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

KENNY R. VALENTIN	:	CIVIL ACTION
v.	:	
PHILADELPHIA GAS WORKS, ET AL.	:	NO. 03-3833

MEMORANDUM

Padova, J. **March 29, 2004**

Plaintiff has brought this action for racial discrimination in employment pursuant to 42 U.S.C. § 1981 against his former employer, Philadelphia Gas Works ("PGW"). Before the Court is Defendant's Motion for Summary Judgment. For the reasons which follow, Defendant's Motion is granted.

I. BACKGROUND

Plaintiff, who is Hispanic, began working for PGW as a laborer in 1984. (Compl. ¶ 8.) He was injured on November 8, 1999 and worked on light duty jobs until he was fired on February 4, 2002. (Compl. ¶ 9.) He claims that he has been subject to disparate treatment and harassment because of his race since his injury, culminating in his termination in February 2002.[1] Plaintiff claims that he was treated differently than similarly situated white employees as follows: 1) he was harassed in connection with requests for his medical records following his placement on light duty; 2) he was subjected to investigations of his residency; 3)

[1]Although Plaintiff claims to have been subject to racial harassment, he asserts only a disparate treatment claim against PGW in this lawsuit.

his claim for workers' compensation benefits was denied; 4) he was terminated for sick leave fraud; 5) he was not notified of his termination within 20 working days as required by PGW's collective bargaining agreement with his union; and 6) he was refused reinstatement after his termination.

A. Request for Medical Records

Plaintiff alleges that he was treated differently than other, white, employees because PGW harassed him with respect to the provision of updated medical records supporting his light duty status. PGW has an Employee Utilization Committee ("EUC") which reviews the work status of employees who are absent for more than 30 days, temporarily disabled, and on long-term light duty. (Lewis Dep. at 29-31; Stewart Dep. at 33-34.) The EUC is comprised of PGW's Medical Director, Vice-President of Labor and Business, Director of Labor, Director of Risk Management, Director of Safety, and Director of EEO and Affirmative Action. (Lewis Dep. at 33, Stewart Dep. at 31.) PGW's Medical Director notifies the EUC when a particular employee's medical records are not current. (Id. at 36-39.) When the Medical Director informs the EUC that an employee's medical records are not current, the EUC has the manager or director of the employee's unit send the employee a letter requesting that he or she provide the medical department with updated medical information. (Id. at 41.) If the employee does not provide the requested information, the EUC may direct his or

her department manager to write a letter to the employee stating that, if he or she does not provide medical information by a specific date it will result in termination. (Id. at 45.) PGW does not have a written policy to that effect, however, the EUC will threaten termination if the employee had not provided information when previously requested and is not cooperating. (Id. at 45, 47.) The manager or director of the unit has input into what the letter requesting medical information says. (Id. at 48.) PGW maintains that these letters are sent at the direction of the EUC to "PGW employees regardless of their race, color, national origin, age or sex. As such, these letters are sent to white employees in addition to black employees and Hispanic employees." (Stewart Aff. ¶ 7.) The record before the Court indicates that, over the past three years, the EUC has directed that these letters be sent to twenty-five (25) white employees, thirty-one (31) black employees and seven (7) Hispanic employees. (Id. at ¶ 3.)

On September 28, 2001, Robert Barlow, M.D., PGW's Medical Director, sent Plaintiff a letter by certified mail to his address at 4961 Whitaker Avenue in Philadelphia, informing him that PGW had asked his physician to provide updated information with respect to the extent of his injury and asking Plaintiff to provide that information by October 12, 2001. (Pl.'s Ex. 4.) Plaintiff did not receive the letter and his doctor did not provide the requested information. On October 17, 2001, Joseph Sullivan, Plaintiff's

supervisor, had a copy of the letter hand delivered to Plaintiff and spoke about it with him on the telephone. (Pl.'s Ex. 5.) Sullivan wrote to Plaintiff on December 14, 2001, asking him to provide the medical information requested in the previous letter, which had not been provided, and notified him that "[f]ailure to provide this information by December 28, 2001 will result in your termination of employment from PGW." (Pl.'s Ex. 6.) On December 18, 2001, Plaintiff resubmitted information to the Medical Department which he had previously provided in May 2001. (Pl.'s Ex. 9.) Sullivan sent Plaintiff another letter on December 18, 2001, asking him to comply with the December 14, 2001 letter requesting updated medical information. (Id.) The December 18, 2001 letter repeated the statement that "[f]ailure to provide this information by December 28, 2001 will result in your termination of employment from PGW." (Id.) The EUC subsequently extended the deadline for provision of this information until January 7, 2002. (Pl.'s Ex. 10.)

