-99 (3d Cir. 1995), cert. denied, 516 U.S. 937 (1995). Any expansion of substantive due process should be taken with the "utmost care." Collins v. City of Harker Heights, 503 U.S. 115, 124 (1992). In the Third Circuit, substantive due process review is limited to interests in real property. Nicholas, 227 F.3d at 141. See also Holt Cargo Sys., Inc. v. Delaware River Port Auth., 20 F. Supp.2d 803, 830 (E.D. Pa. 1998), aff'd, Holt Cargo Systems, Inc. v. Delaware River Port Authority, 165 F.3d 242 (3rd Cir. 1999).

Keating and Galloway offer no evidence of a deprivation of an interest entitled to substantive due process protection; there was not even an actual or constructive discharge. Keating's

reprimands, three day suspension, transfer of work space and other allegations of harassment incidents were not deprivations of any constitutionally cognizable property right. Keating offers no evidence of any specific deprivation of property or liberty during the Green Street plant spill investigation. Galloway points to two reprimands and other scattered incidents of harassment, but no employment termination, demotion, or other significant property right deprivation. Summary judgment will be granted on Count II, plaintiffs' substantive due process claims.

B. Equal Protection / First Amendment Retaliation

Plaintiffs' third count, titled "Equal Protection - Retaliation," alleges "retaliation for plaintiffs' exercise of protected First Amendment actions" and "unequal treatment in retaliation for their actual or perceived political affiliation." It is really a First Amendment retaliation action.¹

To prove an action under the Equal Protection clause, a plaintiff must show he or she is a member of a protected class who was treated differently than a similarly situated member of an unprotected class. Keenan v. City of Philadelphia, 983 F.2d

¹There is a suggestion in the amended complaint, the fact section of plaintiffs' brief, and plaintiffs' affidavits that defendants retaliated against them for criticizing the operation of the King's Plaza plant. But the argument section of plaintiffs' brief does not address this claim; they limit their argument to the claim that defendants' actions were motivated by plaintiffs' political affiliation. (Pl.'s Opp. at 17-18). Accordingly, we consider the First Amendment claim limited to the allegation that defendants retaliated against them because of their actual or perceived political affiliations.

459, 465 (3d Cir. 1992); Sims v. Mulcahy, 902 F.2d 524 (7th Cir. 1990). Even if the court were to assume Democrats and/or perceived Democrats are protected classes under the Equal Protection Clause, plaintiffs have not attempted to show that similarly situated members of an unprotected class were treated differently. Plaintiffs have failed to state a cause of action for denial of equal protection.

Plaintiffs have moved to amend Count III based on Village of Willowbrook v. Olech, 528 U.S. 562 (2000), (equal protection claim by a "class of one" survives motion to dismiss where plaintiff alleges she has been intentionally treated differently from others similarly situated without rational basis even if plaintiff did not allege membership in a class or group).² However, plaintiffs' equal protection claim fails, not because they are not members of a protected class, but because there is no evidence similarly situated persons were treated differently. Granting their motion to amend would be futile; it will be denied.

The First Amendment protects employees from acts of retaliation for political affiliation even if the retaliation does not effect a property deprivation sufficient to support a substantive or procedural due process claim. See Suppan v.

²This Supreme Court opinion was announced on February 23, 2000, before defendants' motion for summary judgment and plaintiffs' opposition were filed; it could have been cited before now.

Dadonna, 203 F.3d 228, 234 (3d Cir. 2000)(First Amendment violated by low rankings on promotion list resulting from union involvement).

To prove a Section 1983 First Amendment retaliation claim, a plaintiff must show that his protected First Amendment activity was a "substantial or motivating factor in the alleged retaliatory action." Feldman v. Philadelphia Housing Auth., 43 F.3d 823, 829 (3d Cir. 1994). Here, plaintiffs must first show knowledge or perception of the plaintiffs' political affiliation to establish causation. See Stephens v. Kerrigan, 122 F.3d 171, 177-183 (3d Cir. 1997). Defendants can defeat the claim by showing they would have taken the same action absent the First Amendment activity. See Swineford v. Snyder County Pa., 15 F.3d 1258, 1270 (3d Cir. 1994).

1. Keating

There is evidence from which it could be inferred that McIlhinney and Jones both believed Keating was a Democrat and identified him as a suspect in the Green Street plant spill because of this belief. During her deposition, McIlhinney acknowledged having seen Keating at a Democratic booth at the 1998 Grange Fair, and relaying this information to Jones. Pls.' Opp. Ex. C at 45. A jury could infer the knowledge element, i.e., McIlhinney and Jones believed Keating was a Democrat.

