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

CECIL HANKINS	:	
	:	
v.	:	
	:	**CIVIL ACTION**
CITY OF PHILADELPHIA, AMERICAN FEDERATION OF STATE, CITY AND MUNICIPAL EMPLOYEES AND AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES DISTRICT COUNCIL 47, LOCAL 2187	:	**NO. 95-1449**

M E M O R A N D U M

WALDMAN, J. **April 9, 1998**

Background

Presently before the court are defendants' Motions for Summary Judgment. In his Third Amended Complaint, plaintiff asserts claims against the defendant City under Title VII, PHRA and 42 U.S.C. § 1983 for employment discrimination based upon race and under § 1985 for conspiracy to discriminate on the basis of race.[1] He asserts claims against the defendant unions for conspiracy under § 1985(3), civil conspiracy, fraudulent misrepresentation, breach of contract and tortious interference with prospective contractual relations.[2]

Legal Standard

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[1] Plaintiff also asserted a claim against the City for breach of contract which was dismissed earlier.

[2] Plaintiff also asserted claims against the unions for intentional infliction of emotional distress and tortious interference with contractual relations which were dismissed earlier.

In considering a motion for summary judgment, the court must determine whether the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show there is no genuine issue as to any material fact, and whether the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Anderson v. Liberty Lobby Inc., 477 U.S. 242, 247 (1986); Arnold-Pontiac-GMC, Inc. v. General Motors Corp., 786 F.2d 564, 568 (3d Cir. 1986). Only facts that may affect the outcome of a case under applicable law are "material." Anderson, 477 U.S. at 248. A dispute over a material fact is "genuine" only if the evidence is such that "a reasonable jury could return a verdict for the nonmoving party." Id.

All reasonable inferences from the record are drawn in favor of the non-movant. Id. at 256. Although the movant has the initial burden of demonstrating an absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which he bears the burden of proof. J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990), cert. denied, 499 U.S. 921 (1991)(citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

From the evidence of record, as uncontroverted or viewed in the light most favorable to plaintiff, the pertinent facts are as follow.

Facts

1. General Background

Plaintiff is a black male. He started his employment with the defendant City in December of 1978 in the Department of Human Services as a Children and Youth Counselor. Plaintiff subsequently began to work for the City Health Department. By December of 1987 plaintiff had held the positions of Social Worker II and Program Analyst in the Office of Mental Health/Mental Retardation. At this time, plaintiff became a Program Analyst in the Health Department's AIDS Activities Coordinating Office ("AACO").

Plaintiff was promoted to AIDS Program Analyst Supervisor in June of 1988. Plaintiff was temporarily promoted to Acting Director of AIDS Agency Services, a position within AACO, in March 1989. At this time plaintiff carried out the duties of this position as well as the duties of AIDS Program Analyst Supervisor. This was not a permanent position and plaintiff later resumed his regular position.

2. The Promotion of Mara Natkins

On September 4, 1991, the City Personnel Department completed an audit of the position of AIDS Policy and Planning Associate Director then held by Mara Natkins, a white female. This audit revealed that Ms. Natkins was doing work outside of the responsibilities of her position. It was recommended by one Stephen W. Kurtiz that Ms. Natkins' position be changed to AIDS Policy and Planning Director to correspond with the duties she was performing.

Plaintiff was told in February of 1992 that Ms. Natkins had been promoted to the position of Director of Policy and Planning in AACO. Plaintiff then spoke with a representative of the Philadelphia Commission on Human Relations about possibly filing a complaint with the Commission regarding the "promotion" received by Ms. Natkins. Plaintiff believed that his position should have been audited as well.

Plaintiff did not file a complaint with the Philadelphia Human Rights Commission, however, he did file a complaint with the EEOC regarding the "promotion" of Ms. Natkins in April of 1992. Plaintiff felt that he was entitled to a "desk audit" of his position as well and that the City has acted in a discriminatory manner. Plaintiff later dropped this complaint.

3. Plaintiff's Transfer to the Charles R. Drew Mental Health/Mental Retardation Center ("the Center") and Michael Reardon's Promotion at the Center

The Center was a privately owned neighborhood mental health facility which provided services for the City on a contract basis. The Center was experiencing operating difficulties at this time. In March 1992, Deputy Health Commissioner Estelle Richman advised the executives of the Center that the City was taking over the day to day operations and that Michael Reardon would serve as the Director of the Center. Prior to this, Mr. Reardon has served as the Acting Director. Mr. Reardon is black.

After the takeover, City Health Commissioner Robert K. Ross, M.D., wanted someone from the City to work at the Center and to serve as a liaison between the Center and the City. Plaintiff had previously been a member of the Board of the Drew Center and had expressed to Dr. Ross a concern about finding other career opportunities as well as a desire to work in the mental health field. Dr. Ross is black.

Plaintiff was transferred to the Center in March 1992 on an emergency basis by Dr. Ross to oversee day to day operations. When plaintiff arrived at the Center, however, Mr. Reardon and another individual were running the center. Plaintiff received a fax from Dr. Ross' office stating that plaintiff's role at the Center was to be a monitor. This was not the role that plaintiff had anticipated for himself.

On June 8, 1992 plaintiff was reassigned to work in the Commissioner's Office, a position viewed as a "plum" assignment.

4. The City's Failure to Promote Plaintiff to the Position of AIDS Program Services Manager (aka Director of AIDS Agency Services)

The City published the results of the civil service examination for the position of AIDS Program Services Manager on June 18, 1992. Philadelphia Civil Service Regulation 11.01 provides that only individuals with the two highest scores on an examination may be selected by the appointing authority for the position being filled. Plaintiff had the fifth highest score on the exam. He was not appointed to the position.