B. Investigation of Plaintiff's Residency

Plaintiff maintains that he was discriminated against and harassed by PGW in connection with his residency. PGW has had a policy since 1983 that all union employees hired after that date must reside in the City of Philadelphia. (Sullivan Aff. ¶ 3.) Plaintiff maintains that he has resided continuously in Philadelphia. PGW began an investigation into Plaintiff's

residency on October 17, 2001, after he told Sullivan that he had not received the first letter requesting medical documentation, although he still lived at 4961 Whitaker Avenue in Philadelphia. (Pl.'s Ex. 13 at 1.) Sullivan was suspicious that Plaintiff was not being truthful and checked the gas account for that address. (Id.) Sullivan discovered that the gas account for 4961 Whitaker Avenue had not been in Plaintiff's name since September 3, 1999. (Id.) Albert D'Attilio, Director of Labor Relations, Safety and Security for PGW, then requested a residency investigation of Plaintiff. (Id. at 2.) Two resulting investigations did not turn up any evidence that Plaintiff resided outside of Philadelphia. (Pl.'s Exs. 12, 14.)

In late 2001, Jane Lewis, PGW's Director of Risk Management, who was reviewing Plaintiff's pending worker's compensation claim, was told by a PGW employee that Plaintiff had taken a job at Today's Man in Cherry Hill, New Jersey. (Lewis Aff. ¶¶ 3-4.) Lewis instructed outside counsel to subpoena Valentin's employment records from Today's Man. (Id. ¶ 4.) In November 2001, in response to the subpoena, she received a copy of Plaintiff's employment application with Today's Man and a copy of the Federal W-4 form that Plaintiff filed with Today's Man. (Id. ¶ 5.) These documents both show that Plaintiff's address is in Blackwood, New Jersey. (Id., Exs. 1 & 2.) Lewis provided those documents to Sullivan on January 29, 2002, as well as the results of

surveillance performed by Wes Davis Detective Agency on January 25-26, 2002. (Sullivan Aff. ¶ 4, Sullivan Dep. at 110.) The investigator for Wes Davis Detective Agency followed Plaintiff to an apartment on Woodhaven Road in Philadelphia. (Pl.'s Ex. 16.) Sullivan questioned Plaintiff about his residency on January 29, 2002, Plaintiff stated that he did not live in New Jersey. (Sullivan Aff. ¶ 7.)

C. Denial of Plaintiff's Worker's Compensation Benefits

Plaintiff claims that after August 13, 2000, when he returned to work from his shoulder injury, PGW refused to pay for his physical therapy or ongoing doctor treatments. Plaintiff also claims that PGW used his failure to continue physical therapy to contest the permanency of his disability. Plaintiff's worker's compensation case was eventually settled and he was paid for some limited periods of benefits. (Lewis Dep. at 42.)

D. Plaintiff's Termination for Sick Leave Fraud

PGW fired Plaintiff for working for another employer on the same day he called in sick to PGW and received sick leave pay from PGW.[2] (Sullivan Dep. at 20-21.) Lewis discovered the facts which formed the basis of Plaintiff's termination during her review of Plaintiff's employment records from Today's Man. PGW's counsel on

[2]Plaintiff does not claim that the letters sent by Sullivan to Plaintiff demanding updated medical documentation or the investigations into his residency resulted in his termination from PGW.

Plaintiff's workers' compensation case sent those work records to Lewis on January 8, 2002. (Lewis Aff. ¶ 8.) Those records showed the dates and numbers of hours Plaintiff worked at Today's Man. (Id., Ex. 4.) Lewis reviewed the records a few days after receiving them and compared them with Plaintiff's PGW attendance records. (Id. ¶ 5.) The Today's Man records showed that Plaintiff worked at Today's Man on three days he was out sick from PGW, September 30, 2000 and May 1 and 2, 2001. (Lewis Dep. at 46-47.) At the time of Plaintiff's termination, PGW did not have a written policy specifically prohibiting employees from working for another employer on a day they are off sick and collecting sick pay from PGW. (Sullivan Dep. at 21, 25.) Lewis believed, however, from her experience in another case, that PGW considered this conduct to be a violation of a work rule. (Lewis Dep. at 46-48.) Lewis sent a memo to Sullivan on January 29, 2002, stating what she had discovered. (Lewis Aff. ¶ 6.)