There is evidence Jones and McIlhinney named Keating as a suspect in the plant incident because they suspected Keating was

a Democrat. An inference can be made against McIlhinney because she told Jones of seeing Keating at the Democratic booth at the Grange Fair and asked Jones to convey that information to the D.A. detectives. See Jones Depo. at 30. Statements in the Authority's press release and by the D.A. detectives, and testimony from a newspaper reporter who spoke to Jones in conjunction with the articles she wrote about the spill, suggest McIlhinney and Jones believed the spill was politically motivated sabotage. Jones identified Keating by name to the D.A. as a suspect. Detective Carroll, compiling a report after speaking with Jones, listed three possible suspects, one of whom was Keating. Detective Carroll testified that the "ticks under those names are reasons why [Jones] thought of those persons, I guess, in response to our questions." Pls.' Opp. Ex. F at 21. Under Keating's name, Detective Carroll wrote "[h]e had been seen at a Democratic Booth at the Grange Fair earlier in 1998." Defs.' Mot. Ex. C at 5.

Keating also complains of other forms of harassment he alleges were motivated by defendants' belief he was a Democrat. He offers no evidence that defendants had this perception prior to McIlhinney having seen him at the 1998 Grange Fair, so incidents prior to August, 1998 cannot be evidence of any First Amendment retaliation.

The only subsequent incidents of record are Keating's October, 1998, reprimand from Butler for refusal to take down

material he was storing on the wall in his work area, and his transfer (with Galloway and others) to the "pole barn." Keating offers no evidence his perceived Democratic affiliation was a motivation for these incidents.

Timing alone is not sufficient to satisfy this burden, unless it is "unusually suggestive" of a retaliatory motive. Robinson v. City of Pittsburgh, 120 F.3d 1286, 1302 (3d Cir. 1997). See also Farrell v. Planters Lifesavers Co., 206 F.3d 271, 279-80 (3d Cir. 2000)(same). The October, 1998, reprimand and transfer to the "pole barn" were not so extraordinarily close in time to the 1998 Grange Fair incident to allow an inference of causation, particularly since others were also transferred at the same time.

Plaintiffs have not offered evidence that defendant Butler knew of Keating's political affiliation. In certain situations, a jury can infer knowledge of an employee's political beliefs from circumstantial evidence. In Stephens v. Kerrigan, 122 F.3d 171 (3d Cir. 1997), the plaintiff police officers alleged they were denied promotions because they opposed or failed to support the defendant, a Republican mayoral candidate. The Court of Appeals held summary judgment, based on defendants' lack of knowledge of plaintiff's political affiliation, was inappropriate: "[E]vidence that the political affiliations of the members of the Police Department constituted more than workplace rumor; the heated and contentious debate over the

endorsement of [the Republican candidate] for Mayor drew clear lines between those who supported [him] and those who did not." Id. at 177. There was additional testimony that the "identities of the members of each faction were widely known among the employees of the Police Department," id. at 177-78, and that there was an "information 'pipeline' between [the defendant candidate] and his FOP supporters," id. at 178.

There is no similar circumstantial evidence that Butler was aware of the political affiliation of either Keating or Galloway. Butler testified he asked Keating and Galloway if they had keys to the Green Street plant, Pls.' Opp. Ex. G at 45; this may have meant he suspected them but there is no evidence that it was because he thought they were Democrats. There was no evidence that either McIlhinney or Jones told Butler the political affiliation of either Keating or Galloway. There is only evidence that Butler was a lifelong friend of Charles McIlhinney, Keren McIlhinney's son and a Republican committeeman, Pls.' Opp. Ex. D at 22-23, but the inferred knowledge of Jones or McIlhinney cannot be imputed to Butler simply because he was friendly with them.

Defendants Jones and McIlhinney can defeat Keating's claim by showing they would have taken the same action in the absence of protected conduct (in this case, in the absence of their perception that Keating was a Democrat). See Bradley v. Pittsburgh Bd. of Educ., 913 F.2d 1064, 1075 (3d Cir. 1990).

Defendants argue Keating's name was given to D.A. detectives in response to inquiries about employees with a history of discipline problems, but the evidence Keating was seen at the Democratic booth at the Grange Fair and the Authority's suspicion that the spill was politically-motivated sabotage are sufficient for a jury inference this reason was pretextual. Summary judgment in favor of McIlhinney and Jones on Count III will be denied. Summary judgment in favor of Butler on Count III will be granted.

