

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

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ELIJAH WARNER,	:	CIVIL ACTION
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Plaintiff,	:	
	:	
v.	:	No. 01-3309
	:	
MONTGOMERY TOWNSHIP,	:	
POLICE CHIEF RICHARD BRADY and	:	
TOWNSHIP MANAGER JOHN	:	
NAGEL,	:	
Defendants.	:	

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**MEMORANDUM**

ROBERT F. KELLY, Sr. J.

JULY 22, 2002

Presently pending before this Court is Defendants’ Motion for Summary Judgment and Plaintiff’s Response. For the following reasons, Defendants’ Motion will be granted.

**I. FACTUAL BACKGROUND**

This action is an employment discrimination case.<sup>1</sup> Elijah W. Warner, Sr. (“Warner”), who is a black male, claims that his employer, Montgomery Township, and its employees, Police Chief Richard Brady (“Brady”) and Township Manager John Nagel (“Nagel”)(collectively, “the Defendants”), wrongfully discharged him because of alleged racial and disability discrimination and retaliation. Specifically, Count I of Warner’s Complaint alleges discrimination pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

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<sup>1</sup> The Court has subject matter jurisdiction over this action under the federal question jurisdiction statute, 28 U.S.C. § 1331, because the case is premised upon various federal statutes and alleges several violation of Plaintiff’s Constitutional rights. 28 U.S.C. § 1331. The Court has subject matter jurisdiction over the state law claims pursuant to 28 U.S.C. §1367.

(“Title VII”), the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. (“ADA”) and 42 U.S.C. § 1981; Count II alleges Intentional Infliction of Emotional Distress; Count III alleges violations of Warner’s First Amendment rights, as well as violations of 42 U.S.C. §§ 1981, 1982, 1983, 1985(1-3) and 1986; Count IV alleges violations of 42 U.S.C. § 1981, Title VII and the Pennsylvania Human Relations Act, 43 P.S. § 951, et seq. (“PHRA”); Count V alleges violations under 42 U.S.C. § 1982; Count VI alleges various state law claims; Count VII alleges violations of Warner’s First and Fourteenth Amendment rights; and Count VIII alleges invasion of Warner’s privacy. See Compl. Warner has stipulated to dismiss Counts VI, entitled “Violation of State Rights”, and Count VIII, entitled “Invasion of Privacy.” (Defs.’ Mem. Law Supp. Mot. Summ. J., Ex. B at 102 (Warner’s Depo.)). As a result of Warner’s stipulation, Counts VI and VIII are dismissed with prejudice.

Montgomery Township hired Warner as a police dispatcher from August 1, 1997 until his employment was terminated on October 5, 2000. (Compl., ¶ 11). As a police dispatcher, Warner was ordinarily assigned to work the midnight shift from 11:00 p.m. to 7:00 a.m. (Defs.’ Mem. Law Supp. Mot. Summ. J. at 8). The midnight shift is relatively quiet and Warner was routinely the only employee in the Police Department or Township Building. (Id.). Warner’s supervisor, Chief Richard Brady, referred to Warner as “Captain Midnight” four or five times throughout Warner’s employment with the Police Department. (Id. at 8-9). Warner never voiced a complaint that the nickname was offensive until the filing of this lawsuit. (Id. at 9).

Throughout Warner’s employment with Montgomery Township he received numerous raises and promotions. (Id. at 2). In fact, Warner is unable to recall if there was ever a time when he was denied a raise or a promotion after the requisite evaluation or promotional

testing. (Id., Ex. B at 178 (Warner’s Depo.)). In 2000, Warner was involved in obtaining a salary and wage increase for all hourly employees. (Id., Ex. G (Montg. Twnsp. Board of Supervisors Ltr. to Warner)). By letter, the Montgomery Township Board of Supervisors informed Warner of the wage increase and thanked him for his “valuable” involvement. (Id.).

In addition to receiving raises and promotions, Warner also received discipline throughout his employment.<sup>2</sup> On numerous occasions, Warner was disciplined for failing to comply with proper police dispatcher policies and procedures. (Defs.’ Mem. Law Supp. Mot. Summ. J. at 3). As part of his discipline, Warner received verbal and written notification of errors, remedial training and numerous suspensions. (Id.). It was at the conclusion of a five day suspension from work that Warner was scheduled to return to work on May 31, 2000. (Id.). On May 31, 2000, Warner called and left a message stating that he would not be returning because he had tremors in his hands. (Id. at 4). “On or about June 1, 2000, [Warner] complained to his doctor of symptoms of unclear etiology, mainly uncontrollable tremors in his right arm and hand, with severe pain in his right shoulder, which made writing and using a keyboard impossible during the tremors.”<sup>3</sup> (Compl., ¶ 14). On June 1, 2000, Warner submitted a handwritten doctor’s note dated May 30, 2000 from the Mount Airy Family Practice to the Police Department “stating

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<sup>2</sup> In the Complaint, Warner claims that he “has had only two minor disciplinary actions taken against him during his employment with defendant.” (Compl., ¶12). However, the Defendants’ Motion for Summary Judgment includes various exhibits which show numerous examples of considerable discipline taken against Warner. Thus, the Defendants exhibits belie Warner’s contention that he had only two minor disciplinary actions taken against him.

<sup>3</sup> Warner claims that he was first diagnosed in April 1999, however, he has failed to offer proof of any diagnosis. In fact, the Defendants state that Warner has never provided any medical report containing any diagnosis of his condition or articulating the reasons for Warner to be on disability. (Defs.’ Mem. Law Supp. Mot. Summ. J. at 8).

that he would be out of work for six months due to tremors in his right hand due to unknown etiology.” (Defs.’ Mem. Law Supp. Mot. Summ. J. at 4). Specifically, the note states as follows:

“Mr. Warner has been under the care of our physicians and other health care professionals for symptoms of unclear etiology. A joint decision has been reached that six months short term disability is warranted for complete diagnosis and treatment.”  
/s/ Linda W. Good, M.D.

(Id., Ex. I (Note Regarding Warner’s Disability Written by Linda W. Good, M.D.)). Notably, the doctor’s note fails to include any diagnosis or description of Warner’s symptoms concerning his disability. (Id.). The note also fails to suggest any reasonable accommodation, such as a split keyboard, to assist Warner in the performance of his employment duties. (Id.).

Based upon the aforementioned doctor’s note, Montgomery Township placed Warner on short term disability. (Id. at 4). As part of its Disability Policy, Montgomery Township scheduled to have Warner examined by one of its doctors, Dr. Matthew Cahill, M.D. (Id. at 5). On June 19, 2000, Dr. Cahill examined and evaluated Warner and his condition. (Id.). During the examination, Warner stated that “he had undergone extensive work-up for this problem, including a neurological examination by Dr. Smith as well as multiple examinations by the Mt. Airy Family Practice, an MRI and a 24 hour electroencephalogram.” (Id.). That same date, Dr. Cahill wrote a report based on his medical examination of Warner. (Id.). Dr. Cahill’s report states the following impression, in pertinent part, as follows:

My impression is that the symptom is likely to be a benign, familiar tremor given the fact that tests and referrals have been made and no pathology has been found, according to the patient. The possibility exists that there is a more distinct neurologic abnormality, perhaps even a focal seizure type of disorder, but apparently appropriate neurological evaluation has been instituted and without further records I cannot say whether there is any

suggestion or evidence of a true seizure disorder.

(Id., Ex. J (Dr. Cahill's Report)). Based on Warner's physical examination and verbal history, without reviewing the other reports and diagnostic studies performed by Dr. Smith and the Mt. Airy Family Practice, Dr. Cahill concluded that Warner was not disabled and could safely return to work. (Id.).

After receiving Dr. Cahill's report, Montgomery Township and the Police Department concluded that it could not determine whether Warner was disabled until Dr. Cahill had reviewed the reports and diagnostic studies performed by Dr. Smith and the Mt. Airy Family Practice. (Id. at 6). On July 20, 2000, Montgomery Township forwarded correspondence to Warner informing him of his rights and responsibilities under the Township's Disability Policy and the Family and Medical Leave Act. (Id.). Following up on its July 20, 2000 letter, Montgomery Township sent Warner a second letter dated July 24, 2000 confirming his signing of a medical release form and requesting that he advise the Township if he was seeing any other doctors regarding his disability. (Id.). In keeping with its Disability Policy, the Township forwarded correspondence dated August 10, 2000 requesting that Warner complete various sections of the long term disability claim form. (Id.).

