

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

RODERICK FOXWORTH, JR.	:	CIVIL ACTION
	:	
v.	:	
	:	
PENNSYLVANIA STATE POLICE, et al.	:	NO. 03-CV-6795

MEMORANDUM

Baylson, J.

April 11, 2005

I. Introduction

Presently before this Court is Defendants’ Motion to Dismiss, pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). For the reasons set forth below, the Defendants’ Motion to Dismiss the Amended Complaint will be granted in part and denied in part.

II. Background

A. Procedural Background

On December 19, 2003, Plaintiff Roderick Foxworth, Jr. (“Plaintiff”) filed a complaint under 42 U.S.C. § 1983, alleging employment discrimination based on race against the Pennsylvania State Police, Jeffrey Miller, Terry McElheny, Steven McDaniel, and Linda M. Bonney (collectively, “Defendants”). On February 19, 2004, Defendants filed their first Motion to Dismiss. In an Order dated May 17, 2004, this Court granted Plaintiff leave to amend his Complaint to more fully plead his claims under 42 U.S.C. § 1983 or request leave of the Court to delay the amendment of his Complaint and place the case in suspense until his Title VII claims then pending before the EEOC and PHRC were exhausted. In an Order dated June 17, 2004, pursuant to Plaintiff’s request, this Court placed the case in suspense pending the exhaustion of

his claims before the EEOC and PHRC and the filing of an amended Complaint. On January 11, 2005, after communication with counsel, the Court ordered that the case be transferred from the Civil Suspense File to the current docket for final disposition. Plaintiff filed an Amended Complaint on January 19, 2005, alleging racial discrimination under 42 U.S.C. §§ 1981 and 1983 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (“Title VII”). On February 2, 2005, Defendant Pennsylvania State Police filed an Answer to Count II of the Amended Complaint. The same day, Defendants collectively filed a Motion to Dismiss the Amended Complaint. Briefing in this matter was complete on March 28, 2005.

B. Allegations

The following are the facts, as alleged by Plaintiff in the Amended Complaint. Plaintiff is a former candidate for appointment to the position of Pennsylvania State Police trooper cadet. Defendant Jeffrey Miller is the Commissioner of the Pennsylvania State Police, Defendant Terry McElheny was an officer with the Pennsylvania State Police and is now retired, Defendant Steven McDaniel is a Captain and Commander of the Pennsylvania State Police Troop to which Plaintiff was assigned, and Defendant Linda M. Bonney is the Director of Human Resources for the Pennsylvania State Police. Amended Compl. at ¶¶3-8.

Plaintiff is a 24 year-old African-American male who applied to be a cadet for the Pennsylvania State Police (“PSP”). In April 2003, Plaintiff submitted a formal, completed application to the PSP. Plaintiff took the required written examination on January 11, 2003 and received a score of 89.52, ranking him 47 out of 2993 candidates who took the examination. Plaintiff took the required oral examination on March 14, 2003 and received a score of 82.55, giving him a ranking of 183 out of 888 candidates who took both the written and oral

examinations. On April 14, 2003, Plaintiff received a letter informing him of his ranking and notifying him that the PSP would be inviting candidates in order of rank to participate in further consideration. Id. at ¶¶9-14.

On April 25, 2003, Plaintiff received a letter from the PSP's Bureau of Human Resources extending him a "conditional offer" of employment. This same letter informed Plaintiff that he had to successfully complete additional selection procedures, including medical and fitness examinations and background checks, and that he was to report on May 15, 2003 for his physical screening. Id. at ¶¶15-17.

When Plaintiff arrived on May 15, 2003, he was informed by Defendant Trooper Terry McElheny that he would have to withdraw his application or be permanently disqualified from future selection. Rather than risk permanent disqualification, Plaintiff withdrew his application. Id. at ¶¶19, 24.

The written application that Plaintiff completed prior to May 15, 2003 included a questionnaire, on which Plaintiff indicated that he had been processed through the Accelerated Rehabilitation Disposition program ("ARD"), pursuant to the Pennsylvania Criminal Code. On July 23, 2001, an Expungement Order pursuant to 18 Pa. C.S.A. § 9122(c) and (d) had been served on PSP and directed them to destroy all charges or records pertaining to Plaintiff. At no point in time had Plaintiff had any criminal charges that resulted in a conviction, nor does he have a criminal record. Id. at ¶¶21, 27, 29.