2. Galloway

The evidence defendants knew Galloway was a Democrat comes from Galloway's affidavit, in which he states, "[m]anagement well knew that I was a Democratic party member, and that members of my family were active Democratic party activists." Pls.' Opp. Ex. B. Although Galloway's affidavit does not specifically state he had personal knowledge of this, the statement implies he did.

Even if defendants knew Galloway was a Democrat, Galloway has not produced evidence that was a substantial factor in considering him a suspect. Detectives from the D.A. chose to interview Galloway, but unlike Keating, Galloway is not listed on the detective's report as a suspect identified by Jones. Detective Carroll acknowledged Galloway's name arose during his interviews, but stated he could not recall who brought his name up but did not think it was Jones. Defs.' Mot. Ex. B at 42-43.

After the spill, Butler asked Galloway (as well as Keating

and two other employees) whether he had a key to the Green Street plant, Pls.' Opp. Ex. G at 45, but there is no evidence Butler knew of his political affiliations or that his inquiry was related to the detectives' decision to interview Galloway.³

Galloway testified that Authority employee Charles Ott told him he was a suspect in the probable sabotage, and that the reason might be that Galloway is a Democrat, but this testimony is inadmissible hearsay and there is no corroborating testimony by Ott. Galloway was investigated as a suspect, but there is no admissible evidence of any link between the investigation and his political affiliation.

Galloway, like Keating, complains of various other "harassment" incidents he alleges were motivated by his political affiliation, but there is no evidence that Galloway's political affiliation was the cause of this "harassment." Galloway's theory that his membership in the Democratic party was the cause of these incidents, although stated in his affidavit, is purely speculative and insufficient to sustain his First Amendment

³ Galloway states in his affidavit that he was "identified by management" as a suspect, and was "investigated due to the fact that [he] was 'fingering' by Jones . . . [d]ue to [his] association with John Keating." Pls.' Opp. Ex. B. There is no suggestion in the affidavit that these statements are based on personal knowledge so the court must disregard them. Galloway further states that "[p]ersons including Charles Ott and Keith Terry informed me and others that Keating and I were regarded as perpetrators," Pls.' Opp. Ex. B., but these statements are inadmissible hearsay. Ott and Terry were both deposed, but neither testified that any of the defendants told them Keating or Galloway were suspects or that they told Keating or Galloway they were suspects.

retaliation claim. Summary judgment will be granted in favor of all defendants with respect to Count III, Galloway's First Amendment retaliation claim.

C. Procedural Due Process

Both plaintiffs allege all defendants except Butler violated their Fourteenth Amendment procedural due process rights when their names were provided to the D.A. without prior internal investigation and/or a grievance procedure.

To prevail on a procedural due process claim, the plaintiffs must demonstrate defendants deprived them of a protected interest without affording an adequate opportunity to be heard in connection with that deprivation. See Taylor Investment, Ltd. v. Upper Darby Township, 983 F.2d 1285, 1293 (3d Cir. 1993), cert. denied, 510 U.S. 914 (1993).

Plaintiffs do not clearly define the specific interest of which defendants allegedly deprived them without due process. Plaintiffs' response to defendants' summary judgment motion alleges defendants gave their names to the District Attorney "in diminishment of their property employment right, with the intent to undo it." Pls.' Opp. at 14. This is a much less tangible interest than the property rights invoked in the cases cited by plaintiffs. See Ciechon v. City of Chicago, 686 F.2d 511 (7th Cir. 1982)(loss of employment); Winsett v. McGinnes, 617 F.2d 996 (3d Cir. 1980), cert. denied, Anderson v. Winsett, 449 U.S. 1093 (1981)(denial of a prisoner's work release application).

Plaintiffs' employment was never terminated nor were they demoted in connection with the D.A. investigation.

A mere investigation does not amount to a property right deprivation requiring due process. Plaintiffs must show that the investigation resulted in a deprivation of a constitutionally protected property interest. A plaintiff must show "a change or extinguishment of a right or status guaranteed by state law or the Constitution" in order to sustain a Section 1983 action for denial of procedural due process. Clark v. Township of Falls, 890 F.2d 611, 619 (3d Cir. 1989).

The only interest of which plaintiffs may have been deprived is an injury to their reputations resulting from the investigation. Galloway avers that his "reputation as a class A sewage treatment operator has been substantially damaged," Pls.' Opp. Ex. A. Keating's affidavit suggests a similar injury to his reputation (reflected in his defamation claim) and an injury to his right to privacy. Pls.' Opp. Ex. B.

