

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

RICHARD SUPPAN,	:	
Plaintiff	:	
	:	Civil Action
v.	:	No. 97-2102
	:	
CITY OF ALLENTOWN and	:	
GERALD MONAHAN, JR.,	:	
Defendants	:	

M E M O R A N D U M

Cahn, C.J.

August ____, 1997

Plaintiff Richard Suppan, a police officer employed by the City of Allentown ("City"), has sued the City and Gerald Monahan, the Chief of the Allentown Police Department ("Police Department"), asserting that the City and Monahan retaliated against Suppan's exercise of his First Amendment rights and violated his Fourteenth Amendment rights by altering the Police Department's seniority system to disadvantage him. Before the court is Defendants' motion for summary judgment. For the reasons that follow, the court grants the summary judgment on the Fourteenth Amendment claims, and dismisses without prejudice the First Amendment retaliation claims.

I. FACTS

This case results from the Police Department's revision of its promotions policy. In October of 1993, Plaintiff Suppan participated in the Sergeant Promotional Evaluation for the positions of patrol sergeant and detective sergeant. The evaluation score consisted of two components, an oral

interview/evaluation and a seniority ranking. Pl. Aff. ¶ 6. Promotion eligibility lists were then created for each position based on the evaluation scores. Suppan's evaluations left him with very low rankings on both promotion lists. Pl. Aff. ¶ 8.

The lists were to be effective from January 1, 1994 until December 31, 1995. However, in December 1993, before the lists became effective, Queen City Lodge No.10 of the Fraternal Order of Police ("FOP"), the collective bargaining agent for members of the Police Department, filed an unfair labor practice ("ULP") charge with the Pennsylvania Labor Relations Board ("PLRB"). The charge stated that the promotion lists were compiled in the midst of negotiations over a new collective bargaining agreement and that the rankings of the FOP negotiating team members reflected anti-union animus and retaliation. Suppan, who was the negotiating team chairman, represented the FOP at the PLRB hearings. Monahan, who was at the time the Assistant Chief of Police and a member of the evaluation panel, represented the City. Compl. ¶ 16.

The PLRB agreed with Suppan and the FOP in many respects, finding that anti-union animus had affected the rankings of Suppan and other officers. On September 21, 1995, the PLRB Hearing Examiner issued a proposed order invalidating the 1994-1995 sergeant promotion lists, and ordered the City to refrain from making promotions until a new list was developed. Pl. Aff. Opp. Summ. Judg., Ex. D (order of Hearing Examiner). The City unsuccessfully appealed the Hearing Examiner's decision to the PLRB and Commonwealth Court of Pennsylvania. Pl. Aff. ¶¶ 16-17.

While the ULP charges were pending before the PLRB, Suppan and

three other officers filed suit in this district, asserting claims under 42 U.S.C. § 1983 and § 1985(3) for violation of their First Amendment rights and conspiracy to violate those rights. The basis of the lawsuit was the same as in the ULP charge: that the plaintiffs' low rankings on the 1993-1994 promotion list were the result of retaliations and anti-union animus. See Suppan v. Daddona, Civ. A. No. 95-5181, 1996 WL 592644 (E.D. Pa. Oct. 15, 1996) (granting partial summary judgment for defendants, including the City and Monahan, because Suppan failed to show cognizable injury).

In August of 1996, now-Chief Monahan and FOP President Edward Zucal agreed to negotiate a new promotions policy. On November 7, 1996, the FOP and the City entered into a Memorandum of Understanding adopting a new promotions policy.¹ The policy, codified as Section 308 of the Police Department Manual, relies on an objective test rather than subjective evaluations. Ninety percent of a candidate's score is determined by his or her performance on a written examination. Def. Answer, Ex.D (Section 308) at 3. Seniority accounts for 10% of the score. Id.² Section

¹According to Suppan, Zucal's handling of the negotiations with the City led to charges before the FOP. In June of 1997, an FOP fact-finding panel found that Zucal violated his presidential oath. Pl. Aff. ¶ 32. This court will not address Zucal's conduct or any bad faith representation charges against the union; these are matters of exclusive PLRB jurisdiction. 43 Pa. C.S.A. § 1101.1301.