On July 15, 1992, plaintiff tendered his notice of resignation to the City. Dr. Ross and Ms. Richman tried to discourage plaintiff from resigning. They asked him to reconsider. Plaintiff decided to hold to his decision to resign from City employment and did so effective August 21, 1992.

5. The Naming of Richard Scott as Acting Program Director

In 1993 the AACO program was experiencing difficulties. The City had trouble locating and keeping properly qualified employees in the position of AIDS Program Director ("Program Director") which carries with it the responsibility for AACO. Five different individuals have been executive managers of AACO during its six or seven years of existence. AACO was an under-funded office with a high profile. Because the struggle for AIDS funding was perceived as having racial and ethnic overtones, Dr. Ross wanted to insure that the process of getting funds was as fair and objective as possible.

In mid-1993, Dr. Ross asked Anola Vance to assume the duties of Program Director. Ms. Vance is black. Dr. Ross believed that Ms. Vance had good people management skills which were needed in AACO. Ms. Vance, a City employee, in her previous position worked on AIDS prevention and education. After she became Acting Program Director, she continued to maintain the responsibilities of her previous position as well. Ms. Vance informed Dr. Ross that she would only accept the position on a temporary basis and he would have to find someone else permanently to fill it.

Dr. Ross discussed with Deputy Health Commissioner Barry Savitz the Program Director position. Mr. Savitz suggested that the eligibility requirements be broadened to attract more applicants. The City, however, had financial difficulties and the salary level for Program Director could not be increased. Dr. Ross made it clear to Mr. Savitz that he wanted to encourage minority candidates to apply for the position. Dr. Ross had appointed four blacks to senior management positions in his department.

Mr. Savitz suggested that Richard Scott would be a good candidate for the position of Program Director. Mr. Scott had been serving for eight years as an elected union agent for American Federation of State, County, and Municipal Employees (AFSCME) District Counsel 47, Local 2187 while on a leave of absence from City employment. Mr. Savitz had observed Mr. Scott perform his role as a union agent and was impressed with his fairness and objectivity. Over the years Mr. Scott had developed AIDS information and training programs; coordinated AIDS programs with City officials, community groups and service providers; consulted on AIDS related issues with ten local unions; had lobbied at all three levels of government for AIDS funding and services; served as President and Chairman of the Philadelphia AIDS Advocacy Coalition; and, coordinated efforts of numerous agencies in activities in response to the AIDS crisis. Dr. Ross and Mr. Savitz did not discuss Mr. Scott’s race or sexual preference.

In the fall of 1992, Dr. Ross telephoned Richard Scott to ask if he would consider the position of Program Director. Mr. Scott informed Dr. Ross that he would be unable to take the position at that time. Dr. Ross also approached three other individuals about the Director's position, two of whom were black. None were interested.

In January 1993, Dr. Ross again telephoned Mr. Scott to ask if he would reconsider the Program Director position and he agreed. While considering whether to take the position, Mr. Scott spoke with Barry Savitz and Dorothy Mann, a community activist. Both encouraged Mr. Scott to accept the position because they thought he possessed the ability, experience, knowledge and commitment necessary to do the work. Mr. Scott asked Dr. Ross if a gay white male taking over a position previously held by a black female would present any difficulties. Dr. Ross said it should not, particularly as the two of them would work together on AIDS issues.

Mr. Scott at some point inquired about the Civil Service job specifications ("specs") and told Dr. Ross that he needed to know that his qualifications matched the specs. Dr. Ross indicated that he would see if the job could be made available to Mr. Scott which Mr. Scott interpreted to mean that the job description could be changed.

Mr. Savitz worked with Joseph McNally, the Health Department Personnel Officer, to broaden the qualifications for the position of Program Director so that Richard Scott would be

able to compete for the position. Mr. McNally requested that the job specifications for the position be revised by memorandum dated January 13, 1993.

On January 18, 1993, the Health Department completed the paperwork necessary to request that the Personnel Department take action to fill the position of Program Director. The Personnel Action Data form, which is prepared for all positions, stated, inter alia, that "we now have the opportunity to fill it with a qualified individual who has interest in the position."

Michael McAnally, the City Personnel Department's Chief of Classification, completed the revised job description for the position of AIDS Program Director on January 26, 1993. The next day, a draft of the revised job description was submitted to the Philadelphia Civil Service Commission which approved it. In late January 1993, Mr. Scott informed Dr. Ross that he would accept the position of Program Director.

At her request, Ms. Vance was reassigned to the duties of Mental Health/Mental Retardation Services Director on February 15, 1993. Richard Scott ended his leave of absence and resumed active employment with the City on February 16, 1993. He was assigned the duties of managing AACO and was given the working title of Acting Aids Program Director. Dr. Ross regarded Mr. Scott's appointment to this position as permanent.

In late April 1993, the changes in the eligibility requirements for Program Director position were approved by the Administrative Board.

6. Plaintiff's Reemployment With the City

Sometime in January 1993 plaintiff learned Ms. Vance was vacating her position as Program Director. Plaintiff thereafter contacted Dr. Ross to express interest in the position. Plaintiff avers that Dr. Ross told him the position was reserved for a member of the gay white community and specifically identified Richard Scott as that person. Dr. Ross denies plaintiff's version. At this juncture, of course, the court must accept plaintiff's account.[3]

Plaintiff again telephoned Dr. Ross and expressed a general desire to return to work for the City. Dr. Ross arranged for plaintiff to return to City employment on March 1, 1993. Plaintiff was assigned to CODAAP, the Coordinating Office for Drug and Alcohol Abuse Programs. He was given a fully funded grant position of Program Analyst in the Health Department's Mental Health/Mental Retardation Unit which he continues to hold.