18 Pa. C.S.A. § 9124 prohibits the use of information regarding convictions which have been annulled or expunged in determining eligibility for licensing, certification, registration or permission to engage in a trade, profession or occupation. Id. at ¶28. However, Plaintiff was

informed by the PSP that an automatic disqualification factor affected him, and he risked further permanent disqualification, because of admission of criminal behavior. Id. at ¶26.

On May 18, 2003, Plaintiff met with Defendant Steven McDaniel, the Commander and Captain of Troop “J,” to discuss Plaintiff’s automatic disqualification. McDaniel was made aware that Plaintiff’s prior contacts with the law had been expunged. Thus, according to Plaintiff, McDaniel should have known that these items could not be considered, but instead informed Plaintiff that these items had to be considered. Id. at ¶22.

Defendant Linda M. Bonney, the Director of Human Resources for the PSP, also knew that Plaintiff’s legal problems had been expunged but nevertheless chose to implement the disqualification procedures. Id. at ¶23.

On June 17, 2003, Plaintiff inquired as to whether he was entitled to a due process hearing and was told that the PSP was not required to provide such a hearing. Id. at ¶25.

Count I of the Amended Complaint makes a claim against all Defendants pursuant to 42 U.S.C. § 1983, alleging Defendants violated Plaintiff’s civil rights. Specifically, Plaintiff alleges that Defendants deprived Plaintiff of his federally protected rights under the Due Process Clause of the Fourteenth Amendment and Equal Protection of laws by improperly disqualifying Plaintiff from the cadet position and denying him a hearing in the matter. Amended Complaint at ¶¶32-58. Plaintiff seeks at least \$100,000 in compensatory and punitive damages. Id. at 15.

Count II makes a claim for employment discrimination based on race pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. against all Defendants. Id. at ¶¶59-77. Plaintiff seeks equitable relief, compensatory damages in excess of \$100,000, and reasonable attorney’s fees. Id. at 19-20.

Count III makes a claim against all Defendants pursuant to 42 U.S.C. § 1981, alleging that Defendants denied Plaintiff the right to make and enforce a contract of employment as enjoyed by white citizens. Amended Complaint at ¶¶78-92. Plaintiff seeks injunctive relief, compensatory and punitive damages in an amount in excess of \$100,000, and reasonable attorneys fees. Id. at 26.

III. Legal Standard and Jurisdiction

When deciding a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court may look only to the facts alleged in the complaint and its attachments. Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1251, 1261 (3d Cir. 1994). The Court must accept as true all well-pleaded allegations in the complaint and view them in the light most favorable to the plaintiff. Angelastro v. Prudential-Bache Sec., Inc., 764 F.2d 939, 944 (3d Cir. 1985). A Rule 12(b)(6) motion will be granted only when it is certain that no relief could be granted under any set of facts that could be proved by the plaintiff. Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988).

In this case, this Court has federal question jurisdiction pursuant to 28 U.S.C. § 1331 and venue is proper in this Court pursuant to 29 U.S.C. § 1391(b), as the facts giving rise to the claims occurred in this district and the parties are citizens of this district.

IV. Motion to Dismiss

A. Defendants

Defendants argue that Count I must be dismissed because it fails to state a viable due process or equal protection claim under 42 U.S.C. § 1983 against any defendant. (Def's Motion at ¶4A). Specifically, Defendants argue that state agencies and state employees in their official

capacities are not “persons” for purposes of §1983. (Def’s Motion at 5).

Defendants also argue that Count II must be dismissed as to Defendants Miller, McElheny, McDaniel, and Bonney because individuals cannot be sued under Title VII. (Def’s Motion at 4B).

Finally, Defendants argue that Count III, based on 42 U.S.C. §1981, must be dismissed as to the State Police and as to the other defendants in their official capacities because it is barred by the Eleventh Amendment. (Def’s Motion at ¶4C). In addition, Defendants argue that Plaintiff is not entitled to pursue a §1981 claim against state actors such as defendants and at a minimum, qualified immunity would apply. (Def’s Motion at ¶4C).

Defendants assert that only Count II, Plaintiff’s Title VII claim, may proceed, but only against Defendant Pennsylvania State Police. (Def’s Motion at ¶5).

B. Plaintiff

Plaintiff agrees that Count II against Defendants Miller, McElheny, McDaniel, and Bonney in their individual capacities should be dismissed. However, Plaintiff maintains that these defendants can be sued under Title VII in their official capacities. Plaintiff also agrees that the State Police, as a Commonwealth agency, and the other Defendants named in their official capacities under Count III, based on 42 U.S.C. §1981, would be barred from suit by the Eleventh Amendment. However, Plaintiff does not agree that the individual defendants would enjoy any type of qualified immunity under §1981.

