

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

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<b>ROBBIE B. POLLACK</b>	:	
<b>Plaintiff,</b>	:	
	:	
v.	:	<b>CIVIL ACTION</b>
	:	<b>NO. 06-4089</b>
<b>THE CITY OF PHILADELPHIA,</b>	:	
<b>TYRONE COOK, JAMES CLARK,</b>	:	
<b>JOHN DOE and SYLVESTER JOHNSON</b>	:	
<b>Defendant.</b>	:	

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**ORDER AND MEMORANDUM**

**ORDER**

**AND NOW** this 16th day of February, 2007, upon consideration of Defendants' Motion to Dismiss Plaintiff's Complaint (Document No. 6, filed November 20, 2006); and Plaintiff's Memorandum of Law in Opposition to Defendants' 12(b)(6) Motion to Dismiss (Document No. 8, filed December 4, 2006), for the reasons set forth in the attached Memorandum, **IT IS ORDERED** that Defendants' Motion to Dismiss Plaintiff's Complaint is **GRANTED IN PART AND DENIED IN PART**, as follows:

1. Defendants' Motion to Dismiss is **GRANTED** as to plaintiff's equal protection claim against defendant Tyrone Cook under 42 U.S.C. § 1983 (Count One), and the Complaint is **DISMISSED** as to Tyrone Cook **WITHOUT PREJUDICE** to plaintiff's right to file an amended complaint with respect to this claim within twenty (20) days if warranted by the facts.

2. Defendants' Motion to Dismiss is **DENIED** in all other respects

## MEMORANDUM

### **I. INTRODUCTION**

This case arises out of plaintiff's former employment with the City of Philadelphia Police Department. Plaintiff's Complaint raises eight claims against defendants, the City of Philadelphia, Tyrone Cook, James Clark, John Doe, and Sylvester Johnson. Plaintiff's claims are as follows:

- Count One: Violation of plaintiff's Fourteenth Amendment right to equal protection against defendant Cook in his individual capacity, pursuant to 42 U.S.C. § 1983;
- Count Two: Violation of plaintiff's First Amendment right to free speech against defendant Clark in his individual capacity, pursuant to 42 U.S.C. § 1983;
- Count Three: Violation of plaintiff's First Amendment right to free speech against defendant John Doe in his individual capacity, pursuant to 42 U.S.C. § 1983;
- Count Four: Violation of plaintiff's First Amendment right to free speech against defendant Johnson in his individual capacity, pursuant to 42 U.S.C. § 1983;
- Count Five: Violation of plaintiff's Fourth Amendment right to be free from unreasonable search and seizure against defendant Clark in his individual capacity, pursuant to 42 U.S.C. § 1983;
- Count Six: Violation of plaintiff's Fourth Amendment right to be free from unreasonable search and seizure against defendant John Doe in his individual capacity, pursuant to 42 U.S.C. § 1983;
- Count Seven: Violation of 42 U.S.C. § 1981 against defendant the City of Philadelphia relating to adverse employment actions;
- Count Eight: Violation of 42 U.S.C. § 1981 against defendant the City of Philadelphia relating to retaliation.

Presently before the Court is defendants' Motion to Dismiss Count One, Count Three, Count Four, Count Six and Count Seven of the Complaint.

### **II. BACKGROUND**

The following facts are taken from the Complaint, and are presented in the light most favorable to plaintiff.

Plaintiff, an African American male, began working as a custodial employee for the City

of Philadelphia Police Department on January 24, 1999. Plaintiff alleges that defendant Administrative Sergeant Tyrone Cook, his supervisor, continually harassed plaintiff on the basis of his race.<sup>1</sup> Management did not respond to plaintiff's numerous complaints about the harassment. After the complaints were made, the harassment worsened to the point where, on July 30, 2004, plaintiff suffered a stress-related attack at work which required that he be taken by ambulance to a local hospital.

In late August or early September 2004, defendant Lieutenant James Clark replaced defendant Cook as plaintiff's supervisor. Despite plaintiff's complaints to defendant Clark about defendant Cook's behavior, no action was undertaken to stop defendant Cook's behavior. Again, after the complaints, the harassment worsened.

