

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

COLLINS MILES : CIVIL ACTION  
 :  
 v. :  
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 CITY OF PHILADELPHIA, :  
 CAPT. THOMAS NESTEL and :  
 LT. JOHN LaCON : NO. 98-5837

M E M O R A N D U M

WALDMAN, J.

April 10, 2001

**I. Introduction**

Plaintiff has asserted claims pursuant to 42 U.S.C. § 1983 and the Pennsylvania Whistleblower Law, 43 P.S. § 1421 et seq., arising out of his employment as a Philadelphia police officer.<sup>1</sup> He alleges that he was the victim of retaliation for speaking out against racial discrimination and other wrongdoing in the Philadelphia Police Department. Defendants have filed a motion for summary judgment.

**II. Legal Standard**

In considering a motion for summary judgment, the court must determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). See also Anderson

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<sup>1</sup>Plaintiff also initially asserted a claim under 42 U.S.C. § 1981 which was eliminated by Court order of May 5, 1999.

v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Arnold Pontiac-GMC, Inc. v. General Motors Corp., 786 F.2d 564, 568 (3d Cir. 1986). Only facts that may affect the outcome of a case are "material." See Anderson, 477 U.S. at 248. All reasonable inferences from the record must be drawn in favor of the non-movant. See id. at 256.

Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which it bears the burden of proof. See J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)), cert. denied, 499 U.S. 921 (1991). A plaintiff cannot avert summary judgment with speculation or conclusory allegations, such as those found in the pleadings, but rather must present evidence from which a jury could reasonably find in his favor. See Anderson, 479 U.S. at 248; Ridgewood Bd. of Educ. v. N.E. for M.E., 172 F.3d 238, 252 (3d Cir. 1999); Williams v. Borough of West Chester, 891 F.2d 458, 460 (3d Cir. 1989); Woods v. Bentsen, 889 F. Supp. 179, 184 (E.D. Pa. 1995).

### **III. Facts**

From the evidence of record, as uncontroverted or otherwise viewed in a light most favorable to plaintiff, the pertinent facts are as follow.

Plaintiff is a Philadelphia police officer. He is black. Prior to 1997, plaintiff consistently received satisfactory evaluations and was considered by his peers to be an excellent, reliable police officer. The events comprising the substance of plaintiff's claims transpired in 1997, while he was assigned to the 14th District. Plaintiff's platoon was supervised by three sergeants, Sgt. Albert Gramlich, Sgt. John Hearn and Sgt. Michael Corbett. Plaintiff's immediate supervisor was Sgt. Hearn. These three sergeants reported to defendant Lt. John LaCon, the commander of plaintiff's platoon. The Commanding Officer of the 14th District during most of 1997 was Captain Thomas Lynch. Defendant Captain Thomas Nestel III replaced Captain Lynch as Commanding Officer on August 8, 1997.

In January 1997, Officer Hertkorn, a white male police officer, unholstered and brandished his service revolver in the presence of Officer Angela Brown, a black female police officer. Plaintiff was informed by Officer Brown that Officer Hertkorn's behavior was of a threatening nature. Upon the encouragement of plaintiff, Officer Brown reported the incident to her supervisors in the 14th District. According to plaintiff and other officers, Officer Brown became the subject of ridicule for her complaint about the incident. Officer Brown and Officer Hertkorn were both members of plaintiff's platoon.

In mid-January 1997, Officer Hertkorn was detailed to a different platoon in the 14th District. He returned to plaintiff's platoon in March of 1997. On February 24, 1997, a formal Request for Discipline was issued against Officer Hertkorn. Unbeknownst to plaintiff, in March of 1997 Officer Brown requested a transfer out of the 14th District. In April of 1997, Officer Brown was detailed to the 5th District. Also unbeknownst to plaintiff, on April 13, 1997 Officer Hertkorn was found guilty of misconduct at a Police Board of Inquiry ("PBI") hearing and was suspended for four days.

In the months immediately following the Angela Brown incident, plaintiff engaged in a course of conduct intended as a protest of the manner in which the 14th District was handling the incident. Plaintiff and other non-white officers in the 14th District expressed their support for Officer Brown and requested that Officer Hertkorn be disciplined. Plaintiff specifically expressed his opinion to Sgt. Hearn that Officer Hertkorn should be fired and he stated to Sgt. Corbett that Officer Hertkorn should be "locked up." The officers in plaintiff's platoon were subsequently advised during roll call "to stay out of" the Angela Brown incident. Discord nevertheless developed in the District over what plaintiff and other non-white officers perceived as favorable treatment toward Officer Hertkorn. The Angela Brown incident fueled a perception among a number of the non-white

officers in the 14th District that race was a factor in how assignments and discipline were meted out in the District.

