

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

ROBERT E. WRIGHT, SR. : CIVIL ACTION
 :
 v. :
 :
 MONTGOMERY COUNTY, et al. : NO. 96-4597

MEMORANDUM AND ORDER

HUTTON, J.

May 20, 2002

Upon consideration of Plaintiff's Pre-Trial Memorandum (Docket No. 52), Defendants' Supplemental Pre-Trial Memorandum (Docket No. 206), and the Motions in Limine filed by the parties to date, the Court issues the following Memorandum and Order.

I. BACKGROUND

On June 25, 1996, Plaintiff Robert E. Wright, Sr. ("Wright" or "Plaintiff") brought this employment discrimination action against Defendants Montgomery County, Richard S. Buckman, Commissioner of Montgomery County and Joseph M. Hoeffel, III, Commissioner of Montgomery County ("Montgomery County Defendants" or "Defendants"). All that remains of the Plaintiff's complaint is a claim of retaliation for protesting against his own mistreatment for being a member of a racial minority brought under 42 U.S.C. § 1981.

II. DISCUSSION

A. Section 1981 Claim

Section 1981 provides in relevant part that:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. 1981(a) (1994). Although §1981 has proven effective in battling discrimination, its scope is limited to cases of race discrimination. Saint Francis College v. Al-Khazraji, 481 U.S. 604, 613 (1987). Thus, these sections may only be invoked when discrimination is alleged against "identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics." Id. "Congress amended § 1981 in 1991 to allow suits for workplace harassment. See 42 U.S.C. §1981(b). "[Accordingly, c]laims of a hostile working environment that arise after 1991 are ... actionable under § 1981." Simpson v. Martin, Ryan, Andrada & Lifter, No. CIV.A. 96-4590, 1997 WL 542701, at * 3 (N.D. Ca. Aug. 26, 1997) (citations and footnote omitted). Retaliation claims are also actionable under 1981. Patterson v. Augat Wiring Sys., Inc., 944 F. Supp. 1509, 1519-21 (M.D. Ak. 1996); see Freeman v. Atlantic Ref. & Mktg. Corp., No. CIV.A. 92-7029, 1994 WL 156723, at * 8 (E.D. Pa. Apr. 28, 1994) ("Section 1981's prohibitions against

discrimination extend to the same broad range of employment actions and conditions as in Title VII.”).¹

1. Retaliation

To make out a prima facie case of retaliation, the Plaintiff must show that: (1) he engaged in protected conduct; (2) his employer took adverse action against him; and (3) there was a causal link between the protected conduct and the adverse action. Kohn v. Lemmon Co., Civ.A. No.97-3675, 1998 WL 67540, *5 (E.D. Pa. Feb. 18, 1998) (citing Kachmar v. SunGard Data Sys., Inc., 109 F.3d 173, 177 (3d Cir. 1997)). Protected activity consists of opposition to conduct prohibited by Title VII or participation in an investigation of or proceeding regarding such conduct. See 42 U.S.C. § 2000e-3(a); Walden v. Georgia-Pacific Corp., 126 F.3d 506, 513 n.4 (3d Cir. 1997) (grievances about working conditions not protected activity when they do not concern acts made unlawful by Title VII), cert. denied, 118 S.Ct. 1516 (1998); Sumner v. United States Postal Service, 899 F.2d 203, 208 (2d Cir. 1990) (Title VII “prohibits employers from firing workers in retaliation for their

¹ Title VII’s § 2000e-2(a)(1) states:
It shall be an unlawful employment practice for an employer – to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1).

opposing discriminatory employment practices"). To establish the requisite causal connection, a plaintiff must proffer evidence "sufficient to raise the inference that [his] protected activity was the likely reason for the adverse action." Zanders v. National R.R. Passenger Corp., 898 F.2d 1127, 1135 (6th Cir. 1990) (citing Cohen v. Fred Meyer, Inc., 686 F.2d 793, 796 (9th Cir. 1982)). Plaintiff must also show that the persons who took the adverse employment action against him knew of the protected activity and acted with a retaliatory motive. Gemmell v. Meese, 655 F.Supp. 577, 582 (E.D. Pa. 1986).

