

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

DERRICK U. JACOBS,	:	
Plaintiff	:	CIVIL ACTION
	:	
v.	:	
	:	
CITY OF PHILADELPHIA	:	NO. 03-CV-950
and CAPTAIN JOSEPH O'DONNELL,	:	
Defendants	:	

MEMORANDUM

Baylson, J.

August 8, 2005

I. Introduction

Presently before the Court are Plaintiff's Motions to Amend the Judgment and for New Trial. Plaintiff, a Philadelphia police officer, filed this suit to complain about racial discrimination for which he blamed the City of Philadelphia and his superior, Captain Joseph O'Donnell. A jury trial resulted in a judgment entered in favor of Defendants and against Plaintiff. For the following reasons, Plaintiff's motions will be denied.

II. Procedural Background

Plaintiff filed a complaint on February 19, 2003 and an Amended Complaint on June 5, 2003. Discovery in the case was largely completed by November 1, 2004. Defendants filed a Motion for Summary Judgment on November 9, 2004, which was granted as to the 42 U.S.C. §§ 1981 and 1983 claims against the City, but otherwise denied. See Doc. No. 34. On December 15, 2004, a jury trial began, ending with a verdict for the Defendants on December 22, 2004.¹ The Court entered judgment in favor of Defendants on December 27, 2004. On January 6, 2005,

¹ Even though the jury found for the Plaintiff on Count III (the PHRA claim against Defendant O'Donnell), it awarded zero damages. See Verdict Sheet at 5, sections F and G.

Plaintiff filed timely post-trial motions, which have been extensively briefed and argued on June 15, 2005.

III. Plaintiff's Factual Claims and Theories of Recovery at Trial

At trial, Plaintiff alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., as amended 1991 ("Title VII"); the Civil Rights Act of 1866, 42 U.S.C. § 1981 via the Civil Rights Act of 1871, 42 U.S.C. §1983; and the Pennsylvania Human Relations Act, 43 P.S. § 951, et seq., as amended 1991 ("PHRA"). The evidence at trial was disputed and numerous fact issues existed for the jury to resolve.

Plaintiff presented evidence that Defendant Captain O'Donnell discriminated against him because of his race. Specifically, Plaintiff testified that O'Donnell made racially offensive comments, ordered Plaintiff's overtime pay and compensation to be changed resulting in loss of pay, and changed his platoon and assignment in violation of the labor contract. Plaintiff also testified that he suffered a loss of approximately \$24,000 in overtime while O'Donnell was his commanding officer. In an attempt to prove damages, Plaintiff presented some of his past tax returns to the jury. Plaintiff also called Defendant O'Donnell to testify regarding the Directives of the Philadelphia Police Department as well as Police Commissioner Sylvester Johnson regarding a meeting with the detectives at Northwest Division. In addition, Plaintiff called various lieutenants and detectives from the Philadelphia Police Department who gave testimony regarding the workplace, Plaintiff's character, and the disciplinary actions taken against Plaintiff.

Defendants presented several witnesses, including Captain O'Donnell who denied that a racially hostile work environment existed or that Plaintiff was discriminated against because of his race. In addition, on cross-examination, Police Commissioner Johnson testified that he had

no knowledge of any discrimination or racially offensive comments. Defendants also called Assistant District Attorney Barbara Paul who testified that Plaintiff did not appear in court to provide essential discovery material; Captain Lawrence Kirkland who testified regarding Plaintiff's attendance, complaints made by Plaintiff about being marked "AWOL," and the investigations responding to those complaints; and William Grab, Director of Labor Relations for the City of Philadelphia, who explained the employment contract between the Fraternal Order of Police ("FOP") and the City as well as the grievance process.

Plaintiff asserted three theories of liability under Title VII, including: 1) disparate treatment because of race; 2) racial harassment/hostile work environment; and 3) retaliation for opposing racial discrimination. The Plaintiff's §1981 and §1983 claims alleged that Defendant O'Donnell intentionally denied Plaintiff similar terms, privileges and conditions of his contractual employment relationship as white employees. Plaintiff's PHRA claim against the City alleged impermissible racial discrimination in the enforcement of Defendant City's policies, regulations, customs, or usages. Plaintiff also made a PHRA claim against Captain O'Donnell for aiding and abetting the City in its discriminatory practices. (See Plaintiff's Motion for a New Trial at 1).

Because the focus of Plaintiff's motions are the jury interrogatories, which must be considered in the context of the instructions, both are attached as exhibits for reference. See Exhibit A: Jury Instruction 11; Exhibit B: Verdict Sheet.

IV. Post-Trial Motions

A. Plaintiff

Plaintiff argues that he is entitled to an amended judgment or a new trial because 1) the verdict was against the weight of the evidence; 2) the verdict was facially inconsistent; and 3) the verdict sheet was improper and inconsistent with the jury instructions. (Pl’s Memo Supporting Motion for New Trial). Plaintiff also relies on post-verdict conversations between his counsel and several jurors as they were leaving the courthouse. Further, Plaintiff argues that his objections were not required to be preserved during the trial and are not waived even though his counsel did not object prior to the charge, prior to the jury’s deliberations, or prior to discharge of the jury, because the defects in the verdict sheet constituted plain error that substantially affected and prejudiced his rights to recovery. Id. at 8-10, 15.

1. Weight of the Evidence

First, Plaintiff argues that the verdict was against the weight of the evidence. Id. at 2-8. Plaintiff contends that the weight of the evidence favored the Plaintiff’s case based on the “Court’s observations of the witnesses and the following of the trial coupled with the special jury findings and the post-verdict juror interviews. . . .” Id. at 7. Specifically, Plaintiff argues that a new trial should be granted because the jurors “did not find the Commissioner, Captain O’Donnell, and O’Donnell’s subordinate superiors to be credible witnesses. . . .” Id. at 7.

2. Facially Inconsistent Verdict

Second, Plaintiff argues that the verdict sheet was facially inconsistent. Id. at 8-11. Specifically, the Plaintiff argues that it is incongruous that the jurors would find that Captain

O'Donnell aided and abetted the City in illegal discrimination but did not find for Plaintiff on his §§ 1981 and 1983 claim nor award Plaintiff any damages. Id. at 7.