Plaintiff also continued his vocal support of Officer Brown. He rebuked other officers for distancing themselves from Officer Brown in the presence of superior officers, particularly Lt. LaCon. When plaintiff overheard Sgt. Corbett tell another officer in reference to Officer Brown that "if that bitch gets in your face like that, you need to knock her on her ass," plaintiff informed Sgt. Corbett that "I'm not going to stand here and let you talk about her when she's not around." On another occasion, plaintiff expressed his support of Officer Brown's conduct to Sgt. Hearn when she stepped out of roll call because she refused to be near Officer Hertkorn with his gun drawn. Plaintiff went on to state his opinion to Sgt. Hearn that if plaintiff or someone else "not in the lieutenant's favor" had acted similarly to Officer Hertkorn, they "would have been detailed or transferred a long time ago."

On another occasion, plaintiff refused to allow Officer Hertkorn to follow him with a drawn gun responding to a burglary in progress. This raised the ire of Lt. LaCon who told plaintiff that if he "did not like the way [Lt. LaCon] ran the squad, [plaintiff] could get out of the squad."

The Angela Brown incident continued to cause some division among white and minority officers in the 14th District.

Plaintiff was regarded as the spokesperson for the minority officers.

During this period, Lt. LaCon had two private conversations with plaintiff in which they discussed agitation among the officers in the District as well as plaintiff's response to the Angela Brown incident. During these conversations, Lt. LaCon placed his gun on a table with the barrel pointed toward plaintiff who felt this was designed to intimidate him. It became apparent to plaintiff during these conversations that Lt. LaCon blamed plaintiff for inciting unrest and racial tension in the District following the Angela Brown incident. Plaintiff responded to Lt. LaCon that the 14th District supervisors had themselves turned the incident into a racial one by detailing Officer Brown out of the squad while Officer Hertkorn remained and by failing to discipline Officer Hertkorn immediately.

Shortly after the Angela Brown incident plaintiff decreased his "activity," meaning that he wrote fewer tickets for traffic violations and similar minor infractions during his daily tour of duty than he had in the past. According to plaintiff, this decrease in activity was caused by his unwillingness to please his superiors through meeting "illegal" quotas of traffic

tickets after the Angela Brown incident.<sup>2</sup> Plaintiff maintains that he stopped making a conscious effort to produce "activity" at the behest of his supervisors but still wrote tickets when he observed violations. During the period following the Angela Brown incident, plaintiff ranked last in his platoon in activity.

During this period plaintiff also was "detailed" to less desirable assignments with more frequency. Some other non-white officers who commented on the Angela Brown incident also received these "details" with more frequency. Sgt. Hearn informed plaintiff that he was receiving these details on the express orders of Lt. LaCon. Plaintiff informed his supervisors of his belief that his receipt of undesirable details was in retaliation for his vocal support of Officer Brown. Defendants maintain that plaintiff received these details as a consequence of his decreased activity. On one occasion plaintiff was informed by Sgt. Hearn that if plaintiff's activity did not increase, he would be "utilized in other ways."

On September 9, 1997, plaintiff turned in a blank patrol log. On September 14, 1997, plaintiff was informed by Sgt. Hearn that Lt. LaCon wanted him to write a memo explaining why he had turned in a blank patrol log. Plaintiff refused. After plaintiff turned in his patrol log and signed off duty that

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<sup>2</sup>Plaintiff testified that Lt. LaCon implored all officers to write at least ten tickets per tour which practice plaintiff believed constituted an illegal quota.

evening, he engaged in a brief argument with Sgts. Corbett and Hearn during which he informed them of his belief that he was being retaliated against because of his support for Angela Brown and stated that "I'm not going to kiss any of your asses." After plaintiff exited the precinct, Officer Michael Mills overheard Sgt. Corbett state that "we'll see whose ass is on the line when we put pen to paper."

On September 15, 1997, plaintiff was detailed by Lt. LaCon to a non-street assignment at Gray's Ferry. This order was countermanded by Inspector Frankie Heyward, Captain Nestel's supervisor, who detailed plaintiff to the 35th District. Also on September 15, Sgt. Hearn, with the approval of Lt. LaCon, requested that Captain Nestel file formal disciplinary charges against plaintiff for his statement of the previous evening.

On September 30, 1997, plaintiff filed a complaint with the Internal Affairs Division ("IAD") in which he attributed racial problems in the 14th District to his supervisors; described the private meeting at which Lt. LaCon placed his gun on the table toward plaintiff; claimed that Sgts. Corbett and Hearn were harassing him by assigning him to undesirable details; and, claimed that he feared retaliation from Captain Nestel. On October 22, 1997, plaintiff filed IAD complaints in which he claimed that Lt. LaCon suggested planting a weapon on a suspect

and carried an unauthorized weapon on duty, and that Sgt. Corbett physically abused an arrestee.<sup>3</sup>

Plaintiff also filed a complaint on October 22, 1997 with the Department's internal equal employment opportunity office ("EEO") alleging harassment and retaliatory and discriminatory treatment by Sgts. Corbett and Hearn and Lt. LaCon. At the end of October, plaintiff distributed to 14th District officers a self-prepared list of charges he had filed. In November 1997, plaintiff gave interviews to the EEO and IAD regarding the allegedly discriminatory, retaliatory and illegal conduct.

