

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

DERRICK U. JACOBS,	:	CIVIL ACTION
Plaintiff	:	
	:	
v.	:	
	:	NO. 03-cv-0950
CITY OF PHILADELPHIA, and	:	
CAPTAIN JOSEPH O'DONNELL,	:	
Defendants	:	

MEMORANDUM

Baylson, J.

December 10, 2004

I. Introduction

Presently before this Court are Motions for Summary Judgment, pursuant to Federal Rule of Civil Procedure 56 filed by Defendants City of Philadelphia and Joseph O'Donnell. For the reasons set forth below, the Motions for Summary Judgment will be granted in part.

II. Procedural Background

Derrick U. Jacobs ("Plaintiff") filed a Complaint against the City of Philadelphia and Police Captain James O'Donnell ("Defendants") on February 19, 2003, and an amended complaint on June 5, 2003, alleging racial discrimination under 42 U.S.C. §§ 1981¹ and 1983, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII") and the Pennsylvania Human Relations Act, 43 PA. STAT. ANN. § 951 et seq. ("PHRA") for employment discrimination based on race and a racially hostile work environment. In his Complaint, Plaintiff claims that Defendants engaged in employment discrimination because of Plaintiff's race,

¹In a January 29, 2004 memorandum denying Defendants' Motion to Dismiss the Amended Complaint, the Court held that Plaintiff's § 1981 claim would be merged into his § 1983 claim.

retaliation for opposing racial discrimination, and racial animus in the enforcement of Defendant City of Philadelphia's policies, regulations, customs or usages. Plaintiff also makes a claim against Defendant O'Donnell for aiding and abetting Defendant City in its discriminatory practices. (Pl's Response at ¶1, 1-2). Plaintiff seeks damages against Defendants in an amount in excess of One Hundred Fifty Thousand Dollars (\$150,000) for compensatory damages, plus costs of suit, attorney fees, and interest. (Compl. at 8).

On November 9, 2004, Defendants filed Motions for Summary Judgment. Plaintiff responded on December 1, 2004. Oral Argument was held on December 7, 2004, after which the Court denied Defendants' Motion for Summary Judgment with regard to Counts I and III alleging violations of Title VII and the PHRA, respectively, finding and identifying genuine issues of material fact for trial. However, the Court reserved judgment on Count II alleging violations of 42 U.S.C. §1983 and 42 U.S.C. §1981, against Defendant City of Philadelphia.

III. Legal Standard

Summary judgment may be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the 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). When considering a motion for summary judgment, the court must view all evidence in favor of the non-moving party. Bixler v. Central Pennsylvania Teamsters Health & Welfare Fund, 12 F.3d 1292, 1297 (3d Cir. 1993). Accordingly, all doubts must be resolved in favor of the non-moving party. Meyer v. Riegel Prods. Corp., 720 F.2d 303, 307 (3d Cir. 1983), cert. denied, 465 U.S. 1091 (1984). To successfully challenge a motion for summary judgment, the non-moving party must be able to produce evidence that "could be the

basis for a jury finding in that party's favor." Kline v. First W. Government Sec., 24 F.3d 480, 485 (3d Cir.), cert. denied, 115 S. Ct. 613 (1994).

IV. Discussion

To establish a violation of 42 U.S.C. §1983 and 42 U.S.C. §1981 by a municipality such as the City of Philadelphia, a Plaintiff must show that the alleged misconduct was caused by an official government custom or policy. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978).² The Court in Monell specifically addressed this issue and held 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. Thus, although municipalities can be sued directly under Section 1983, they cannot be liable under principles of respondeat superior; instead, the plaintiff must show that the violation was caused by the execution of an official custom or policy. Id. at 690.

In addition, "[i]t is the plaintiff's burden to show . . . that a policymaker is responsible for the policy or has acquiesced to the custom." Martin v. City of Philadelphia, 2000 WL 11831, *9

² The court in Meachum v. Temple Univ., 42 F. Supp. 2d 533, 540 (E.D. Pa., 1999) addressed the application of the Monell test to both § 1983 and § 1981 actions. The court stated:

While commentators have expressed some uncertainty as to whether the Monell "custom or policy" requirement that Jett [v. Dallas Independent Sch. Dist.], 491 U.S. 701 (1989) read into § 1981 survived the 1991 amendments, no federal court appears to have concluded that the 1991 amendments eliminated the Monell requirement from § 1981 actions. Several courts, including those that disagree whether § 1981(c) implies a cause of action, have concluded that a plaintiff seeking to subject a government entity to liability for the acts of its employee must still prove a governmental "custom or policy."

Meachum v. Temple Univ., 42 F. Supp. 2d 533, 540 (E.D. Pa., 1999) (internal citations omitted).