After receiving and reviewing various medical records concerning Warner, Dr. Cahill issued a supplemental report dated August 15, 2000. (Id., Ex. N (Dr. Cahill's Suppl. Report)). Upon a complete review of the newly acquired records and Warner's previous examination, Dr. Cahill once more expressed the opinion that Warner "may safely return to work given that the only limitation in his functioning is perhaps a maximum of ten minutes of tremor total during any day, and typically much less." (Id.). Following the receipt of Dr. Cahill's

supplemental report, Nagel and Brady conferred and determined that Warner was not disabled and was able to return to work. (Id. at 7). In order to accommodate Warner’s tremors, Montgomery Township and the Police Department determined that Warner would be scheduled for the day shift with another dispatcher upon his initial return to work. (Id.). “The reasoning of the Defendants was that a second dispatcher would be able to assist and take over the Plaintiff’s duties for whatever brief period of time the Plaintiff might be suffering from a tremor of the right hand.” (Id.). Consequently, the Defendants sent Warner a letter dated September 6, 2000 informing him that he was to return to work the day shift on September 11, 2000 and that he was scheduled to work from September 11, 2000 through September 15, 2000 with another dispatcher. (Id.).

On September 10, 2000, one day prior to when Warner was scheduled to return to work, Warner left Chief Brady a voice mail message informing him “that he had to go to court on a child support matter for September 11, 2000 and that he had a follow-up appointment with his doctor for September 12, 2000.”<sup>4</sup> (Compl., ¶ 22). On September 12, 2000, Warner called the Police Department and left a voice message stating that his doctor told him to stay home and that he had completed his long term disability paperwork. (Defs.’ Mem. Law Supp. Mot. Summ. J. at 8). Warner has never forwarded any documentation confirming his court appearances or any documentation from his doctors substantiating their September 10, 2000 advices that Warner stay

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<sup>4</sup> The Defendants contend that Warner informed them that he could not return to work on September 11, 2000 because of a court appearance, but he advised that he would return to work on September 12, 2000. (Defs.’ Mem. Law Supp. Mot. Summ. J. at 7). The Defendants also contend that Warner called the Police Department later on September 11, 2000 to advise that he was attempting to have his “support” reduced and that he had a follow-up appointment with his doctor. (Id. at 8).

home from work. (Id.). Additionally, Warner has not provided to the Defendants any medical report containing any diagnosis of his condition or articulating the reasons for being on disability. (Id.). By letter dated October 23, 2000, Montgomery Township terminated Warner's employment effective as of October 5, 2000. (Compl., ¶ 24). The Defendants' termination letter states the reasoning for terminating Warner's employment was his failure to appear for work as directed by the Chief of Police and his failure to provide any documentation to substantiate his claim for disability. (Defs' Mem. Law Supp. Mot. Summ. J., Ex. P (Montg. Twnshp Police Dep't Ltr of Termination)).

On November 20, 2000, Warner dual filed a charge of discrimination in violation of the ADA with the Equal Employment Opportunity Commission ("EEOC") and the Pennsylvania Human Relations Commission. (Id., Ex. A (EEOC Compl.)). The EEOC issued a Notice of Right to Sue on April 4, 2001. (Compl., ¶ 4). Warner filed the instant action in this Court on July 2, 2001. Presently, the Court is addressing the Defendants' Motion for Summary Judgment and Warner's response which he labels "Reply Memorandum in Opposition to Defendants' Motion for Summary Judgment."<sup>5</sup>

## **II. STANDARD**

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<sup>5</sup> The Court notes that Warner's Reply Memorandum in Opposition to Defendants' Motion for Summary Judgment is unclear. For instance, the Memorandum fails to respond to some of the Defendants' arguments. As for the portion of the Memorandum dealing with the Defendants' arguments, many times it expansively cites caselaw, but does not provide sufficient analysis to the instant case. As a result, the Court has been forced to sift through the Memorandum, trying to decipher and organize Warner's arguments in a comprehensive manner.

Regarding substantiation of his claims, the only exhibits attached to Warner's Reply Memorandum are copies of Warner's entire deposition and copies of the Defendants' Answer and First Amended Answer. However, in his Memorandum, Warner fails to specifically cite to these exhibits in support of his arguments against the Defendants' Motion for Summary Judgment.

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper “if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(c). Essentially, the inquiry is “whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-252 (1986). The moving party has the initial burden of informing the court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). An issue is genuine only if there is a sufficient evidentiary basis on which a reasonable jury could find for the non-moving party. Anderson, 477 U.S. at 249. A factual dispute is material only if it might affect the outcome of the suit under governing law. Id. at 248.

To defeat summary judgment, the non-moving party cannot rest on the pleadings, but rather that party must go beyond the pleadings and present “specific facts showing that there is a genuine issue for trial.” FED. R. CIV. P. 56(e). Similarly, the non-moving party cannot rely on unsupported assertions, conclusory allegations, or mere suspicions in attempting to survive a summary judgment motion. Williams v. Borough of W. Chester, 891 F.2d 458, 460 (3d Cir. 1989)(citing Celotex, 477 U.S. at 325 (1986)). Further, the non-moving party has the burden of producing evidence to establish *prima facie* each element of its claim. Celotex, 477 U.S. at 322-23. If the court, in viewing all reasonable inferences in favor of the non-moving party, determines that there is no genuine issue of material fact, then summary judgment is proper. Id. at 322; Wisniewski v. Johns-Manville Corp., 812 F.2d 81, 83 (3d Cir. 1987).

### **III. DISCUSSION**

Warner's Complaint specifically includes eight counts. See Compl. However, the paragraphs included within each individual count contains sub-claims based on various federal and state laws. Id. For purposes of clarity, the Court will first address the specific count and then will segregate out the included sub-claims.

### **A. Count I - Title VII**

The first count of Warner's Complaint is entitled "Title VII." (Compl., ¶¶ 11-28). Pursuant to the terms of Title VII, it is unlawful 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 . . . ." 42 U.S.C. § 2000e-2(a). Warner's claim primarily relies upon the allegation that he suffered discriminatory treatment in his employment because of his disability. Warner also nebulously inserts a claim of discriminatory treatment based on race and retaliation. In addition to Title VII, Warner includes contentions that the Defendants knowingly violated the ADA and 42 U.S.C. § 1981.<sup>6</sup> (Compl., ¶ 28.). The Defendants proffer two arguments regarding Warner's Title VII claim. See Defs.' Mem. Law Supp. Mot. Summ. J. First, they argue that all of Warner's Title VII claims, other than the ADA claim, must be dismissed for failure to exhaust the requisite administrative remedies. Second, in relation to the ADA claim, the Defendants argue that it should also be dismissed because Warner fails to set

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<sup>6</sup> It appears that Warner's Complaint does not specifically state that Count I, entitled "Title VII", includes a PHRA claim. (Compl., ¶¶ 11-28). However, the Court notes that "[c]ourts have uniformly interpreted the PHRA and Title VII; thus, any conclusions under Title VII analysis will be equally applicable to [a] PHRA claim." Tupper v. Haymond & Lundy, No. 00-3550, 2001 WL 936650, at \*2 (E.D. Pa. Aug.16, 2001)(citing Gautney v. Amerigas Propane, Inc., 107 F. Supp.2d 634, 640 (E.D. Pa. 2000)).

forth a claim upon which relief can be granted. In his response, Warner does not respond to the Defendants' argument that his race and retaliation claim under Title VII must be dismissed because he did not exhaust the requisite administrative remedies. As for the Defendants' second argument that Warner has not proven an ADA claim, Warner relies upon his own unsupported assertions and conclusory allegations to respond that his ADA claim should not be dismissed.