²The score also includes credits for unused sick time and for a clean discipline record. Section 308 at 3-4. These provisions are not relevant to this dispute.

308 changes the method by which seniority is calculated. Whereas the prior promotion policy calculated seniority on the basis of total service, Section 308 calculates seniority on the basis of consecutive years of service. Under the prior policy, officers became eligible to participate in the Sergeant Promotional Evaluation after five years of experience as officers in the Department; Section 308 requires candidates to complete five consecutive years of service in order to participate. Monahan Supp. Aff. ¶¶ 8-9. The new seniority calculation also affects the score an eligible officer receives: each candidate receives one point for each consecutive year of service in the Police Department, for a maximum of ten seniority points. The candidates begin receiving seniority points with the completion of their sixth consecutive year of service. Section 308 at 3.

The change in the seniority computation directly impacts Suppan because his years of service are not continuous.³ Suppan's first period of duty with the Police Department lasted from August 20, 1979 until January 17, 1988, when he resigned to work in the private sector. Pl. Aff. ¶¶ 3-4. His second period of service began when he was rehired on February 25, 1991, and continues to the present. Id. at ¶ 5. Therefore, as of January 1, 1997, while

³Plaintiff claims that he is the only officer negatively affected by the seniority system change. Defendants deny this proposition, and Monahan's supplemental affidavit details the effect of the new system on several other officers. The court need not resolve this dispute, and for this motion will assume that Suppan is the only officer whose seniority credit is affected.

Suppan had worked for the Police Department for over fourteen years, he had completed only five years and ten months of consecutive service.⁴ He could participate in the sergeant promotion process, but would not receive any seniority credit.

Section 308 also incorporates the concept of "banding" into the promotion rankings. The company which administers the tests groups the total scores, including test scores plus seniority and other credits, into bands "reflecting statistically proximate results." Section 308 at 5. There is no order of promotion within any band; any candidate within a band may be promoted before another candidate within that band. Id. However, with a few exceptions not relevant to this case, "[n]o candidate from a lower band . . . can be promoted until all the candidates in the band above have been promoted." Id.

The new promotion test was given on March 15, 1997. Pl. Aff. ¶ 31. The promotion list created from the examination, dated April 1, 1997, will remain in effect until December 31, 1998, or until a new list is completed and posted, whichever comes first. Monahan Supp. Aff. ¶ 19. The testing company grouped the scores into three bands. The first band contains eighteen candidates. See Monahan Supp. Aff. ¶ 16; Def. Mot. Summ. Judg., Ex. B (score printout). Suppan took the examination and received a total score of 56.800, placing him seventy-first (in the third band) on the sergeants

⁴January 1, 1997 is the relevant date for calculating Suppan's consecutive years of service. Section 308 counts the consecutive years of service completed as of January 1 of the year the promotion process begins. Monahan Supp. Aff. ¶¶ 6, 8-9.

promotion list. Monahan Aff. ¶ 13. As of July of 1997, Monahan had made eleven appointments to sergeant. Monahan Supp. Aff. at ¶ 20.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when the "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The court's role is to determine whether the evidence is such that a reasonable jury could return a verdict for the non-moving party, with all reasonable inferences viewed in the light most favorable to the non-moving party. Anderson v. Liberty Lobby, 477 U.S. 242, 249, 255 (1986). The moving party has the burden of demonstrating that no genuine issue of material fact exists; however, if the nonmoving party fails to produce sufficient evidence in connection with an essential evidence of a claim for which it has the burden of proof, then the moving party is entitled to summary judgment. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

III. DISCUSSION

A. PROPERTY INTEREST

Suppan asserts that the change in the seniority policy violated his "vested right to employment and to be considered fairly for promotion[.]" Compl. ¶ 43. The court reads this claim as one pursuant to 42 U.S.C. § 1983. To establish a valid claim

under § 1983, Plaintiff must show (1) that the conduct complained of was committed under color of state law, and (2) that the conduct deprived Plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States. West v. Atkins, 487 U.S. 42, 48 (1988). Defendants unquestionably acted under color of state law; however, the court finds that Suppan fails the second requirement because he has not been deprived of an interest protected by the Constitution or laws of the United States.