In October 1997, Captain Nestel conducted interviews regarding the incident of September 14. He interviewed plaintiff on October 29, 1997. On October 30, 1997, Captain Nestel received plaintiff's EEO complaint for investigation. In November 1997, Sgt. Branson of the IAD issued subpoenas to 14th District officers for interviews relating to plaintiff's complaint against Sgt. Corbett and Lt. LaCon.

On November 12, 1997, Captain Nestel issued a Request for Discipline against plaintiff charging him with

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<sup>3</sup>The charge against Sgt. Corbett related to conduct that occurred in January 1997. It was sustained by Internal Affairs on May 9, 1998. Internal Affairs originally sustained the allegation that Lt. LaCon had carried an unauthorized weapon but could not substantiate the weapon planting allegation. In a subsequent revised report, IAD concluded that neither allegation against Lt. LaCon could be substantiated.

insubordination for the September 14 incident. The request was then sent up the chain of command to Inspector Heyward who declined to approve the request. He cited "rumors of long term problems in the platoon which has caused deep seeded mistrust of the current supervisors" and expressed the opinion that "there is much more to this than meets the eye."

On February 13, 1998, Lt. LaCon was interviewed by Sgt. Branson regarding plaintiff's complaint. Lt. LaCon acknowledged awareness of plaintiff's EEO complaint against him. On February 23, 1998, Lt. LaCon, Sgt. Corbett and Sgt. Gramlich collaboratively prepared a performance evaluation of plaintiff.<sup>4</sup> Plaintiff received an "unsatisfactory" rating in his overall performance and for his work habits, dependability, initiative and relationship with people. The evaluation also described him as having "a negative work ethic consistent with current practices within the Police Department," and an "insubordinate and unprofessional attitude towards [his] permanent supervisors when interviewed or counseled relative to [his] lack of initiative."

At the time that this evaluation was issued, plaintiff had been working for four months in the 35th Precinct under the

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<sup>4</sup>Sgt. Hearn, who had been plaintiff's direct supervisor, was no longer at the 14th District. Sgt. Gramlich did consult with him by telephone before plaintiff's evaluation was prepared.

supervision of Sgt. McCloskey. Sgt. Gramlich contacted Sgt. McCloskey and questioned him about plaintiff's job performance shortly before completion of his evaluation. Sgt. McCloskey indicated that plaintiff's performance was satisfactory. Sgt. McCloskey's assessment of plaintiff's performance was excluded from the evaluation. Plaintiff refused to sign this evaluation. At the same time, two other minority officers from the 14th District, Officer Gerald Golden and Officer Lawrence Austin, also received unsatisfactory evaluations. For both officers, this was the first negative evaluation of their careers.<sup>5</sup>

In April of 1998, plaintiff was evaluated by Sgt. McCloskey. He was rated as "excellent" in his "ability to get along with supervisors, co-workers and the community." The evaluation stated that plaintiff performed his responsibilities in an "above average manner" and rated him "satisfactory" in all categories including overall performance.

On March 23, 1998, Captain Nestel issued an evaluation of Lt. LaCon in which he commended the removal of "the rebellious segment" of the platoon. The composition of this "rebellious segment" is not specifically identified, however, plaintiff believes that it could only refer to himself and other non-white officers who fell out of favor with the 14th District

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<sup>5</sup>Both officers were later terminated. Officer Austin has filed a § 1983 claim for retaliatory discharge.

administration after the Angela Brown incident. Some of the other officers who protested the treatment of the Angela Brown incident were in fact transferred at about the same time as plaintiff. Another Officer, Michael Mills, was charged by Captain Nestel with insubordination and using disrespectful language when he protested an assignment to a hospital detail and accused superiors at the 14th District of "gestapo tactics." The PBI declined to sustain the charge.

In June 1998, plaintiff was detailed to the 5th District. In a conversation with Lt. LaCon at this time, Captain Nestel indicated that he had "made inquiries" with the Advocate Board of the PBI as to "what the holdup was" with the Request for Discipline against plaintiff.<sup>6</sup> Inspector Heyward was contacted by Chief Inspector Pryor's office regarding the Request for Discipline. He then forwarded the Request along to Chief Pryor's office. Prior to receiving this call he had never mentioned the Request for Discipline to anyone in Chief Pryor's office.