Sullivan met with Plaintiff and two union representatives on January 29, 2002 and asked Plaintiff if he could explain why the Today's Man employment records showed that he had been working there while he was off sick from PGW. (Sullivan Aff. ¶ 7.) Plaintiff said that he could not. (Id.) Sullivan then suspended Plaintiff with intent to terminate for fraudulently calling out sick at PGW while he was working at Today's Man. (Id. ¶ 8.) Sullivan then recommended to D'Attilio that Plaintiff be terminated

for sick leave fraud. (Id. ¶ 9.)

D'Attilio determined that Plaintiff had violated PGW's "sick leave policy by working at another position on days when he had taken off sick and received sick pay" and decided to terminate him. (D'Attilio Aff. ¶¶ 9-10.) D'Attilio has been employed by PGW since March, 1999 and, during his tenure at PGW, it has been PGW's uniformly enforced "policy to terminate employees who are found working at another job on the same day that they had taken sick leave and collected sick pay." (D'Attilio Aff. ¶¶ 5-6.) He is aware of five other "cases where individuals were found to have violated PGW's work rules by working at another job on the same day that they had taken off sick and collected sick pay. In every case, PGW terminated the employees who violated this work rule." (Id. ¶ 11.) In two of these cases the employee was Hispanic (Plaintiff and his brother Edgardo Valentin), in two cases the employees were black and in two cases the employees were white. (Id. ¶ 11.)

Plaintiff admitted in his deposition that he was working at Today's Man on two of the days he had taken off sick from his job at PGW and collected sick pay. (Valentin Dep. at 328-29.)

E. The Twenty Day Rule

Plaintiff claims that PGW violated its Collective Bargaining Agreement with his union, Local 686, by firing him in violation of the 20 day rule. According to the Collective Bargaining Agreement,

"[a]ll discipline shall be imposed within twenty (20) working days of the alleged misconduct, or the Company's knowledge thereof." (Pl.'s Ex. 28 at 9.) PGW received the payroll information from Today's Man on January 8, 2002. The 20th working day after January 8, 2002 was February 6, 2002. PGW sent a termination letter to Plaintiff at his 4961 Whitaker Avenue, Philadelphia address on February 4, 2002. (Def.'s Ex. H.) Plaintiff claims that he did not receive that letter, but a copy was hand delivered to him on February 19, 2002 by a union representative. (Pl.'s Mem. at 15.) PGW has disciplined other employees after the twenty day period in two instances, both of the disciplined employees are white men. (D'Attilio Aff. ¶ 13.)

F. Post Termination Discrimination

Plaintiff alleges that PGW discriminated against him by not rehiring him after he was terminated for sick leave fraud. Plaintiff has submitted evidence that two employees who had been terminated by PGW for sick leave fraud were reinstated following arbitration after Plaintiff filed this lawsuit. (Pl.'s Exs. 27, 28.) One of those individuals, Edgardo Valentin, Plaintiff's brother, is Hispanic. The other individual, Stephanie Burgess, is an African-American female. Edgardo Valentin was rehired after an arbitrator found, on November 5, 2003, that he was on vacation from PGW, and not on sick leave, at the time he was found to have been working at his second job. (Pl.'s Ex. 27 at 14.) The arbitrator

in the case of Ms. Stephanie Burgess found, on April 21, 2003, that her conduct, in working a second job outside of her normal PGW working hours, while on sick leave from PGW, was not fundamentally dishonest. (Pl.'s Ex. 26 at 9.) The arbitrator noted that Ms. Burgess had provided PGW with a doctor's note "canvassing her medical history of work induced stress, revealing her treatment regimen, and explaining how she was able to work a second job at Strawbridges while she was out of work from PGW." (Pl.'s Ex. 26 at 10.)

II. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. Id.

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material

fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant's initial Celotex burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325. After the moving party has met its initial burden, "the adverse party's response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). That is, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. "Speculation, conclusory allegations, and mere denials are insufficient to raise genuine issues of material fact." Boykins v. Lucent Technologies, Inc., 78 F. Supp. 2d 402, 407 (E.D. Pa. 2000). Indeed, evidence introduced to defeat or support a motion for summary judgment must be capable of being admissible at trial. Callahan v. AEV, Inc., 182 F.3d 237, 252 n.11 (3d Cir. 1999)(citing Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1234 n. 9 (3d Cir. 1993)).