## **1. Title VII**

### **a. Racial Discrimination and Retaliation Claims**

#### **1. Exhaustion of Administrative Remedies Regarding Racial Discrimination and Retaliation**

Prior to "bringing suit in a federal court alleging violations of Title VII and the PHRA, it is well-settled that a plaintiff must exhaust h[is] administrative remedies by first filing a charge with the appropriate agency."<sup>7</sup> Ivory v. Radio One, Inc., No. 01-5708, 2002 WL 501489, at \*2 (E.D. Pa. Apr. 3, 2002)(footnote omitted). "The scope of the civil complaint is accordingly limited by the charge filed with the EEOC and the investigation which can reasonably be expected to grow out of that charge." Reddinger v. Hosp. Cent. Servs., Inc., 4 F. Supp.2d 405, 409 (E.D. Pa. 1998)(citation omitted). In order to decipher whether a plaintiff has failed to exhaust administrative remedies, the test "is whether the acts alleged in the subsequent . . . suit are fairly within the scope of the prior EEOC complaint, or the investigation arising therefrom." Id. (citing Antol v. Perry, 82 F.3d 1291, 1295 (3d Cir. 1996)(citations omitted)).

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<sup>7</sup> Similar to Title VII, "[t]he PHRA also requires the exhaustion of administrative remedies before suit may be filed in court." Schouten v. CSX Transp., Inc., 58 F. Supp.2d 614, 617 (E.D. Pa. 1999)(citing Churchill v. Star Enters., 183 F.3d 184, 190 (3d Cir.1999)). "Moreover, the analysis of whether a plaintiff has failed to exhaust those remedies under the PHRA is identical to that of whether he or she has done so under Title VII." Id. (citation omitted).

The determination of whether a judicial complaint is within the scope of an earlier administrative charge or a reasonable investigation therefrom “turns on whether there is a close nexus between the facts supporting each claim or whether additional charges made in the judicial complaint may fairly be considered explanations of the original charge or growing out of it.” Fakete v. Aetna Inc., 152 F. Supp.2d 722, 732 (E.D. Pa. 2001)(citation omitted). The factual statement is the most important consideration in determining whether a judicial complaint is sufficiently related to an administrative charge. Ivory, 2002 WL 501489, at \*2 (citing Doe v. Kohn Nast & Graf, P.C., 866 F. Supp. 190, 196 (E.D. Pa. 1994)).

Warner’s EEOC complaint does not contain a charge of racial discrimination or retaliation. Not only does Warner’s EEOC complaint fail to charge racial discrimination or retaliation, it fails to set forth information that would constitute notice of such claims. In his EEOC complaint, Warner failed to mark the boxes individually labeled racial discrimination and retaliation as causes of discrimination. Significantly, Warner did not make any factual allegations of racial discrimination or retaliatory conduct on the part of the Defendants. Instead, the factual statement in Warner’s EEOC complaint refers only to his alleged disability and the Defendants’ allegedly wrongful termination based on such disability. Nowhere in Warner’s EEOC complaint does he allege the Defendants engaged in racially discriminatory or retaliatory conduct. Therefore, viewing the facts in a light most favorable to Warner, the Court concludes that Warner has failed to exhaust the requisite administrative remedies because his EEOC complaint failed to put the EEOC and the Defendants on notice that he alleged racial discrimination and retaliation in his employment. Based on the above, the Court grants the Defendants’ Motion for Summary Judgment on Warner’s Title VII claims based upon racial

discrimination and retaliation.

**b. Disability Discrimination Claim**

It appears that Warner's Title VII claim is based primarily upon alleged disability discrimination. Since Warner's race and retaliation claims have been dismissed for failure to exhaust, Warner's disability claim is his only remaining Title VII claim. As mentioned earlier, Title VII creates a cause of action for employment discrimination based on an individual's "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). "Disability is not among the enumerated bases for a Title VII suit, and therefore a claim for disability discrimination brought under Title VII cannot survive." Diep v. Southwark Metal Mfg. Co., No. 00-6136, 2001 WL 283146, at \*2 (E. D. Pa. Mar. 19, 2001); see also Brennan v. Nat'l Tel. Directory Corp., 881 F. Supp. 986, 997 (E. D. Pa. 1995)(stating "while Title VII prohibits discrimination based upon a person's 'race, color, religion, sex, or national origin' . . . it does not prohibit disability discrimination. Thus, such claims are not cognizable under Title VII."). "The proper avenue for a disability suit is, of course, the American with Disabilities Act, which explicitly provides a legal remedy for discrimination on the basis of disability." Id. (citing 42 U.S.C. §12112(a)(footnote omitted)). Since Warner has brought an ADA claim within this count, the Court will address this disability claim therein and will grant the Defendants' summary judgment regarding Warner's disability claim premised upon Title VII. As a result of the aforementioned, the Court dismisses Warner's Title VII claim in its entirety.

## 2. ADA Claim<sup>8</sup>

### a. Framework of an ADA Claim

The ADA prohibits an employer from discriminating “against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” 42 U.S.C § 12112(a). “The decision whether to grant or deny summary judgment in an employment discrimination action under the ADA is governed by the Supreme Court’s burden-shifting analysis in McDonnell Douglas v. Green, 411 U.S. 792 (1973), recently clarified in Reeves v. Sanderson Plumbing Products, 530 U.S. 133 (2000).” Law v. Garden State Tanning, 159 F. Supp.2d 787, 791 (E.D. Pa. 2001)(citing McNemar v. Disney Store, Inc., 91 F.3d 610, 619 (3d Cir.1996)). “Under this analysis, the plaintiff must first make out a *prima facie* case of

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<sup>8</sup> In his Complaint, Warner does not clearly state what type of claim he is attempting to bring under the ADA. “There are two distinct types of claims under the ADA--disparate treatment claims and failure to accommodate claims.” Taylor v. Phoenixville Sch. Dist., 113 F. Supp.2d 770, 776 n. 3 (E.D. Pa. 2000). “In the former type of claim, a plaintiff without direct proof of discrimination may use the McDonnell Douglas test to meet his burden indirectly.” Id. However, “[i]n the latter type of claim . . . the McDonnell Douglas test does not apply.” Id. “Once a plaintiff alleges facts that, if proven, would show that an employer should have reasonably accommodated an employee’s disability and failed to, the employer has discriminated against the employee.” Ferreri v. Mac Motors, Inc., 138 F. Supp.2d 645, 651 n.1 (E.D. Pa. 2001)(citations omitted).

Since Warner frames his ADA claim as one involving disparate treatment and failure to accommodate, the Court assumes that Warner’s ADA claim includes both a disparate treatment claim and a failure to accommodate claim. Although Warner alludes to being denied reasonable accommodation, such as a split keyboard, the Court concludes that Warner has not established any facts showing that the Defendants should have reasonably accommodated his alleged disability and failed to so accommodate. Warner provides neither relevant analysis nor evidence to support his failure to accommodate claim. As a result, the Court concludes that Warner’s failure to accommodate ADA claim is dismissed. Accordingly, the Court’s analysis of Warner’s ADA claim is based upon his disparate treatment claim.

discrimination.” Id. To create “a prima facie case of disparate treatment under the ADA, a plaintiff must show ‘(1) he is a disabled person within the meaning of the ADA; (2) he is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer; and (3) he has suffered an otherwise adverse employment decision as a result of discrimination.’” Shaner v. Synthes, 204 F.3d 494, 500 (3d Cir. 2000)(quoting Gaul v. Lucent Techs., Inc., 134 F.3d 576, 580 (3d Cir.1998)). “Once the plaintiff does so, the defendant must present a legitimate, non-discriminatory reason for the negative employment decision.” Law, 159 F. Supp.2d at 791. In order to survive summary judgment, the plaintiff must then show by a preponderance of the evidence that “the reason presented by the defendant is pretextual, either by showing that the defendant’s reason is ‘unworthy of credence,’ Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981), or by showing that the real motivation was more likely than not discriminatory.” Id. (citations omitted). In conjunction with the McDonnell Douglas analysis, it is important to note that “[w]hile the burden of production may shift, ‘[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.’” Jones v. Sch. Dist. of Phila., 198 F.3d 403, 410 (3d Cir. 1999)(quoting Texas Dep’t of Cmty. Affairs, 450 U.S. at 252-53).