Inspector Heyward stated it is unusual that such a discipline request would be pursued above him in the chain of command despite his decision not to sustain it. He stated that

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<sup>6</sup>Captain Nestel disputes this and states that Lt. Cummings from Chief Pryor's office contacted him regarding the status of the discipline request. For purposes of summary judgment, of course, the court may not assess credibility and all evidence must be viewed in the light most favorable to the nonmovant.

normally his denial would mark the end of a Request for Discipline and he would hear nothing further on the matter. Inspector Heyward's decision was overturned by Chief Pryor's Office and the Request for Discipline was allowed to proceed to the PBI. Following a PBI inquiry, plaintiff was found guilty on June 15, 1998 of insubordination and of using profane or insulting language to a superior officer. The determination was approved by Deputy Commissioner Sylvester Johnson and then by Commissioner Timoney on June 19, 1998. Plaintiff received a ten day suspension.

On August 18, 1998, plaintiff interviewed with Captain Markert for a position in the bomb squad. During the interview Captain Markert informed him that his application would most likely be approved but that the bomb squad probably would not take him because he was so close to being promoted to sergeant. Captain Markert then referred to plaintiff's difficulties in the 14th District and informed him that the bomb squad would not tolerate any type of insubordination. Plaintiff felt this comment was inappropriate since Captain Markert had been in the IAD when plaintiff made his complaints against Lt. LaCon and Sgt. Corbett and knew of the circumstances surrounding plaintiff's difficulties with them. Plaintiff's application for the bomb squad was ultimately approved.

On November 19 1999, a year after initiating suit, plaintiff was interviewed by the Promotional Board for promotion to the rank of sergeant. He was questioned extensively about his difficulties in the 14th District and especially about his statement on September 14, 1997. His captain in the 5th District, Captain Trzcinski, would not recommend plaintiff for promotion. He cited plaintiff's disciplinary record, abuse of sick time and the evaluation of Lt. Wiley, plaintiff's platoon commander, who criticized plaintiff for low activity and difficulty taking orders.

The Board concluded that "even though [plaintiff was] less than a stellar performer, [it did] not feel there [was] enough valid reasons to deny [his] promotion." It also recommended that plaintiff's future commanding officer be apprised of "his previous record" and that plaintiff be "closely monitored and supervised during his probationary period." Plaintiff was informed by Deputy Commissioner Johnson that he overrode Board members who did not want to promote him and cautioned plaintiff to stay out of trouble as his own neck was also "on the line." Plaintiff was promoted to sergeant in December 1999.

#### IV. Discussion

##### A. § 1983 Retaliation Claim against the Individual Defendants<sup>7</sup>

With a First Amendment claim of retaliation by a public employee for engaging in a protected speech, the plaintiff must first show that the speech in question was protected. The plaintiff must then show that the protected activity was a substantial or motivating factor in the alleged retaliatory action. A defendant may still defeat such a claim by demonstrating that the same action would have been taken even in the absence of the protected activity. See Watters v. City of Philadelphia, 55 F.3d 886, 892 (3d Cir. 1995). Supervisory liability under § 1983 must be predicated on personal participation in the retaliatory conduct or knowing acquiescence in retaliatory conduct of subordinates. See Keenan v. City of Philadelphia, 983 F.2d 459, 466 (3d Cir. 1992).

To be actionable, an act of retaliation must constitute some form of adverse employment action. See Nunez v. City of Los Angeles, 147 F.3d 867, 875 (9th Cir. 1998) ("To succeed on a wrongful-retaliation claim, a plaintiff must show, in the first

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<sup>7</sup>It was not clear from plaintiff's complaint whether he asserted a claim for race discrimination. It now clearly appears that plaintiff did not intend to pursue such a claim. In his response to defendants' motion, plaintiff does not dispute defendants' contention that there is no evidence to support a claim of racial discrimination against plaintiff, and he expressly stated at his deposition that he does not claim the acts complained of were perpetrated because of his race.

instance, that he has suffered an adverse employment action"). Defendants concede that plaintiff's suspension constitutes an adverse employment action. They argue, however, that plaintiff's negative evaluation and Lt. LaCon's behavior toward him do not rise to the level of adverse actions.

To constitute an adverse employment action in a First Amendment retaliation case, the aggrieved conduct need not be exceptionally harsh or cause direct financial loss. See id.; Allen v. Scribner, 812 F.2d 426, 434 n.16 (9th Cir. 1987) (retaliatory transfer sufficient although it results in no loss of pay, seniority or other benefits). Mere threats, however, unless accompanied by a tangible loss of a privilege of employment will not rise to the level of actionable conduct. See Nunez, 147 F.3d at 875. See also Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997) (retaliatory conduct must in some way alter terms, conditions or privileges of employment).