III. DISCUSSION

Plaintiff asserts his claim for discrimination pursuant to 42 U.S.C. § 1981. Section 1981(a) provides 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). PGW argues that Plaintiff's claims must be dismissed because Plaintiff cannot bring a direct action against a municipality pursuant to Section 1981 and that, if Plaintiff can bring an action against PGW pursuant to Section 1981, there is no evidence to support a cause of action pursuant to Monell v. Department of Social Services, 436 U.S. 658 (1978).[3]

A. Section 1981 Actions Against a Municipal Agency

PGW "is not, itself, an identifiable entity," PGW is "merely a collective name for the real and personal property used to furnish gas service to customers within the City." Hendrickson v. Philadelphia Gas Works, 672 F. Supp. 823, 825 (E.D. Pa. 1987) (citing Dawes v. Philadelphia Gas Commission, et al., 421 F. Supp.

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[3]Defendant also contends that Plaintiff cannot bring an action for race discrimination pursuant to 42 U.S.C. § 1981 because he is Hispanic. The Court finds that an Hispanic person can bring a cause of action for race discrimination pursuant to Section 1981. See Rodriguez v. American Parts System, Civ. A. No. 86-3904, 1986 WL 13034, at *3 (E.D. Pa. Nov. 19, 1986) (determining that "an allegation of discrimination based upon Puerto Rican background states a cause of action for racial discrimination under 42 U.S.C. § 1981."); see also Al-Khazraji v. Saint Francis College, 784 F.2d 505, 517-18 (3d Cir. 1986) (concluding that a person of Arab background could state a claim for racial discrimination under Section 1981).

806, 811 (E.D. Pa. 1976)). PGW's general operations are overseen by the Philadelphia Gas Commission, which "is an operating arm of the City of Philadelphia responsible for the setting of rates and operating regulations by reason of Article III, §§ 3-100 and 3-309 of the City's Home Rule Charter." Id. (citing Dawes, 421 F. Supp. at 815). The Philadelphia Facilities Management Corporation manages PGW for the "sole and exclusive benefit" of the City pursuant to municipal ordinance. Id. (citing Dawes, 421 F. Supp. at 815). PGW is, therefore, considered to be a municipal agency "'synonymous with the City of Philadelphia' for purposes of the civil rights statutes." Sanders v. Philadelphia Gas Works, No. Civ. A. 98-6271, 1999 WL 482394, at *1 (E.D. Pa. July 2, 1999) (citing Hendrickson, 672 F. Supp. at 825).

PGW argues that Plaintiff cannot bring a viable cause of action against it pursuant to Section 1981 because 42 U.S.C. § 1983 is the exclusive remedy for allegations of discrimination against a municipal agency. Defendant relies on Jett v. Dallas Independent School District, 491 U.S. 701 (1989), in which the Supreme Court held that Section 1983 provides the exclusive federal remedy for violations of Section 1981 by a state actor:

> We hold that the express "action at law" provided by § 1983 for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws," provides the exclusive federal damages remedy for the violation of the rights guaranteed by § 1981 when the claim is pressed against a state actor. Thus to prevail on his claim for

> damages against the school district, petitioner must show that the violation of his "right to make contracts" protected by § 1981 was caused by a custom or policy within the meaning of Monell and subsequent cases.

Id. at 735.

The Court recognizes that "there is disagreement among other circuits, as well as within the Eastern District of Pennsylvania" regarding whether the 1991 amendments to the Civil Rights Act, which added subsection (c) to Section 1981, created an independent cause of action, thereby abrogating the holding in Jett that Section 1983 provides the only remedy for violations of Section 1981 by state actors. Jacobs v. City of Philadelphia, No. Civ. A. 03-950, 2004 WL 241507, at * 4 (E.D. Pa. Jan 29, 2004) (noting that Section 1983 remains the exclusive remedy for violations of Section 1981 by a municipality). Subsection (c) provides that "[t]he rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law." 42 U.S.C. § 1981(c). There is nothing in the legislative history of the 1991 amendments which indicate that Congress intended to overrule Jett and establish an independent cause of action against state actors pursuant to Section 1981. See Miles v. City of Philadelphia, No. Civ. A. 98-5837, 1999 WL 274979, at *5 (E.D. Pa. May 5, 1999) ("The legislative history of the 1991 amendments shows that § 1981(c) was intended only to codify existing case law. There is no indication that Congress intended to

nullify Jett and to create a new civil cause of action.") (citations omitted). This Court addressed this issue in Poli v. SEPTA, No. Civ. A. 96-6766, 1998 WL 405052 (E.D. Pa. July 7, 1998), and found that the 1991 amendments to the Civil Rights Act did not overrule Jett:

> The Court of Appeals for the Ninth Circuit ("Ninth Circuit") has held that the Civil Rights Act of 1991 creates an implied cause of action against state actors under section 1981, and thus statutorily overrules Jett's holding that section 1983 provides the exclusive federal remedy against municipalities for violation of the civil rights guaranteed by section 1981. Federation of African American Contractors v. City of Oakland, 96 F.3d 1204, 1214 (9th Cir. 1996). In contrast, the Courts of Appeals for the Fourth and Eleventh Circuits have held that section 1983 continues as the exclusive federal remedy for rights guaranteed in section 1981 by state actors. Dennis v. County of Fairfax, 55 F.3d 151, 156 (4th Cir. 1995); Johnson v. City of Fort Lauderdale, 903 F. Supp. 1520 (S.D. Fla. 1995), aff'd 114 F.3d 1089 (11th Cir. 1997).
>
> In keeping with the reasoning of Dennis and Johnson, the Court finds that the 1991 Amendments do not abrogate the holdings of Jett, that section 1983 is the exclusive remedy for section 1981 claims against municipal entities, and that direct claims under section 1981 cannot be brought against municipal entities.

Id. at *11-12 (footnotes omitted). Although the United States Court of Appeals for the Third Circuit ("Third Circuit") has not addressed this issue explicitly, it recently reiterated the holding, in Jett, that Section 1983 provides the remedy for

violations of Section 1981 by a state actor:

> The Court has ruled "that the express action at law provided by § 1983 for the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, provides the exclusive federal damages remedy for the violation of the rights guaranteed by § 1981 when the claim is pressed against a state actor. . . . Thus to prevail in his claim for damages [against a state actor], [a claimant] must show that the violation of his right to make contracts protected by § 1981 was caused by a custom or policy within the meaning of Monell and subsequent cases."

Oaks v. City of Philadelphia, 59 Fed. Appx. 502, 503 (2003) (citing Jett, 491 U.S. at 735-36).

Plaintiff suggests that some courts have permitted Section 1981 claims to proceed against municipal actors if the requirements for bringing a Section 1983 action against municipal actors set forth in Monell are satisfied. Indeed, Miles v. City of Philadelphia, No. Civ. A. 98-5837, 1999 WL 274979 (E.D. Pa. May 5, 1999), found that the 1991 amendments did not overrule the ruling in Jett that Section 1983 provides the exclusive remedy for violations of Section 1981 by state actors and, consequently, treated plaintiff's Section 1981 claim as merged into his Section 1983 claim. Id. at * 5. That approach was followed in Jacobs v. City of Philadelphia, No. Civ. A. 03-950, 2004 WL 241507 (E.D. Pa. Jan 29, 2004), which similarly treated plaintiff's Section 1981 claim as being merged into his Section 1983 claim. Id. at *4 ("This Court will follow the approach taken by the Third Circuit

in Oaks and Judge Waldman in Miles. Accordingly, Plaintiff's § 1981 will not be dismissed, but will be treated as merged into his § 1983 claim.").

The Court finds, for the reasons set forth in Poli, Miles, Jacobs, and Oaks, that Section 1983 remains the exclusive remedy for violations of Section 1981 by a state actor. Plaintiff maintains that the requirements of Section 1983 are satisfied in this case and that he could, if need be, amend his Complaint accordingly. Rather than further delay this litigation by requiring Plaintiff to amend the Complaint to restate his claim pursuant to Section 1983, the Court will follow the approach taken in Miles and Jacobs by treating Plaintiff's claim as if it had been brought pursuant to Section 1983. Consequently, Defendant's Motion is denied with respect to Defendant's argument that Plaintiff cannot bring an action against PGW pursuant to Section 1981. However, Plaintiff's claim cannot survive summary judgment unless he can establish, in accordance with the requirements for a claim brought pursuant to Section 1983, that the race discrimination he complains of "was caused by a custom or policy within the meaning of Monell." Oaks, 59 Fed. App. at 503.