Injury to the reputations of Keating and Galloway that may have resulted from the investigation is not protected by the due process clause. Paul v. Davis, 424 U.S. 693 (1976)(a police department publication naming the plaintiff as a possible shoplifter did not give rise to procedural due process protection). Neither the threat to plaintiffs' employment posed by the investigation, nor the injury to reputation that plaintiffs allege it caused, rise to the level of an injury

sufficient to implicate procedural due process protections. Summary judgment in favor of defendants will be granted on Count IV, plaintiffs' procedural due process claim.

D. Qualified Immunity

Although the individual defendants seek qualified immunity on all federal claims, only Keating's First Amendment retaliation claim against McIlhinney and Jones survives. Defendants McIlhinney and Jones are entitled to qualified immunity on Keating's First Amendment retaliation claim if their conduct did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The test is whether reasonable persons in the defendants' position at the relevant time "could have believed, in light of clearly established law, that their conduct comported with established legal standards." Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720, 726 (3d Cir. 1989), cert. denied, 493 U.S. 1044 (1990). Defendants do not dispute the existence of clearly established constitutional rights; they argue a reasonable person could have believed their conduct was legal.

Applying the objective reasonableness standard of the qualified immunity doctrine to the subjective knowledge and motivation elements of a First Amendment retaliation claim requires "the somewhat illogical inquiry into 'whether a person reasonably could have thought that he in fact thought

something.'" Larsen v. Senate of Com. of Pa., 154 F.3d 82, 94 (3d Cir. 1998), cert. denied, Nix v. Larsen, 525 U.S. 1144 (1999)(citation omitted). The issue is whether McIlhinney and Jones could reasonably have believed that their motivations in providing Keating's name to the D.A. were proper even if they were actually retaliatory. Id.

Where plaintiffs allege an unconstitutional subjective intent, they must "proffer particularized evidence of direct or circumstantial facts ... supporting the claim of an improper motive in order to avoid summary judgment [on qualified immunity grounds]. This standard allows an allegedly offending official sufficient protection against baseless and unsubstantiated claims, but stops short of insulating an official whose objectively reasonable acts are besmirched by a prohibited unconstitutional motive." Sheppard v. Beerman, 94 F.3d 823, 828 (2d Cir. 1996) (internal citations omitted).

Naming a person as a saboteur based upon his political affiliation violates the First Amendment right to free association. See Rutan v. Republican Party of Illinois, 497 U.S. 62, 70 (1990), rehrg denied, 597 U.S. 1050 (1990)("The First Amendment prevents the government, except in the most compelling circumstances, from wielding its power to interfere with its employees' freedom to believe and associate, or not to believe and not associate."). A reasonable person in Jones' or McIlhinney's position could not have reasonably believed that

doing so "comported with established legal standards."
Stoneking, 883 F.2d at 726. Defendants argue they were simply responding to an inquiry by detectives about possible suspects, but there is evidence Keating was named because McIlhinney saw him at a Democratic booth at the Grange Fair and shared this information with Jones, who in turn gave it to the detectives. This disputed material fact precludes the court from finding that Jones and McIlhinney reasonably could have believed that their actions were proper even if they were actually retaliatory. See Larsen, 154 F.3d at 94.

Plaintiffs have offered evidence of Jones and McIlhinney's improper motive in naming Keating as a suspect in the Green Street plant spill, so summary judgment will not be granted in favor of Jones and McIlhinney based on qualified immunity.

E. Authority Liability

The First Amendment retaliation claim is the only federal claim remaining against the Authority. For Section 1983 liability of a municipal agency, a plaintiff must show that "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy," caused the constitutional injury. Monell v. New York City Dept. of Social Services, 436 U.S. 658, 694 (1978). "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." Beck

v. City of Pittsburgh, 89 F.3d 966, 971 (3d Cir. 1996), cert. denied, 117 S. Ct. 1086 (1997)(quoting Andrews v. City of Philadelphia, 895 F.2d 1469, 1480 (3d Cir. 1990)). As a municipal agency, the Authority cannot be liable for a claim under 42 U.S.C. § 1983 based on respondeat superior. See Monell, 436 U.S. at 691-92.

"A course of conduct is considered to be a 'custom' when, though not authorized by law, 'such practices of state officials [are] so permanent and well settled' as to virtually constitute law." Id. The reasoning behind this limitation is that municipalities "should be held responsible when, and only when, their official policies cause their employees to violate another person's constitutional rights." City of St. Louis v. Praprotnik, 485 U.S. 112, 122 (1988).

A single decision by a policymaking government official can constitute an unconstitutional government policy. Id. at 123. Whether someone is a policymaking official is a question of state law. Id. at 124. See also Woodwind Estates, Ltd., 205 F.3d at 126 (quoting Erwin Chemerinsky, Federal Jurisdiction, §8.5 at 479 (3d ed. 1999)).

