

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

LAWRENCE HAMMOND : CIVIL ACTION
 :
 v. :
 :
 CITY OF PHILADELPHIA, :
 JOHN TIMONEY, Commissioner, Lt. :
 CHARLES LORENZ, Sgt. YOLANDA :
 LLOYD, and DRUGSCAN, INC. : No. 00-5082

MEMORANDUM ORDER

This action arises out of plaintiff's termination from the Philadelphia Police Department (the "Department"). The pertinent facts as alleged by plaintiff are as follow.

Plaintiff was a police officer with the Department, assigned to District # 17 (the "District"). During his investigation of suspicious activity while on duty on October 3, 1998, plaintiff entered a room in which several persons were smoking marijuana. He thus exposed himself to marijuana smoke. Plaintiff was unable to arrest the persons smoking marijuana, and did not confiscate evidence of drug use or write an incident report. Several minutes after this incident, plaintiff arrested a fugitive who he transported to the District. While at the District, plaintiff was ordered by Sgt. Lloyd to provide her with a urine sample. Plaintiff informed Sgt. Lloyd of his exposure to marijuana and resumed his duties. Defendant Drugscan, Inc. analyzed plaintiff's urine and reported to the District that it had tested positive for marijuana. His urine sample contained 28 nanograms of marijuana which exceeded the 20 nanogram limit set under Department Directive 55.

Lt. Lorenz, an officer with the Department's Internal Affairs ("IAD") Unit, interviewed plaintiff on October 8, 1998 and again on October 9, 1998 about his activities on October 3, 1998. Plaintiff was suspended on October 9, 1998 and was terminated on November 7, 1998. The termination was affirmed by the Philadelphia Civil Service Commission on June 29, 1999, and by the Philadelphia Court of Common Pleas on March 24, 2000.¹ Plaintiff initiated this action on November 6, 2000.

Plaintiff has asserted several claims against the City of Philadelphia (the "City"), Commissioner Timoney, Sgt. Lloyd and Lt. Lorenz pursuant to 42 U.S.C. §§ 1981 & 1983 and the Pennsylvania constitution. Plaintiff claims that the Department's drug testing policy, known as Directive 55, is unconstitutional on its face and as applied to plaintiff (Count One); that the October 3, 1998 drug test deprived him of his right to privacy and freedom from unreasonable search and seizure, and that his termination violated his Fourteenth Amendment liberty and property interests in continued employment (Count Two); that the termination was racially motivated and thus constituted illegal discrimination under § 1981 (Count Three);

¹The court has considered the existence and substance of the Commission's opinion which is referenced in the complaint. See Southern Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group, Ltd., 181 F.3d 410, 427 n.7 (3d Cir. 1999). The court has taken judicial notice of the Court decision as it is a matter of public record but has not considered its substance as it is not referenced in the complaint. Id. at 426.

that defendants conspired to deprive him of his right to due process and equal protection (Count Five); and, that he was deprived of his rights under Article 1, Sections 1, 7 and 26 of the Pennsylvania Constitution (Count Six).²

Presently before the court is the Motion of defendants City of Philadelphia, Commissioner Timoney, Sgt. Lloyd and Lt. Lorenz to Partially Dismiss plaintiff's complaint.

Dismissal for failure to state a claim is appropriate when it clearly appears that the plaintiff can prove no set of facts to support the claim which would entitle him or her to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Robb v. Philadelphia, 733 F.2d 286, 290 (3d Cir. 1984). Such a motion tests the legal sufficiency of a claim accepting the veracity of the claimant's allegations. See Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990); Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987). A claim may be dismissed when the facts alleged and the reasonable inferences therefrom are legally insufficient to support the relief sought. See Pennsylvania ex rel. Zimmerman v. PepsiCo., Inc., 836 F.2d 173, 179 (3d Cir. 1988).

Defendants first argue that plaintiff's § 1983 claims, enumerated in counts One, Two and Five, are time-barred except to the extent that they are based on his November 7, 1998

²The complaint does not contain a Count Four.

termination. Plaintiff acknowledges that any § 1983 claims based on the urine test per se are time-barred under the applicable two-year statute of limitations. See Smith v. Holtz, 87 F.3d 108, 111 (3d Cir. 1996) (§ 1983 action governed by state personal injury statute of limitations); Bougher v. University of Pittsburgh, 882 F.2d 74, 80 (3d Cir. 1989) (§ 1983 action in Pennsylvania governed by two year statute of limitations); Colbert v. City of Philadelphia, 931 F. Supp. 389, 391 (E.D. Pa. 1996) (same). The limitations period begins to run when the cause of action accrues, that is when a plaintiff "knew or had reason to know of the injury that constitutes the basis of [the] action." Sandutch v. Muroski, 684 F.2d 252, 254 (3d Cir. 1982). A claim accrues when the final significant event occurs necessary to make the claim cognizable. See Barnes v. American Tobacco Co., 984 F. Supp. 842, 857 (E.D. Pa. 1997), aff'd 161 F.3d 127 (3d Cir. 1998); Resolution Trust Corp. v. Farmer, 865 F. Supp. 1143, 1149-50 (E.D. Pa. 1994).

Plaintiff clearly may challenge his termination which occurred exactly two years before he filed suit, and may use evidence regarding the urine test for that purpose. Plaintiff's claims of invasion of privacy and unreasonable search and seizure, however, accrued on the date of the urine test more than two years prior to initiation of this suit. Plaintiff's § 1983 claims are thus time barred insofar as they are predicated on the constitutionality of his urine test.

Plaintiff challenges both his IAD interview and his hearing before the Commission on procedural due process grounds, but does not challenge the Common Pleas Court's review of the Commission's decision.