V. Discussion

A. Count I

Count I of Plaintiff’s Amended Complaint raises §1983 due process and equal protection

claims against all defendants.

A review of Third Circuit case law reveals that “[n]either a State nor its officials acting in their official capacities are ‘persons’ under § 1983.” Douris v. Schweiker, 229 F. Supp. 2d 391, 409 (E.D. Pa. 2002) aff’d, No. 03-4345, 2004 WL 1396209 (3d Cir. 2004) (citing Will v. Michigan Dep’t. of State Police, 491 U.S. 58, 71 (1989)); see also Blanciak v. Allegheny Ludlum Corp., 77 F.3d 690, 698 (3d Cir.1996) (affirming judgment barring ADEA claims of employees against employer and Commonwealth of Pennsylvania, Department of Labor and Industry); Carter v. State Correctional Institute at Graterford Medical Health Dept., No. 04-3285, 2004 WL 3019239, at *5 (E.D.Pa. Dec. 28, 2004) (granting defendants’ motion to dismiss because “state officials acting in their official capacities are not ‘persons’ subject to suit for damages under §1983”). Therefore, Count I against Defendant Pennsylvania State Police, a state agency, must be dismissed and PSA will be terminated as a party in Count I. Similarly, Count I against the individual Defendants Miller, McElheny, McDaniel, and Bonney in their official capacities must also be dismissed.

To the extent that Plaintiff is suing the individual defendants in their personal capacities, an individual cannot be held liable for § 1983 liability unless he personally “participated in violating [another’s] rights, or ... directed others to violate them or ... had knowledge of and acquiesced in his subordinates’ violations.” Baker v. Monroe Township, 50 F.3d 1186, 1190-91 (3d Cir.1995); see also Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir.1988) (holding that defendant in civil rights action must also have personal involvement in alleged wrongs). The Third Circuit has explained that “allegations of participation or actual knowledge and acquiescence, however, must be made with appropriate particularity.” Dellarciprete, 845 F.2d at

1195. Viewed in a light most favorable to Plaintiff, the Amended Complaint sufficiently alleges personal involvement in the wrongs to allow Count I to proceed against the individual Defendants McElheny, McDaniel, and Bonney in their personal capacity.¹ However, the Amended Complaint fails to state any particular facts indicating that Defendant Miller had any personal involvement with Plaintiff's disqualification.² As a result, Defendant Miller may not properly be named as a defendant in Count I of this action. Count I against Defendant Miller will be dismissed without prejudice, with leave granted to Plaintiff to amend the Complaint, within ten (10) days, by alleging particular facts indicating Defendant Miller's personal involvement in Plaintiff's disqualification.

B. Count II

Count II makes a Title VII claim for racial discrimination against all Defendants.

Defendants correctly point out that the Third Circuit has stated "Congress did not intend to hold individual employees liable under Title VII" in dismissing claims against a plaintiff's former supervisor. Sheridan v. DuPont, 100 F.3d 1061, 1078 (3d Cir. 1996) (concluding that Congress did not intend to hold individual employees liable under Title VII). Plaintiff does not

¹Specifically, Plaintiff alleges that 1) Defendant McElheny was the person who informed Plaintiff that he would have to withdraw his application or be permanently disqualified for any future positions; 2) Defendant McDaniel was present and participated in the disqualification process involving Plaintiff; 3) Defendant Bonney knew that Plaintiff had an expunged record and chose to apply the disqualification procedure. (Amended Compl. at ¶¶7, 19, 22, 23)

² With regard to Defendant Miller, the Amended Complaint only states: "Defendants allowed and sanctioned the administrative decisions that affected the Plaintiff herein, as passed on through the full understanding and sanctioning of the Commissioner Defendant of PSP, and further communicated by its agents, servants and employees, Defendants, McEleny, McDaniels and Bonney on or about May 15, 2003." (Amended Compl. at ¶37c).

disagree and indicates that “to the extent that ¶5-8 of the Amended Complaint to bring action against the individuals in their official capacity and individual capacity the Defendants are correct.” (Pl’s Response at 12) (emphasis added). To the extent Plaintiff argues in his Sur Rebuttal that official capacity suits against individuals are permissible under Title VII, the Court disagrees. Because the only proper defendant in a Title VII case is the “employer,” pursuing such claims against individuals in their official capacities would be redundant. See Kim v. City of Philadelphia, 1997 WL 277357 (E.D.Pa. 1997) (granting partial summary judgment in favor of individual defendants). In Kim, Judge Dubois stated:

With respect to plaintiff’s claims against those individual defendants in their official capacities, such claims merge with the remaining claim under Count II against the City of Philadelphia. See Hafer v. Melo, 502 U.S. 21, 25 (1991).