3. Inconsistency Between Jury Instructions and Verdict Sheet

Plaintiff's primary argument is that the jury interrogatories were legally incorrect and inconsistent with the jury instructions.² (Plaintiff's Memo Supporting Motion to Amend Judgment at 2-4; Pl's Memorandum Supporting Motion for New Trial at 13-15). Specifically, Plaintiff contends that because the jury answered Interrogatories B-1 and B-2 affirmatively, he proved all the elements required to prevail on his racial harassment/hostile work environment claim. However, the Court entered judgment in favor of Defendant on Count II because the jury answered Interrogatory B-3 in the negative. Plaintiff contends that this was error because Interrogatory B-3 was superfluous and changed the requisite legal showing by adding an unnecessary and improper element to Plaintiff's claim, thereby substantially affecting and prejudicing his rights to recovery. Id. Thus, Plaintiff argues that because he prevailed in his case for hostile work environment, he is now entitled to a trial on damages. Id.

In addition, Plaintiff argues that his objections to the interrogatories have been preserved on appeal under Rule 49(a) of the Federal Rules of Civil Procedure because the Third Circuit does not require a party to object to special verdicts prior to the district court's dismissal of the

² The Court notes that even though Plaintiff states that "an erroneous jury instruction likely misled or confused the jury" and "this instruction was highly prejudicial to Plaintiff," (Pl's Memo Supporting Motion for New Trial at 11, 15), Plaintiff's counsel, at oral argument, specifically conceded that the Jury Instructions were, in fact, correct. However, Plaintiff contends that the jury charge and the interrogatories were inconsistent and only challenges the Jury Interrogatories, specifically Interrogatory B-3. See Plaintiff's Response to Court's Questions, Doc. No. 93, at 1 ("Interrogatory B-3 was improper. Jury Charge 11 was proper."). In addition, in a letter brief submitted to the Court, dated March 28, 2005, Doc. No. 91, Plaintiff's counsel also stated, "Plaintiff's arguments focus on the Jury Interrogatories for racial harassment and the resulting verdict . . . [Plaintiff] does NOT have any objection to the jury charge." (Pl's letter brief at 1).

jury. See Pl's Memo Supporting Motion for New Trial at 8 (citing Simmons v. City of Philadelphia et al., 947 F.2d 1042,1057 (3d Cir. 1991) (contrasting special verdicts with general verdicts lodged under 49(b), which require objections prior to jury's dismissal)). In the present case, Plaintiff asserts that the jury interrogatories constituted a special verdict because the different theories of recovery were presented separately and broken down into their elements rather than asking the jury a general question regarding liability. (Pl's Motion for New Trial at 9-10). Moreover, Plaintiff asserts that because the alleged mistake constitutes plain error, it is immaterial that the issue was not properly preserved for review post-trial. Id. at 12.

B. Defendants

Initially, the Defendants contend that Federal Rule of Evidence 606(b) bars Plaintiff from offering any post-trial conversations with jurors to impeach the verdict. (Def's Response at 1, 3-5).

Next, Defendants rely heavily on waiver and argue that Plaintiff's motions should be denied for his failure to properly object at trial. Id. at 5-6. Defendants argue that when a party fails to object on the record to a jury verdict sheet or to a jury charge that a party believes is in error before the jury is discharged, the objections are waived. See Def's Response at 5-6 (citing Inter Medical Supplies, Ltd. v. EBI Medical Systems, Inc., 181 F.3d 446, 463 (3d Cir. 1999)).

Further, Defendants contend that even if an error existed in the jury charge or verdict sheet, it constitutes harmless error. See Def's Response at 6-8 (citing McQueeney v. Wilmington Trust Co., 779 F.2d 916, 924-27 (3d Cir. 1985) (stating that error is harmless when highly probable that it did not affect plaintiff's substantial rights)). The Defendants argue that any errors in the instructions or verdict sheet did not affect Plaintiff's substantial rights because

Plaintiff has not, as a matter of law, proved his hostile work environment claim nor did the jury award Plaintiff any damages. See Def's Response at 7-8.³

V. Additional Information Requested by the Court

Following the receipt of briefs, the Court felt that the parties were not specific enough on some key issues, and therefore, posed five questions to counsel in a letter dated May 4, 2005.

Submissions were received (Doc. Nos. 93 and 94) and oral argument was held on June 15, 2005.

A summary of the questions by the Court and answers by counsel follows.

1. Was jury charge 11 and/or Interrogatory B-3 improper? Explain your position, including the specific issue relating to the interrelationship between the concept of respondeat superior and the affirmative defenses available to the City if the jury found that the plaintiff did not suffer an adverse employment action.

Plaintiff responded that Jury Charge 11 was proper but interrogatory B-3 was improper because the interrogatory relates to direct evidence, which is inapplicable in proving harassment. (Pl's Response at 5). Plaintiff argues that in Fragher v. City of Boca Raton, 524 U.S. 775 (1998) and Burlington Industries v. Ellerth, 524 U.S. 742 (1998), the Supreme Court refined the doctrine of respondeat superior by allowing defendants who have not taken a tangible employment action against a plaintiff, to assert an affirmative defense to a claim of vicarious liability. Thus, Plaintiff argues that when the jury answered Interrogatories B-1 and B-2 in the affirmative, it necessarily already considered the City's affirmative defense, which is

³ Defendants also contend that Plaintiff's motions should be denied for failure to prosecute because Plaintiff did not order a trial transcript or file a motion to excuse his failure to do so. See Defendants' Response Brief at 9. Local Rule 7.1 provides that within 14 days after filing any post-trial motion, the movant shall either order a transcript of the trial by a writing delivered to the Court Reporter Supervisor or provide a verified motion showing good cause to be excused from this requirement. Despite Defendants' contentions to the contrary, the docket shows that the Plaintiff requested trial transcripts on January 20, 2005, which was within 14 days after the post-trial motion was filed on January 6, 2005.

incorporated into the doctrine of respondeat superior. Id. at 2-3. Plaintiff also summarized the elements of a hostile work environment claim, the tenets of respondeat superior, and the differences between a burden-shifting claim and a harassment claim. Id. at 1-6.

Defendants responded that the issue of the propriety of jury Charge 11 and/or interrogatory B-3 is waived because Plaintiff did not make any objection at trial. (Def's Response at 1-2). Defendants further argue that Plaintiff is estopped from challenging the jury charge or the interrogatories because he received the charge he requested and agreed to the interrogatories when they were discussed prior to the charge to the jury. Id. at 2.