Plaintiffs' theory of Authority liability is that the individuals retaliating against them were policymakers whose actions constituted official Authority policy. However, there is no evidence of record that either individual constituted the "final decisionmaking authority" for the Authority, although

there is evidence that McIlhinney was the Chairman and Jones was the Executive Director.⁴

The Authority issued a press release suggesting it suspected the spill was caused by politically motivated sabotage,⁵ but the release is not evidence that the Authority believed either plaintiff was a suspect. The Authority can only be liable for actions it took that were directed at plaintiffs, not for its general suspicion about political sabotage.

Because there is no evidence of record that either McIlhinney or Jones had final decisionmaking authority, and no evidence that the Authority itself ratified a decision to name either plaintiff as a suspect, the Authority cannot be held liable with respect to plaintiffs' First Amendment retaliation claim. Summary judgment will be granted in favor to the Authority with respect to Count III, plaintiffs' First Amendment retaliation claims.

III. State Law Claims

⁴Authorities incorporated by one municipality are governed by a board of no less than five members. 53 P.S. §309(1)(a)(West 1997 & Supp. 2000). To conduct any Authority business, a board vote is necessary. 53 P.S. §309(C)(West 1997 & Supp. 2000). It is the board that determines the powers of the Authority's officers, agents and employees. Id. Without evidence that the board imbued either the Chairman or the Executive Director with final decision-making authority, the Authority cannot be held liable.

⁵There is evidence that the press release was issued after Jones spoke with the Authority's public relations person and that Jones was listed as the contact person in connection with the release, but there is no evidence that Jones was the person with the final decision-making authority to issue the release.

Plaintiffs acknowledge the Authority itself is immune from liability arising from plaintiffs' state law claims. Pls.' Opp. at 21 n.4. Under the Pennsylvania Political Subdivision Tort Claims Act ("PSTCA"), employees of local agencies are liable for damages for acts within the scope of their duties only if the actions constituted a crime, actual fraud, actual malice, or willful misconduct. See 42 Pa. C.S.A. § 8550 (West 1998).

A. Malicious Prosecution

Plaintiffs have conceded they have no evidence to sustain their malicious prosecution claim. Summary judgment in favor of defendants will be granted on Count I.

B. Defamation

Under Pennsylvania defamation law, a plaintiff has the burden of proving: (1) communications of a defamatory nature; (2) by the defendant; (3) about the plaintiff; (4) understood by the recipient to have defamatory meaning; (5) understood by the recipient to apply to plaintiff; (6) resulting in special harm to the plaintiff; and (7) abuse of any established conditional privilege. See 42 Pa. C.S.A. § 8343(a) (West 1998). Since defendants are local agency employees sued for actions taken within the scope of their duties, plaintiffs must also prove the defamation was willful or malicious.

The court determines whether the statement complained of has a defamatory meaning. See Bogash v. Elkins, 176 A.2d 677 (Pa. 1962). "[A] communication is defamatory if it tends so to harm

the reputation of another as to lower him in the estimation of the community or to deter third persons from dealing with him.'" Franklin Music Co. v. American Broadcasting Companies, Inc., 616 F.2d 528, 541 (3d Cir. 1979)(quoting Restatement of Torts §559 (1938)). See also Corabi v. Curtis Publ'g Co., 273 A.2d 899, 904 (Pa. 1971)(same). Communications must be evaluated to determine "the effect the [communication] is fairly calculated to produce, the impression it would naturally engender, in the minds of the average persons among whom it is intended to circulate.'" Corabi, 273 A.2d at 907(quoting Boyer v. Pitt Publ'g Co., 188 A. 203, 204 (Pa. 1936)).

Defenses are: (1) the truth of the defamatory communication; (2) the privileged character of the occasion on which it was published; or (3) that the subject matter is of public concern. See 42 Pa. C.S.A. § 8343(b) (West 1998). The defendants have the burden of proof on all affirmative defenses. Id.

Plaintiffs bring their defamation claim against defendants Jones and McIlhinney only. Galloway has difficulty making a prima facie case of defamation because he cannot establish the defendants gave his name to the D.A.. The D.A. investigated Galloway after speaking with Jones, but even if a jury could infer that Jones provided his name, there is no evidence of cognizable harm to Galloway or abuse of a conditional privilege; neither can Galloway meet the willful or malicious standard required under the PSTCA.