This is a non-supervisory position. Plaintiff's last position with the City had been at a supervisory level. Civil Service Regulation 15.031 provides that an employee may be reinstated to a "lower position" than one previously held.

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[3] Plaintiff cites to a statement in the deposition of Dr. Ross to suggest that he said Mr. Scott's race would be a positive attribute in running AACO. This is disingenuous. A review of the transcript shows that after initially misunderstanding what he had been asked, Dr. Ross actually said the opposite. He said that Mr. Scott's appointment might be less well received because he was white. Plaintiff at times seizes upon a fragment of testimony to make a point which is not supported when the deponent's statement is read in context.

Pursuant to Civil Service Regulation 14.01, as a reinstated City employee, plaintiff had to complete a six-month probationary period before he could obtain permanent Civil Service status.

7. Plaintiff's Application and Rejection for the Position of Program Director

A Promotional Opportunity Announcement for the AIDS Program Director position was issued on May 3, 1993. The minimum requirements included permanent Civil Service status, three years of second-level supervisory experience and a Masters Degree. This announcement did not reflect the changes that had been made to the qualifications. Plaintiff applied for this position in May 1993.

On his application, plaintiff stated that he had three years of second-level supervisory experience based on his employment in the Health Department from March 1, 1989 until March 1, 1992. Plaintiff, however, had not continuously performed the duties of a second level supervisor during this three year period. Rather, over the course of three years he temporarily assumed such duties when needed and then returned to his previous position. Plaintiff also noted that he had just received a Masters Degree in Health Administration in May 1993.

A new announcement with the amended qualifications was posted on June 14, 1993. Permanent Civil Service status was still required. This posting also provided that the following specific experience was necessary for the position:

3. Two years of administrative experience in a program involving the provision of HIV/AIDS programs and services in a paid or volunteer capacity.

and

4. Three years of administrative experience directing, through subordinate supervisors, a program involving delivery of HIV/AIDS programs and services which has included the responsibility for planning, developing and evaluating HIV/AIDS programs and services or educational, informational and counseling services for a large governmental jurisdiction;

or

5. Three years of administrative experience planning, developing and evaluating HIV/AIDS educational and informational services which has included the development, administration, and coordination of a National HIV/AIDS program;

or

6. Any equivalent combination of education and experience determined to be acceptable by the Personnel Department that has included completion of a bachelor's degree program as a minimum.

Mr. Scott and Jeffrey Petraco, another City employee, then applied for this position.

City Personnel Department Personnel Analyst Marc O'Connor notified plaintiff by letter dated July 9, 1993 that his application for the position of AIDS Program Director had not been approved because he did not have the experience required. Mr. O'Connor had checked the department's computerized records system and determined that plaintiff was not in fact performing second level supervisory work continuously for three years as claimed. Plaintiff has now admitted that this is true. Mr. O'Connor did not determine whether or not plaintiff met the

additional requirements for the job. Mr. O'Connor advised plaintiff that he could submit additional application materials if he desired. It was not part of Mr. O'Connor's duties to determine if applicants had permanent Civil Service status. This was the responsibility of an employee in the Central Personnel Office.

Plaintiff did not receive Mr. O'Connor's letter until July 16, 1993. On July 19, 1993, he submitted additional information regarding his qualifications for the position. Plaintiff stated that he held the position of Acting Director of AIDS Services from March 1990 until March 1992. Plaintiff did not include on his application in May or June 1993 or his letter of July 19, 1993 anything about his volunteer experience in 1988 as Director of AIDS Community Initiatives.

Plaintiff also noted in his letter to Mr. O'Connor that he had national experience. The experience he described, however, consisted of work done in Philadelphia for the federal AIDS Community Conference for AIDS Providers in Philadelphia. Plaintiff states that his work was used to design a two day training conference which was duplicated nationally. Plaintiff does not state, however, that he played any role in organizing or administering such conferences at the national level.

Mr. Scott was permanently appointed to the position of Program Director on July 19, 1993.

Plaintiff achieved permanent Civil Service status on September 1, 1993.

In response to a telephone inquiry by plaintiff, Mr. O'Connor sent him a letter on September 20, 1993 reiterating job requirements 3, 4, and 5 for the position of Program Director and stated that the information plaintiff submitted did not substantiate his claim that he met these requirements. The sixth alternative requirement provision, which permitted an applicant to satisfy the educational requirement with a bachelors degree plus experience deemed equivalent to a masters, was inapplicable to plaintiff who had a masters degree.

Mr. Scott was the first Program Director appointed under the "job specs." Previous individuals doing the work of Program Director held other titles or were working and getting paid "out of class."

8. The City's Failure to Promote Plaintiff to the Position of Program Director when Richard Scott Was Assigned Other Duties

Mr. Scott was relieved of his duties as Program Director in October of 1994 when it was discovered that a grant application impermissibly contained the names of four individuals who were HIV positive. Mr. Scott, however, continues to hold the Civil Service title of Program Director.

Estelle Richman became the Commissioner of Public Health in April 1994. Ms. Richman is black. She assumed the Program Director position herself from November 1994 until July 10, 1995. Although Mr. Scott was officially assigned to the Health Commissioner's Office as Acting Chief of Staff, he continued to perform duties of the Program Director. Although

Ms. Richman felt burdened by the responsibility of running AACO while serving as Commissioner, she was reluctant to hire a new Program Director because she felt that the AACO office was dysfunctional.