Moreover, Defendants contend that, in any event, jury charge 11 and interrogatory B-3 were not improper because they properly required the jury to consider a key element of the Plaintiff's case. Id. at 3. Defendants assert that "[a]sking the jury if the Plaintiff proved by a preponderance of the evidence that race was a determinative factor in the actions taken against plaintiff is necessary to establish one element of Plaintiff's claim; whether Plaintiff would have suffered the same hostile environment absent his membership in a protected class." Id. at 4. Thus, Defendants argue that jury charge 11 and Interrogatory B-3 simply asked the jury to consider whether it was race, as opposed to some other reason, such as "personal animus," that was the determinative factor in the actions against Plaintiff. Accordingly, Defendants argue that the jury's verdict should stand. Id.

Finally, Defendants argue that because the jury found that Plaintiff did not suffer a tangible adverse employment action, the jury necessarily considered the City's affirmative defenses under the hostile work environment claim and found in favor of the City. Id. at 4-7.

2. Was there an inconsistency between the charge in jury instruction No. 11 and jury interrogatory B-1-2-3? Explain your position.

Plaintiff responded that there was an inconsistency between Instruction No. 11 and Interrogatories B-1-2-3. Plaintiff argues that Jury Instruction No. 11 did not cover the direct evidence instruction because it was improper to do so. However, Plaintiff contends that the “Court improperly inserted a question for direct evidence, Interrogatory B-3, which is clearly contrary to the prevailing law . . . and had a substantially prejudicial effect upon Plaintiff.” Pl’s Response at 7. Therefore, Plaintiff argues that Instruction 11 and Interrogatory B-3 are clearly inconsistent. Id.

Defendants responded that to the extent there was any inconsistency between jury instruction 11 and interrogatory B-3, Plaintiff waived his objection. Id. at 7-8. Defendants also contend that there was no inconsistency between the charge and the interrogatories because the “Court’s charge to the jury and jury interrogatory B-1-2-3 are identical.” Id. at 8. Therefore, the Defendants assert that there was no inconsistency.

3. Was it wrong to ask the jury to answer Interrogatory B-3 when they had answered Interrogatory B-1 and B-2 in the affirmative? Did this constitute plain error, in view of the fact that there was no exception taken to jury instruction No. 11 or Interrogatory B-1-2-3? Explain your position.

Plaintiff responded that it was wrong for the Court to ask the jury to answer Interrogatory B-3 and that it constituted plain error because it materially affected the judgment for the Plaintiff and any award of damages under the hostile work environment claim. Id. at 7, 9. Plaintiff again summarized the elements of a hostile work environment claim and submits that he clearly established a racially hostile work environment. Id. at 9-10. Plaintiff argues that the “instruction likely misled or confused the jury which was not harmless error, but so fundamental as to create

manifest injustice.” Id. at 8. Thus, the Plaintiff contends that it does not matter that the issue was not properly preserved for review post-trial because, and even though the Plaintiff did not object before the verdict, the court may consider the error pursuant to Federal Rule of Civil Procedure 51(d)(2).⁴ Id. at 8,11.

Defendants responded that it was not wrong to ask the jury to answer interrogatory B-3 because it addressed a requisite element of Plaintiff’s claim of racial harassment. Def’s Response at 9. Even if it was wrong to ask the question, Defendants contend that Plaintiff’s failure to make a timely objection constituted a waiver. Id. Defendants also claim that Plaintiff’s reliance on Simmons v. City of Philadelphia et al, 947 F.2d 1042 (3d Cir. 1991) is misplaced because the language upon which Plaintiff relies did not represent a holding in the case. Id. at 9, n2.

Furthermore, Defendants argue that it was not plain error to ask the jury to answer interrogatory B-3. Defendants contend that Plaintiff cannot meet the high standard of plain error and has not presented any evidence that any of his rights were affected. Id. at 10-11. Thus, even if there was an error in the instructions or the interrogatories, Defendants contend that the error is harmless and the verdict must stand. Id.

4. Are the jury interrogatories in this case subject to F. R. Civ. P. 49(a) or 49(b)? Assuming the latter, please consult the last sentence and advise me of your position as to whether there was an inconsistency.⁵

⁴The Court notes that Rule 51(d)(2) applies to plain error in the jury instructions. As discussed infra, the Court finds that Rule 49(b), discussing general verdicts, governs the issues in this case.

⁵ The last sentence of Rule 49(b) states:

When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers or shall order a new trial.

Plaintiff responded that the interrogatories are subject to Rule 49(a) because they constituted a special verdict in that “Plaintiff’s theory of impermissible racial discrimination by either defendant was broken down separately by his different theories of liability” Pl’s Response at 11-13. Further, Plaintiff argues that “it is not necessary in this circuit for a party, prior to the district court’s dismissal of the jury, to lodge an inconsistency objection to special verdicts rendered under Rule 49(a).” Id. at 11 (relying on Simmons v. City of Philadelphia et al, 947 F.2d 1042 (3d Cir. 1991)).

Nevertheless, per the court’s request, the Plaintiff assumed that the verdict was a general verdict under Rule 49(b) and addressed the last sentence of that rule. Pl’s Response at 13. Plaintiff summarized the four permissible approaches when general verdicts on different claims are inconsistent: (1) “in certain circumstances, . . .allow the verdict to stand;” (2) attempt to read the verdict in a manner that will resolve the inconsistencies;” (3) “resubmit the question to the jury;” or (4) ‘order an entirely new trial.” Id. at 14 (citing Mosley v. Wilson, 102 F.3d 85, 90-91 (3d Cir. 1996)(quoting Los Angeles v. Heller, 475 U.S. 796 (1986))).

Plaintiff contends that because the Court failed to harmonize the internal inconsistencies of the jury’s responses to the interrogatories before the jury was discharged, it must now grant a new trial. (Pl’s Response at 14). Plaintiff argues that it is incongruous that the verdict was entered for Defendants on all counts when the jury answered affirmatively that Plaintiff suffered intentional discrimination because of his race; that other Philadelphia police detectives who were not African-American were treated differently; that Plaintiff had proven hostile work

environment based upon his race; and that Defendant O'Donnell acted to aid or abet the City to commit any unlawful acts under the PHRA. Id. at 14-15 (citing Verdict Sheet at 1-5).

Defendants responded that the jury interrogatories are subject to Rule 49(b) because they asked the jury to make findings of fact and apply those facts to the law and make a determination of liability. Def's Response at 11 (relying on Stanton v. Astra Pharmaceutical Products, Inc., 718 F.2d 553 (3d Cir. 1983)). Defendants contend that the jury was asked to render a general verdict in the damages section of the verdict sheet and that the preceding interrogatories supported the general verdict. (Def's Response at 11).