There is evidence that both Jones and McIlhinney were responsible for giving Keating's name to the D.A. as a suspected saboteur; Keating has met his burden of proving the first three elements of his prima facie case. A jury could infer that Jones (as a result of a discussion with McIlhinney), for political motives, told Detective Carroll that Keating may have sabotaged the plant. This statement is defamatory; a political saboteur of a sewage treatment plant is undoubtedly held in low esteem by the community. Elements four and five are also met.

The sixth element, special harm, does not require proof of actual harm. See Rockwell v. Allegheny Health, Educ. & Research Fdn., 19 F. Supp.2d 401, 407 (E.D. Pa. 1998). Pennsylvania has adopted the Gertz⁶ definition of harm in a defamation suit; it encompasses "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974). See also Rockwell, 19 F. Supp.2d at 407 (same). Further, "it is not necessary that the communication actually cause harm to another's reputation or deter third persons from associating or dealing with [the plaintiff]," id. (quoting Restatement of Torts §559, comment d (1938)); the basis of the harm is the communication's "general tendency to have such an

⁶In Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974), the Supreme Court declined to define "actual injury," but noted that "it is not limited to out-of-pocket loss."

effect," id.. Keating has met this sixth element; a statement that he sabotaged the sewage plant, causing environmental harm, has the "general tendency" to harm Keating's reputation or to deter others from dealing with him.

"[A] publisher of defamatory matter is not liable if the publication was made subject to a privilege, and the privilege was not abused." Chicarella v. Passant, 494 A.2d 1109, 1112 (Pa. Super. 1985). "'A privileged communication is one made upon a proper occasion, from a proper motive, in a proper manner and based upon reasonable and probable cause.'" Baird v. Dun & Bradstreet, 285 A.2d 166, 171 (Pa. 1971)(quoting Dempsky v. Double, 126 A.2d 915, 917 (Pa. 1956)). A defamatory communication may be privileged to protect the interest of the publisher, the recipient, or a recognized public interest. See Elia v. Erie Ins. Exch., 634 A.2d 657, 660 (Pa. Super. 1993), appeal denied, 537 Pa. 662 (1994). Any statements made by Jones or McIlhinney to the D.A. regarding Keating's involvement in the Green Street plant spill were conditionally privileged because they were made for a recognized public interest: aiding a law enforcement investigation.

Even where a conditional privilege applies, a defendant can still be liable for defamation if the plaintiff can prove abuse of the conditional privilege. Abuse of a conditional privilege occurs when the statement is made: (1) maliciously; (2) negligently; (3) for a purpose other than that for which the

privilege is given; (4) to a person not reasonably believed to be necessary for accomplishment of the purpose of the privilege; or (5) by including defamatory matter not reasonably believed to be necessary for accomplishment of the purpose. Elia, 634 A.2d at 661. Whether a conditional privilege applies is a question of law, but whether that privilege has been abused is a question of fact. See Agriss v. Roadway Express, Inc., 483 A.2d 456, 463 (Pa. Super. 1984). There is evidence that the statements were made maliciously (to retaliate against Keating because defendants believed he was a Democrat). The dispute of material fact whether defendants abused the conditional privilege precludes summary judgment on Keating's defamation claim based on communications to the D.A..

Plaintiffs also assert a defamation claim based on Jones' statement to a newspaper reporter that an employee was responsible for the sabotage, and that political motivations were suspected. There is evidence of such a statement, but neither Keating nor Galloway were mentioned by name. A defamed party needs to be specifically named although he can be "named" by description or circumstances tending to identify him. See Weinstein v. Bullick, 827 F. Supp. 1193 (E.D. Pa. 1993). There is no evidence of such a description or identifying circumstances. The article describes the suspects as "current or former authority employees or someone with access to their keys." Pls.' Opp. Ex. L. This is a large group and does not identify

the plaintiffs over other employees in that category; the statement arguably excludes plaintiffs, who did not have keys to the Green Street plant. Defs.' Mot. Ex. E v.2 at 20; Defs.' Mot. Ex. D at 86.

The Political Subdivision Tort Claims Act does not grant immunity for intentional torts. See Weinstein v. Bullick, 827 F. Supp. 1193, 1206 (E.D. Pa. 1993). "Willful misconduct" under 42 Pa. C.S.A. §8550 "means that the actor desired to bring about the result that followed, or at least that was aware that it was substantially certain to ensue." Evans v. Phila. Transp. Co., 212 A.2d 440, 443 (Pa. 1965). See also Weinstein, 827 F. Supp. at 1206. "In other words, the term 'willful misconduct' is synonymous with the term 'intentional tort.'" King v. Breach, 540 A.2d 976, 981 (Pa. Commw. 1988). See also Weinstein, 827 F. Supp. at 1206 (same). Because Keating's defamation claim against Jones and McIlhinney alleges the charge they made against him to the D.A. detectives was made improperly - i.e., based on their perception of Keating as a Democrat - Keating alleged an intentional tort. See id. This is an issue of material fact precluding summary judgment based on statutory immunity.