There is evidence that plaintiff's negative evaluation became a topic of discussion in his interview with the bomb squad and his interview with the Promotion Board. It remains a part of his permanent employment record and apparently has influenced his relationship with his current lieutenant. It has caused him considerable stress in his employment. Plaintiff's negative evaluation can reasonably be viewed as an adverse employment action. See Simpson v. Weeks, 570 F.2d 240, 241 (8th Cir. 1978)

(transfer and poor evaluation ratings after plaintiff engaged in protected conduct sufficient). See also Wideman v. Wal-Mart Stores, 141 F.3d 1453, 1455 (11th Cir. 1998) (receipt of written reprimand sufficient in Title VII retaliation case).

Plaintiff's assignment to undesirable details also constitutes adverse action. See Hampton v. Borough of Tinton Falls Police Dep't, 98 F.3d 107, 115-16 (3d Cir. 1996) (state trooper's undesirable assignment after engaging in protected activity sufficient in Title VII retaliation case); Allen, 812 F.2d at 434 n.16 (9th Cir. 1987) (retaliatory reassignment sufficient basis for § 1983 claim). Also, while Lt. LaCon's allegedly menacing behavior in the "closed door" meetings with plaintiff may not alone constitute an adverse employment action, such conduct may be considered in tandem with the other adverse acts that plaintiff alleges. Id. at 434 n.17 (insubstantial incidents of harassment in gross can support First Amendment claim).

Speech in the public employment context is protected when it appears from an examination of the content, form and context that it relates to a matter of public concern and the speaker's interest in such speech is not outweighed by the government's interest in effective and efficient operation. Connick v. Myers, 461 U.S. at 146-48; Swineford v. Snyder County Pa., 15 F.3d 1258, 1271 (3d Cir. 1994). See also Azzaro v.

County of Alleghany, 110 F.3d 968, 975 (3d Cir. 1997); Feldman v. Philadelphia Housing Auth., 43 F.3d 823, 829 (3d Cir. 1995). Whether a public employee's speech involves a matter of public concern is a question of law for the court. See Connick v. Myers, 461 U.S. 138, 148 n.7 (1983); Versage v. Township of Clinton, N.J., 984 F.2d 1359, 1364 (3d Cir. 1993).

As to content, speech opposing discrimination generally touches upon a matter of public concern. See Bonnell v. Lorenzo, 241 F.3d 800, 812 (6th Cir. 2001). As to form and context, plaintiff verbally protested to superiors who were in a position to address any problems of discriminatory assignments or discipline and then complained in the prescribed manner to the IAD whose mission includes combating internal misconduct. Plaintiff's protest and EEO complaint about disparate or discriminatory treatment of minority officers would relate to a matter of public concern.

Defendants characterize plaintiff's conduct in the wake of the Angela Brown incident as disruptive and threatening to the effective operation of the police department which has a recognized interest in maintaining discipline and harmony. See, e.g., Cochran v. City of Los Angeles, 222 F.3d 1195, 1199 (9th Cir. 2000). Discontent or disruption over the subject matter to which protected speech relates, however, does not render that speech itself disruptive. Watters, 55 F.3d at 897 (3d Cir.

1995). It does not clearly appear from the record that plaintiff's conduct created an undue disturbance. It appears from the record that plaintiff's supervisors contributed to, if not caused, whatever unrest occurred in the 14th District by speaking disparagingly of Officer Brown in the presence of other officers after a command not to discuss the incident was issued. The court does not suggest that plaintiff engaged in no inappropriate conduct. It does not appear, however, that the overall manner and substance of his conduct threatened the effective functioning of the District so as to overcome plaintiff's interest in speaking on matters of public concern.<sup>8</sup>

Defendants do not dispute that plaintiff's IAD complaints regarding abuse of an arrestee and suggestions of planting a gun on a suspect relate to matters of public concern. Speech disclosing wrongdoing of public officials generally is protected. *See, e.g., Swineford*, 15 F.3d at 1271-72 (allegations of malfeasance by public officials); *O'Donnell v. Yanchulis*, 875 F.2d 1059, 1061 (3d Cir. 1989) (exposing breach of public trust is matter of public concern).

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<sup>8</sup>Defendants correctly note that the potential for disruption from expressive conduct to the effective operation of government is a factor which may be considered. One may not simply presume, however, that such disruption will likely occur. A "prediction [of disruption] must be supported by the presentation of specific evidence." *Barker v. City of Del City*, 215 F.3d 1134, 1140 (10th Cir. 2000). There is no such specific evidence of record.

Defendants do not suggest that this speech threatened the effective operation of government. They do suggest that plaintiff's expressed concern was not genuine, but rather that he lodged these complaints for leverage in anticipation of a charge of insubordination.