The Fourteenth Amendment prohibits state deprivations of life, liberty or property without due process of law. Though not stated explicitly in the Complaint, Suppan's claim of a "vested right to his employment" appears to assert a property interest in being considered fairly for promotion. To have a property interest, Suppan must have a "legitimate claim of entitlement to it." Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972). In determining whether Suppan had such an entitlement, the court looks not to the Constitution, but to state law and other independent sources of rights. Id.

Suppan has no property right in prospective promotion. See Oladeinde v. City of Birmingham, 963 F.2d 1481, 1486 (11th Cir. 1992); Robb v. City of Philadelphia, 733 F.2d 286, 293 (3d Cir. 1984) (no entitlement to promotion under Philadelphia Civil Service Regulations). Nor is Suppan entitled to a specific ranking on the promotion list. Newark Branch, N.A.A.C.P. v. Town of Harrison, 940 F.2d 792, 809-811 (3d Cir. 1991) (no constitutionally protected property interest in specific ranking on hiring eligibility list).

Therefore, while Suppan does have a property interest in his employment, he does not have a protected property interest in either a promotion or a particular ranking on the promotion eligibility lists.

Suppan's argument that he had a vested right to be fairly considered for promotion also fails. There is no property interest in a promotions procedure. "[P]rocedural interests under state law are not themselves property interests that will be enforced in the name of the Constitution." District Council 33 v. City of Philadelphia, 944 F. Supp. 392, 395 (E.D. Pa. 1995) (citations omitted), aff'd without op., 101 F.3d 690 (3d Cir. 1996). Fair and due process "is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement." Olim v. Wakinekona, 461 U.S. 238, 250 (1983). Since Suppan has no property right to his promotion, he has no property interest in the process by which promotions are made.

Nor has Suppan been deprived of a liberty interest. An employment action implicates a Fourteenth Amendment liberty interests only if it is based on a charge that might seriously damage an individual's standing in the community, or if it imposes a stigma on the individual which forecloses his freedom to take advantage of other employment opportunities. Roth, 408 U.S. at 573. In addition, stigma to reputation alone, absent an accompanying deprivation of present or future employment, does not implicate a liberty interest. Paul v. Davis, 424 U.S. 693, 701-06

(1976). Suppan has alleged neither charges by the City against him nor a damaging stigma; therefore his liberty interests are not at stake.

B. RETALIATION

Even though Suppan has no property interest in a promotion, a ranking on the promotion eligibility list, or in the promotion procedures, Defendants may not retaliate against Suppan for engaging in protected conduct. Perry v. Sindermann, 408 U.S. 593, 597 (1972). This is the case regardless of whether Suppan has a "right" to the benefit that was denied. Id. However, an employee is not entitled to be placed in a better employment position than he or she would have occupied without the protected speech. Rather, an employee must be placed in "no worse a position" than he or she would have occupied without the speech. Mt. Healthy City Bd. of Ed. v. Doyle, 429 U.S. 274, 285-86 (1977).