#### **b. Analysis of Warner’s ADA Claim<sup>9</sup>**

In the interest of expediency, even though the Defendants strongly argue Warner

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<sup>9</sup> The ADA analysis in this case applies equally to Warner’s PHRA claims because the legal analysis for an ADA claim is identical to that of a claim submitted under the PHRA. Kelly v. Drexel Univ., 94 F.3d 102, 105 (3d Cir.1996).

has failed to establish his *prima facie* case, the Court will assume for purposes of this Opinion that Warner has met his initial burden of establishing his *prima facie* case. Assuming *arguendo* that Warner has established his *prima facie* case, the burden of production then shifts to the Defendants to articulate some legitimate, nondiscriminatory reason for Warner's termination. In order to satisfy their burden of production, the Defendants only need to "introduc[e] evidence which, taken as true, would permit the conclusion that there was a nondiscriminatory reason for the unfavorable employment decision." Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994)(citation omitted). The Defendants' legitimate, nondiscriminatory reasons for Warner's termination are his failure to appear for work as directed by the Chief of Police and his further failure to provide any documentation to substantiate his claim for disability. Having satisfied their burden by providing nondiscriminatory reasons for terminating Warner, the burden shifts back to Warner to show, by a preponderance of the evidence, that the reasons presented are pretextual.

Viewing the evidence in the light most favorable to Warner, the Court concludes that he has failed to carry his burden of showing pretext. A plaintiff can demonstrate pretext in two different ways. Ferreri v. Mac Motors, Inc., 138 F. Supp.2d 645, 649 (E.D. Pa. 2001). "The plaintiff must point 'to some evidence, direct or circumstantial, from which a fact-finder would reasonably either: (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action.'" Id. (quoting Jones, 198 F.3d at 413 )(citations omitted). In order to satisfy the first section, a plaintiff is required "to show 'such weaknesses, implausibilities,

inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its actions that a reasonable factfinder could rationally find them unworthy of credence.'" Id. (quoting Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101, 1108-09 (3d Cir.1997)). "In other words, to succeed the plaintiff must demonstrate that 'the employer's articulated reason was not merely wrong, but that it was so plainly wrong that it cannot have been the employer's real reason.'" Id. (quoting Jones, 198 F.3d at 413 )(quotation marks omitted). As for the second section, "[t]here are a number of ways by which this burden can be met, including by showing 'that the employer previously discriminated against [the plaintiff], that the employer has previously discriminated against other persons within the plaintiff's protected class, or that the employer has treated more favorably similarly situated persons not within the protected class.'" Id. (quoting Fuentes, 32 F.3d at 764).

In this case, Warner offers no evidence to discredit the Defendants' proffered legitimate reasons for terminating his employment. Warner fails to point to any evidence, direct or circumstantial, that could lead a fact-finder to disbelieve the Defendants' proffered reason for his termination or believe that discrimination was more likely than not a motivating factor in his termination. Without pointing to any evidence whatsoever, Warner relies solely upon his bare allegations and conclusions in attempting to show that the Defendants' proffered reasons for his dismissal are pretextual. After examining the record, the Court finds that there is nothing that indicates any inconsistencies or weaknesses in the Defendants' reasons for Warner's termination. Likewise, there is no evidence showing that the Defendants previously discriminated against Warner based on his disability or any other similarly situated employee. Interestingly, Warner's

own Reply Memorandum lends credence to the Defendants' proffered nondiscriminatory reasons by stating that "Defendant[s] terminated Plaintiff for failure to provide documentation of his court appearance . . . and his doctor's appointment." (Pl.'s Reply Mem. Opp'n Defs.' Mot. Summ. J. at 3). As a result of the aforementioned, the Court concludes that the Defendants are entitled to summary judgment regarding Warner's ADA claim because the Defendants have produced nondiscriminatory reasons to support their decision to terminate, which Warner has failed to discredit. Accordingly, Warner has not carried his burden under the McDonnell Douglas framework and we will grant the Defendant's summary judgment with respect to Warner's ADA claim.

### **3. 42 U.S.C. § 1981**

The Court will address this issue in Part III.D. Part III.D. fully addresses Warner's Count IV which is entitled "Violation of 42 U.S.C. § 1981."

### **B. Count II - Intentional Infliction of Emotional Distress<sup>10</sup>**

The second count of Warner's Complaint, entitled "Intentional Infliction of Emotional Distress", alleges that Warner suffered emotional distress due to various members of the Police Department inquiring into the progress of his psychiatric therapy and his personal well-being. (Compl., ¶¶ 29-40)(stating "[v]arious township supervisors would often stop by the

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<sup>10</sup> Although the Defendants mention dismissing Warner's intentional infliction of emotional distress claim in their Motion for Summary Judgment, they inexplicably fail to specifically address the merits for such dismissal. (Defs.' Mem. Law Supp. Mot. Summ. J.). However, in his Reply Memorandum, Warner addresses the merits of why his intentional infliction of emotional distress claim should not be dismissed. (Pl.'s Reply Mem. Opp'n Defs.' Mot. Summ. J. at 22-23). Thus, Warner had notice and utilized the opportunity to oppose summary judgment regarding his intentional infliction of emotional distress claim. See Otis Elevator Co. v. George Washington Hotel Corp., 27 F.3d 903 (3d Cir. 1994).

communication center after their evening meetings and ask Plaintiff how he was doing and if everything was all right.”). In his Complaint, Warner’s intentional infliction of emotional distress claim is based solely on allegations concerning inquiries into Warner’s psychiatric health. However, in his Reply Memorandum, Warner seems to solely rely upon the alleged racial discrimination and retaliation that he suffered as the basis for his claim. (Pl.’s Reply Mem. Opp’n Defs.’ Mot. Summ. J. at 22-23). Specifically, Warner states that his claim should not be dismissed because he has alleged a pattern of racial harassment and retaliation, thus “Plaintiff has sufficiently pled a cause of action of intentional infliction of emotional distress.” (Id. at 23). Nevertheless, taking the facts of the entire claim in the light most favorable to Warner, the Court finds that the Defendants are entitled to summary judgment on Warner’s claim for intentional infliction of emotional distress.

In order to establish a claim for intentional infliction of emotional distress, Warner must show that the Defendants’ conduct was: (1) extreme and outrageous; (2) intentional or reckless; and (3) caused severe emotional distress. Wisniewski v. Johns-Manville Corp., 812 F.2d 81, 85 (3d Cir. 1987)(citations omitted). Under Pennsylvania law, liability can only be found where the conduct is “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society.” Hoy v. Angelone, 720 A.2d 745, 754 (Pa. 1998)(quoting Buczek v. First Nat’l Bank of Mifflintown, 366 Pa. Super. 551, 558 (1987)). The Court has the “responsibility to determine if the conduct alleged in the instant case reaches the requisite level of outrageousness.” Hitchens v. City of Montgomery, No. 00-4282, 2002 WL 253939, at \*10 (E.D. Pa. Feb. 20,

2002)(citing Cox v. Keystone Carbon, 861 F.2d 390, 395 (3d Cir. 1988)). In order to recover for intentional infliction of emotional distress in Pennsylvania, Warner is required to support his claim with competent medical evidence, in the form of expert medical evidence. Rosenberg v. Vangelo, No. 01-2514, 2002 WL 576109, at \*4 (E.D. Pa. Apr. 18, 2002)(citing Bolden v. S.E. Pa. Transp. Auth., 21 F.3d 29, 35 (3d Cir. 1994); DeBellis v. Kulp, 166 F. Supp.2d 255, 281 (E.D. Pa. 2001)).

The Court concludes that the Defendants are entitled to summary judgment on Warner's Count II for two reasons. First, Warner has failed to show that the Defendants' conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society." Hoy, 720 A.2d at 754. That is, the conduct alleged by Warner fails to rise to a sufficient level of egregious conduct to allow this case to proceed. Second, Warner has failed to offer any competent medical evidence that he suffered severe emotional distress. In fact, Warner has shown absolutely no medical evidence to support his claim. Warner has not attached any affidavits or medical reports showing that he has competent medical evidence revealing severe emotional distress. The only evidence submitted by Warner in support of his claim is his own conclusory testimony, which is insufficient to sustain his evidentiary burden. Therefore, the Defendants are entitled to summary judgment on this Count because the alleged conduct does rise to the level of outrageousness necessary to sustain such a claim and Warner is unable to sustain his evidentiary burden with expert medical proof that he suffered severe emotional distress.