After the plaintiff makes a prima facie showing, a presumption of retaliation arises that shifts the burden of production to the employer to rebut the prima facie case by producing "clear and reasonably specific" evidence that its actions were taken for legitimate, nonretaliatory reasons. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981). If an employer meets its burden of articulating a non-retaliatory reason, the burden of production shifts back to the plaintiff, who "must have the opportunity to demonstrate that the proffered reason was not ... true." Id. at 256. The plaintiff's burden of production "merges with the ultimate burden of persuading the court that he has been the victim of intentional discrimination." Id. The plaintiff can meet the burden "either directly by persuading the court that a discriminatory reason more likely motivated the

employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Id. (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-05 (1973)). If he successfully shows that a retaliatory motive played a motivating part in an adverse employment decision, the employer can nevertheless avoid liability by demonstrating by a preponderance of the evidence that it would still have taken the same action absent retaliatory motive. See Price Waterhouse v. Hopkins, 490 U.S. 228, 252-53 (1989); Berger v. Iron Workers Reinforced Rodmen, Local 201, No. 97-7019, 1999 WL 169431, at *12 (D.C.Cir. Mar.30, 1999).

B. Immunity

The Defendants are not immune from suit in this § 1981 retaliation claim. First and foremost, the Court is unaware of any court dismissing such a claim based on either absolute immunity or qualified immunity. Second, if this Court were to apply the rationale applied by courts to § 1983 claims to this case, the Court still finds that the Defendants' are not entitled to immunity. No Court has held that a local government is immune from a civil rights suit. The Supreme Court has held that local legislators are absolutely immune from suit under § 1983 for their legislative acts. See Bogan v. Scott-Harris, 118 S.Ct. 966, 970 (1998). "Whether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it." Id., at 973. In Bogan, Mayor Bogan proposed a budget that

froze the salaries of all municipal employees and eliminated one hundred thirty-five city positions. Id., at 969. As part of this package, Bogan called for the elimination of the Plaintiff's position. Id. Because "the ordinance, in substance, bore all the hallmarks of traditional legislation," the Court granted absolute immunity without determining whether the character of the action was legislative. Id., at 973.

In the present case, absolute immunity does not apply, because the decision to terminate the Plaintiff as Director of Montgomery County Department of Housing Services ("MDHS") was not a legislative act. The Defendant Commissioners' decision to terminate the Plaintiff did not bear any of the hallmarks of traditional legislation. Moreover, the character of the Defendant Commissioners' actions does not entitle them to legislative immunity. This Court has found that a genuine issue exists as to whether the Defendant Commissioners terminated the Plaintiff from his position as Director of Montgomery County Department of Housing Services ("MDHS") because the Plaintiff complained of his mistreatment for being a member of racial minority.

Individual government officials engaged in discretionary functions enjoy qualified immunity from suits 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, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). The question is whether a reasonable commissioner in the Defendants' position could have believed their conduct was lawful in view of clearly established law and the information they possessed. See Parkhurst v. Trapp, 77 F.3d 707, 712 (3d Cir. 1996).

In this case, a commissioner who takes retaliatory action against a subordinate for speaking out against his own mistreatment for being a member of a racial minority would be violating a clearly established right of which a reasonable commissioner would be aware. See, e.g., Watters v. City of Philadelphia, 55 F.3d 886, 892-93 (3d Cir. 1995); 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).

C. Punitive Damages

Compensatory damages for mental anguish, as well as punitive damages, are recoverable in certain circumstances under § 1981. United States v. Burke, 504 U.S. 229, 240 (1992) (citing Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 460 (1975)). To recover punitive damages, a plaintiff must show that a defendant (1) intentionally retaliated against him, and (2) did it "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1).

In Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981), the Supreme Court held that a municipality (as opposed to an individual

defendant) is immune from liability for punitive damages under § 1983. Newport, 453 U.S. at 269-270. A significant part of the Court's reasoning was that deterrence of constitutional violations would be adequately accomplished by allowing punitive damage awards directly against the responsible individuals. The Court explained:

Moreover, there is available a more effective means of deterrence. By allowing juries and courts to assess punitive damages in appropriate circumstances against the offending official, based on his personal financial resources, the statute [§ 1983] directly advances the public's interest in preventing repeated constitutional deprivations. In our view, this provides sufficient protection against the prospect that a public official may commit recurrent constitutional violations by reason of his office.

Newport, 453 U.S. at 269-270.

Similarly, in Carlson v. Green, 446 U.S. 14 (1980), the Supreme Court stated that punitive damages would be available in an action against federal officials directly under the Eighth Amendment, partly on the reasoning that since such damages are available under § 1983, it would be anomalous to allow punitive awards against state officers but not federal ones. Id., at 22, and n. 9. See also Adickes v. Kress & Co., 398 U.S. at 233 (Brennan, J., concurring and dissenting); Carey v. Piphus, 435 U.S. 247, 257, n. 11 (1978); Johnson, 421 U.S. at 460 (punitive damages available under 42 U.S.C. § 1981). Thus, the Court finds that although Montgomery County is immune from punitive damages, the Defendant Commissioners are not afforded such protection.

D. Witnesses

In their Pre-Trial Memoranda, the parties have identified numerous witnesses that they intend to call at trial. Below, the Court finds that these witnesses fit into one of four categories: (1) Relevant; (2) Irrelevant; (3) Cumulative; or (4) Irrelevant and Cumulative. All parties to the action are deemed relevant. Otherwise, those witnesses found to be relevant as to liability or damages are indicated as such.² Only witnesses that this Court has found to be relevant as indicated below may be called during trial. All other witnesses are prohibited from being called during this trial absent a renewed proffer acceptable to the Court after all witnesses presently determined by the Court to have relevant testimony have testified.

1. Plaintiff's Witnesses

Regarding the Plaintiff's witnesses as indicated in his Pre-Trial Memorandum, the Court finds as summarized below:

²The Court uses the following abbreviations: (1) "L" for Liability; and (2) "D" for Damages.

Robert E. Wright, Sr.	Relevant, Plaintiff
Sheilah Wright	Relevant (L)
Mario Mele	Relevant, Defendant
Richard Buckman	Relevant, Defendant
Joseph Hoeffel	Relevant, Defendant
Michael Marino	Irrelevant
Oscar Vance	Relevant (L)
Nick Melair	Relevant (L)
Harry Payne	Relevant (L)
William Hannesberry	Irrelevant
Victor Depollo	Irrelevant
Karen Washington	Irrelevant
Richard Bylar	Irrelevant
Patrick Borden	Irrelevant
Terrence McMullen	Irrelevant
Doug Detwiler	Irrelevant
Stephanie Coleman	Irrelevant
David Wheeler	Irrelevant
John Q. Bingaman	Irrelevant
Marvin Pierce	Irrelevant
George Schlossher	Irrelevant
Charles Nahill	Irrelevant
Jay Moyer	Relevant (L)
Denise Neuschwander	Relevant (L)
Kathy Smith	Irrelevant
Bill Hitchcock	Irrelevant