Suppan asserts that Defendants changed the promotion procedure, in particular the seniority system, to retaliate against him for his participation in the PLRB hearings and his prior civil lawsuit. The parties agree Suppan's actions constituted protected First Amendment activity. See San Filippo v. Bongiovanni, 30 F.3d 424, 441-43 (3d Cir. 1994) (filing of nonfrivolous grievances and lawsuits protected by First Amendment petition clause even if they address solely a matter of private concern). However, as in all Section 1983 cases, Suppan must not only assert the existence of his rights, but also the deprivation of those rights. In the public employment context, employees must

show that an adverse employment action occurred in retaliation for their exercise of First Amendment rights. An action need not be as severe as dismissal in order to constitute retaliation. See Rutan v. Republican Party of Illinois, 497 U.S. 62, 73-75 (1990) (layoffs, transfers, and the denial of recalls after layoffs are adverse employment actions for purposes of First Amendment claims). However, employment decisions do not amount to adverse employment actions implicating the Constitution unless an adverse result occurs. Pierce v. Texas Dept. of Criminal Justice, 37 F.3d 1146, 1150 (5th Cir. 1994).⁵

In this case, it is unclear whether Suppan's alleged injury is the change in the seniority policy alone, or the denial of a promotion to sergeant. This court finds that the seniority policy change is insufficient to support a First Amendment retaliation claim because that change does not constitute an adverse employment action. In Suppan's challenge to the 1993-1994 lists, Judge Troutman held that a low ranking on promotion lists, even if caused by an employer's retaliation against a plaintiff's protected conduct, was too insubstantial a deprivation of rights to support

⁵The last sentence of Rutan's footnote 8 suggests that "even an act of retaliation as trivial as failing to hold a birthday party" can state an actionable First Amendment injury. Rutan, 497 U.S. 62, 75 n.8 (citation omitted). This court agrees with the Fifth Circuit Court of Appeals that "[s]uch a literal reading of this Supreme Court dictum would be a serious mistake because that sentence is inconsistent with the body of the opinion." Pierce, 37 F.3d at 1149 n.1 (internal quotation marks and citation omitted). But see Tao v. Freeh, 27 F.3d 635, 639 (D.C. Cir. 1994)(applying last sentence of Rutan's footnote 8 as standard for actionable harm).

plaintiff's claims of retaliation. Suppan v. Daddona, Civ. A. No. 95-5181, 1996 WL 592644, at *6-7 (E.D. Pa. Oct. 15, 1996). Similarly, the change in the seniority policy has led only to Suppan being ranked lower on the eligibility list than he would have under a non-consecutive seniority policy. The low ranking on the list alone does not constitute an adverse employment result. See Larou v. Ridlon, 98 F.3d 659, 663-64 (1st Cir. 1996) (posting of new job position not adverse employment action even though new position included many of plaintiff's former responsibilities because plaintiff could have applied for new position); Pierce, 37 at 1150 (investigating employee, videotaping her without authorization, and forcing her to submit to polygraph test not actionable harm for First Amendment retaliation claims); DiMeaglio v. Haines, 45 F.3d 790, 806-07 (4th Cir. 1995) (assignment to less favorable territory not an actionable adverse employment action); Dorsett v. Bd. of Trustees, 940 F.2d 121, 123 (5th Cir. 1991) (allegedly retaliatory actions concerning teaching assignments, pay increases, and department procedures do not rise to level of constitutional violation); but see Tao v. Freeh, 27 F.3d 635, 639 (D.C. Cir. 1994) (requiring plaintiff to recomplete and resubmit time-consuming materials in order to be considered for promotion rises to constitutional injury).

Suppan's other possible injury is the actual denial, through the use of the new seniority system, of a promotion to the position of sergeant. A denial of a promotion is an actionable injury in First Amendment retaliation claims. Rutan, 497 U.S. at 75.

However, because Suppan cannot yet show that the use of the new seniority system has led to any actual injury, the court finds that Suppan's claims are not yet ripe for decision.

Article III of the Constitution permits federal courts to exercise jurisdiction only over ripe cases and controversies. Only when a complaint is based upon real and not speculative injury does a controversy become ripe for decision. The court determines ripeness by weighing two factors: (1) the hardship to the parties of withholding court consideration; and (2) the fitness of the issues for judicial review. Artway v. Attorney General of New Jersey, 81 F.3d 1235, 1247 (3d Cir. 1996), citing Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967). In this case, the court concludes that both Artway factors counsel against exercising jurisdiction over Suppan's retaliation claim.