### **C. Count III - Violation of First Amendment Rights**

The third count of Warner’s Complaint is entitled “Violation of First Amendment Rights.” (Compl., ¶¶ 41-61). Upon reading Warner’s third count, he alleges that his First Amendment rights were violated by the Defendants in retaliation for his speaking in support of a more equitable wage package and unionization of dispatchers. (Id.). Thus, in Count III, Warner purports to bring a direct cause of action under the United States Constitution. (Id.). “However, such claims are impermissible because § 1983 provides an adequate, alternative remedial scheme for plaintiff’s alleged constitutional violations.” Smith v. Sch. Dist. of Phila., 112 F. Supp.2d 417, 430 (E.D. Pa. 2000)(citing Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971)(noting that when a plaintiff has a remedy under § 1983, it is the exclusive remedy for alleged constitutional violations); Scott v. Rieht, 690 F. Supp. 368 (E.D. Pa.1988)). Since a direct constitutional action under the First Amendment is precluded, Warner’s Count III must be dismissed. The Court notes, however, that Warner has included a Section 1983 claim in Count VII, entitled “Violation of 42 U.S.C. §1983”, which includes claims virtually identical to this count. Therefore, the Court will fully address Warner’s constitutional claim in its analysis of Count VII.

In addition to allegations of direct constitutional violations, Warner’s Count III also includes claims of violations of 42 U.S.C. §§ 1981, 1982, 1983, 1985(1-3) and 1986.<sup>11</sup>

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<sup>11</sup> The Court notes that Warner’s Complaint is neither clear nor specific. In addition to his “Violation of First Amendment Rights” claim, Count III includes allegations of violations of 42 U.S.C. §§ 1981, 1982, 1983, 1985(1-3) and 1986. All of these claims are conglomerated into one paragraph, without any distinction as to the factual basis for each claim or as to which claims are asserted against specific Defendants. See Compl., ¶¶ 41-61. Using the Complaint and Warner’s Reply Memorandum, the Court has used its best efforts to fully understand and address all of Warner’s claims.

(Compl., ¶¶ 60). Although the Court has dismissed the section of Count III dealing with the alleged constitutional violations, which is the majority of the claim, the Court will fully address each sub-claim below.

**1. 42 U.S.C. § 1981**

The Court will address this issue in Part III.D. Part III.D. fully addresses Warner’s Count IV which is entitled “Violation of 42 U.S.C. §1981.”

**2. 42 U.S.C. § 1982**

The Court will address this issue in Part III.E. Part III.E. fully addresses Warner’s Count V which is entitled “Violation of 42 U.S.C. §1982.”

**3. 42 U.S.C. § 1983**

The Court will address this issue in Part III.G. Part III.G. fully addresses Warner’s Count VII entitled “Violation of 42 U.S.C. §1983.”

**4. 42 U.S.C. §1985(1-3)**

**a. 42 U.S.C. §1985(1)**

42 U.S.C. § 1985(1) provides, in pertinent part, that an injured party may have an action for the recovery of damages “[i]f two or more persons . . . conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof . . . .” 42 U.S.C. § 1985(1). “Section 1985(1) ‘governs interference with the duties of federal officials only . . . .’” Hitchens, 2002 WL 253939, at \*11 (quoting Robison v. Canterbury Vill., Inc., 848 F.2d 424, 430 n. 5 (3d Cir. 1988)). Accordingly, in order to state a claim under Section 1985(1), a plaintiff is

required to allege that he is a federal officer and that Defendants interfered with his official federal duties. *Id.* (citing *Indus. Design Serv. Co. v. Upper Gwynedd Township*, No. 91-7621, 1993 WL 19756, at \*4 (E.D. Pa. Jan. 27, 1993)(stating “Section 1985(1) prohibits interference with federal officials in the performance of their duties . . . . Since plaintiffs have not alleged any facts involving . . . a federal officer . . . they fail to state a cause of action under [this] provision[.]”). In the instant case, Warner fails to make any allegations, or proffer any evidence, that he is a federal officer or that the Defendants have interfered with his official federal duties. As a result, the Court grants summary judgment on Warner’s Section 1985(1) claim.

**b. 42 U.S.C. 1985(2)**

42 U.S.C. § 1985(2), which provides a cause of action against persons who conspire to obstruct justice, creates a cause of action where

two or more persons ... conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict ...; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws.

42 U.S.C. § 1985(2). This statute includes two general categories of claims. *Messa v. Allstate Ins. Co.*, 897 F. Supp. 876, 881 (E.D. Pa.1995). The two categories in which the cause of action under Section 1985(2) will lie are “when there has been obstruction of justice, including, for instance, intimidating or injuring witnesses, and when there has been a conspiracy for the

purpose of impeding the due course of justice in any state or territory.” Altieri v. Penn. State Police, No. 2000 WL 427272, at \*16 (E.D. Pa. Apr. 19, 2000)(citing Messa, 897 F. Supp. at 881)). Warner fails to state which category of Section 1985(2) he bases his claim. However, under either category, Warner’s Section 1985(2) claim fails.

Viewing the facts in a light most favorable to Warner, the Court concludes that summary judgment must be granted regarding Warner’s claim. Turning to the first category of Section 1985(2), Warner has neither alleged nor presented evidence that there was any obstruction of justice involving a court proceeding or testimony in court. As for the second category of Section 1985(2), Warner has not produced any evidence supporting a claim that there was a conspiracy concerning racial or other class-based invidiously discriminatory animus for the purpose of obstructing justice. Although Warner broadly alleges a conspiracy in his Complaint, he has failed to offer any evidence, specific or otherwise, that there was any conspiracy by the Defendants against him. As a result, the Court finds no evidence of record suggesting a conspiracy by the Defendants against Warner. Thus, the Court shall grant summary judgment in favor of the Defendants on Warner’s 1985(2) claim because he has failed to create a genuine issue of material fact as to whether the Defendants violated his rights under either category of Section 1985(2).

**c. 42 U.S.C. §1985(3)**

Section 1985(3) creates a cause of action against any two persons who “conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . .” 42

U.S.C. § 1985(3). In order to establish a cause of action under § 1985(3), a plaintiff must show:

“1) a

conspiracy; (2) motivated by a racial or class based discriminatory animus designed to deprive, directly or indirectly, any person or class of persons to the equal protection of the laws; (3) an act in furtherance of the conspiracy; and (4) an injury to person or property or the deprivation of any right or privilege of a citizen of the United States.” Lake v. Arnold, 112 F.3d 682, 685 (3d Cir. 1997)(citing United Brotherhood of Carpenters and Joiners of America, Local 610 v. Scott, 463 U.S. 825, 828-29 (1983); Griffin v. Breckenridge, 403 U.S. 88, 102-03 (1971)). Since Warner has failed to offer any evidence of a conspiracy by the Defendants, *see supra* part III.C.b., he has failed to show the first element required to establish a cause of action under Section 1985(3).

Accordingly, the Court grants summary judgment to the Defendants on this claim.

#### **5. 42 U.S.C. §1986**

Plaintiff alleges a violation under 42 U.S.C. § 1986. Section 1986 states, in relevant part, the following:

[e]very person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured ... for all damages caused by such wrongful act, which such persons by reasonable diligence could have prevented.

42 U.S.C. § 1986. “Claims under [Section] 1986 can only be maintained if a cause of action has been established under § 1985.” Ocasio v. Lehigh Valley Family Med. Health Ctr, No. 99-4091, 2000 WL 1660153, at \*3 (E.D. Pa. Nov. 6, 2000)(citing Rogin v. Bensalem Township, 616 F.2d

680, 696 (3d Cir. 1980)(citation omitted)). Since Warner has failed to assert a valid Section 1985 claim, he lacks standing to assert a Section 1986 claim. Therefore, the Defendants are entitled to summary judgment regarding Plaintiff's Section 1986 claim.