(E.D.Pa. 2000) (granting City's motion for summary judgment with regard to §1983 claim) (citing Gallo v. City of Philadelphia, No. 96-3909, 1999 WL 1212194 (E.D.Pa. Dec. 17, 1999)). Plaintiff "must show that an official who has the power to make policy is responsible for either the affirmative proclamation of a policy or acquiescence in a well-settled custom." Bielevicz v. Dubinon, 915 F.2d 845, 850 (3d Cir. 1990) (reversing grant of directed verdict for defendant city and remanding for further proceedings because Plaintiffs presented sufficient evidence of longstanding practice or custom in defendant's police department of making illegal arrests, which had been acquiesced in by defendant's policymakers, to allow issue of defendant's civil rights liability to go to jury). "In determining whether an official holds such policymaking authority, courts are to consider whether an official has 'final, unreviewable discretion to make a decision or take an action.'" Blanche Road Corp. v. Bensalem Township, 57 F.3d 253, 269 n.16 (3d Cir. 1995) (quoting Andrews v. City of Philadelphia, 895 F.2d 1469, 1481 (3d Cir. 1990)). "Only those municipal officials who have final policymaking authority may by their actions subject the government to § 1983 liability." See Oaks v. City of Phila., 59 Fed. Appx. 502, 503 (3d Cir., 2003) (non-precedential) (affirming grant of summary judgment in favor of City of Philadelphia because employee failed to present any evidence showing that any city official with final policy making authority had authorized or acquiesced in policy or custom in violation of §§ 1981 and 1983) (citations omitted). Basically, the official must be responsible for establishing final governmental policy respecting the challenged activity. Pembauer v. City of Cincinnati, 475 U.S. 469, 481-82 (1986) (citing Oklahoma City v. Tuttle, 471 U.S. 808, 822-24 (1985)).

In this case, Plaintiff argues that Defendant O'Donnell was the official decisionmaker engaging in the prohibited course of discriminatory conduct and establishing final policy

regarding guidelines within the Police Department Directives. (Pl's Response at 22). In support, Plaintiff offers the deposition testimony of Philadelphia Police Commissioner Sylvester M. Johnson. (Pl's Ex. 59). Commissioner Johnson testified that, in certain circumstances, Defendant O'Donnell had the power and authority to be "flexible" with the directives and to the best of his recollection, no captain has ever been disciplined for failure to follow guidelines. (Johnson Dep. at 13-18). Thus, Plaintiff argues, it can be inferred that O'Donnell had "the responsibility for establishing [the Department's] final policy regarding the guidelines . . . and his practices are so permanent and well-settled as to constitute law." (Pl's Response at 22-23). For the reasons stated below, the court rejects this argument.

A review of Third Circuit case law finds several decisions rejecting claims that the City of Philadelphia has authorized or acquiesced in a policy or custom of discrimination violating §§ 1981 and 1983. To the contrary, it is undisputed that the City has in place and has utilized policies that prohibit such conduct. (See Def's Exhibit 24, Philadelphia Police Department Directive 97, infra note 4).

For example, in King v. City of Phila., 66 Fed. Appx. 300 (3d Cir., 2003) (non-precedential) (affirming grant of summary judgment in favor of City of Philadelphia), Richard King, an employee of the City of Philadelphia, filed a discrimination complaint regarding an incident where two fellow city police officers used a racial epithet.³ After King's first contact with an equal employment opportunity officer, he was suspended on three occasions.⁴ Id. at 302.

³ Two officers called King a "nigger." King v. City of Phila., 66 Fed. Appx. 300, 302 (3d Cir., 2003).

⁴The City offered evidence regarding the bases for each suspension. The suspensions were for insubordination, neglect of duty, disobedience of orders, failure to report to work, late arrival, a

King was later fired following his arrest for allegedly making a false report that his pistol was stolen during a burglary of his home and for obstructing justice. Id. The city offered evidence to demonstrate that it had a policy of terminating the employment of any officer who was arrested, whether or not he was ultimately convicted. Id. at 303. The court found that the alleged conduct by the two officers was an isolated and sporadic incident that did not demonstrate a pervasive atmosphere of harassment required to prove a Title VII violation. Also, evidence of the one incident was not enough to establish a municipal custom or policy; thus, King's § 1983 claim against the City was also properly dismissed. Id. at 305. See also Groman v. Township of Manalapan, 47 F.3d 628, 637 (3rd Cir. 1995) (holding that vague assertions combined with one incident of illegal behavior do not establish a custom).