Lillian Ritts	Irrelevant
Nancy Shearer	Irrelevant
Rena Singer	Relevant (L)
Ken Delanian	Irrelevant
Vincent Cirillo	Irrelevant
Marie Kavanaugh	Irrelevant and Cumulative
Jon Fox	Relevant (L)
Don Polce	Irrelevant and Cumulative
Thomas Stone	Relevant (L)
Joseph Pizonka	Relevant (L)
Harry Massler	Relevant (L)
Jim Jerla	Irrelevant
Grace DelBono	Irrelevant
John Sgarlata	Relevant (L)
Jonh DePaul	Relevant (L)
Frank Lalley	Irrelevant
Dr. Michael Mash	Relevant (D)
Dr. William Rodgers	Relevant (D)
Dr. Patrick McDonough	Relevant (D)
Dr. Harold Byron	Relevant (D)
John Markley	Irrelevant
Jane Markley	Irrelevant
Rev. Dr. Mickarl D. Thomas	Relevant (D)

2. Defendants' Witnesses

Regarding Defendants' witnesses as indicated in their Supplemental Pre-Trial Memorandum, the Court finds as summarized below:

Frank Aiello	Cumulative
Jamesetta Arthur	Cumulative
Salvatore Bello	Relevant (L)
Beneficial National Bank, corporate designee	Cumulative
Patrick Borden	Irrelevant and Cumulative
Michael Brescia	Cumulative
Richard Buckman	Relevant, Defendant
Nora Butler	Irrelevant
Dr. Harold Byron	Irrelevant
CityBank Credit Card Division, corporate designee	Irrelevant and Cumulative
Dr. Gordon Clement	Irrelevant
Coastal Federal Mortgage Co., corporate designee	Cumulative
Stephanie Coleman	Irrelevant and Cumulative
Commerce Bank, corporate designee	Relevant (L)
Commonwealth Bank, corporate designee	Cumulative

CoreStates Bank (d/b/a First Union), corporate designee	Cumulative
Lawrence T. Crossan	Relevant (L)
Carrie C. Darden	Irrelevant and Cumulative
Elsie Darden	Irrelevant and Cumulative
General Richard J. DeCarlo	Relevant (L)
John DePaul	Relevant (L)
Douglas Detwiler	Cumulative
Donatucci Kitchens and Representatives thereof	Irrelevant and Cumulative
Thomas E. Doran	Relevant (L)
Charles Dutill	Cumulative
Gloria Echols	Cumulative
Thomas Eichman	Cumulative
George J. Flaconiero	Relevant (L)
First Tuskegee Bank, corporate designee	Cumulative
Dawn Flagg	Irrelevant and Cumulative
Sharon Foley	Irrelevant and Cumulative
Alphonzo Gallo	Relevant (L)
Barbara Gallo	Irrelevant
Richard Gallo	Relevant (L)
Ruth Gant	Irrelevant and Cumulative
G.E. Capital Mortgage Services, corporate designee	Cumulative
John Glennon	Irrelevant and Cumulative
Robert J. Goral	Cumulative

Robert Graft	Irrelevant
Edith Hadrick	Irrelevant and Cumulative
Barbara Harrington	Cumulative
Ann Hartman	Relevant (L)
Lynne Hissner	Cumulative
William Hitchcock	Irrelevant
Joseph Hoeffel	Relevant, Defendant
Jerry Hoff	Irrelevant
Gillis Lee Holmes, Sr.	Cumulative
Lee Holmes, Jr.	Irrelevant and Cumulative
Celeste Jackson	Cumulative
James Jerla	Irrelevant
Bruce A. Kelley	Cumulative
Joseph F. Kuklinski	Cumulative
Curtis C. Lindsey, Jr.	Cumulative
Dr. Michael Mash	Relevant (D)
Dr. Patrick McDonough	Relevant (D)
Terrence McMullen	Cumulative
Robert McNeil	Irrelevant
Nicholas Melair	Relevant (L)
Mario Mele	Relevant, Defendant
Dr. Timothy Michals	Relevant (D)
Philip Montefiore	Relevant (L)
Jay Moyer	Relevant (L)
Matthew Nahrgang, Esq.	Relevant (L)
Denise Neuschwander	Relevant (L)
Robert Neuschwander	Cumulative
Sherry O'Rourke	Cumulative