Moreover, Defendants argue that the jury responses are not inconsistent because they are capable of being reconciled. Id. Defendants suggest that it is possible that the jury believed that Captain O'Donnell made an offensive remark to Plaintiff and personally discriminated against Plaintiff on one occasion, supporting the jury finding against O'Donnell on the PHRA claim. Id. at 13. Defendants argue that it is also plausible that the jury found that race was not a factor in the employment related actions taken against Plaintiff. Id. Thus, because a single comment, without more will not establish a hostile work environment, the jury findings were not inconsistent and supported the finding of "\$0" damages. Id.

Alternatively, Defendants argue that the jury responses can be reconciled by assuming that the jury followed the court's instructions precisely. Id. at 14. Defendants contend that it is possible that the jury found that the Plaintiff proved his claim of hostile work environment, rejected the City's affirmative defenses, and then went on to assess the Plaintiff's damages at "0." Id. at 14-15. Then, having found that the City violated Title VII, the jury properly assessed whether O'Donnell violated the PHRA. Id. at 15. Finding that O'Donnell violated the PHRA,

the jury then assessed the Plaintiff's damages against O'Donnell as "0." Id. In addition, Defendants argue that the jury properly found that Defendant O'Donnell did not violate §§ 1981 and 1983 because they repeatedly found that there was no adverse employment action taken against Plaintiff because of race, a required element for the §§ 1981/1983 claim. Id. Thus, Defendants argue that the jury's responses were not inconsistent.

5. Assuming arguendo there was plain error and/or an inconsistency, is there any significance to the fact that the jury found damages "0" and if not, whether any relief to the plaintiff would be limited to a new trial as to damages on the claim under Title VII for harassment/hostile work environment?

Plaintiff responded that there is no significance to the fact that the jury found damages "0." Pl's Response at 16. Plaintiff also argues that he is not limited to a new trial as to damages for his hostile work environment claim because the jury also found in favor of the Plaintiff and against Defendant O'Donnell under the PHRA. Further, Plaintiff argues that it is inconsistent that the jury found for him under the PHRA but against him under §§ 1981 and 1983 because the claims are substantially the same. Id. at 16-17. Plaintiff also argues that the issue of punitive damages should be before the new jury because "the first jury found that O'Donnell aided and abetted the City in impermissible race discrimination . . . in violation of the PHRA." Id. at 18. The Plaintiff concludes that he should have a new trial for damages based on his claims for racial harassment, the PHRA, and Section 1981. Id. Finally, the Plaintiff argues that "it would be pure speculation for [the Defendants] or this Court to determine whether the jury would have awarded damages to Plaintiff for racial harassment if Interrogatory B-3 had not been before them." Id. at 19.

Defendants responded that the fact that the jury found damages “0” is significant because it makes any alleged error or inconsistency harmless. Id. at 16. Defendants argue that this finding clearly shows that the jury weighed the Plaintiff’s claims and found that he did not suffer any damage. Id. Moreover, Defendants argue that because Plaintiff did not present sufficient evidence to prove his claim, Defendants are entitled to judgment as a matter of law. Id. at 18.

Assuming that there was plain error or an inconsistency, Defendants argue that the remedy would not be limited to a trial on damages. Id. First, Defendants argue that any new trial should be limited to the hostile work environment claim. Id. The Defendants then argue that simply assigning liability to the Defendants and proceeding directly to damages would work a severe injustice upon them because the issue of damages is interwoven with the question of liability. Id. at 18-19. Thus, it would be improper to limit any new trial to the issue of damages. Id.

VI. Discussion

Initially, the Court agrees with the Defendants that any post-trial conversations with the jury cannot be used to impeach the verdict in this case because the alleged statements do not suggest that there was any “extraneous prejudicial information [that] was improperly brought to the jury’s attention or [that] any outside influence was improperly brought to bear upon any juror.” Federal Rule of Evidence 606(b); see also Government of Virgin Islands v. Gereau, 523 F.2d 140, 148 (3d Cir. 1975) (noting that, if there have been no extraneous influence on the jury, the “no impeachment” rule dictates that “a juror may not impeach his own verdict once the jury has been discharged”);⁶ McDonald v. Pless, 238 U.S. 264, 269 (1915) (noting that “the losing

⁶ In Gereau, the Third Circuit explained:

The rule was formulated to foster several public policies: (1) discouraging harassment of

party cannot, in order to secure a new trial, use the testimony of jurors to impeach their verdict”). Thus, the Court places no weight on the alleged juror statements presented by Plaintiff in his motions.

A. Weight of the Evidence

The Third Circuit has held that a district court has discretion in deciding whether to grant a new trial because the verdict was against the weight of the evidence. See Lind v. Schenley Industries, Inc., 278 F.2d 79, 89 (3d Cir. 1960) (reversing order granting new trial as there were no sufficient grounds for this decision). However, this discretion is narrow. See Klein v. Hollings, 992 F.2d 1285, 1290 (3d Cir. 1993) (discussing the continuum of discretion given the district court and reversing district court’s grant of a new trial to plaintiffs). Therefore, a new trial should be granted “only when the record shows that the jury’s verdict resulted in a miscarriage of justice or where the verdict, on the record, cries out to be overturned or shocks our conscience.” Williamson v. CONRAIL, 926 F.2d 1344, 1353 (3d Cir. 1991) (vacating grant of conditional new trial and ordering the jury verdict reinstated because it did not constitute a miscarriage of justice as it was supported by the evidence). A review of the record leads this Court to the conclusion that the Plaintiff has not met this standard.

Although the Plaintiff argues that the verdict was against the weight of the evidence, (Pl’s Motion for New Trial at 2-8), the jury is free to assess the credibility of all the witnesses. If the

jurors by losing parties eager to have the verdict set aside; (2) encouraging free and open discussion among jurors; (3) reducing incentives for jury tampering; (4) promoting verdict finality; (5) maintaining the viability of the jury as a judicial decision-making body.

Gereau, 523 F.2d at 148.

jury disbelieved Plaintiff and instead believed the Defendants' witnesses, then the verdict was within the jury's discretion. See Lind, 278 F.2d at 89 (noting that if there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion)(internal citations omitted); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions."). Considering the Plaintiff's burden to prove his case by the preponderance of the evidence, the jury's verdict was not against the weight of the evidence. Of particular significance is the jury's clear finding that Plaintiff did not suffer a tangible employment action and that Plaintiff did not prove a claim of retaliation.