Further, even though the Third Circuit has held the police commissioner to be a policymaker for purposes of § 1983 liability, police captains and lieutenants have not been similarly categorized. For example, in Andrews v. Philadelphia, 895 F.2d 1469 (3d Cir., 1990), the Third Circuit found that the police commissioner was the "policymaker" and that because he did not acquiesce to or authorize the alleged sexual discrimination, the city could not be held liable for that discrimination under § 1983. As a result, the Third Circuit affirmed the district court's holding that any discrimination at the Accident Investigation Division (AID) did not rise to the level of an "official policy or custom" by the City because it had not been approved or promulgated by a "policymaker." Id. at 1477. Similarly, in Keenan v. City of Phila., 983 F.2d 459, 468-469 (3d Cir., 1992), the Third Circuit held that the district court correctly determined that the police commissioner was the official policymaker. However, unlike in Andrews, the

failed sick check, and conduct unbecoming an officer. King, 66 Fed. Appx. at 303.

court held that there was evidence showing that the commissioner knowingly acquiesced to many actions of his subordinates, thereby establishing municipal liability.

However, Judge Kelly has more recently held that there was no evidence that mid-level police officers, including a corporal and commanding officer, were “policymakers” with the final authority to establish municipal policy for the City of Philadelphia. Martin v. City of Philadelphia, 2000 WL 11831, *9 (E.D.Pa., Jan. 7, 2000) (granting City’s motion for summary judgment with regard to §1983 claim).

These cases reinforce the standard articulated in Monell by reaffirming that municipalities can only be found liable for violations of Section 1983 through the conduct of certain high ranking officials who have final policymaking authority. City of St. Louis v. Praprotnik, 485 U.S. 112, 123 (1988); Pembaur v. City of Cincinnati, 475 U.S. 469, 483 (1986); Simril v. Twp. of Warwick, 2001 WL 910947 (E.D.Pa. 2001) (dismissing borough as defendant because plaintiff could not show that actions of individuals represented official policy). Further,

[w]hen 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. Where the official policy delegates discretion to a subordinate official, a municipal body is not liable for the mere failure to investigate by the final policy-maker.

Brady v. Cheltenham Twp., 1998 WL 164994, *3 (E.D.Pa.,1998) (granting summary judgment in favor of township regarding §1983 and §1981 claims) (internal citations omitted).

In this case, the City of Philadelphia has established guidelines within the Police Department Directives prohibiting discrimination. (See Def’s Exhibit 24)⁵. Even though a

⁵Directive 97-1 for the Philadelphia Police Department specifically prohibits employees from engaging in any act, action, or course of conduct which is

captain can, in certain circumstances “be flexible,” (Johnson Dep. at 14:3), such a decision to disregard the guidelines does not necessarily reflect City policy. Similarly, that no captain has been disciplined for failure to follow the guidelines does not mean that the City knew of or acquiesced in any discriminatory policy or custom. See Praprotnik, 485 U.S. at 127 (“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.”); see also Vassallo v. Timoney, 2001 WL 1243517, at *8 (E.D. Pa. Oct. 15, 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)).

Although Plaintiff has presented sufficient evidence that Captain O’Donnell took action against Plaintiff that a jury might find sufficient to impose liability, there is no evidence that Defendant O’Donnell is a decisionmaker who possesses final authority to establish a municipal policy. Any decisions he made to deviate from the guidelines were reviewable by his superiors and cannot be considered official policy of the City of Philadelphia. Thus, Defendant City of Philadelphia’s Motion for Summary Judgment will be granted in part and Count II asserting §1983 and §1981 claims will be dismissed with prejudice, as to the City of Philadelphia.

V. Conclusion

Plaintiff has not presented any evidence that Defendant O’Donnell is a decisionmaker

discriminatory, and based on race, color, gender, religion, national origin, age, ancestry, sexual orientation, physical or mental disability (or perception of such disabilities) or because of an association with a member of any of these protected classes.

Def’s Exhibit 24, Philadelphia Police Department Directive 97-1, section II.A.

possessing final authority to establish municipal policies and therefore no evidence that the Defendant City of Philadelphia had a policy or custom of racial discrimination. Accordingly, Defendants' Motion for Summary Judgment will be granted as to the § 1983 claim against the City of Philadelphia. Count II will be dismissed with prejudice, as to the City of Philadelphia.

An appropriate Order follows.

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DERRICK U. JACOBS,	:	CIVIL ACTION
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	:	
v.	:	
	:	NO. 03-cv-0950
CITY OF PHILADELPHIA, and	:	
CAPTAIN JOSEPH O'DONNELL,	:	
Defendants	:	

ORDER

AND NOW, this 10th day of December, 2004, based on the foregoing memorandum and upon consideration of the motions and briefs, it is hereby ORDERED that Defendants' Motions for Summary Judgment Pursuant to Fed.R.Civ.P. 56 (Doc. Nos. 20, 21, and 26) be GRANTED as to the § 1983 claim against the City of Philadelphia. Count II of Plaintiff's Complaint is hereby DISMISSED with prejudice, as to the City of Philadelphia. Otherwise, Defendants' Motions are denied for the reasons stated on the record at the hearing held on December 7, 2004. Trial will start on December 15, 2004.

BY THE COURT:

/s/ Michael M. Baylson

MICHAEL M. BAYLSON, U.S.D.J.