Id. at *1. In addition, under Hafer v. Melo, 502 U.S. 21, 25 (1991), there is complete symmetry between a governmental entity as a defendant and the officers who hold positions in that governmental entity in their official capacities. See also A.M. v. Luzerne County Juvenile Det. Ctr., 372 F.3d 572, 580 (3d Cir. 2004) (“A suit against a governmental official in his or her official capacity is treated as a suit against the governmental entity itself.”). Thus, Plaintiff suffers no prejudice from having his suit proceed against the PSA alone, rather than against the individual Defendants in their official capacity.

Accordingly, Defendants’ Motion to Dismiss as it relates to Count II against the individual Defendants Miller, McElheny, McDaniel, and Bonney arising under Title VII must be granted. The individual defendants will be terminated as parties to Count II. Count II may

proceed only against Defendant Pennsylvania State Police.

C. Count III

Count III makes a claim against all Defendants pursuant to 42 U.S.C. § 1981, alleging that Defendants denied Plaintiff the right to make and enforce a contract of employment as enjoyed by white citizens.

Plaintiff agrees with the Defendants that the State Police, as a Commonwealth agency, and the other Defendants named in their official capacities under Count III, based on 42 U.S.C. §1981, would be barred from suit by the Eleventh Amendment. (Pl’s Response at 2). Thus, Count III against Defendant Pennsylvania State Police must be dismissed with prejudice and the Defendant State Police will be terminated as a party to Count III. However, Plaintiff does not agree that the individual defendants would enjoy any type of qualified immunity under §1981 and contends that the §1981 claim may proceed against them. (Pl’s Response at 12-18).

1. Merger

A review of relevant case law reveals that there is disagreement among the circuits, as well as within the Eastern District of Pennsylvania on the issue of whether a plaintiff’s claim under 42 U.S.C. § 1981 should be dismissed because 42 U.S.C. § 1983 provides the exclusive remedy or whether the claims should be merged. Plaintiff argues that his §1981 claim should not be dismissed and “[a]t a minimum there would be a merger issue.” (Pl’s Response at 15).

Without any controlling Third Circuit precedent, this court notes that there are several cases in this district addressing this issue. For example, in Miles v. City of Philadelphia, 1999 WL 274979 (E.D. Pa. May 5, 1999), Judge Waldman found that the Supreme Court’s holding in Jett v. Dallas Independent School Dist., 491 U.S. 701 (1989) that “§ 1983 provides the exclusive

remedy for violations of § 1981 by state actors” to still be effective despite the 1991 amendments to § 1981. Accordingly Judge Waldman treated the § 1981 claim as merged into the § 1983 claim. See also Poli v. SEPTA, 1998 U.S. Dist. LEXIS 9935 (E.D. Pa. July 7, 1998) (following the holding in Jett that § 1983 is the exclusive remedy for § 1981); but see Watkins v. Penn. Bd. of Probation and Parole, et al., 2002 U.S. Dist. LEXIS 23504 (E.D. Pa. November 25, 2002) (following the 9th Circuit view that there is an individual cause of action under § 1981).

Although the Third Circuit has not explicitly addressed this issue, in a recent non-precedential opinion the Third Circuit stated:

The Court has ruled “that the express action at law provided by § 1983 . . . 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 735-6).

Although the opinion in Oaks does not directly address the effect of the 1991 amendments to § 1981, it does apply the view that § 1983 is still the remedy for § 1981 claims against state actors to the case before it. 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.

2. Qualified Immunity

Defendants assert qualified immunity for Defendants Miller, McElheny, McDaniel, and Bonney. The Court initially rejects Defendants’ position that the claims against Defendants, in

their individual capacities, should be dismissed.