Ms. Richman decided that responsibility for running the AACO office should be given to a neutral party who would be "able to give her a feel for why the department was so dysfunctional." She believed that having a "loaned executive" assume the Program Director's duties would meet her needs while not obligating her under the Civil Service laws to make a permanent employment decision until she determined how to make the AACO function effectively.

In a letter dated March 6, 1995 addressed to Ms. Richman, plaintiff expressed interest in assuming the Program Director position. There is no evidence of a response to this letter. There is also no evidence of record that Ms. Richman herself ever saw this correspondence.

Ms. Richman spoke to Temple University President Peter Liacouris about the possibility of his "loaning" her someone for the position of Program Director. Mr. Liacouris suggested Jesse Milan whom Ms. Richman had met a few years prior. Mr. Milan is black.

As part of the executive loan agreement, Ms. Richman agreed to pay Temple whatever Mr. Milan's salary at the University was. Ms. Richman did not compare Mr. Milan's resume to the official qualifications for the position. Mr. Milan left the position in February of 1997. On April 16, 1997, Ms. Richman appointed Patricia Bass and Joe Cronauer to serve as "Interim Co-

Directors" of the AACO.[4] Ms. Bass had been an outside consultant for AACO and Mr. Cronauer had served as executive director of "We the People," an AIDS advocacy group.

Ms. Richman avers that she would not appoint plaintiff or anyone else with permanent Civil Service status to the position of Program Director because she does not want to be locked in before she can get a clear understanding of why AACO remained so dysfunctional and determine precisely what is needed to make it function effectively.

9. The Involvement of the Unions

Plaintiff was a member of AFSCME District Council 47, Local 2187, an affiliate of the national AFSCME. There is no evidence that the national union played any role in the events of which plaintiff complains. Thus, the term "union" is used only to designate the AFSCME local to which plaintiff belongs.

Richard Scott was present, as a union agent, when the Civil Service Commission approved the changes to the qualification requirements for the Program Director position at a meeting at the end of January 1993. Mr. Scott was responsible for representing the union at these meetings on issues that dealt with bargaining unit positions. The position of Program Director is not a bargaining unit position. Neither Mr. Savitz nor Mr.

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[4] No evidence of the race of either of these appointees has been presented by the parties. According to a contemporaneous news account, Ms. Bass is black. See The Philadelphia Tribune, April 26, 1997, Vol. 113, p. 2-A.

McNally discussed the proposed changes to the job specs with Mr. Scott.

As a union member and agent, Mr. Scott was not prohibited from seeking a City position, including one for which other union members were competing, and was not required to inform other union members that he was seeking a particular position with the City.

In June of 1993, Mr. Elijah Morris, a union shop steward, encouraged plaintiff to initiate union action regarding the changing of the job qualifications for the Program Director position. Plaintiff was concerned that as a probationary employee he might be fired if he initiated such action against the City. Plaintiff instead decided to pursue the City's administrative procedures for resolving personnel disputes.

At a union meeting on June 22, 1993, Mr. Morris raised the issue of the Program Director position. He stated that two union members who were employed in the Health Department were upset about the perceived lowering of the job qualifications for the position so that Richard Scott could obtain the job and that the union had allowed that to happen. Cathy Scott, a union agent, agreed to look into this matter. She is not related to Richard Scott.

Ms. Scott prepared a report and submitted it to the union's Executive Board on August 12, 1993. Ms. Scott's report contained the following findings:

1. That Richard Scott's position as a union official gave him the responsibility for handling Civil Service agenda items on behalf of the union.

2. That the Program Director position training and experience requirements were revised on January 27, 1993 and that this was a non-represented position.

3. That January 27, 1993 was the last day Richard Scott filled out a union time sheet for that week and that the next three week days were partially filled out but are not dated.

4. The last day that Richard Scott was on the union payroll was February 15, 1993.

5. The Administrative Board approved the Civil Service agenda of January 27, 1993 on April 22, 1993.

6. The City Personnel Department issued a copy of the Administrative Board's action taken on April 22, 1993 on May 5, 1993.

7. The City posted the position of Program Director on June 14, 1993.

Ms. Scott also noted that on February 4, 1993, the City announced that Richard Scott had been appointed acting Program Director and that he was approved on March 29, 1993 for the temporary promotion to that position. At this time Mr. Scott was still a Union member.

Ms. Scott asked the Executive Board to advise her of any actions that it wanted her to take. The Executive Board never instructed Ms. Scott to take further action.

During the summer of 1993, plaintiff told Ms. Scott that he did not wish to file a grievance concerning the appointment of Richard Scott because he feared retaliation from the City.

In September 1993, plaintiff called Ms. Patricia Walton, a union vice-president, to seek formation on how to file an appeal with the City regarding Richard Scott's appointment. Plaintiff told Ms. Walton that he was filing an appeal based on race as he thought the exam was discriminatory. Ms. Walton provided plaintiff with information on how to appeal. Plaintiff asked Ms. Walton if she had any information regarding Mr. Scott getting the job. She said yes and that she would send it to him. She then sent plaintiff the investigative report made by Cathy Scott.

By letter dated September 23, 1993, plaintiff notified Michael McAnally, the Chief of Classification and Examination for the City, that plaintiff wanted to appeal the Personnel Department's decision to amend the qualifications for the position of Program Director which allowed volunteer experience to be substituted for paid experience.