The presence of a personal motivation for an employee's speech does not per se vitiate the public import of that speech. See O'Donnell v. Barry, 148 F.3d 1126, 1134 (D.C. Cir. 1998); Thompson v. City of Starkville, 901 F.2d 456, 464-65 (5th Cir. 1990).<sup>9</sup>

A factfinder could rationally conclude on the evidence of record that defendants retaliated against plaintiff for engaging in protected speech.

There is evidence that Lt. LaCon knew of at least some, if not all, of plaintiff's charges against him when he participated in the February 23, 1998 evaluation, the first and only negative evaluation in plaintiff's career. The evaluation failed to note any of the positive comments of Sgt. McCloskey about plaintiff's performance. At least two other officers who had engaged in similar protest received unsatisfactory evaluations for the first time in their careers. There is

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<sup>9</sup>As a result of plaintiff's IAD complaint, for example, an officer was found in fact to have abused an arrestee and was disciplined.

evidence that Lt. LaCon ordered Sgt. Hearn to give plaintiff undesirable assignments.

Captain Nestel argues that his Request for Discipline would have been filed in any event. He points to evidence that he assumed leadership of the 14th District well after the Angela Brown incident, that plaintiff's conduct on September 14, 1997 violated Police Department directives and that he began his inquiry into the matter at the request of Sgt. Hearn and Lt. LaCon before plaintiff initiated the IAD and EEO complaints.<sup>10</sup> If this were the extent of the record regarding Captain Nestel's conduct, he would have a forceful argument for summary judgment. There is, however, other pertinent evidence.

Inspector Heyward declined to approve the Request for Discipline due to his perception that there was more to it "than meets the eye." He testified that his decision not to proceed would ordinarily signify the end of this type of disciplinary request. Yet, it could rationally be inferred that Captain

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<sup>10</sup>Plaintiff does not contend that his "kiss any of your asses" remark was protected speech or did not constitute an infraction of a Department directive. There is no evidence of record regarding whether the type of discipline meted out to plaintiff was or was not similar to that given to others for comparable infractions. In any event, the fact that an employee may be disciplined for unprotected speech will not justify discipline which would not have been imposed but for contemporaneous protected speech. The evidence of record is sufficient to raise a factual issue in this regard.

Nestel went over Inspector Heyward's head to Chief Pryor to push the disciplinary request.

Inspector Heyward received a request that he process and forward the disciplinary request to Chief Pryor's Office in early June 1998. There is evidence that prior to plaintiff being disciplined, Captain Nestel informed Lt. LaCon that he had "made inquiries" of the PBI as to "what the holdup was" in the discipline of plaintiff.<sup>11</sup> This took place after plaintiff initiated several complaints against his 14th District supervisors. The defense has offered no evidence to show this type of personal interest and pursuit of a disciplinary request by a District Captain is other than extraordinary. Rather, Captain Nestel simply denies having made such inquiries.

Also, on June 19, 1998 Captain Nestel issued an evaluation of Lt. LaCon in which he applauded the elimination of

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<sup>11</sup>Defendants seem to suggest that because there is no claim that the PBI harbored a retaliatory animus toward plaintiff, there can be no chain of causation even accepting that Captain Nestel acted out of such animus. One could rationally infer from the record, however, that the PBI would not have taken action at all but for the influence and persistence of Captain Nestel. "[I]t is not readily apparent why the chain of causation should be considered broken where the initial wrongdoer can reasonably foresee that his misconduct will contribute to an 'independent' decision that results in a deprivation" of a secured right. Zahrey v. Coffey, 221 F.3d 342, 352 (2d Cir. 2000). Inspector Heyward apparently thought that Captain Nestel had withheld material information necessary to put the charge against plaintiff in proper context. There is no evidence of record that such information was provided to the PBI by the Captain or others pushing for discipline.

the "rebellious segment" of plaintiff's platoon. From the evidence of record, one could reasonably infer that the "rebellious segment" included plaintiff.

B. Qualified Immunity

Defendants Nestel and LaCon have also moved for summary judgment on the ground of qualified immunity. Individual government officials engaged in discretionary functions enjoy qualified immunity from suits under § 1983 when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Sherwood v. Mulvihill, 113 F.3d 396, 398-99 (3d Cir. 1997) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). The question is whether a reasonable officer in defendant's position could have believed his conduct was lawful in view of clearly established law and the information he possessed. Parkhurst v. Trapp, 77 F.3d 707, 712 (3d Cir. 1996).