B. Monell

PGW argues that, if Defendant's claim is treated as a Section 1983 claim, it is entitled to summary judgment because Plaintiff cannot establish that he was discriminated against in accordance

with any policy, custom or practice of PGW. PGW, as a municipal agency, cannot be held liable under Section 1983 "*solely* because it employs a tortfeasor–or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." Monell v. New York City Dept. of Social Services, 436 U.S. 658, 691 (1978) (emphasis in original). The Supreme Court concluded in Monell that:

> a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

Id. at 694. A government's policy is established when "a 'decisionmaker possess[ing] final authority to establish municipal policy with respect to the action' issues an official proclamation, policy, or edict." Andrews v. City of Philadelphia, 895 F.2d 1469, 1480 (3d Cir. 1990) (quoting Pembaur v. City of Cincinnati, 475 U.S. 469, 481 (1986)). A course of conduct becomes a custom when "though not authorized by law, 'such practices of state officials [are] so permanent and well settled' as to virtually constitute law." Id. (quoting Monell, 436 U.S. at 690). It is the plaintiff's burden to show that "a policymaker is responsible either for the policy or, through acquiescence, for the custom." Id. A policymaker is an official with "final,

unreviewable discretion to make a decision or take an action." Id. at 1481 (citing City of St. Louis v. Praprotnik, 485 U.S. 112, 142 (1988)). Even high ranking officials are not policymakers for purposes of Section 1983 if their decisions are constrained by policies put into place by others, or if their decisions are reviewable:

> When an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality. Similarly when a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with *their* policies.

Praprotnik, 485 U.S. at 127 (emphasis in original); see also Vassallo v. Timmoney, No. Civ. A. 00-84, 2001 WL 1243517, at * 8 (E.D. Pa. Oct. 1, 2001) (noting that even a high ranking official "is not a final policymaker if his decisions are subject to review and revision.") (citing Morro v. City of Birmingham, 117 F.3d 508, 510 (11th Cir. 1997), cert. denied, 523 U.S. 1020(1998)).

PGW argues that there is no evidence that Sullivan, or any one else employed by PGW, acted pursuant to a policy, custom or practice that was anything other than neutral on its face with respect to PGW's treatment of Plaintiff. Plaintiff does not contend that he was discriminated against pursuant to a discriminatory policy or custom of PGW. He argues, however, that "Sullivan, D'Attilio and Lewis, the principal actors involved in

Mr. Valentin's termination and employment history at defendant, are all high-ranking policymaking officials of defendant." (Pl's Mem. at 23.) He maintains, therefore, that their actions can be construed as the actions of PGW and as setting official municipal policy pursuant to Pembaur v. City of Cincinnati, 475 U.S. 469 (1986).

In Pembaur, the Supreme Court recognized that a municipality may be liable for a single decision to take unlawful action made by a municipal policymaker under Section 1983 "where--and only where--a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." 475 U.S. at 483 (citing Oklahoma City v. Tuttle, 471 U.S. 808, 823 (1985)). Plaintiff maintains that Lewis, Sullivan and D'Attilio are policymaking officials of PGW whose actions can subject PGW to municipal liability because they had complete discretion with respect to their conduct toward Plaintiff in connection with the requests made for Plaintiff's medical records, the investigations of Plaintiff's residency, and Plaintiff's termination. Plaintiff does not assert that these individuals have full discretion with respect to PGW's denial of Plaintiff's worker's compensation benefits, PGW's violation of the 20 day rule, or PGW's refusal to reinstate Plaintiff after his termination. Consequently, Defendant's Motion is granted with

respect to these allegations of discrimination.

Plaintiff contends that Lewis had full discretion to order a residency investigation of Plaintiff. Plaintiff has submitted evidence that Lewis had discretion to order surveillance in direct relation to workers' compensation claims. (Ferrer dep. at 21-22.) However, Plaintiff has submitted no evidence that Lewis has unfettered authority to order surveillance of PGW employees, that she has any authority to order residency investigations, or that she was responsible for establishing final policy with respect to residency investigations.