The Executive Board received an unsigned letter dated September 22, 1993 asking that disciplinary action be taken against Mr. Scott for several purported infractions. These included collusion with management to the detriment of the union, failing to enforce the sick leave policy, failing to take action when members on a promotional list for Budget Assistant positions

were not promoted and acting “in his own behalf against members of Local 2187 in regard to the AIDS Program Director position.”

The Executive Board took no action in response to this letter because it was not signed. While the Board has the power to investigate an unsigned complaint, it is not required to do so. At the time the letter was received, Mr. Scott was no longer a union member since Program Director was not a bargaining unit position and thus he could not be disciplined by the union.

By letter dated November 1, 1993, Mr. McAnally responded to plaintiff’s letter. Mr. McAnally stated that there was established precedent to accept non-paid experience for positions that dealt with AIDS issues as much of the early activity in this area came from grass roots and citizen groups.

After receiving Mr. McAnally’s letter, plaintiff contacted Ms. Walton and discussed the volunteer experience allowance with her. She asked plaintiff to send her a copy of the McAnally letter and his response to it. Plaintiff sent this information to Ms. Walton by letter dated November 1, 1993. Ms. Walton responded by letter dated November 29, 1993 that she would be meeting with Cathy Scott to discuss the Program Director position that week and would get back to plaintiff. Ms. Walton noted in her letter that plaintiff should contact her if he had any further questions. Ms. Walton contacted plaintiff sometime in January 1994 and advised him that it was too late for the union to take action regarding the appointment of Mr. Scott.

Under the collective bargaining agreement between the union and the City, a grievance must be filed within ten days of the occurrence complained of or within ten days of the time the grievant reasonably should have been aware of the occurrence. There is no suggestion plaintiff was unaware of Mr. Scott's appointment as Program Director from the time it occurred on July 19, 1993.

Discussion

Plaintiff claims that the union and City conspired to deprive him of the Program Director position because of his race in violation of § 1985(3). Plaintiff claims that the city discriminated against him in filling this position with a "less qualified" white candidate in the spring of 1993.[5] Plaintiff claims the City racially discriminated and retaliated against him for filing a complaint when he was not appointed to the position after Mr. Scott was assigned to other duties in the fall of 1994.[6]

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[5] In a footnote in his brief, plaintiff states he is no longer pressing claims of racial discrimination against the City premised on his failure to receive a promotion to AIDS Program Services Manager, his assignment at the Drew Center or his reemployment in a lower level position than his previous one.

[6] Plaintiff did not explicitly or discernibly plead a retaliation claim. In none of the four versions of his complaint is the word retaliation used. Plaintiff nevertheless argues in his brief that he seeks relief from the City under this theory as well. Because the City has not objected and has addressed in its brief the merits of a retaliation claim on the record presented, albeit summarily, the court also analyzes such a claim as if it had been properly pled. This is not the only instance in which plaintiff appears in his brief to recharacterize his claims as pled.

To sustain a § 1985(3) claim, a plaintiff must prove a conspiracy motivated by a racial or comparable class based discriminatory animus designed to deprive a person or class of persons of the equal protection of the laws, an act in furtherance of the conspiracy, and resulting injury to the person or property or the deprivation of a right or privilege of a citizen of the United States. Lake v. Arnold, 112 F.3d 682, 685 (3d Cir. 1997) (citing United Bhd. of Carpenters & Joiners of Am., Local 610 v. Scott, 463 U.S. 825, 828-29 (1983); Griffin v. Brekenridge, 403 U.S. 88, 102-03 (1971).

A plaintiff has the burden of establishing a prima facie case of employment promotion discrimination under Title VII. To do so, plaintiff must show that he is a member of a protected class, that he possessed the qualifications for the position in question, that he did not receive the position and the employer solicited or accepted other applicants of similar or lesser qualifications. Bray v. Marriott Hotels, 110 F.3d 986, 989-90 (3d Cir. 1997); Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994).

If a plaintiff does so, the burden shifts to the defendant to articulate a legitimate nondiscriminatory reason for the adverse employment decision. Hicks, 509 U.S. at 507; Fuentes, 32 F.3d at 763. The plaintiff may then discredit the employer's articulated reason and show that it was pretextual from which a fact finder may infer that the real reason was discriminatory or otherwise present evidence from which one

reasonably could find that unlawful discrimination was more likely than not a determinative or "but for" cause of the adverse employment action. Hicks, 509 U.S. at 511 & n.4; Miller v. CIGNA Corp., 47 F.3d 586, 595-96 (3d Cir. 1995) (en banc); Fuentes, 32 F.3d at 763-64.

To discredit a legitimate reason proffered by the employer, a plaintiff must present evidence demonstrating such weaknesses, implausibilities, inconsistencies, contradictions or incoherence in that reason that one reasonably could conclude it is incredible and unworthy of belief. Fuentes, 32 F.3d at 364-65; Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509, 531 (3d Cir. 1992), cert. denied, 510 U.S. 826 (1993).

The ultimate burden of proving that a defendant engaged in intentional discrimination against the plaintiff remains at all times on the plaintiff. Hicks, 509 U.S. at 507, 511.

The same analysis is employed in assessing a PHRA claim, see Griffiths v. CIGNA Corp., 988 F.2d 457, 468 (3d Cir.), cert. denied, 510 U.S. 865 (1993); Harley v. McCoach, 928 F. Supp. 533, 538 (E.D. Pa. 1996), or a public employment discrimination claim asserted under § 1983. See Harris v. Shelby County Bd. of Educ., 99 F.3d 1078, 1082 (11th Cir. 1996); Lewis v. University of Pittsburgh, 725 F.2d 910, 915 n.5 (3d Cir.), cert. denied, 460 U.S. 892 (1984).[7]

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[7] Plaintiff states in his brief that he "is not alleging due process violations and an analysis of plaintiff's property interests is, therefore, irrelevant." Rather, plaintiff (continued...)