**D. Count IV- Violation of 42 U.S.C. §1981<sup>12</sup>**

Count IV of Warner's Complaint, entitled "Violation of 42 U.S.C. §1981", alleges that Warner suffered racially discriminatory treatment at his job, thereby creating a hostile work environment in violation of 42 U.S.C. § 1981, Title VII and the PHRA. (Compl., ¶¶ 62-81).<sup>13</sup> The Defendants argue that Warner's Count IV should be dismissed because he cannot demonstrate "purposeful discrimination", since he "was always granted raises and promotions, and never denied any available opportunities of his employment due to his race or national origin." (Defs.' Mem. Law Supp. Mot. Summ. J. at 18). Additionally, the Defendants allege that Warner is unable to prove any "purposeful discrimination" because he had "a general complaint about the way the Township was operating as a whole." (*Id.*). In support of this contention, the Defendants rely upon Warner's deposition testimony. During his deposition, when counsel for the Defendants specifically questioned Warner about his employment and his treatment as an

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<sup>12</sup> Warner's lack of clarity has forced this Court to construe what Warner is actually alleging in his Section 1981 claim. In his Complaint, Warner appears to base his Section 1981 claim upon a wrongful termination based on race. However, in his Reply Memorandum, Warner alleges that his claim under Section 1981 also involves a claim of retaliation for opposing racially offensive conduct. Thus, the Court gleans that Warner's claim is based on both wrongful termination based on race and retaliation under Section 1981. Accordingly, the Court will address Warner's Section 1981 claim in two sections, (1) Section 1981 claim and (2) Section 1981 retaliation claim.

<sup>13</sup> Even though Warner alleges violations of Section 1981, Title VII and the PHRA, the Court will only address Warner's Section 1981 claim because his Title VII and PHRA claims have been previously decided in Part III.A. of this Opinion.

African-American, Warner replied that he was working in a tainted environment. (Id., Ex. B, pp 170-72 (Warner’s Depo)). As Warner was questioned further, he responded that the “tainted environment” at the Police Department was “not solely based on African -- being African American. It is solely based on a juvenile mentality that you would only find prominent probably in high schools or junior high schools.” (Id.). Warner went on to state that, due to the way things were run around the Department, everyone had to conform in order “to fit into the click”, whether one was white, black, Puerto Rican, Jewish, Catholic or Muslim. (Id.).

In his Reply Memorandum, without providing a shred of evidence, Warner summarily claims that his Section 1981 claim should not be dismissed because the Defendants’ treatment of Warner can raise an inference of pretext. (Pl.’s Reply Mem. Opp’n Defs.’ Mot. Summ. J. at 13). Warner relies upon his own bare allegations of receiving discriminatory and retaliatory treatment and the three or four times that Captain Brady referred to him as “Captain Midnight” to show an inference of pretext.<sup>14</sup> (Id.).

### **1. Section 1981 Claim**

Section 1981 prohibits racial discrimination in the making and enforcement of

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<sup>14</sup> The Defendants contend that Chief Brady referred to Warner as “Captain Midnight” because he was assigned to work the night shift from 11:00 p.m. to 7:00 a.m. and he was normally the only employee in the Police Department during that time. (Defs.’ Mem. Law Supp. Mot. Summ. J. at 8). Warner states that he was given the nickname because he “was the black man on the 11:00 p.m. to 7:00 a.m. shift.” (Id., Ex. B, p. 175 (Warner’s Depo.)). Interestingly, Warner does not contest the statements made by the Defendants that Warner “never complained to Chief Brady that he perceived [the] nickname [Captain Midnight] to be offensive . . . . [n]ever alleged in his Complaint that he asked Defendant Brady to stop calling him Caption [sic] Midnight, or that he found it to be offensive, or that he complained to any other Township supervisors of his alleged racial remark.” (Defs.’ Mem. Law Supp. Mot. Summ. J. at 15).

contracts and property transactions.<sup>15</sup> Brown v. Philip Morris Inc., 250 F.3d 789, 796 (3d Cir.

2001)(citing 42 U.S.C. §1981(a)). Section 1981, provides in pertinent part:

(a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . .

(b) For purposes of this section, the term “make and enforce contracts” includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, relationships, privileges, terms, and conditions of the contractual

(c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

See 42 U.S.C. § 1981(a)-(c). In order “[t]o sustain a section 1981 discrimination claim, Plaintiff must show that Defendants intentionally discriminated against h[im] ‘because of race in the making, performance, enforcement or termination of a contract or for such reason denied her the enjoyment of the benefits, terms or conditions of the contractual relationship.’” Hitchens v. County of Montgomery, No. 01-2564, 2002 WL 207180, at \*5 (E.D. Pa. Feb. 11, 2001)(quoting McBride v. Hosp. of the Univ. of Pa., No. 99-6501, 2001 WL 1132404, at \*3 (E.D. Pa. Sept. 21, 2001))(citation and footnote omitted). In order to establish a Section 1981 discrimination claim,

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<sup>15</sup> “Unlike under Title VII, under Section 1981 a municipality cannot be held liable based on a theory of respondeat superior.” Phillips v. Heydt, 197 F. Supp.2d 207, 221 (E.D. Pa. 2002). Thus, in order “[f]or municipal liability to attach, a plaintiff must demonstrate that the alleged discriminatory practice rose to the level of an ‘official policy or custom.’” Id. (citing Monell v. Dep’t of Soc. Servs. of City of New York, 436 U.S. 658, 692-95 (1978); Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 735-36 (1989)). In the instant case, Warner has not offered any evidence, other than his own bare assertions and allegations, that the Defendants’ alleged racial discrimination rose to the level of an official policy of Montgomery Township. As a result, the Court concludes that Warner has failed to attach municipal liability to Montgomery Township regarding his Section 1981 claims.

a plaintiff must show the following: “(1) [that plaintiff] is a member of a racial minority; (2) intent to discriminate on the basis of race by the defendant; and (3) discrimination concerned one or more of the activities enumerated in the statute . . . .” Yelverton v. Lehman, No. 94-6114, 1996 WL 296551, at \*7 (E.D. Pa. June 3, 1996), aff’d. mem., 175 F.3d 1012 (3d Cir. 1999)(citations omitted). Employing the familiar McDonnell Douglas burden-shifting framework, once a plaintiff has successfully shown a *prima facie* case, the Defendant is required to “articulate some legitimate, nondiscriminatory reason for the employee’s rejection.” Jones, 198 F.3d at 410 (quoting McDonnell Douglas Corp., 411 U.S. at 802). If the Defendant has carried its burden, “the plaintiff then must have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.” Id. (citing Texas Dep’t of Cmty. Affairs, 450 U.S. at 252-53).

**a. Analysis of Section 1981 to Warner’s Case**

It appears that Warner’s Section 1981 claim is based on the contention that the Defendants denied him the enjoyment of the benefits, terms or conditions of the contractual relationship of his employment. Warner has satisfied the first prong because he is an African-American. As for the second and third prongs, Warner has failed to offer any evidence that the Defendants intended to racially discriminate against him concerning any activity enumerated in 42 U.S.C. §1981. Warner does not proffer any evidence to show an intent by the Defendants to discriminate on the basis of his race. Likewise, Warner fails to show any proof that the Defendants discriminated against him in his employment. Although Warner relies on his own bare allegations as proof, the record is devoid of any evidence suggesting that the Defendants

racially discriminated against Warner. As a result, Warner fails to establish his *prima facie* case under Section 1981. However, even assuming *arguendo* that Warner has made out a *prima facie* case, he has produced no evidence to rebut or show that the Defendants' proffered legitimate reasons for his termination are a pretext for discrimination. As discussed earlier, see supra Part III.A.2.b., Warner fails to show by a preponderance of the evidence that the that the Defendants' proffered legitimate reasons were not its true reasons, but were a pretext for discrimination. By relying solely on his bare assertions of race discrimination, Warner does not offer any evidence from which a jury could conclude that the purported reasons for the Defendants' adverse employment action were in actuality a pretext for intentional race discrimination. Consequently, the Court concludes that the Defendants are entitled to summary judgment on Warner's Section 1981 claim because he has failed both to establish his *prima facie* case and to show that the Defendants' proffered legitimate nondiscriminatory reasons were pretext for intentional race discrimination.