Plaintiff took a stress leave from work on September 15 and 16, 2004. On September 17, 2004, plaintiff called defendant Clark and advised him that he was coming to the workplace to see defendant Cook. Defendant Clark then instructed police personnel to secure the workplace and ordered Detective Marta Betancourt to meet with plaintiff across the street from the police station. Defendant Clark ordered that plaintiff be charged with making terroristic threats, and plaintiff was so charged on September 17, 2004.<sup>2</sup> Without a warrant, plaintiff's vehicle and home were then searched, and items of his personal property were seized, including a firearm

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<sup>1</sup>For example, plaintiff states that "the harassment by Cook was on the basis of plaintiff's race. The harassment and demeaning treatment was so severe and/or pervasive that it was observed by other City personnel who gave Cook the nickname 'Sarge' and Plaintiff the nickname 'T.J.' from the movie 'Soldier's Story' in which a black army sergeant discriminates against a black enlisted man." Compl. ¶ 12.

<sup>2</sup>At this time, plaintiff has not determined who formally brought charges against plaintiff. For that reason, the Complaint is brought against defendant Clark and, in the alternative, defendant "John Doe" with respect to any claims based on the charges brought against plaintiff.

lawfully registered in plaintiff's name.

On September 21, 2004, plaintiff was given notice of suspension with intent to dismiss and on October 21, 2004, he was dismissed from his employment with the City with the purported basis being "conduct unbecoming an employee." The Notice of Intent to Dismiss filed with the Civil Service Commission contained language suggesting that marijuana was found in plaintiff's vehicle, when in fact, green tea had been found.

On September 28, 2004, based upon the charges filed against plaintiff, plaintiff's license to carry a firearm was revoked. In July 2006, at a trial on the merits in the Court of Common Pleas, plaintiff was acquitted of the charges of making terroristic threats. On September 13, 2006, plaintiff instituted this action.

### **III. DISCUSSION**

#### **A. Legal Standard**

In considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a court must take all well pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. See Jenkins v. McKeithen, 395 U.S. 411, 421 (1969). The Court must only consider those facts alleged in the complaint in considering such a motion. See ALA v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994). A complaint should be dismissed if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishin v. King & Spaulding, 467 U.S. 69, 73 (1984). Therefore, the facts alleged in plaintiff's Complaint and Amended Complaint are accepted as true in deciding this motion.

#### **B. Count One**

Count One alleges a violation of the Equal Protection Clause with respect to defendant

Cook pursuant to 42 U.S.C. § 1983. In support of that claim, plaintiff alleges only that defendant Cook harassed him on the basis of his race. See Compl. ¶ 37 (“By subjecting Plaintiff to a hostile work environment based on his race, Defendant Cook violated Plaintiff’s right to Equal Protection as guaranteed by the Fourteenth Amendment to the U.S. Constitution.”). This is the only claim against defendant Cook.

Defendants move to dismiss Count One contending that: (1) plaintiff’s claim is time-barred by the statute of limitations; and (2) plaintiff’s allegations do not adequately state a claim under 42 U.S.C. § 1983 as there was no allegation of differential treatment. The Court will address each argument in turn.

1. Statute of Limitations

The statute of limitations for plaintiff’s § 1983 claim is two years. See Sameric Corp. of Del., Inc. v. City of Philadelphia, 142 F.3d 582, 599 (3d Cir. 1998) (citing 42 Pa. C.S.A. § 5524) (explaining federal rule requiring application of Pennsylvania’s two-year statute of limitations for personal injury claims to § 1983 claims). “A section 1983 cause of action accrues when the plaintiff knew or should have known of the injury upon which [her] action is based.” Id.

Defendants argue that, because the facts alleged by plaintiff in the Complaint to support Count One all occurred prior to September 13, 2004, more than two years before plaintiff filed his Complaint on September 13, 2006, plaintiff’s cause of action is time-barred by the statute of limitations. Plaintiff responds that, although much of the harassment leading to the § 1983 claim in Count One did occur prior to September 13, 2004, the pattern of harassment continued after that day.

Accepting as true the facts alleged in the Complaint and in the light most favorable to

plaintiff, the Court reads Count One of the Complaint to allege that defendant Cook engaged in continuing violations rather than discrete adverse employment actions. This characterization is important because the Supreme Court, in Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002), distinguished allegations of continuing violations leading to a hostile workplace from allegations of discrete acts of workplace discrimination for the purpose of statute of limitations analysis. **See id. at 115-18** (applying analysis in context of a Section VII claim). Specifically, the Court held that

A hostile work environment claim is comprised of a series of separate acts that collectively constitute one 'unlawful employment practice. . . It does not matter, for purposes of the statute, that some of the component acts of the hostile work environment fall outside the statutory time period. Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability.

Id. at 117. The Third Circuit, in O'Connor v. City of Newark, 440 F.3d 125 (3d Cir. 2006) held that Morgan's "distinction between 'continuing violations' and 'discrete acts' is not an artifact of Title VII, but is rather a generic feature of federal employment" and thus, "in whatever statutory context the distinction may arise, Morgan will control." Id. at 128.