Plaintiff claims that the Commission hearing was inadequate because he did not receive a "full Civil Service Commission," that the Commission was biased, that the Commission was "an advocate for the City" and that the Commission favored the City's witnesses. Plaintiff does not further explain these allegations and neither plaintiff nor defendants discuss them in their submissions.

It appears from the Commission opinion that although all three commissioners appeared for two of the three days that plaintiff's appeal was heard, one commissioner was absent for the last day. This member did not sign the Commission's opinion. Plaintiff has cited and the court has found no statutory or administrative provision requiring that all commissioners sit for the entirety of a hearing. Although not binding, there also is persuasive authority that the absence of a Commission member does not deprive a plaintiff of due process. See Ross v. Civil Serv. Comm'n, 511 A.2d 941, 568 n.3 (Pa. Commw. Ct. 1986). See also Barr v. Pine Tp. Bd. of Sup'rs, 341 A.2d 581, 583 (Pa. Commw. Ct. 1975). Plaintiff's due process claim, however, cannot be dismissed at this juncture in view of facially adequate allegations of Commission bias.

The court has not considered plaintiff's claims that the City did not turn over all relevant documents to him before the Commission hearing and that the Commission did not allow him to challenge the chain of custody for the urine sample as these were asserted for the first time in his response to the motion to dismiss. A party may not rely on new facts in submissions in response to a motion to dismiss to defeat the motion. See Schneider v. California Dep't of Corrections, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998) (court may not look to additional facts alleged in opposition to motion to dismiss when deciding 12(b)(6) motion); Shanahan v. City of Chicago, 82 F.3d 776, 781 (7th Cir. 1996) (plaintiff may not present new allegations in response to dispositive motion); Scholastic, Inc. v. Stouffer, 124 F. Supp. 2d 836, 851 n.16 (S.D.N.Y. 2000) (parties may not assert new facts in submissions on motion to dismiss); Davis v. Cole, 999 F. Supp. 809, 813 (E.D. Va. 1998) (court may not rely on additional allegations in response to motion to dismiss); In re Colonial Ltd. P'ship Litig., 854 F. Supp. 64, 79 (D. Conn. 1994) (plaintiff may not rely on new allegations introduced in response to motion to dismiss); James Wm. Moore, 2 Moore's Federal Practice, §§ 12.34[2] (Matthew Bender 3d ed.).³

³The court also notes that contrary to plaintiff's assertion, due process did not require that the City provide him with all evidence against him. He was entitled to receive only the "substance of relevant supporting evidence." See Copeland v. Philadelphia Police Dep't, 840 F.2d 1139, 1145 (3d Cir. 1988).

As to his IAD interview, plaintiff asserts that Lt. Lorenz "suspend[ed] and fir[ed] him in the manner that is inconsistent to the established pre and post suspension and firing due process Plaintiff was entitled to" and that Lt. Lorenz lacked authority to fire him. Defendants do not address these assertions in their motion and the court cannot conclude that plaintiff clearly will be unable to sustain a claim predicated on the IAD process, since his assertions suggest that he may have been denied a meaningful opportunity to respond to the charge against him. See Morton v. Breyer, 822 F.2d 364, 370 (3d Cir. 1987); Gniotek v. City of Philadelphia, 808 F.2d 241, 243 (3d Cir. 1986), cert. denied, 481 U.S. 1050 (1987).

Plaintiff acknowledges that he cannot sustain a claim for deprivation of substantive due process based on his termination as there is no fundamental right to retain public employment. See Nicholas v. Pennsylvania State University, 227 F.3d 133, 142 (3d Cir. 2000); Nilson v. Layton City, 45 F.3d 369, 371 (10th Cir. 1995); McKinney v. Pate, 20 F.3d 1550, 1560 (11th Cir. 1994); Sutton v. Cleveland Bd. of Educ., 958 F.2d 1339, 1351 (6th Cir. 1992); Homar v. Gilbert, 63 F. Supp. 2d 559, 570-77 (M.D. Pa. 1999). Plaintiff, however, seems to argue that he may sue for a breach of substantive due process based on deprivation of a right given to him by the Pennsylvania Constitution. He may not. Only interests that are "fundamental under the United

States Constitution" are protected by substantive due process. Nicholas, 227 F.3d at 140; Brobson v. Borough of New Hope, 2000 WL 1738669, *4 (E.D. Pa. Nov. 22, 2000).

Plaintiff's § 1981 claims will be dismissed as § 1983 provides the exclusive remedy for violation by state actors of rights enumerated in § 1981. See Butts v. County of Volusia, 222 F.3d 891, 892-95 (11th Cir. 2000); Dennis v. County of Fairfax, 55 F.3d 151, 156-57 (7th Cir. 1995); Williams v. Little Rock Mun. Water Works, 21 F.3d 218, 223 (8th Cir. 1994); Stinson v. Pennsylvania State Police, 1998 WL 964215, *3 n.3 (E.D. Pa. Nov. 2, 1998); Poli v. SEPTA, 1998 WL 405052, * 12 (E.D. Pa. July 7, 1998).

ACCORDINGLY, this day of June, 2001, upon consideration of the Motion of defendants City of Philadelphia, John Timoney, Charles Lorenz and Yolanda Lloyd for Partial Dismissal (Doc. #10), and plaintiff's response thereto, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** in part in that plaintiff's § 1981 claims, plaintiff's § 1983 substantive due process claims and plaintiff's § 1983 invasion of privacy and unreasonable search and seizure claims based on the urine test of October 3, 1998 are **DISMISSED**, and said Motion is otherwise **DENIED**.

BY THE COURT:

JAY C. WALDMAN, J.