A police supervisor who takes retaliatory action against a subordinate for speaking out against police misconduct or racial discrimination would be violating a clearly established right of which a reasonable police supervisor would be aware. See, e.g., Watters, 55 F.3d at 892-93; Thompson v. City of Starkville, 901 F.2d 456, 470 (5th Cir. 1990) (long established that public employee speaking on matter of public concern enjoys First Amendment protection); Bennis v. Gable, 823 F.2d 723, 733

(3d Cir. 1987) (right not to be subjected to adverse employment action in retaliation for engaging in protected First Amendment activity clearly established since 1982); McDonald v. City of Freeport, Tex., 834 F. Supp. 921, 930-32 (S.D. Tex. 1993) (police officers who retaliate against subordinates for reporting police misconduct not entitled to qualified immunity from § 1983 suit).

Defendants seem to suggest that they could not reasonably be expected to know that plaintiff's speech related to a matter of public concern. A protest of discriminatory assignments and discipline within a police district, and whistle blowing on physical abuse of an arrestee or suggestions of planting a firearm on a suspect, would reasonably be perceived by a police official to relate to matters of public concern.

C. Monell Claim against the City

There is no respondeat superior liability under § 1983. See Robinson v. City of Pittsburgh, 120 F.3d 1286, 1295 (3d Cir. 1997). A municipality is liable for a constitutional tort only "when 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, inflicts the injury" complained of. Id. (quoting Monell v. Dept. of Social Services, 436 U.S. 658, 694 (1978)).

"Policy" is made when a decision-maker with final authority to establish municipal policy with respect to the

action in question issues an official proclamation, policy or edict. A "custom" is a course of conduct which, although not formally authorized by law, reflects practices of state officials that are so permanent and well settled as to virtually constitute law. A decision by an official with final discretionary decision-making authority over the subject matter can constitute a "policy." See Pembauer, 475 U.S. at 480; Kennan v. City of Philadelphia, 983 F.2d 459, 468 (3d Cir. 1992); Omnipoint Communications, Inc. v. Penn Forest Twp., 1999 WL 181954, \*10 n.4 (M.D. Pa. Mar. 31, 1999); Callahan v. Lancaster-Lebanon Intermediate Unit 13, 880 F.2d 319, 341 (E.D. Pa. 1994). Liability under § 1983 also may be predicated on a final policymaker's omissions if such inaction evinces a "deliberate indifference" to the rights of those with whom an offending subordinate comes into contact. See Bonenberger v. Plymouth Twp., 132 F.3d 20, 25 (3d Cir. 1997).

As a preliminary matter, it is incumbent upon a plaintiff to show that a final policymaker is responsible for the policy or custom at issue. See Pembaur v. City of Cincinnati, 475 U.S. 469, 481-82 (1986); Andrews v. City of Philadelphia, 895 F.2d 1469, 1480 (3d Cir. 1990). Whether an official is a final policymaker in a particular area or on a particular issue depends upon the definition of his functions under pertinent state law. See McMillian v. Monroe County, 520 U.S. 781, 785 (1997);

Garrison v. Burke, 165 F.3d 565, 572 (7th Cir. 1999); Myers v. County of Orange, 157 F.3d 66, 76 (2d Cir. 1998), cert. denied, 119 S. Ct. 1042 (1999); Garrett v. Kutztown Area School Dist., 1998 WL 513001, \*4 (E.D. Pa. Aug. 11, 1998). A municipal official is not a final policymaker if his decisions are subject to review and revision. See Morro v. City of Birmingham, 117 F.3d 508, 510 (11th Cir. 1997), cert. denied, 118 S. Ct. 1299 (1998). An official with final decision-making authority may delegate his power to a subordinate whose decision, if unconstrained, could then constitute an "official policy." See City of St. Louis v. Praprotnik, 485 U.S. 112, 126-27 (1988); Pembauer, 475 U.S. at 483 n.12; Ware v. Jackson County, Mo., 150 F.3d 873, 885-86 (8th Cir. 1998); Hyland v. Wonder, 117 F.3d 405, 414 (9th Cir.), amended on denial of rehearing, 127 F.3d 1135 (9th Cir. 1997), cert. denied, 118 S. Ct. 1166 (1998); Scala v. City of Winter Park, 116 F.3d 1396, 1399-1400 (11th Cir. 1997); Andrews v. City of Philadelphia, 895 F.2d 1469, 1481 (3d Cir. 1990).

The only evidence of record of an express departmental policy concerning retaliation is a directive which explicitly forbids retaliation against whistle blowers. Plaintiff nevertheless contends that the conduct of Deputy Commissioner Johnson constituted deliberate indifference to retaliatory conduct against whistle blowers.

Police Commissioner Timoney is the pertinent official policymaker. See Andrews, 895 F.2d at 1480; Keenan, 983 F.2d at 469. There is no evidence of record to show that Deputy Commissioner Johnson's determination regarding plaintiff's suspension was plenary on the matter or that he had been delegated final disciplinary authority. Indeed, the Commissioner signed off on the proposed discipline. There is no evidence to show that when doing so the Commissioner knew of any of the occurrences underlying the alleged retaliation or himself had any retaliatory motive.