**Applying Morgan, the Court concludes that because plaintiff has sufficiently alleged a pattern of continuing violations, the fact that some of those violations occurred within the statutory period<sup>3</sup> is sufficient to withstand defendants' Motion to Dismiss. See also Fortes v. Boyertown Area Sch. Dist., 2006 U.S. Dist. LEXIS 77039, \*30 (E.D. Pa. Oct. 23, 2006) ("It**

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<sup>3</sup>In particular, reading plaintiff's Complaint in the light most favorable to plaintiff, the Complaint alleges that defendant Cook's behavior was ongoing and that plaintiff was subjected to that behavior until he took a stress-related leave of absence on September 15, 2004. Accordingly, reasonably inferring that defendant's conduct continued on September 14th, that conduct was sufficient to bring the claim within the statute of limitations.

would be premature to dismiss plaintiff's Section 1983 claim as time barred without giving plaintiff an opportunity to show that the alleged discrimination was part of a continuing violation and not a series of separate and discrete acts.”).

2. Failure to State a Claim

To state a § 1983 claim for denial of equal protection under the Fourteenth Amendment, plaintiff must allege that he is a member of a protected class, similarly situated to members of an unprotected class, and treated differently from the unprotected class. Young v. New Sewickley Twp., 160 F. App'x 263, 266 (3d Cir. 2005) (citing Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985)); Montanye v. Wissachickon Sch. Dist., 2003 U.S. Dist. LEXIS 15570, \*41 (E.D. Pa. Aug. 11, 2003). Defendants argue that plaintiff has failed to state an equal protection claim because plaintiff has not alleged that he was treated differently than similarly situated members of an unprotected class. Plaintiff responds that his allegations that he was harassed on the basis of his race is sufficient to state his equal protection claim.

**The Court concludes that although plaintiff has alleged that he was subject to harassment on the basis of his race, he has failed to allege that he was treated in any way differently than any other individuals, a requirement for pleading an equal protection claim. Absent more specific facts from which differential treatment can be inferred, plaintiff has failed to state an actionable equal protection claim. See, e.g., Keefer v. Durkos, 371 F. Supp. 2d 686, 696-97 (W.D. Pa. 2005) (“Under the Equal Protection Clause of the Fourteenth Amendment, a violation occurs when similarly situated persons are treated differently . . . [Although] it may be possible for the Court to infer a discriminatory purpose or motive . . . this does not establish the differential treatment necessary for a violation of the Equal Protection Clause.”); cf. Second Baptist Church**

v. Gilpin Twp., 118 F. App'x 615, 618 (3d Cir. 2004) (“Finally, as to its Equal Protection claim, the Church failed to plead any facts to establish under Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985), that it was treated differently from similarly situated assemblies.”). Because plaintiff has failed to state adequately his equal protection claim against defendant Cook in Count One, the Court dismisses that count without prejudice to plaintiff’s right to file an amended complaint with respect to this claim within twenty days if warranted by the facts.

**C. Count Three**

Second, plaintiff’s Complaint raises a 42 U.S.C. § 1983 claim of First Amendment retaliation based upon being charged with making terroristic threats. Plaintiff pleads this claim under two alternate theories: in Count Two, plaintiff alleges that defendant Clark charged him with the crime, and in Count Three, plaintiff alleges that it was John Doe who charged him with the crime. To adequately plead a claim for First Amendment retaliation, plaintiff must allege that (1) he was engaged in a protected activity; (2) defendant responded with retaliation; and (3) the protected activity was the cause of the retaliation. See Anderson v. Davila, 125 F.3d 148, 161 (3d Cir. 1997).

Defendants move to dismiss Count Three, the First Amendment claim alleged against defendant Doe, stating that “nowhere in the complaint is it alleged that defendant Doe had knowledge of plaintiff’s protected activity, i.e. the complaints of harassment,” and therefore the activity could not have been a substantial or motivating factor in the alleged retaliation. Def. Mot. 8. Plaintiff responds that “Doe’s knowledge of the protected activity is implied” by statements in the Complaint that state that Doe’s actions were motivated by plaintiff’s protected actions. Pl. Resp. 4-5.

The Court concludes that plaintiff has adequately plead a claim for First Amendment retaliation against defendant Doe because plaintiff specifically alleged that he was engaged in a protected activity, that defendant Doe responded with retaliation, and that the protected activity motivated the retaliation. See id. Accordingly, defendants' Motion to Dismiss Count Three is denied.<sup>4</sup>

**D. Count Four**

In Count Four, plaintiff alleges a separate 42 U.S.C. § 1983 First Amendment retaliation claim relating to the termination of his employment. In this claim, plaintiff alleges that defendant Sylvester Johnson, as Police Commissioner, terminated plaintiff's employment and was motivated, at least in part, by plaintiff's protected activity.