The remainder of the Plaintiff's arguments deal with the allegedly improper jury interrogatories, concerning his claim of racial harassment/hostile work environment.

B. Jury Interrogatories

Before evaluating Plaintiff's arguments, it is necessary to briefly set forth the law applicable to Plaintiff's claim for racial harassment/hostile work environment and as summarized for the jury. See Charge at 15-19.

Following Third Circuit law, the Court articulated the five elements necessary to establish a prima facie case of hostile work environment:

- (1) the plaintiff suffered intentional discrimination because of his or her membership in the protected class;
- (2) the discrimination was pervasive and regular;
- (3) the discrimination detrimentally affected the plaintiff;
- (4) the discrimination would have detrimentally affected a reasonable person of the same protected class in that position; and,

(5) the existence of respondeat superior liability.

West v. Philadelphia Elec. Co., 45 F.3d 744, 753 (3d Cir. 1995) (vacating judgment for defendant and remanding for new trial).

Further, the Court's instructions followed the holdings in Faragher v. City of Boca Raton, 524 U.S. 775 (1998) and Burlington Industries v. Ellerth, 524 U.S. 742 (1998), in which the Supreme Court articulated an affirmative defense available to employer defendants who have not taken a tangible employment action against a plaintiff, to negate vicarious liability based on a theory of respondeat superior in harassment/hostile work environment claims. Faragher and Ellerth require that such a defendant must show by a preponderance of evidence 1) that the employer exercised reasonable care to prevent and correct promptly any harassing behavior; and 2) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm. Faragher, 524 U.S. at 805; Ellerth 524 U.S. 764-65. Any defendant who has not taken a tangible adverse employment action against a plaintiff must be given the opportunity to present this affirmative defense. See Pennsylvania State Police v. Suders, 124 S.Ct. 2342, 2357 (2004) (vacating judgment precluding employer from asserting the affirmative defense).

1. Charging Conference

On December 21, 2004, the Court held a charging conference with both counsel to discuss the jury instructions and interrogatories. At the conference, the court developed Charge No. 11, to which there was no objection. Even on post-trial motions, Plaintiff agrees that Charge No. 11 is an accurate statement of the law. See Plaintiff's Response to Court's Questions at 1 ("Jury Charge 11 was proper.").

After some discussion regarding the elements of hostile work environment, the Court suggested Interrogatory B-3. Instead of asking the jury to make specific findings on the two prongs of the affirmative defense as explained in the instructions, the Court “compressed” the elements of the affirmative defense, and causation, by the language of Interrogatory B-3. The Court stated:

Then in the jury interrogatories on Page 2, I would insert after B-1 and B-2, a B-3. And it would say, “If you have answered yes as to B-1 and B-2, has plaintiff showed that the determinative factor for the action was race?”

And that would get - - that would cover the finding on the affirmative defense under the instructions.

Transcript of Dec. 21, 2004 at 12:3-8 (emphasis added).

The Plaintiff did not object to this change. See Id. at 12. Moreover, the Court believes that the Plaintiff received a strategic advantage from this wording (specifically “determinative”) because it avoided requiring the jury to answer a more detailed interrogatory regarding the City’s affirmative defense. Furthermore, it is likely that Plaintiff’s counsel intentionally remained silent realizing that Plaintiff had received an advantage.⁷ Considering this “deliberate inaction,” it

⁷ Plaintiff argues that once the jury interrogatory sheet and the jury charge are reviewed, “it becomes quickly apparent that they are inconsistent.” (Pl’s Letter brief at 2). However, it is important to note, as Defendants point out, that Plaintiff was in possession of both the charge and the verdict sheet during the charge and while the jury was deliberating for one and a half days. (Def’s Letter Brief at 1). Thus, Plaintiff had ample time to scrutinize the interrogatories and cure or object to any defect. In fact, immediately prior to deliberations, the Court gave counsel an opportunity to raise any objections at sidebar. See Tr. of Charge at 41:7-45:8. At that time, Plaintiff’s counsel made two objections to the charge. Specifically, Plaintiff’s counsel objected to and was granted exceptions for:

- The Court instructing the jury that some back pay is separate and distinct from compensatory damages. (Tr. of Charge at 41:14-43:14).
- The Court instructing the jury that a work environment is hostile or abusive because of racial harassment only if, inter alia, “a reasonable person, as distinguished from someone

would be unfair and improper now to grant the Plaintiff a new trial and allow him to profit simply because his counsel's strategy backfired. See U.S. v. Harris, 498 F.2d 1164, 1170-71 (3d Cir. 1974) (affirming convictions and explaining the responsibilities of counsel).

The Court then reviewed the jury instructions. After some discussion of respondeat superior, the Court agreed to add the following to Instruction 11:

If you find the plaintiff has proven his claim, and the defendant has not proven its affirmative defenses, and that race was the determinative factor, you must then determine the amount of damages plaintiff has sustained.

Id. at 21:21-25 (emphasis added).⁸ Plaintiff agreed with this change. Id. at 22:2. The corresponding jury interrogatories were B-1-2-3. See Exhibit B, Verdict Sheet at 2.

At no point during the charging conference or at any time prior to the discharge of the jury did Plaintiff's counsel object to these jury interrogatories or suggest removing or rephrasing Interrogatory B-3. Thus, Plaintiff has waived his objections.

2. Waiver

Fed.R.Civ.P. 49 governs whether a party waived any objection to inconsistency in

who is unduly sensitive, would have found the workplace to be hostile or abusive." Plaintiff objected and argued that the Court should have said "reasonable black person." (Tr. of Charge at 43:17-20) (emphasis added).

Interestingly, Plaintiff's second objection refers to Instruction No. 11, which Plaintiff now contends properly explained Plaintiff's hostile work environment claim to the jury. Given Plaintiff's attention and objection to such a minute detail in Instruction 11, it is apparent that counsel's failure to object to the interrogatories was deliberate.

⁸Instruction No. 11 also states:

[I]n order for the plaintiff to recover damages for having been exposed to a discriminatorily hostile or abusive work environment because of race, the Plaintiff must prove that such damages were proximately or legally caused by the unlawful discrimination. For damages to be the proximate or legal result of unlawful conduct, it must be shown that, except for such conduct, the damages would not have occurred.