Plaintiff will suffer no hardship from the court's denial of review at this time. The current promotion list will be in effect until the end of 1998. Section 308 does not set a mandatory order for promotions within each band, but it does mandate that no promotions may be made from the second band of candidates until all candidates from the first band are offered promotions, and that no candidates from the third band may be promoted until the entire second band has been offered promotions. Granting Suppan every reasonable inference, Suppan would have been in the second band if he received the seniority credit he would have been entitled to

under a non-consecutive seniority system.⁶ As a member of the second band, Suppan could not be promoted to sergeant until every member of the first band had been offered a promotion. Since there are eighteen officers in the first band of candidates, Suppan cannot be promoted to sergeant until the first eighteen have been offered the job. Since only eleven promotions have been made from the list, Suppan has no claim of injury. Any alleged wrongdoing in the design and implementation of the consecutive seniority requirement has not yet injured Suppan; therefore, he suffers no hardship in the denial of review. He will begin to suffer injury traceable to the seniority policy when candidates in the second band become eligible for promotion.

The second factor for evaluating ripeness is fitness for judicial review. In determining fitness for review, the court considers "whether the record is factually adequate to enable the court to make the necessary legal determinations." Artway, 81 F.3d at 1249. In light of the rule to avoid unnecessary constitutional decisions, "[c]ourts are particularly vigilant to ensure that cases are ripe when constitutional questions are at issue." Id.

⁶Suppan's assertion that a non-consecutive system would place him in the first band is without support. Suppan states that under the PLRB remedy, he should have been able to compete against only 35 other candidates, and with seniority points, he would rank eleventh on the promotion list. Suppan Supp. Aff. ¶ 5. Whether the PLRB order has been complied with is a matter for the PLRB, not this court. Suppan has presented no evidence that the size of the candidate pool was expanded in an attempt to "get" him. Given that Suppan scored last or close to last on the objective portion of the exam, a non-consecutive seniority system would have placed Suppan, at best, in the second band.

(citation omitted). In this case, the record is not yet factually adequate to determine whether the new seniority system has had an adverse effect on Suppan.

In Massachusetts Ass'n of Afro-American Police v. Boston Police Dept., 973 F.2d 18 (1st Cir. 1992), the First Circuit Court of Appeals was faced with a challenge to a consent decree involving police department promotion lists. In that case, a group of officers within a police department argued that they would be denied promotions because of the consent decree's effect on the promotion lists. The court held that the challenge was not ripe for decision because the injury was too speculative: "Until the situation arises . . . where there is a likelihood of a vacancy for an appointment [to lieutenant or captain] over and above the number of appointments . . . specifically exempted under the consent decree, there is no justiciable issue ripe for decision of whether the consent decree would indeed result in [a member of the group] not being fairly considered." Id. at 20. This court finds Massachusetts Ass'n of Afro-American Police instructive here. As in that case, Suppan's real injury, the denial of a promotion which he would have received if the new seniority policy had not been enacted, may never occur. Because Suppan scored poorly on the objective exam, even the addition of full seniority credit would not put him in the first band of candidates. Whether he will suffer any injury because of the new seniority policy is purely speculative.

In arguing that his case is ripe, Suppan argues that the

statute of limitations for his complaint began to run on the date Section 308 went into effect. Suppan's position is not without support. In Lorance v. AT&T Technologies, 490 U.S. 900 (1989), the Supreme Court was presented with a Title VII challenge to a facially gender-neutral seniority system. The Court held that the time within which the plaintiffs had to file a complaint with the Equal Employment Opportunity Commission ("EEOC") began to run on the date the seniority policy was adopted. Id. at 911. This court believes that Lorance does not control the ripeness analysis in this case for several reasons.