To establish a prima facie case of retaliation, a plaintiff must show that he engaged in protected activity, that he was subsequently or contemporaneously subject to an adverse employment action, and that there was a casual link between the protected activity and the adverse action. Woodson v. Scott Paper Co., 109 F.3d 913, 920 (3d Cir. 1997); Barber v. CSX Distribution Services, 68 F.3d 694, 701 (3d Cir. 1995); Jalil v. Advel Corp., 873 F.2d 701, 708 (3d Cir. 1989), cert. denied, 493 U.S. 1023 (1990). Except perhaps in circumstances where the timing of the alleged retaliatory act is "unusually suggestive," timing alone is not sufficient to demonstrate a causal link. Krouse v. American Sterilizer Co., 126 F.3d 494, 503 (3d Cir. 1997). See also Robinson v. City of Pittsburgh, 120 F.3d 1286, 1302 (3d Cir. 1997); Delli Santi v. CNA Ins. Co., 88 F.3d 192, 199 n.10 (3d Cir. 1996).

If the plaintiff establishes such a prima facie case, then with retaliation claims as well the burden shifts to the defendant to offer a legitimate reason for the adverse employment action. Jalil, 763 F.2d at 708. The plaintiff must then discredit any legitimate reason proffered by the defendant by presenting evidence from which one may infer that the real reason was retaliatory or otherwise present evidence from which one reasonably can find that retaliation was more likely than not a

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[7](...continued)
asserts that his § 1983 claim is based on unequal treatment because of race when Mr. Scott was appointed to the Program Director position for which plaintiff was "better qualified."

determinative cause of the adverse employment action. Lawrence v. National Westminster Bank of New Jersey, 93 F.3d 61, 66 (3d Cir. 1996); Charlton v. Paramus Board of Education, 25 F.3d 194, 201 (3d Cir.), cert. denied, 513 U.S. 1022 (1994); Geary v. Visitation of the Blessed Virgin Mary Parish School, 7 F.3d 324, 329 (3d Cir. 1993).

Defendants contend that plaintiff has failed to sustain a claim for employment discrimination because he cannot show that he had the qualifications for Program Director. They stress that plaintiff failed to meet the primary requirement of both Promotional Opportunity Announcements that the applicant have permanent Civil Service status within thirty days of the closing date of the announcement. Defendant City contends that plaintiff has also failed to demonstrate a causal connection between his filing a complaint and Ms. Richman not appointing him to the position in 1994, and has failed to discredit the non-discriminatory and non-retaliatory reason she gave for her decision to make no permanent Civil Service appointment to head AACO.

Promotion competition is governed by Civil Service Regulation 9.026, which states:

> SCOPE OF PROMOTION COMPETITION. Competition in any promotional examination shall be open to employees with permanent Civil Service status in such classes and in such departments as the Director in his discretion shall determine. Employees serving in a probationary period as a result of reinstatement following previous service with permanent status may also be admitted, provided, however, that such reinstated employees may

> not be certified for appointment until the probationary period has been completed.

Plaintiff admits that he lacked permanent Civil Service status, but presents several arguments why he nevertheless should have been appointed Program Director.

Plaintiff notes the City did not initially tell him this was the reason he was not appointed. Once Mr. O'Connor determined from his application that plaintiff lacked the required experience, however, he concluded there was no reason to further investigate plaintiff's qualifications. Also, as noted, he was not the person responsible for verifying applicants' Civil Service status.

Plaintiff argues that he could have taken the examination for Program Director while on probationary status and then temporarily be appointed or the City could have waited until he achieved permanent status and then appointed him. Plaintiff contends that the City frequently holds positions open in this manner. He does not, however, present any competent evidence whatsoever to support this assertion.

Plaintiff next argues that "given that the City has routinely manipulated the Civil Service Regulations to accomplish illicit goals, it should not be permitted to use them as a shield against liability for illegal conduct." The requirement that an employee have permanent Civil Services status, however, was always a criteria for the position. Moreover, plaintiff again presents absolutely no competent evidence to substantiate his

serious accusation that the City routinely manipulates Civil Service Regulations to achieve illicit goals. Indeed, he has not presented evidence of any occasion on which the City was guilty of such misconduct.[8]

Plaintiff finally argues that he should have been deemed eligible to take the examination for Program Director. He points to a section of Regulation 9.026 which provides that reinstated employees "may" also compete for a promotion and then argues that it should be read in conjunction with Civil Service Regulation 11.03 which provides that only the top two scoring applicants may be certified to the appointing authority. Taking these regulations in tandem, plaintiff argues he could have competed for the position when it was posted and then been certified for the position when he achieved permanent Civil Service status on September 1, 1993.

There is uncontroverted evidence, however, that the City Personnel Department has consistently interpreted the referenced language in Regulation 9.026 regarding reinstated employees to be permissive and not mandatory. Linda Seyda, the City Personnel Director, avers that it is the consistent policy and practice of the Personnel Department that individuals may not be appointed from a promotional eligible list if they do not have

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[8] In making his arguments, plaintiff often hypothesizes about nefarious cabals without competent supporting evidence. The testimony of Dr. Ross that plaintiff was a "conspiracy theorist" who in conversations frequently proffered conspiratorial explanations for events was not controverted.

permanent Civil Service status and generally may not compete unless they can meet this and other qualifications within 30 days of the closing date for applications. Ms. Seyda's averment that she is not aware of any instance in the Philadelphia Civil Service where an individual was appointed from a promotional eligible list who lacked permanent Civil Service status is uncontroverted by any competent evidence of record.