Plaintiff argues that Sullivan had complete discretion with respect to the letters sent to Plaintiff requesting medical documentation, ordering residency investigations of Plaintiff, and terminating Plaintiff. Plaintiff maintains that Sullivan had full discretion to determine the discipline which would be applied if Plaintiff failed to provide the updated medical documentation requested by the EUC. However the record on this Motion shows otherwise. The letters sent by Sullivan concerning the EUC's request that Plaintiff provide updated medical records were not sent by Sullivan in his full discretion, but at the request of the EUC, in accordance with the practice of the EUC of threatening termination if an employee did not comply with a request for records. (Stewart Dep. at 44-49, Stewart Aff. ¶¶ 8-10). M. Ann Stewart, the Chairperson of the EUC, explained the EUC's practice

as follows:

> 8. There are two letters that the EUC requests managers to send to employees who request or are currently working in light duty assignments or are on long - term sick leave – more than thirty (30) days.
>
> 9. The first letter is a request to provide updated medical information to PGW with [sic] ten days.
>
> 10. The second letter, which is sent if the employee does not respond to the first letter, states that the employee will be terminated if the requested information is not provided in ten days.

(Stewart Aff. ¶¶ 8-10.) Plaintiff has submitted no evidence that Sullivan had the complete discretion to order a residency investigation of Plaintiff. The evidence submitted by Plaintiff shows that, in order to obtain a residency investigation of Plaintiff, Sullivan would have to make a request for such an investigation to D'Attilio or John Straub. (Ferrer Dep. at 22-24.) The evidence on the record of this Motion also does not support Plaintiff's claim that Sullivan had complete discretion to order Plaintiff's termination. Plaintiff has submitted no evidence that Sullivan had unfettered discretion to terminate employees. Sullivan testified at his deposition that he did not have the unconstrained discretion to fire Plaintiff. He testified that he participated in the decision, but that the recommendation that Plaintiff be fired came from the risk manager's office at PGW and that the ultimate call belonged to D'Attilio. (Sullivan Dep.

at 32.) There is also no evidence that Sullivan is responsible for establishing final policies for PGW with respect to letters requesting medical documentation, employee discipline if the requested documentation is not provided, employee surveillance, or employee termination.

Plaintiff contends that D'Attilio had complete discretion to order residency investigations of Plaintiff. There is evidence on the record that D'Attilio could order a residency investigation of a PGW employee. (Ferrer Dep. at 20.) However, Plaintiff has submitted no evidence that D'Attilio's authority was not subject to review or that his authority was unconstrained by PGW's employment and personnel policies. Plaintiff also contends that D'Attilio had the unfettered discretion to terminate Plaintiff. There is evidence on the record that D'Attilio had authority to terminate PGW employees. (Sullivan Dep. at 32.) However, the evidence also shows that D'Attilio exercised this discretion in accordance with his understanding of the manner in which PGW's sick leave policy had been enforced during his entire tenure at PGW. (D'Attilio Dep. at 56-57.) The record also shows that Sullivan's and D'Attilio's decision making authority with respect to the termination of employees was constrained by PGW's written policies with respect to sick leave (Pl.'s Ex. 21); PGW's written corporate discipline policy (Pl.'s Ex. 24); PGW's written personnel policy (Pl.'s Ex. 25); and the collective bargaining

agreement between PGW and Plaintiff's union (Pl.'s Ex. 28.) Moreover, there is no evidence on the record that D'Attilio's authority to terminate PGW employees was not subject to review or that he had final authority to establish final policy with respect to either residency investigations or the termination of employees of PGW.

The Court finds that Plaintiff has failed to meet his burden of setting forth specific facts which would establish that Lewis, Sullivan, or D'Attilio were policymakers with respect to any of the actions they took vis a vis Plaintiff. Consequently, the Court finds that there is no genuine issue of material fact with respect to Plaintiff's claim to have been subjected to race discrimination in accordance with a policy, custom or practice of PGW. Plaintiff has not, therefore, satisfied the requirements of Monell and Defendant's Motion for Summary Judgment is granted.[4]

C. Request to File Amended Complaint

Plaintiff asked the Court, in his "Sur Reply Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment" for leave to amend the Complaint to assert a new claim for post-

[4]Since the Court grants Defendant's Motion for Summary Judgment based upon Plaintiff's failure to establish the existence of a genuine issue of material fact regarding his claim that he was subjected to race discrimination in employment according to a policy, custom or practice of PGW, the Court need not reach Defendant's argument that it is entitled to summary judgment because Plaintiff has not met the requirements for a disparate treatment claim pursuant to McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

termination discrimination. Plaintiff seeks to allege a retaliation claim based on PGW's refusal to rehire him after he was terminated for sick leave fraud. Plaintiff states that he filed a discrimination complaint against Defendant with the Philadelphia Commission on Human Relations ("PCHR") on February 20, 2002 and PGW denied Valentin's grievance of his termination on May 9, 2002. (Pl.'s Sur Reply at 7.) Plaintiff states that other employees, namely Edgardo Valentin and Stephanie Burgess, were rehired after an arbitrator ordered their return to work.