## **2. Section 1981 Retaliation Claim**

In order to establish a *prima facie* case of retaliation under section 1981, a plaintiff must establish 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., No. 97-3675, 1998 WL 67540, at \*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 that is prohibited by Title VII or participation in an investigation of or proceeding regarding such conduct." Wright v. Montgomery County, No. 96-

4597, 1999 WL 145205, at \*5 (citing 42 U.S.C. § 2000e-3(a); Walden v. Georgia-Pacific Corp., 126 F.3d 506, 513 n.4 (3d Cir. 1997)). To make out the requisite casual connection, “a plaintiff must proffer evidence ‘sufficient to raise the inference that [his] protected activity was the likely reason for the adverse action.’” Id. (quoting Zanders v. Nat’l R.R. Passenger Corp., 898 F.2d 1127, 1135 (6th Cir. 1990)(citation omitted)). That is, a plaintiff is obligated to “show that the persons who took the adverse employment action against him knew of the protected activity and acted with a retaliatory motive.” Id. (citing Gemmell v. Meese, 655 F. Supp. 577, 582 (E.D. Pa. 1986)).

Taking all reasonable inferences in Warner’s favor, the Court concludes that Warner has failed to satisfy the third element of his *prima facie* case. For purposes of this Motion, the Court will assume that Warner has established the first two elements.<sup>16</sup> However, regarding the third element, Warner has not produced any evidence from which a reasonable fact finder could infer a causal link between his alleged protected activity and his termination. There is no evidence that the Defendants considered Warner’s views in a negative way. Likewise, there is no evidence that when the Defendants decided to terminate Warner, they did so in retaliation for his allegedly outspoken involvement in opposing racially offensive conduct. Warner does not proffer any evidence whatsoever to counter the Defendants’ explanation that his employment was

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<sup>16</sup> The Court notes that there is a strong argument that Warner cannot show that he was engaged in a protected activity because he has not pointed to any evidence that he “was outspoken and involved in opposing racially offensive conduct” as he alleges in his Reply Memorandum. (Pl.’s Reply Mem.Opp’n Defs.’ Mot. Summ. J. at 12). In fact, Warner’s deposition reveals that he did not voice any opposition regarding Captain Brady’s calling him “Captain Midnight” and he offers no testimony showing that he was an outspoken opponent of racially offensive conduct within his employment. However, for purposes of expediency, the Court will assume that Warner has proven such an element solely for purposes of this Motion.

terminated solely based on Warner's failure to report to work and show verification of his court appearance and medical analyses. Instead of evidence, Warner relies purely on speculation and conjecture to support his claim. Although Warner makes sweeping statements that he has proven a claim of retaliation under Section 1981, he fails to offer any evidence to support his contentions. Consequently, Warner has failed to prove the third element of his *prima facie* case for retaliation under Section 1981 by failing to produce any evidence from which a reasonable fact finder could infer a causal link between his alleged protected activity and his termination. As a result, the Court concludes that the Defendants are entitled to summary judgment on this claim.

**E. Count V- Violation of 42 U.S.C. §1982**

Count V of Warner's Complaint, entitled "Violation of 42 U.S.C. §1982", alleges that the "Defendants did not provide valid reasons for denying Plaintiff of the [sic] property or of his removal as a dispatcher." (Compl., ¶¶ 82-88). Section 1982 provides that:

[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U.S.C. § 1982. The Defendants argue that Warner's Section 1982 claim must fail because "Plaintiff's complaint rests upon alleged wrongful termination. There are no other allegations of deprivation of real or personal property and therefore this claim should be dismissed." (Defs.' Mem. Law Supp. Mot. Summ. J. at 26). In his Reply Memorandum, Warner does not respond to the Defendants' argument.

"Courts in this District have consistently held that employment claims do not fall

under the protection of section 1982 because the interest implicated in such cases is neither real nor personal property.” Hitchens, 2002 WL 253939, at \*9 (citations omitted); see also Wright, 1999 WL 145205, at \*7(stating “[b]ecause 42 U.S.C. § 1982 by its plain language relates to discrimination in real and personal property transactions, and has no connection whatsoever to employment discrimination, the Plaintiff’s claim under that section will be dismissed.”). Since Warner’s Section 1982 claim is based on employment discrimination, the Court concludes that the Defendants are entitled to summary judgment because there is no genuine issue of material fact regarding whether Warner was deprived of real or personal property.

#### **F. Count VI - Violation of State Rights**

Warner’s Count VI, entitled “Violation of State Rights”, is dismissed because Warner has stipulated to dismiss this Count. (Defs.’ Mem. Law Supp. Mot. Summ. J., Ex. B at 102 (Warner’s Depo.)).

#### **G. Count VII - Violation of 42 U.S.C. § 1983**

The seventh count of Warner’s Complaint is entitled “Violation of 42 U.S.C. §1983.” (Compl., ¶¶ 92-94). Warner’s Section 1983 claims rely upon the discrimination allegedly suffered by Warner in violation of the First and Fourteenth Amendments to the United States Constitution.<sup>17</sup> It appears that Warner’s Section 1983 claim relies upon his assertion that

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<sup>17</sup> Warner’s Section 1983 claim alleges violations of his First Amendment rights under the United States Constitution, as applied to the states through the Fourteenth Amendment. (Compl., ¶¶ 92-94). Warner’s lack of clarity has forced this Court to construe what he is actually alleging in this claim. In his Complaint, Warner appears to base his Section 1983 claim upon alleged racial discrimination and retaliation for exercising his First Amendment rights. Without providing any clear assertions of exactly what he is alleging, the Court gleans that Warner’s claim is both a Section 1983 claim and a Section 1983 retaliation claim. Accordingly, the Court will address Warner’s Section 1983 claim in two sections, (1) Section 1983 claim and (2) Section

the Defendants treated him poorly and eventually terminated his employment because Warner publically spoke in support of a pay increase for hourly workers and supported unionization.<sup>18</sup> In his Complaint, without clearly setting forth the foundation of his claim, Warner relies upon his previously set forth claims as the bases for his Section 1983 claims that his constitutional rights have been violated. (Id.). 42 U.S.C. § 1983 provides, in relevant part: “[e]very person who, under color [of law] . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.” 42 U.S.C. § 1983. Thus, Section 1983 imposes civil liability upon any person who, acting under the color of state law, deprives another individual of any rights, privilege, or immunities secured by the Constitution or laws of the United States. Id. Section 1983 “does not create any new substantive rights but instead provides a remedy for the violation of a federal

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1983 retaliation claim.

<sup>18</sup> Warner’s claims regarding constitutional violations based on his public support of a wage increase and unionization are tenuous. The Court notes that, after conducting a comprehensive wage and salary survey, Montgomery Township concluded that a salary and wage increase was warranted. By letter dated November 9, 1999, Nagel, on behalf of the Township Supervisors, informed Warner of the increase and stated, “I would like to thank you for your involvement. Your cooperation and comments have been valuable during this process, please continue to speak up with any further suggestions.” (Defs.’ Mem. Law Supp. Mot. Summ. J., Ex. G (Nagel’s Ltr. to Warner Regarding Wage and Salary Increase)).

Regarding Warner’s alleged support of unionization, the record establishes that Warner’s support was casual. (Id., Ex. B, at 181-88 (Warner’s Depo.)). Warner was not a member of any union, did not attend any union meetings and was unaware of the content of any meetings or who was in attendance. (Id.). In fact, when Warner was questioned about his pro-unionization discussions, he stated “I don’t know if pro-union discussions would be applicable. I know that we -- we had knocked around the idea and just wanted to see what there was to offer.” (Id., Pg. 187, lines 3-6).

constitutional or statutory right.” Gruenke v. Seip, 225 F.3d 290, 298 (3d Cir. 2000)(citation omitted).

### **1. Section 1983 Claim**

In order to state a claim under Section 1983, “a plaintiff must show that the defendant, through conduct sanctioned under the color of state law, deprived h[im] of a federal constitutional or statutory right.”<sup>19</sup> Id. (citation omitted). When bringing a claim under section 1983, a plaintiff is required to meet two requirements. Open Inns, Ltd. v. Chester County Sheriff’s Dep’t, et al., 24 F. Supp.2d 410, 423 (E.D. Pa. 1998). First, the plaintiff must show a violation of a right secured by the Constitution and laws of the United States. Id. (citing Baker v. McCollan, 443 U.S. 137, 140 (1979))(footnote omitted). Second, the plaintiff must establish that the defendant deprived him of these rights under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory. Id. (citations omitted).