The closing date for applications for the Program Director position was June 30, 1993. Plaintiff's probationary period ended on August 31, 1993. He could not have attained permanent Civil Service status within 30 days of the closing date for applications.

Dr. Ross denies ever making the statement that the position was set aside for a member of the gay white community. The court, of course, must accept plaintiff's averment that he did. Nevertheless, such a statement is essentially factual rather than discriminatory. Dr. Ross had concluded by that time that Mr. Scott was the best available person for this position. Mr. Scott was a gay white man.

Dr. Ross had given plaintiff a "plum" position in the Commissioner's office. Dr. Ross had encouraged plaintiff to remain at the Department of Health. He had just recently accommodated plaintiff's request for reemployment. Dr. Ross appointed blacks to four senior management positions in his department. His first choice for the position in question was Ms. Vance, a black employee. He solicited two blacks for the

position before Mr. Scott was appointed. Dr. Ross is himself a black man. It seems not only unreasonable for one to conclude but virtually inconceivable that he would intentionally discriminate against plaintiff because he is black.

In any event, plaintiff plainly lacked the qualifications for the position. He did not and within thirty days could not have permanent Civil Service status. He also failed to satisfy the experience requirements.

Plaintiff argues that the job specifications were amended to accommodate Mr. Scott. That Mr. Scott may have been helped does not show that plaintiff was harmed. The amendments made it easier for all applicants to qualify. Plaintiff did not qualify under the original specifications, which predate any expression of interest in the position by plaintiff or Mr. Scott, as well as under the amended specifications. There is absolutely no evidence from which one reasonably could find that the specifications were amended to exclude plaintiff because of his race or otherwise.

Plaintiff argues that Mr. O'Connor's determination regarding plaintiff's lack of requisite experience is "inherently suspect" in view of his "superior qualifications." Plaintiff's speculation not withstanding, there is no competent evidence that Mr. O'Connor even knew of the interest of Dr. Ross in Mr. Scott. Mr. O'Connor did not work for Dr. Ross. He was in the City Personnel Department. In any event, Mr. O'Connor cogently explained the review he undertook and the reasons he concluded plaintiff lacked the required experience. There is no evidence

of record from which one reasonably could find these reasons incredible.

Plaintiff has failed to sustain his § 1983, Title VII or parallel PHRA claim against the City for employment discrimination in declining to appoint him to the Program Director position in July 1993.[9]

Even assuming plaintiff met the qualifications for the position by October 1994 and that Ms. Richman actually saw his letter of March 1995, there is no evidence from which one reasonably could find that Commissioner Richman lied about her reason for not appointing plaintiff or any permanent Civil Service employee as Program Director. The person who Ms. Richman retained to run AACO after Mr. Scott was reassigned was a black man. Plaintiff has shown nothing more than that he wrote to Ms. Richman expressing interest in the Program Director position with no response seventeen months after filing his EEOC complaint and a week before summonses were issued in this action. Plaintiff has not remotely sustained a claim of racial discrimination or retaliation by Ms. Richman.

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[9] The City also argued that plaintiff had failed to exhaust the PHRA administrative process by refusing to cooperate with the agency after filing his complaint. The City points to a letter from the PHRC advising plaintiff that the agency was dismissing his claim because of his failure to respond to "repeated attempts" by PHRC to contact him for information. Plaintiff denies receiving the various letters sent by PHRC in an effort to communicate with him. In view of the substantive deficiencies in plaintiff's PHRA claim, the court need not resolve this point.

Plaintiff's § 1985 claim is similarly deficient. Plaintiff has not shown that any union officer was motivated by racial animus to enter into a conspiracy with a City official to injure plaintiff, let alone an officer with final decisionmaking power or for whose conduct the union could otherwise be liable.[10] Plaintiff has not shown that he sustained any injury or was deprived of any right as a result of any conspiracy as he did not qualify for appointment to the Program Director position under the initial or amended specifications.

Plaintiff's other claims against the union are also deficient.[11]

It appears from his brief that plaintiff's "breach of contract" claim against the union is actually a claim for breach of the fiduciary duty plaintiff correctly argues a union owes to its members under the Labor Management Reporting and Disclosure

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[10] There is no respondeat superior liability under § 1985(3). See Bell v. City of Milwaukee, 746 F.2d 1205, 1272 (7th Cir. 1984); Owens v. Haas, 601 F.2d 1243, 1247 (2d Cir.), cert. denied, 444 U.S. 980 (1979); Luke v. Abbott, 954 F. Supp. 202, 203 n.1 (C.D. Cal. 1997); Frazier v. City of Philadelphia, 927 F. Supp. 881, 887 (E.D. Pa. 1996); Carnegie v. Miller, 811 F. supp. 907, 914 (S.D.N.Y. 1993); Callahan v. Commonwealth Land Title Ins. Co., 1990 WL 168273, *10 (E.D. Pa. Oct. 29, 1990); Gant v. Aliquippa Borough, 612 F. Supp. 1139, 1142 (W.D. Pa. 1985); DiMaggio v. O'Brien, 497 F. Supp. 870, 876 (E.D. Pa. 1980).