Summary judgment will be granted on all defamation claims of Count V except Keating's claim against Jones and McIlhinney for statements made to the D.A..

C. Invasion of Privacy

Plaintiffs allege three invasions of privacy against Jones

and McIlhinney: (1) intrusion upon seclusion; (2) publicity given to plaintiffs' private lives; and (3) false light.

A defendant may be liable for intrusion upon seclusion under Pennsylvania law for: "(1) [a] physical intrusion into a place where the plaintiff has secluded himself; (2) [] us[ing] the defendant's senses to oversee or overhear the plaintiff's private affairs, or (3) some other form of investigation or examination into plaintiff's private concerns." Harris by Harris v. Easton Pub. Co., 483 A.2d 1377, 1383 (Pa. Super. 1984). A defendant is liable only if he has intruded into a private place, or otherwise invaded "a private seclusion that the plaintiff has thrown about his person or affairs." Id. The interference must be substantial and highly offensive to the ordinary reasonable person. See id. at 1383-84(citing Restatement (Second) of Torts §652B, comment d).

Jones and McIlhinney may have given plaintiffs' names to the D.A., but it was the D.A., rather than the defendants, who conducted an "investigation or examination." Id. at 1383. The investigation was not "into plaintiff's private concerns," id.; the investigation was into a matter of public concern, a sewage spillage into a waterway. Jones and McIlhinney are not liable for any intrusion upon seclusion.

To prove their private life publicity claim, plaintiffs must show: (1) publicity; (2) about private facts, (3) highly offensive to a reasonable person; and (4) not of legitimate

concern to the public. See id. at 1384. Disclosure of the information to one person or a few people is insufficient. See Vogel v. W.T. Grant Co., 327 A.2d 133, 136 (Pa. 1974). There is no evidence in the record that defendants revealed plaintiffs' names to anyone other than employees of the D.A. or to each other. The disclosure was not about private facts; the matter requiring the disclosure was of legitimate public concern. Plaintiffs have failed to produce evidence supporting a publicity claim.

A defendant liable for the false light tort must be responsible for "publicity that unreasonably places the [plaintiff] in a false light before the public." Curran v. Children's Serv. Ctr. of Wyoming County, Inc., 578 A.2d 8, 12 (Pa. Super. 1990). There must be such a "major misrepresentation of [the plaintiff's] character, history, activities or beliefs that serious offense may reasonably be expected to be taken by a reasonable [person] in his position." Id. at 13. There is no evidence defendants misrepresented either plaintiff to anyone besides the D.A. and each other. As with the private life publicity claim, this publication is not extensive enough to constitute "publicity." Summary judgment in favor of defendants will be granted on all invasion of privacy claims of Count VI.

D. Conspiracy

Plaintiffs allege defendants "conspired to pursue by illegal means the illegal objectives set forth herein, intending to

'frame' plaintiffs, with the knowledge that they were innocent of the alleged sabotage, a wrongful act, and to harass and retaliate against plaintiffs, causing injury to plaintiffs." Pls.' Am. Compl. ¶ 58. It is unclear whether plaintiffs intend to state a claim for a civil rights conspiracy under 42 U.S.C. § 1985, or a state law civil conspiracy claim. The jurisdiction section of the amended complaint suggests the former because it cites section 1985, Pls.' Am. Compl. ¶ 7, but plaintiffs' response to the summary judgment motion addressing their conspiracy count begins with a description of civil conspiracy under Pennsylvania law. Because plaintiffs' response argues only state law, the court assumes that they are asserting a state law civil conspiracy claim.⁷

A civil conspiracy under Pennsylvania law requires that two or more persons combined or agreed with intent to do an unlawful act or to do an otherwise lawful act by unlawful means. Proof of malice, *i.e.*, an intent to injure, is essential in proof of a conspiracy. See Skipworth by Williams v. Lead Industries Ass'n., Inc., 690 A.2d 169, 174 (Pa. 1997); Thompson Coal Co. v. Pike

⁷Courts in this circuit have been unwilling to find a cause of action under 42 U.S.C. § 1985(3) for a conspiracy based on political affiliation. See C & K Coal Co. v. United Mine Workers of America, 704 F.2d 690, 700 (3d Cir. 1983)("The question whether the statute protects against conspiracies, not involving state action, aimed at political classes, as well as classes whose members have the requisite immutable characteristics, is an open one in this [circuit]"). See also St. Germain v. Pennsylvania Liquor Control Board, No. Civ. A. 98-5437, 2000 WL 39065, *12 (E.D. Pa. Jan. 19, 2000); Pierce v. Montgomery County Opportunity Bd., Inc., 884 F. Supp. 965, 978 (E.D. Pa. 1995).