After viewing the complete record, and taking all reasonable inferences in a light most favorable to Warner, the Court concludes that the Defendants are entitled to summary judgment on this claim. First and foremost, Warner does not offer any evidence showing a

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<sup>19</sup> It is well-established that a township “may be liable under Section 1983 only for acts implementing an official policy, practice or custom of the municipality.” Russoli v. Salisbury Tp., 126 F. Supp.2d 821, 839 (E.D. Pa. 2000)(citing Monell, 436 U.S. at 690-691, 698). In such a case, “[a] plaintiff must identify the challenged policy, attribute it to the municipality itself, and show that execution of the policy caused the injury suffered by the plaintiff.” Id. (citation omitted). Other than his own bare assertions, the Court notes that Warner has neither identified any challenged policy attributable to Montgomery Township itself, nor any execution of the policy which caused the injury allegedly suffered by Warner. Since Montgomery Township may be liable under Section 1983 only for acts implementing an official policy, practice or custom of the municipality, the Court concludes that Warner has failed to attach municipal liability to Montgomery Township regarding his Section 1983 claims.

violation of any right secured by the Constitution and laws of the United States. Consequently, Warner has not proffered any evidence that suggests that the Defendants deprived him of any federal constitutional or statutory right. Although Warner summarily asserts that he has shown a claim under Section 1983, he does not point to any evidence which supports such an assertion. Warner has no evidence that any action was taken against him as a result of racial or retaliatory discrimination or because of his alleged protected speech or association with a union. Warner has nothing but speculation and conjecture linking his allegation of a violation under Section 1983 to his termination. However, Warner cannot rely on unsupported assertions, conclusory allegations, or mere suspicions in order to survive this summary judgment motion. Williams, 891 F.2d at 460. Accordingly, the Court will grant summary judgment on the Defendants' motion for summary judgment on Warner's Section 1983.

## **2. Section 1983 Retaliation Claim**

“Retaliation for the exercise of constitutionally protected rights is itself a violation of rights secured by the Constitution actionable under section 1983.” McGrath v. Johnson, 67 F. Supp.2d 499, 512 (E.D. Pa. 1999)(quoting White v. Napoleon, 897 F.2d 103, 111-12 (3d Cir. 1990)(quotation marks and citations omitted)). In order to state a claim for retaliation, “a plaintiff must allege that: (1) he or she engaged in protected conduct; (2) he or she was subjected to adverse actions by a state actor; and (3) the protected activity was a substantial motivating factor in the state actor's decision to take the alleged adverse action.” Id. (citing Anderson v. Davila, 125 F.3d 148, 160 (3d Cir. 1997)). If the plaintiff makes this showing, then the burden shifts to the defendant to prove that they would have acted no differently in the absence of

plaintiff's protected conduct. See Feldman v. Phila. Hous. Auth., 43 F.3d 823, 829 (3d Cir. 1994); Holder v. City of Allentown, 987 F.2d 188, 194 (3d Cir. 1993).

The Defendants argue that Warner's First Amendment claim should be dismissed because "Plaintiff has not provided a scintilla of evidence that the Township prohibited or forced Plaintiff to refrain from exercising his free speech." (Defs.' Mem. Law Supp. Mot. Summ. J. at 23). Warner responds to the Defendants' argument by merely providing the standard of proof for establishing a First Amendment retaliation claim, and nothing more. (Pl.'s Reply Mem. Opp'n Defs.' Mot. Summ. J. at 23-24). Warner fails to offer any analysis, let alone any evidence, that the Defendants retaliated against him for speaking in support of a wage increase or unionization.

For purposes of this Motion, the Court will assume that Warner has shown that he engaged in protected conduct, thereby, establishing the first element of his *prima facie* case.<sup>20</sup> As for the second element, it is satisfied because the Defendants' termination of Warner's employment is an adverse action suffered by Warner. With regards to the third element, Warner has offered no evidence that his alleged protected activity was a substantial motivating factor in the Defendants' decision to terminate his employment. There is no evidence that the Defendants' proffered reason for terminating Warner's employment is untrue. See supra Part III.A.2.b. Likewise, there is no evidence that a substantial motivating factor in the Defendants' decision to terminate Warner was based upon his alleged protected speech or associations. Rather than

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<sup>20</sup> The Court points out that there is a valid dispute regarding whether Warner was engaged in a protected activity under the First Amendment. Warner has not shown that he was engaged in a protected activity because he has not pointed to any evidence regarding such activity, but simply relies on his bare declarations as proof. However, for purposes of expediency, the Court will assume that Warner has proven such an element *arguendo* solely for the purpose of this Motion.

identifying affirmative evidence from which a jury could find that he has shown the pertinent motive, Warner offers virtually nothing to show that the Defendants' actions were retaliatory. After a thorough review of the summary judgment record, the Court concludes that Warner has failed to offer any evidence to substantiate his burden of showing that his alleged protected speech was a substantial motivating factor for the Defendants termination of his employment. Accordingly, summary judgment shall be granted in favor of the Defendants regarding Warner's First Amendment retaliation claim.

#### **IV. CONCLUSION**

As a result of the aforementioned, the Court concludes that the Defendants are entitled to summary judgment on Count I, Count II, Count III, Count IV, Count V and Count VII, including their various sub-claims. As for Counts VI and VIII, they are dismissed with prejudice because of Warner's stipulation of dismissal. Thus, Warner's case is dismissed in its entirety with prejudice.

The Court takes this opportunity to note that the dismissal of Warner's case is due to his complete lack of evidentiary support necessary to carry his burden of proof for a summary judgment motion.<sup>21</sup> As set forth in Federal Rule of Civil Procedure 56(e), when a motion for

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<sup>21</sup> Due to Warner's complete lack of an evidentiary basis to support any of his claims, the Court concluded that it would be most expeditious to dismiss Warner's claims based on their merits. In so doing, the Court did not address the Defendants' argument regarding qualified immunity and Warner's response thereto. Also, the Court notes that Warner's Complaint completely fails to advise under which capacity, either individual or official, he is suing the Defendants. Again, in trying to address this case as expeditiously as possible, the Court notes that it has not addressed the issue of whether the individual Defendants are liable in their individual capacity or official capacity because the relevant claims can be dismissed in their entirety based on their merits and the lack of evidentiary support thereto.

summary judgment is made and properly supported, as the instant case, the party against whom the summary judgment is sought may not rest upon mere allegations or denials of [that party's] pleading, but [that party's] response, by affidavits or otherwise . . . must set forth specific facts showing that there is a genuine issue for trial. FED. R. CIV. P. 56(e). If the adverse party does not so respond, as the case here, "summary judgment if appropriate, shall be entered against the adverse party." Id. Taking all reasonable inferences in light most favorable to Warner, the Court was left with no choice but to grant summary judgment in favor of the Defendants because of Warner's complete lack of evidentiary support. As stated throughout this Opinion, Warner has not provided any evidence to support his claims, but has solely relied upon speculation and his own conclusory allegations. The Court notes that "it is not the Court's obligation to sift through the record searching for a genuine issue of material fact." Dunkin' Donuts, Inc. v. Patel, 174 F. Supp.2d 202, 210 (D.N.J. 2001). "Rather, it is the parties' obligation to show the absence or existence of such an issue." Id. (citing Jackson v. Finnegan, Henderson, Farabow, Garrett & Dunner, 101 F.3d 145, 154 (D.C. Cir. 1996)). Since Warner has failed to meet his obligation of showing the existence of any genuine issues of material fact regarding any of his claims, the Court is obliged to grant the Defendants' Motion for Summary Judgment.

An appropriate Order follows.

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

ELIJAH WARNER,	:	
	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	No. 01-3309
	:	
MONTGOMERY TOWNSHIP,	:	
POLICE CHIEF RICHARD BRADY and	:	
TOWNSHIP MANAGER JOHN	:	
NAGEL,	:	
Defendants.	:	
_____	:	

**ORDER**

AND NOW, this 22 nd day of July, 2002, upon consideration of the Defendants' Motion for Summary Judgment (Dkt. No. 15), and Plaintiff's Response thereto, it is hereby ORDERED that:

1. the Defendants are entitled to summary judgment regarding Count I, Count II, Count III, Count IV, Count V and Count VII, including their various sub-claims;
2. Counts VI and VIII are dismissed with prejudice because of Warner's stipulation of dismissal; and

3. this case is dismissed in its entirety with prejudice.

BY THE COURT:

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Robert F. Kelly,

Sr. J.