Moreover, even if Deputy Commissioner Johnson were the final decision-maker, one could not reasonably conclude from the competent evidence of record that he was deliberately indifferent toward retaliatory conduct as plaintiff suggests. Plaintiff contends that Deputy Johnson had knowledge of complaints of retaliatory discipline from his conversation with Officer Rochelle Bilal, a representative for black officers, plaintiff's own account to Deputy Johnson and a recent lawsuit involving a claim of retaliatory conduct for whistle blowing activity.

When Officer Bilal informed Deputy Johnson that plaintiff and three other minority officers were "having problems" with Captain Nestel, he advised her that they should pursue any grievance through the proper chain of command. There is no evidence, or even allegation, that plaintiff or any other

officer filed a claim of retaliation which rose through the chain of command and was ignored by Deputy Johnson.

A high ranking police official is not deliberately indifferent to discrimination or retaliation by virtue of asking complainants to proceed through an established chain of command for investigation, evaluation and potential resolution at a lower level. Indeed, to allow and thus encourage every officer with a grievance or claim of misconduct to proceed immediately to the Commissioner or Deputy Commissioner would subvert the chain of command, divert these key officials with issues often resolvable at lower levels and disrupt the operation of the department.

The lawsuit to which plaintiff alludes was filed six months after the ultimate disposition of the Request for Discipline against plaintiff. There is no competent evidence of record to show that Deputy Johnson had prior knowledge of the conduct alleged in that action.<sup>12</sup>

One cannot reasonably find from the competent evidence of record in this case that an official with decision-making authority implemented a policy of retaliation for protected speech or was deliberately indifferent to such retaliation.

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<sup>12</sup>The Court in that case granted a motion for a directed verdict in favor of the City on all of the federal claims asserted. When the case was ultimately settled, plaintiff was compensated only on his state Whistleblower Act claim.

D. Pennsylvania Whistleblower Act

The parties agree that any alleged retaliatory acts that occurred before May of 1998 are time-barred under the Pennsylvania Whistleblower Act. See 43 P.S. § 1424(a) (180 day limitations period for acts of retaliation). This would still allow plaintiff to pursue a claim related to his suspension of July 1998. Defendants contend that as to this claim, plaintiff cannot prove a causal connection between his departmental complaints of wrongdoing and his suspension.

To sustain a Whistleblower claim, a plaintiff must establish he was retaliated against "regarding [his] compensation, terms, conditions, location or privileges of [his] employment" because he made a "good faith report . . . to [his] employer or appropriate authority" of an instance of wrongdoing. 43 P.S. § 1423(a). Defendants do not contest that plaintiff's suspension affected the terms, conditions or privileges of his employment, that he brought his complaints to an appropriate authority or that the substance of his complaints reported alleged wrongdoing within the meaning of the statute. Defendants do not contend that these complaints were made other than in "good faith" within the meaning of the statutes.

Defendants do argue that plaintiff cannot prove his suspension was a consequence of his reports of alleged wrongdoing. They refer to the burden shifting causation analysis

suggested in Golashevsky v. Pennsylvania, 720 A.2d 757, 760-61 (Nigro, J., concurring) (citing Watson v. City of Philadelphia, 638 A.2d 489, 492 (Pa. Commw. 1994)). Under this test, the plaintiff bears the initial burden of showing he reported wrongdoing prior to being subject to adverse action. Defendants then must proffer a legitimate reason for the adverse action. Plaintiff then must offer sufficient evidence to show that defendants' proffered reasons are pretextual. Id.

After invoking this burden shifting test, defendants fail to offer a non-retaliatory reason for plaintiff's suspension. The court will assume that they intended to offer plaintiff's allegedly insubordinate conduct of September 14, 1997 as the legitimate reason for the suspension. As the court has already discussed, however, a factfinder could reasonably conclude that plaintiff's whistleblowing was a substantial motivating factor behind the effort to ensure he was disciplined.

#### **V. Conclusion**

Consistent with the foregoing, the court has granted the motion for summary judgment as to the defendant City and denied the motion as to the individual defendants. An appropriate order has been entered.

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

COLLINS MILES : CIVIL ACTION  
 :  
v. :  
 :  
CITY OF PHILADELPHIA, :  
CAPT. THOMAS NESTEL and :  
LT. JOHN LaCON : NO. 98-5837

O R D E R

AND NOW, this day of April, 2001, consistent with the court's order of March 30, 2001 resolving defendants' Motion for Summary Judgment, **IT IS HEREBY ORDERED** that the Clerk shall file and docket the accompanying memorandum with regard to said Motion.

BY THE COURT:

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JAY C. WALDMAN, J.