Ron Paul	Irrelevant
Harry Payne	Relevant (L)
Pennsylvania State Trooper Cory Remp	Irrelevant
Paul Petrolina	Cumulative
Russel Piazza	Irrelevant
Marvin Pierce	Irrelevant
Barbara Pizonka	Irrelevant and Cumulative
Joseph Pizonka	Relevant (L)
PNC Bank, corporate designee	Cumulative
Thomas Raimondi	Relevant (L)
Mark Reichelt	Cumulative
Robert J. Reilley, Jr., Esq.	Cumulative
Patricia Renzi	Relevant (L)
Marianne Rickenbach	Irrelevant
Dr. W.H. Rodgers, III	Relevant (D)
James Rodgers	Cumulative
John M. Ruggiano	Cumulative
Keith Sampson	Cumulative
Tina M. Schimony	Cumulative
Renee Scott	Cumulative
John Sgarlata	Relevant (L)
Dorethea Skinner	Irrelevant
Robert P. Stevens	Cumulative
Lee Stevenson	Cumulative
Samuel Stretton, Esq.	Cumulative
Oscar Vance	Relevant (L)
James Ward	Cumulative

Dr. G.H. Weiss	Irrelevant
William Wentz	Irrelevant
West Norriton Township Police Sergeant Hallman	Irrelevant
David Wheeler	Cumulative
James Wright	Relevant (L)
Robert E. Wright, Sr.	Relevant, Plaintiff
Sheilah Wright	Relevant (L)
W. Kirk Wyckoff, or other designee of Progress Bank	Relevant (L)
Allison Berl	Relevant (L)
Alice M. Bucha	Relevant (L)
Armond Byrd	Relevant (L)
Chevy Chase Bank, custodian of records	Relevant (L)
Shirley Christman	Irrelevant
Leanora Ciarletta	Irrelevant
Joseph Conrad	Irrelevant
Ruth S. Damsker	Relevant (L)
Arlene S. Davis	Irrelevant
Debra DeVitis	Irrelevant
Natalie L. DiNolfi	Irrelevant and Cumulative
First Union National Bank, corporate designee	Cumulative
Neil Granese	Irrelevant and Cumulative
William Hanebury	Irrelevant

Johns Eastern Co., Inc., custodial of records	Irrelevant
Karen Kartanowicz	Irrelevant
George Kunin	Irrelevant
Gordan Lawrence	Irrelevant
Madison Bank	Irrelevant
Michael D. Marino	Irrelevant
James W. Matthews	Irrelevant
Cynthia McClanahan	Irrelevant
Detective Sergeant Jeffrey McGee	Irrelevant
James W. McStravick (compliance expert)	Irrelevant
Merchants and Businessman's Mutual Ins. Co., custodian	Irrelevant
James Monroe	Irrelevant
Barbara J. Morgan	Irrelevant
Sharon M. Olszewski	Irrelevant
Stephen O'Neill	Relevant (L)
Crawford & Co.	Irrelevant
Kathy L. Phifer	Irrelevant
Debbie Toal et al., custodian of records	Irrelevant
Progress Federal Savings Bank, corporate designee	Relevant (L)
Lillian Ritts	Irrelevant
Nan Ryan	Irrelevant

Michael Suray	Irrelevant
Joseph Tinaru	Irrelevant
Karen Trimble	Irrelevant
Robert Trostle	Irrelevant
Diane E. Wood	Irrelevant

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
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O R D E R

AND NOW, this 20th day of May, 2002, upon consideration of Plaintiff's Pre-Trial Memorandum (Docket No. 52), Defendants' Supplemental Pre-Trial Memorandum (Docket No. 206), and the Motions in Limine filed by the parties as of the date of this Order, IT IS HEREBY ORDERED that all witnesses not found above to be relevant are **PROHIBITED** from testifying during trial absent a renewed proffer acceptable to the Court after all witnesses presently determined by the Court to have relevant testimony have testified.

BY THE COURT:

HERBERT J. HUTTON, J.