Charge at 18:8-15.

the jury interrogatories. See Inter Med. Supplies, Ltd. v. Ebi Med. Sys., 181 F.3d 446, 463 (3d Cir. 1999)(affirming denial of post-trial motions); Neely v. Club Med Management Servs., 63 F.3d 166, 199 (3d Cir. 1995) (holding that defendants, by not objecting to the ruling, or to the jury charges implementing it, waived their defense). Rule 49(a) governs special verdicts; Rule 49(b) governs general verdicts.⁹

After carefully reviewing the record and the relevant case law, this Court concludes that the verdict in this case is governed by Federal Rule of Civil Procedure 49(b) and that Plaintiff has waived his objections to any inconsistency or impropriety in the instructions or the interrogatories.

⁹Rule 49 states:

(a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(b) General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

Fed. Rules Civ. Proc. R. 49

Relying almost exclusively on Simmons v. City of Philadelphia et al., 947 F.2d 1042, the Plaintiff contends that, in this case, the Court submitted a special verdict to the jury and thus, Plaintiff was not required to preserve his objections at trial or prior to the dismissal of the jury. Id. at 1057. This Court disagrees.

It is true that, to make the distinct theories of liability clear to the jury, the Court separated each theory into different sections on the verdict sheet and then broke each theory down into its individual elements. However, structuring the Jury Interrogatories to make the issues clearer for the jury does not necessarily convert a general verdict into a special verdict. Also, the fact that the interrogatories were entitled “Special Jury Interrogatories” is not dispositive. This Court believes that the substance of the jury questions and the intent with which they were written rather than the title of the verdict sheet is a better guide to determining whether the interrogatories constitute a special or general verdict. The Court finds Stanton v. Astra Pharmaceutical Products, Inc., 718 F.2d 553, 574 (3d Cir. 1983) instructive on this point.

In Stanton, the Third Circuit stated:

In deciding whether the district court intended to submit the “special questions” under Rule 49(a) or 49(b), it behooves us to consider the court’s own analysis of its actions:

In all candor, in framing the Special Questions, the Court did not consciously intend a Rule 49(a) submission as distinguished from Rule 49(b). It was an honest effort to insure that all issues would be addressed and resolved, including a determination of final liability, in the same manner as if a general verdict was implicated . . .the format utilized here performed the function contemplated under 49(b).

We agree.

Stanton, 718 F.2d at 574 (citing district court’s opinion). Similarly, in this case, this Court made a concerted effort to structure the verdict sheet to clarify, as much as possible, the complex issues before the jury with the intent that the jury would find in favor of either the Plaintiff or the Defendant on each count and assess any damages, thereby performing the function contemplated under 49(b).¹⁰

Even if the Court concluded that the interrogatories in this case constituted a special verdict, there is Third Circuit case law suggesting that Plaintiff’s objections would still be waived. See Herskowitz v. Nutri/System, 857 F.2d 179, 188-89 (3d Cir. 1988) (holding that under Rule 49(a) a party is deemed to have waived any objection to the interrogatories unless those objections are made known to the court before the jury retires); see also U.S. v. Palmeri, 630 F.2d 192, 202 n8 (3d Cir. 1980) (noting that “[i]n civil trials, failure to present a timely objection to the specific wording of the special interrogatories results in waiver”)(citing Frankel v. Burke’s Excavating, Inc., 397 F.2d 167, 170 (3d Cir. 1968)).¹¹

¹⁰ For example, in Instruction No. 10, the Court states:

If the above elements have been proven by a preponderance of the evidence, then you should find in favor of the Plaintiff as to both Title VII Racial Discrimination and the PHRA. On the other hand, if all the above elements have not been proven by a preponderance of the evidence, your verdict must be for defendant on these claims for Title VII Racial Discrimination and PHRA.

Charge at 15:2-9 (Emphasis added).

¹¹ The Court notes that there is some Third Circuit case law supporting Plaintiff’s view. See e.g., Malley-Duff & Associates v. Crown Life Insurance Co., 734 F.2d 133, 144-45 (3d Cir. 1984) (distinguishing verdicts rendered under Rule 49(a) from verdicts rendered under Rule 49(b) and holding that, in the case of a verdict rendered under Rule 49(a), appellate review is not precluded by absence of objection before discharge of jury), cert. denied, 469 U.S. 1072 (1984). However, the Court relies on Herskowitz, 857 F.2d 179, which is the most recent Third Circuit authority on this issue. As stated above, Herskowitz specifically requires a plaintiff to object to special interrogatories before the jury retires.

Furthermore, the Court agrees with Defendants that Plaintiff’s reliance on Simmons is misplaced. In Simmons, Judge Becker states that “in order to preserve the objection on appeal, it is not necessary in this circuit for a party, prior to the district court’s dismissal of the jury, to lodge an inconsistency

Based on this case law, this Court concludes that regardless of which subsection applies, Plaintiff's objections are foreclosed because Plaintiff's counsel did not object to the interrogatories, either when the instructions and verdict sheet were given to the jury or when the jury returned. Therefore, the Court can consider the objections now only if they rise to the level of plain error. See Herskowitz, 857 F.2d at 189.

3. Plain Error

The plain error doctrine authorizes a court to correct only particularly egregious errors. See Alexander v. Riga, 208 F.3d 419, 427 (3d Cir. 2000) (stating court review is appropriate if failure to consider error would result in a miscarriage of justice). The Third Circuit has held that if, as in this case, an objection was not preserved at trial, review should be exercised sparingly and a verdict will be overturned "only where the error is fundamental and highly prejudicial or if the instructions are such that the jury is without adequate guidance on a fundamental question and our failure to consider the error would result in a miscarriage of justice." Watson v. SEPTA, 207 F.3d 207, 222 (3d Cir. 2000) (quoting Smith v. Borough of Wilkinsburg, 147 F.3d 272, 275 (3d Cir. 1998)). After carefully reviewing the record, the Court finds that the jury was properly instructed and that there was no plain error in the interrogatories that would entitle Plaintiff to a

objection to special verdicts rendered under Rule 49 (a)." Simmons, 947 F.2d at 1057 (Part II). However, Part II did not represent a holding in the case because Chief Judge Sloviter concurred in the judgment and did not join Part II of Judge Becker's opinion, but only joined in Part I, Part III (C), and Part IV and Judge Weis dissented.

new trial or amended judgment.¹² Any ambiguity or inconsistency in the interrogatories was harmless error, at best.

a. The Verdict Sheet was not Facially Inconsistent.