The Federal Rules of Civil Procedure provide that, after a responsive pleading has been filed, "a party may amend the party's pleading only by leave of court or by written consent of the adverse party." Fed. R. Civ. P. 15(a). Rule 15 further provides that "leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). Decisions on motions to amend are committed to the sound discretion of the district court. Gay v. Petsock, 917 F.2d 768, 772 (3d Cir. 1990). However, courts liberally allow amendments when "justice so requires," and when the non-moving party is not prejudiced by the allowance of the amendment. Katzenmoyer v. City of Reading, 158 F. Supp. 2d 491, 497 (E.D. Pa. 2001) (citing Thomas v. State Farm Ins. Co., No. Civ. A. 99-268, 1999 WL 1018279, at *3 (E.D. Pa. Nov. 5, 1999)). An applicant seeking leave to amend a pleading has the burden of showing that justice requires the amendment. Id. The United States Supreme

Court has determined that leave to amend should be granted in "the absence of any apparent or declared reason--such as [1] undue delay, [2] bad faith or dilatory motive on the part of the movant, [3] repeated failure to cure deficiencies by amendments previously allowed, [4] undue prejudice to the opposing party by virtue of allowance of the amendment, [5] futility of the amendment, etc." Foman v. Davis, 371 U.S. 178, 182 (1962).

The Third Circuit has explained "that prejudice to the non-moving party is the touchstone for the denial of the amendment." Cornell & Co. v. Occupational Safety and Health Rev. Comm'n, 573 F.2d 820, 823 (3d Cir. 1978). Such prejudice exists "if the amendment substantially changes the theory on which the case has been proceeding and is proposed late enough so that the opponent would be required to engage in significant new preparation." Rehabilitation Inst. v. Equitable Life Assur. Soc. of the U.S., 131 F.R.D. 99, 102 (W.D. Pa. 1992) (citing Wright, et al., 6 Federal Practice and Procedure § 1487 (1990)); see also Niesse v. Shalala, 17 F.3d 264, 266 (8th Cir. 1994) (refusing to find the district court abused its discretion in denying a request to amend where it "was correct in noting that considerable additional discovery would be required to deal with the question of class certification"); Berger v. Edgewater Steel Co., 911 F.2d 911, 924 (3d Cir. 1990) (affirming district court's denial of motion for leave to amend where "allowing the amendment here would

inject new issues into the case requiring extensive discovery"); Cuffy v. Getty Ref. & Mktg. Co., 648 F. Supp. 802, 806 (D. Del. 1986) (noting that "the general presumption in favor of allowing amendment can be overcome only by the opposing party showing that the amendment will be prejudicial").

Plaintiff's request for leave to file an amended complaint asserting a new cause of action under a new legal theory was made on March 24, 2004, after the close of discovery, after Defendant's Motion for Summary Judgment was fully briefed, after the parties submitted their pre-trial memoranda, and a mere twelve days prior to the scheduled trial of this lawsuit on April 5, 2004. Moreover, Plaintiff's new theory is based on facts of which he was aware well before the close of discovery in this case. His grievance was denied nearly two years ago, the arbitrator's decision in Ms. Burgess' case was issued eleven months ago, and the arbitrator's decision in Plaintiff's brother's case was issued more than four months ago. The Court finds that Plaintiff has unduly delayed moving to amend his Complaint and that the amendment, asserting a new claim under a new legal theory less than two weeks prior to the scheduled trial of this action, would be unduly prejudicial to Defendant. Accordingly, Plaintiff's request to file an amended complaint asserting a cause of action for retaliation is denied.

An appropriate order follows.

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

KENNY R. VALENTIN	:	CIVIL ACTION
v.	:	
PHILADELPHIA GAS WORKS, ET AL.	:	NO. 03-3833

ORDER

AND NOW, this 29th day of March, 2004, in consideration of Defendant's Motion for Summary Judgment (Docket No. 28), the papers filed in support thereof, Plaintiff's response thereto, and the oral argument held on the Motion on March 24, 2004, **IT IS HEREBY ORDERED** that the Motion **GRANTED**. It is further **ORDERED** that **JUDGMENT** is **ENTERED** on behalf of Defendant and against Plaintiff. The Clerk of Court shall **CLOSE** this case for statistical purposes.

BY THE COURT:

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John R. Padova, J.