Qualified immunity applies so long as the officials' conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known. In determining whether qualified immunity applies, there are two primary questions: 1) whether the plaintiff has alleged the deprivation of an actual constitutional right, and if so, 2) whether the right was clearly established at the time of the alleged violation. Carswell v. Borough of Homestead, 381 F.3d 235, 241-242 (3d Cir., 2004) (affirming district court's grant of judgment in favor of defendant). The applicability of qualified immunity is decided by the court as a matter of law. Doe v. Groody, 361 F.3d 232, 238 (3d Cir. 2004) (affirming district court's grant of partial summary judgment against defendants on the issue of qualified immunity). See also Bartholomew v. Pennsylvania, 221 F.3d 425, 428 (3d Cir. 2000) (reversing district court's grant of summary judgment and holding qualified immunity defense was not precluded). The jury, however, determines disputed historical facts material to the qualified immunity question. See Sharrar v. Felsing, 128 F.3d 810, 828 (3d Cir. 1997) (affirming grant of summary judgment in favor of defendants on grounds of qualified immunity). Because of the importance of the factual background in determining the applicability of the qualified immunity defense, the Court believes discovery should proceed in this matter to determine what the facts are, and Defendants may reassert their positions in a Motion for Summary Judgment at the conclusion of discovery. Therefore, the Court will not make any definitive ruling on the issue of qualified immunity at this time.

VI. Conclusion

Because neither a state nor its officials acting in their official capacities are “persons” under § 1983, Count I against Defendant Pennsylvania State Police must be dismissed with prejudice. Defendant Pennsylvania State Police will be terminated as a party in Count I. Similarly, Count I against the individual Defendants Miller, McElheny, McDaniel, and Bonney in their official capacities must also be dismissed with prejudice. Because Plaintiff does not present any facts alleging Defendant Miller had any personal involvement in the disqualification as required under section 1983, Count I against him will be dismissed without prejudice, with leave granted to Plaintiff to amend the Complaint, within ten (10) days, by alleging particular facts indicating Defendant Miller’s personal involvement. If Plaintiff does not amend the Complaint within the allotted time period, Count I may proceed only against the individual Defendants McElheny, McDaniel, and Bonney in their personal capacities.

Because the Third Circuit does not allow individuals to be sued under Title VII, the Defendants’ Motion to Dismiss Count II against Defendants Miller, McElheny, McDaniel, and Bonney will be granted and Count II against them will be dismissed with prejudice. These individual defendants will be terminated as parties to Count II.

The parties agree that Count III against Defendant Pennsylvania State Police should be dismissed with prejudice. Therefore, Defendant State Police will be terminated as a party to Count III. Defendants’ Motion to Dismiss Count III against the individual Defendants Miller, McElheny, McDaniel, and Bonney is denied and Count III may proceed against them.

In sum, Plaintiff’s remaining viable claims at this time include:

- Count I (§1983) - against the individual Defendants McElheny, McDaniel, and

Bonney in their personal capacities;³

- Count II (Title VII) - against Pennsylvania State Police;
- Count III (§1981) - against the individual Defendants Miller, McElheny, McDaniel, and Bonney.

Without making any definitive ruling on the remaining issues raised in the Briefs, the Court believes discovery should proceed to determine what the facts are, and Defendants may reassert their positions in a Motion for Summary Judgment at the conclusion of discovery.

An appropriate Order follows.

³ Because the Court has granted Plaintiff leave to amend his Complaint, it is possible that he will allege sufficient facts to also pursue Count I against Defendant Miller in his personal capacity.

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RODERICK FOXWORTH, JR.	:	CIVIL ACTION
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PENNSYLVANIA STATE POLICE, et al.	:	NO. 03-CV-6795

ORDER

AND NOW, this 11th day of April, 2005, upon consideration of the Defendants' Motion to Dismiss and the briefs submitted by the parties, for the reasons stated in the foregoing memorandum, it is hereby ORDERED:

1. Defendants' Motion to Dismiss the Amended Complaint (Doc. No. 22) is granted in part and denied in part.

2. Count I against Defendant Pennsylvania State Police is dismissed with prejudice. Defendant Pennsylvania State Police is hereby terminated as a party in Count I.

3. Count I against the individual Defendants Miller, McElheny, McDaniel, and Bonney in their official capacities is dismissed with prejudice.

4. Count I against Defendant Miller in his personal capacity is dismissed without prejudice, with leave to amend within ten (10) days.

5. Defendants' Motion to Dismiss Count I against the individual Defendants McElheny, McDaniel, and Bonney in their personal capacities is denied.

6. Defendants' Motion to Dismiss Count II against Defendants Miller, McElheny, McDaniel, and Bonney is granted. Count II against Defendants Miller, McElheny, McDaniel, and Bonney is dismissed with prejudice. These defendants are hereby terminated as parties to Count II.

7. Count III against Defendant Pennsylvania State Police is dismissed with prejudice. Defendant State Police is hereby terminated as a party to Count III.

8. Defendants' Motion to Dismiss Count III against the individual Defendants Miller, McElheny, McDaniel, and Bonney is denied.

BY THE COURT:

/s/ Michael M. Baylson

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