The Court disagrees with Plaintiff that the verdict sheet is facially inconsistent even though the jury found for the Plaintiff on the PHRA claim but against the Plaintiff on the §§ 1981 and 1983 claims against Defendant O'Donnell. The jury repeatedly found that the Plaintiff did not suffer an adverse employment action because of his race, an essential element in a §§1981/1983 action. In addition, the Court notes that the Defendants presented testimony that Plaintiff was not a party to the employment contract between the FOP and the City. Because the focus of the §§1981 claim is on the Plaintiff's right to make and enforce contracts, the jury was entitled to find against the Plaintiff on this claim.

Furthermore, it is not necessarily inconsistent that the jury found against Defendant O'Donnell on the PHRA claim but did not find the City liable on any count. After reviewing the verdict sheet, the Court finds that it is possible that, by answering Interrogatories B-1 and B-2 in the affirmative, the jury found that Captain O'Donnell created a hostile work environment and personally discriminated against the Plaintiff. However, it is also possible that, by answering Interrogatory B-3 in the negative, the jury found that the City was not liable because it proved its

¹²In U.S. v. Guadalupe, the Third Circuit stated:

It is the defendant's burden to establish plain error. To do so, he must prove that: (1) the court erred; (2) the error was obvious under the law at the time of review; and (3) the error affected substantial rights--the outcome of the proceeding. If all three elements are established, the court may, but need not, exercise its discretion to award relief if the error affects the fairness, integrity or public perception of the proceedings.

U.S. v. Guadalupe, 402 F.3d 409, 410 (3d Cir. March 31, 2005) (internal citations omitted).

affirmative defense that the Plaintiff failed to mitigate his harm and that, in addition, the Plaintiff did not satisfy his ultimate burden of proving that the hostile work environment was a result of racial discrimination. See Pennsylvania State Police v. Suders, 124 S.Ct. 2342, 2357 (2004) (vacating judgment precluding employer from asserting the affirmative defense). Thus, the verdict sheet is not facially inconsistent.

Moreover, the Third Circuit has held that “consistent jury verdicts are not, in themselves, necessary attributes of a valid judgment.” Mosley v. Wilson, 102 F.3d 85, 90 (3d Cir. 1996) (reversing judgment as a matter of law in favor of defendant and remanding for new trial). In Mosley, the Third Circuit held:

[I]n certain circumstances, a court retains the authority, even in a civil case, to allow an apparently inconsistent verdict to stand. Those circumstances are where the verdict appears to be the result of compromise, as opposed to jury confusion.

Id. (quoting Los Angeles v. Heller, 475 U.S. 796, 805 (1986)).

In the present case, the apparently inconsistent verdict could very well be the result of juror compromise. The jury was properly instructed on all the counts and there is no reason to believe that the jury was confused.¹³ It is more likely that the jury, in order to reach a unanimous verdict, simply agreed to compromise. Thus, any apparent inconsistency in the verdict sheet does not warrant a new trial.

b. The Jury Instructions and Jury Interrogatories are not Inconsistent nor Improper.

Plaintiff’s claims that the charge to the jury and the jury interrogatories are inconsistent and that the Court changed the requisite showing for hostile work environment within the

¹³ The Court notes that the jury did not have any questions regarding the instructions or interrogatories during the course of deliberations and reached a unanimous verdict on each count.

interrogatories resulting in plain error, (see Plaintiff's Memo for New Trial, at 15), must be rejected.

It is well-settled that the Court's charge to the jury and the jury interrogatories should be analyzed together. United States v. Desmond, 670 F.2d 414, 418 (3d Cir. 1981) (affirming conviction). A review of the jury charge and the interrogatories used in this case reveals that the two were parallel. Furthermore, the jury was fully and properly instructed on the law and the Court fails to find any inconsistency.

Given the parallel format of the instructions and interrogatories and a close reading of Faragher and Ellerth, that the jury was allowed to consider the employer's affirmative defense separately from the formal doctrine of respondeat superior. Jury charge No. 11 states:

When a hostile or abusive work environment is created by the conduct of a supervisor with immediate or successively higher authority over the Plaintiff, the Defendant employer is responsible under the law for such behavior and the resulting work environment. This is called respondeat superior.

Charge at 17:24-18:7. The instruction then describes causation and damages. Following that, the Court charged the jury that it should consider the Defendant's affirmative defense if it has found racial harassment or hostile work environment but has found there was no adverse employment action (as did the jury in this case). The affirmative defense is then described:

In order to prevail on the affirmative defense, the Defendant must prove each of the following facts by a preponderance of the evidence:

1) That the Defendant exercised reasonable care to prevent and correct promptly, any racially harassing behavior in the workplace;
and

2) That the Plaintiff unreasonably failed to take advantage of the preventative or corrective opportunities provided by the Defendant to avoid or correct the harm or otherwise failed to exercise reasonable care to avoid harm.

If you find that the Plaintiff has proven his claim and that the Defendant has not proven its affirmative defense and that race was the determinative factor, you must then determine the amount of damages the Plaintiff has sustained.

Id. at 18:23-19:12. Before the jury retired, the Court distributed copies of the verdict sheet to the individual jurors and explained the process of answering the interrogatories. See Tr. of Charge at 36-38.

From these instructions and the explanation of the verdict sheet, the jury understood that respondeat superior liability and the City's affirmative defense were two separate and distinct issues to be considered independently.

A careful reading of Faragher and Ellerth supports the Court's position. In Faragher, the Supreme Court recognized an affirmative defense to liability in some circumstances, even when a supervisor has created an actionable environment. Faragher, 524 U.S. at 804. The Court explained:

An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see Fed. Rule. Civ. Proc. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Id. at 807. Notably, nowhere in Faragher or Ellerth does the Supreme Court state that the affirmative defense is incorporated into the doctrine of respondeat superior.¹⁴

Therefore, the jury could have concluded, based on the instructions, that respondeat superior liability existed because Captain O'Donnell created the hostile work environment, and thus answered Interrogatory B-2 in the affirmative and then decided that the City should not be held liable because it proved its affirmative defense, thus answering Interrogatory B-3 in the negative.

Reading the charge in its entirety, the Court finds no error or inconsistency in the language to which objection is now taken. See Hurley v. Atlantic City Police Dep't, 174 F.3d 95, 115 (3d Cir. 1999) (noting that it is well-settled that jury instructions are “taken as a whole [to determine if] they properly apprised the jury of the issues and the applicable law.”) (quoting Dressler v. Busch Entertainment Corp., 143 F.3d 778, 780 (3d Cir. 1998)). In addition, the interrogatories were not defective, especially when examined in light of the jury charge. Finally, the Court again notes that, although given the opportunity from at the charging conference and up until the jury returned with its verdict, Plaintiff's counsel did not object to the wording of the instructions or the written interrogatories directed to the jury.