Defendant raises the same argument for the dismissal of Count Four as for Count Two: because plaintiff did not specifically allege that defendant Johnson knew of the protected activity, the retaliation claim must be dismissed. The Court concludes, as before, that plaintiff's allegations that he was engaged in a protected activity, that defendant Johnson retaliated against plaintiff by terminating his employment, and that the retaliation was motivated, at least in part, by the protected activity, are sufficient to withstand defendant's Motion to Dismiss. See id. Therefore, the Court denies defendants' Motion to Dismiss Count Four.

**E. Count Six**

In Counts Five and Six, plaintiff offers two alternative claims for violations of plaintiff's

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<sup>4</sup> **The Court denies defendants' Motion to Dismiss this claim and therefore it need not reach plaintiff's argument that the Motion to Dismiss is not properly before the Court because defendant Doe has not been identified and there has been no acceptance of service on his or her behalf.**

Fourth Amendment rights based on the arrest of plaintiff without probable cause, pursuant to 42 U.S.C. § 1983. Count Five alleges that defendant Clark was responsible for the Fourth Amendment violations, and Count Six alleges that it was defendant Doe who was responsible for those violations. Defendant moves to dismiss Count Six on the ground that the allegations in Count Six contradict those in Count Five. Defendant has cited no authority for the proposition that a plaintiff is not permitted to plead inconsistent theories of liability.

Federal Rule of Civil Procedure 8 specifically authorizes pleading alternative theories of liability. See F.R.C.P. 8(e)(2) (“A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses.”). The Third Circuit explained that “[t]his Rule permits inconsistency in both legal and factual allegations.” Indep. Enter. Inc. v. Pittsburgh Water and Sewer Auth., 103 F.3d 1165, 1175 (3d Cir. 1997). Accordingly, the Court concludes that plaintiff has properly plead alternate theories of liability, and that any inconsistencies between Count Five and Count Six of the Complaint are permissible. Defendant’s Motion to Dismiss Count Six is therefore denied.

#### **F. Count Seven**

Count Seven raises a claim against the City of Philadelphia for violations of 42 U.S.C. § 1981. Specifically, plaintiff alleges that

Because Defendant Cook was plaintiff’s supervisor and because plaintiff suffered an adverse action Defendant City of Philadelphia is strictly liable to plaintiff for a violation of 42 U.S.C. § 1981. In the alternative, Defendant’s failure to take any action **to stop or otherwise prevent the harm by Defendant Cook renders it liable to plaintiff for a violation of 42 U.S.C. § 1981.**

Compl. ¶¶ 79-80.

42 U.S.C. § 1981(a) provides that:

All persons within the jurisdiction of the United States shall have the same rights in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

To sustain a § 1981 claim of racial discrimination against a motion to dismiss, plaintiff must allege that (1) he is a member of a racial minority; (2) there was intent by defendant to discriminate against him on the basis of his race; and (3) the discrimination concerned one or more of the protected activities enumerated in the statute including the right to make and enforce contracts. Brown v. Phillip Morris, Inc., 250 F.3d 789, 797 (3d Cir. 2001).

Defendants argue that plaintiff cannot establish a prima facie case against the City of Philadelphia for a violation of § 1981 because plaintiff has not alleged that similarly situated members of other racial classes were treated more favorably than plaintiff or that circumstances exist that give rise to an inference of unlawful discrimination. Plaintiff responds that his allegations of discrimination based on race are sufficient to plead his § 1981 claim.

The Court concludes that plaintiff has sufficiently alleged that he is a member of a racial minority, that there was intent by defendant to discriminate against him on the basis of his race (a reasonable inference from the allegations that he was subjected to discrimination on the basis of his race), and that the discrimination concerned his employment. Accordingly, the Court denies the Motion to Dismiss plaintiff's § 1981 claim raised in Count Seven.

#### **IV. CONCLUSION**

For the foregoing reasons, defendants' Motion to Dismiss is granted in part and denied in part. Plaintiff's § 1983 equal protection claim against defendant Cook in Count One of the Complaint is dismissed without prejudice to plaintiff's right to file an amended complaint with

respect to that claim within twenty days if warranted by the facts. In all other respects, defendants' Motion to Dismiss is denied.

**BY THE COURT:**

**/s/ Honorable Jan E. DuBois**

**JAN E. DUBOIS, J.**