First, Lorance involved Title VII's tight administrative statute of limitations. The 180 and 300 day EEOC filing requirements in Title VII are designed as part of a complex legislative and administrative scheme for resolving employment discrimination complaints quickly. See 42 U.S.C. § 2000e-5(e). In fact, seniority systems "are afforded special treatment under Title VII," requiring a special analysis of intent. Lorance, at 904 (citation omitted). First Amendment retaliation claims are part of no such scheme, and Suppan is not subject to the tight filing deadlines which apply to Title VII claimants. Second, the actual holding of Lorance was overruled when Congress passed the Civil Rights Act of 1991, which provides that for the purposes of challenging a seniority system, the unlawful employment practice which triggers the statute of limitations occurs "when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the

application of the seniority system or provision of the system." 42 U.S.C. § 2000e-5(e). Therefore, this court does not believe that Lorance's statute of limitations discussion creates a hardship which affects the ripeness analysis.

In this case, the ripeness analysis is closely related to the problems of standing and injury. In Doherty v. Rutgers School of Law-Newark, 651 F.3d 893, 900 (3d Cir. 1981), the court of appeals held that an unsuccessful applicant to a state university law school did not have standing to challenge the school's allegedly discriminatory minority admissions program because the applicant was not qualified to be admitted to the school even in the absence of the program he was contesting. Because rescinding the minority admissions program would not have affected Doherty's chances for admission, Doherty suffered no redressable injury and did not have standing. In contrast to Doherty, the Third Circuit Court of Appeals recently held, in a different case involving the 1993-1994 Allentown Police Department promotion lists, that officers who ranked in the top three on the lists had standing to challenge the police chief's decision not to promote anyone from those lists. Stephens v. Kerrigan, -- F.3d --, No. 96-1469, slip. op. at 18 (3d Cir. Aug. 12, 1997). The Stephens plaintiffs suffered a redressable injury because if the police chief had made promotions, plaintiffs "would have been among those few officers to be considered." Id.

This case is closer to Doherty than to Stephens. Suppan's low ranking on the promotion list is caused primarily by his poor

performance on the objective exam, not by the absence of seniority points. It is purely speculative whether the addition of the seniority points would lead to a promotion for Suppan since seniority points place Suppan in the second band, and no promotions may be made from that band until all eighteen members of the first band are promoted. Therefore, as in Doherty, it is not the complained-of policy which hurts Suppan. Because it is not likely that Suppan's injury will be redressed by a favorable decision, he lacks standing to challenge the seniority policy at this time. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (standing requires that it must be "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.") (internal citations omitted).

IV. CONCLUSION

Because Suppan has no cognizable property or liberty interest in a particular ranking on the promotion list, the court will grant summary judgment for the Defendants on Suppan's claim that his vested right to his employment was violated by the adoption of the new seniority system. Because the claims that Defendants changed the promotion system and have failed to promote Suppan in retaliation for his exercise of First Amendment rights are not ripe, the court will dismiss those claims without prejudice for lack of jurisdiction.

An appropriate order follows.

BY THE COURT:

Edward N. Cahn, Chief Judge

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

RICHARD SUPPAN,	:	
Plaintiff	:	
	:	Civil Action
v.	:	No. 97-2102
	:	
CITY OF ALLENTOWN and	:	
GERALD MONAHAN, JR.,	:	
Defendants	:	

O R D E R

AND NOW, this ____ day of August, 1997, upon consideration of Defendants' Motion for Summary Judgment, Plaintiff's response thereto, and supplemental briefs filed by both parties following oral argument, IT IS ORDERED as follows:

1. Defendants' Motion is hereby GRANTED on Plaintiff's Fourteenth Amendment claims, and judgment is entered in favor of Defendants on Count II of the Complaint.
2. Count I of the Complaint is hereby DISMISSED WITHOUT PREJUDICE for lack of subject matter jurisdiction; and
3. The Clerk of Court is directed to close the docket for statistical purposes.

BY THE COURT:

Edward N. Cahn, Chief Judge