The Court acknowledges that the jury could have been given more specific interrogatories regarding the City's affirmative defense, but the Court did not do so, believing that use of the

¹⁴In fact, it would not make sense to incorporate the affirmative defense into the theory of respondeat superior because the defendant is not always entitled to it. Indeed, in Ellerth, the Supreme Court recognized that the affirmative defense and respondeat superior are separate and distinct when it stated that “a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence.” Ellerth, 524 U.S. at 765 (referring to Fed. Rule Civ. Proc. 8(c)). Rule 8(c) also enumerates many other affirmative defenses that a defendant may raise to escape liability, i.e., assumption of risk, contributory negligence, duress, fraud, etc., none of which are automatically incorporated into any particular doctrine.

word “determinative” in Interrogatory B-3 conveyed the requirement that, notwithstanding the elements of the affirmative defense, if the jury found that the Defendant’s actions were based on Plaintiff’s race, the Plaintiff was entitled to recover. The Court concludes that the interrogatories, as given, were not only legally proper, consistent with Instruction No. 11, not inconsistent with any Supreme Court or Third Circuit case, but also, in fact, were highly favorable to the Plaintiff, who understandably did not object, and thus, cannot be the subject of a complaint on post-trial motions. Plaintiff received a fair trial and the jury instructions, taken as a whole, were correct. The jury was given adequate guidance on the hostile work environment claim and Plaintiff received a strategic advantage from the Court’s wording of the Interrogatories. If, as Plaintiff now contends, the jury had been given additional interrogatories on the affirmative defense, the jury would have had an additional “opportunity” to find in favor of the Defendant - a risk to Plaintiff that Plaintiff’s counsel did not ask for at the trial. The jury had no questions for the Court during the course of their deliberations and are presumed to have understood and followed the Court’s instructions. Weeks v. Angelone, 528 U.S. 225, 234 (2000) (affirming conviction). Moreover, Plaintiff’s counsel admits that she has no case support for her plain error argument.

Finally, even assuming the Court erred in posing Interrogatory B-3 to the jury, the fact that damages were found by the jury to be zero indicates that the Plaintiff’s substantial rights were not affected; therefore, any error was harmless and the verdict should not be disturbed. See McQueeney v. Wilmington Trust Co., 779 F.2d 916, 924-27 (3d Cir. 1985) (stating that error is harmless when highly probable that it did not affect plaintiff’s substantial rights); see also Banks

v. Millar Elevator Servs. Co., 2000 U.S. Dist. LEXIS 2703 (E.D. Pa. 2000) (denying motion for new trial). In Banks, Judge Kelly noted:

Even if the Court erred in its rulings at trial, a new trial will not be ordered where the errors constitute harmless error. Trial errors are considered harmless when it is highly probable that the error did not affect the outcome of the case. Unless a substantial right of the party is affected, a non-constitutional error in a civil case is harmless.

Id. at *3 (internal citations omitted).

Applying this standard, the Court notes that Plaintiff has not made any legal showing that the verdict sheet together with the jury charge affected his substantial rights, resulted in a miscarriage of justice, or in any way altered jury deliberations. The Defendants correctly point out that the jury awarded the Plaintiff zero damages. (See Verdict Sheet, Section G (damages)). Even though this may have been in response to the finding of liability against Captain O'Donnell on the PHRA claim, the jury also found zero damages against the City and zero punitive damages, though not required to do so. This is strong evidence that the Plaintiff has not proven any damages relating to any of his claims.

Because the Plaintiff has not shown that his substantial rights were affected, the Court finds that any error was harmless and that no plain error was committed. See F.R. Civ. P. 61. The Court cannot say that “a miscarriage of justice would result if the verdict were to stand.” Williamson v. Consolidated Rail Corp., 926 F.2d 1344, 1352 (3d Cir. 1991) (vacating the grant of conditional new trial and ordering the jury verdict reinstated because it did not constitute a miscarriage of justice as it was supported by the evidence). Thus, the waiver issue is insurmountable, Plaintiff's motions will be denied, and the verdict will not be disturbed.

VII. Request for Injunctive Relief

At the oral argument on June 15, 2005, Plaintiff raised, for the first time, his entitlement to injunctive relief and attorney's fees. Although Plaintiff filed two post-trial motions, neither includes any request for equitable relief or any suggestion that Plaintiff is entitled to an injunction because of the finding of liability on the PHRA claim against Defendant O'Donnell. Thus, this issue has been waived.

Moreover, even though Plaintiff won on liability on the PHRA claim against Defendant O'Donnell, he is not a "prevailing party" as defined by the Supreme Court because the jury awarded zero damages. See Farrar v. Hobby, 506 U.S. 103, 111-12 (affirming judgment of court of appeals denying award of attorney fees to plaintiff and holding that to qualify as a prevailing party, a plaintiff must obtain some relief on the merits of his claim); see also Walton v. City of Philadelphia, 1998 U.S. Dist. LEXIS 13139 at *15-*19 (denying plaintiff's motion for attorney's fees where jury awarded no damages). Therefore, Plaintiff's request for injunctive relief or attorney's fees is denied.

VIII. Conclusion

For the reasons stated above, the Court finds that the weight of the evidence supported the jury's verdict; the verdict was not facially inconsistent; and the jury interrogatories were not inconsistent with the jury charge. The Court also concludes that because Plaintiff failed to properly preserve his objections to the interrogatories, they are waived. Finally, the Court holds that there was no plain error in the jury charge or jury interrogatories that affected Plaintiff's substantial rights or resulted in manifest injustice. Accordingly, Plaintiff's motions to amend the judgment and for a new trial will be denied. An appropriate Order follows.

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

DERRICK U. JACOBS,	:	
Plaintiff	:	CIVIL ACTION
	:	
v.	:	
	:	
CITY OF PHILADELPHIA	:	NO. 03-CV-950
and CAPTAIN JOSEPH O'DONNELL,	:	
Defendants	:	

ORDER

AND NOW, this 8th day of August, 2005, based on the foregoing memorandum and upon consideration of the briefs and arguments made by counsel, it is hereby ORDERED that Plaintiff's Motion to Amend Judgment (Doc. No. 74) and Motion for a New Trial (Doc. No. 75) are DENIED.

BY THE COURT:

/s/ Michael M. Baylson

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