Coal Co., 412 A.2d 466, 472 (Pa. 1979)(citations omitted).

Under Pennsylvania law, a corporation generally cannot conspire with itself. See Thompson Coal Co., 412 A.2d at 473. Nor can it conspire with its officers and agents when they act solely for the corporation and not on their own behalf. See Johnston v. Baker, 445 F.2d 424, 426 (3rd Cir. 1971). However, "a claim for civil conspiracy [can] go forward where agents or employees act outside of their roles as officers and employees of the corporation even in the absence of a co-conspirator from outside the corporation." Doe v. Kohn, Nast & Graf, P.C., 862 F. Supp. 1310, 1328 (E.D. Pa. 1994).

Although plaintiffs argue McIlhinney, Butler and Jones can be liable for civil conspiracy if they acted outside their roles as Authority officers and employees, their complaint alleges "[a]t all relevant times, defendants have acted under color of law." Pls.' Compl. ¶ 40. Plaintiffs' Section 1983 claims require that defendants were state actors. Defendants were clearly acting under color of state law as an Authority officer or employee. Summary judgment will be granted in favor of defendants on Count VII, plaintiffs' civil conspiracy claim.

CONCLUSION

Defendants' motion for summary judgment with respect to all parties will be granted on plaintiffs' claims for malicious prosecution, denial of substantive due process, denial of procedural due process, and conspiracy. Defendants' motion will

be granted with respect to Butler and the Authority on plaintiffs' First Amendment retaliation and defamation claims. Defendants' motion will also be granted with respect to Galloway's First Amendment retaliation and defamation claims.

Judgment will be entered in favor of Butler and the Authority and against Keating and Galloway on all counts. Judgment will be entered in favor of Jones and McIlhinney and against Galloway on all counts. Judgment will be entered in favor of Jones and McIlhinney and against Keating on all counts other than First Amendment retaliation and defamation.

Plaintiffs' motion to amend their complaint will be denied as futile. The action will proceed on Keating's First Amendment retaliation claim and defamation claim against Jones and McIlhinney.

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

JOHN KEATING and : CIVIL ACTION
JAMES GALLOWAY :
 :
v. :
 :
BUCKS COUNTY WATER & :
SEWER AUTHORITY, BENJAMIN :
JONES, JOHN BUTLER and KEREN :
McILHINNY : NO. 99-1584

ORDER

AND NOW, this 29th day of December, 2000, upon consideration of defendants' motion for summary judgment and plaintiffs' response thereto, it is **ORDERED** that:

1. Defendants' motion for summary judgment is **GRANTED IN PART** and **DENIED IN PART**.

a. Defendants' motion is **GRANTED** with respect to all defendants and all plaintiffs on Counts I, II, IV, VI, and VII.

b. Defendants' motion is **GRANTED** with respect to defendant Butler on Counts III and V.

c. Defendants' motion is **GRANTED** with respect to defendant Bucks County Water & Sewer Authority on Counts III and V.

d. Defendants' motion is **GRANTED** with respect to plaintiff Galloway on Counts III and V.

e. Defendants' motion is otherwise **DENIED**.

2. Judgment is **ENTERED** in favor of defendant Bucks County Water & Sewer Authority, and against plaintiffs John Keating and James Galloway, on Counts I-VII.

3. Judgment is **ENTERED** in favor of defendant John Butler, and against plaintiffs John Keating and James Galloway, on Counts I-VII.

4. Judgment is **ENTERED** in favor of defendants Benjamin Jones and Keren McIlhinney, and against plaintiff James Galloway, on Counts I-VII.

5. Judgment is **ENTERED** in favor of defendants Benjamin Jones and Keren McIlhinney, and against plaintiff John Keating, on Counts I, II, IV, VI, and VII.

6. Plaintiffs' motion to amend Count III of their complaint is **DENIED**.

7. The following counts remain:

a. Count III (Equal Protection - Retaliation): plaintiff Keating against defendants Jones and McIlhinney.

b. Count V (Libel and Slander): plaintiff Keating against defendants Jones and McIlhinney.

8. All other parties having been dismissed, this action shall be recaptioned John Keating v. Benjamin Jones and Keren McIlhinney.

S.J.