[11] As noted, plaintiff has presented absolutely no evidence of any possible culpable conduct by the national AFSCME. He offers no argument in opposition to the national union's motion for summary judgment. The court thus uses the term "union to refer only to Local 2187.

Act ("LMRDA").[12] The defendant argues just as correctly that the LMRDA does not apply to public employee unions. See 29 U.S.C. § 402(e); Local 1498 American Federation of Government Employees v. American Federation of Government Employees, AFL-CIO, 522 F.2d 486, 490 (3d Cir. 1975). Moreover, plaintiff has not shown that he was deprived of the Program Director position as a result of a denial of "the honest and faithful services of union officials." See U.S. v. Boffa, 688 F.2d 919, 931 (3d Cir. 1982).

Plaintiff was not even a union member at the time the Civil Service Commission approved the amended specifications for Program Director to which the union purportedly should have objected. Moreover, the union had no authority to lodge an objection as Program Director was not a bargaining unit position. It is uncontroverted that plaintiff asked the union not to file a grievance during the time allowed under the collective bargaining agreement and that the union did assist him in filing a protest with the City under its personnel dispute procedures.

To sustain a claim for intentional interference with prospective contractual relations, a plaintiff must prove the

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[12] Plaintiff does not dispute the union's contention that he has identified no right under the collective bargaining agreement which he was denied by the union in bad faith of a type necessary to show a breach of the duty of fair representation under state law. There also is no private cause of action for money damages under the LMRDA or state law for a breach of fiduciary duty to a member by a union. See Building Material and Dump Truck Drivers, Local 240 v. Traweek, 867 F.2d 500, 506 (9th Cir. 1989); International Longshoremen's Assoc., AFL-CIO v. Spear, 1998 WL 83684, *4 (E.D. Pa. Feb. 25, 1998); Waklet-Riker v. Sayre Area Educational Association, 656 A.2d 138, 141 (Pa. Super.), app. denied, 668 A.2d 1136 (Pa. 1995).

existence of a prospective contractual relationship; conduct by the defendant undertaken for the purpose of harming the plaintiff by preventing the relationship from occurring; the absence of any privilege or justification; and, actual damage resulting from the defendant's conduct. Advent Systems Ltd. v. Unisys Corp., 925 F.2d 670, 673 (3d Cir. 1991); Thompson Coal Co. v. Pike Coal Co., 412 A.2d 466, 471 (Pa. 1979). The "gravamen of this tort is the lost pecuniary benefits flowing from the contract." Peligatti v. Cohen, 536 A.2d 1337, 1343 (Pa. Super. 1987). A plaintiff must show that absent the wrongful conduct of the defendant, there was an "objectively reasonable probability" a contract would have been formed. Schulman v. J.P. Morgan Im. Management, Inc., 35 F.3d 799, 808 (3d Cir. 1994); Glenn v. Point Park College, 272 A.2d 895, 898-99 (Pa. 1971). Plaintiff has not shown that there was a reasonable probability he would have been selected for the Program Director position, without regard to any conduct of the union.

To sustain his fraud claim, plaintiff must prove by clear and convincing evidence that the defendant fraudulently made a misrepresentation with an intent to induce plaintiff to act thereon; that plaintiff justifiably relied on the misrepresentation; and, that he sustained actual damages as a proximate result. Tunis Bros. Co. v. Ford Motor Co., 952 F.2d 715, 731 (3d Cir. 1991); Gibbs v. Ernst, 647 A.2d 882, 889 (Pa. 1994). Plaintiff contends that he was misled by the union into believing Ms. Scott would do a more thorough investigation

regarding Mr. Scott's appointment and by Ms. Walton when she wrote she would "get back to" plaintiff in her letter of November 29, 1993. Plaintiff testified that Ms. Walton did contact him about five weeks later. In any event, he contends that the union induced or lulled him into not challenging the Program Director appointment more promptly.

Plaintiff's fraud claim is untenable. It is uncontroverted that a union shop steward timely encouraged plaintiff to initiate action over his grievance regarding the Program Director appointment and that plaintiff declined. It is uncontroverted that plaintiff told Ms. Scott he did not want any grievance filed by the union on his behalf during his probationary period. It is uncontroverted that Ms. Walton provided plaintiff with the information he requested about how to file an administrative complaint with the City. By the time of Ms. Scott's investigation, Ms. Walton's promise to "get back to" plaintiff and the expiration of his probation the time allowed by contract for filing a grievance had lapsed. Moreover, plaintiff cannot prove by a preponderance, let alone by clear and convincing evidence, that there was any realistic prospect of his becoming Program Director even if a timely grievance had been filed. Plaintiff has failed to produce evidence to sustain a finding of detrimental reliance on or actual damages caused by any statement or omission of the union, fraudulent or otherwise.

To sustain a civil conspiracy claim, a plaintiff must prove that two or more persons combined or agreed with the intent

to commit an unlawful act or an otherwise lawful act by unlawful means; that they did so with malice or an intent to injure the plaintiff; that an overt act was done in furtherance of the objective of the conspiracy; and, that plaintiff was damaged as a result. See Pierce v. Montgomery County Opportunity Bd., Inc., 884 F. Supp. 965, 974 (E.D. Pa. 1995); Thompson Coal Co., 412 A.2d at 472; Smith v. Wagner, 588 A.2d 1308, 1311-12 (Pa. Super. 1991); Cohen v. Pelagatti, 528 A.2d 657, 658 (Pa. Super. 1987). "A claim for civil conspiracy can proceed only when there is a cause of action for an underlying act." Caplan v. Fellheimer Eichen Braverman Kaskey, 884 F. Supp. 181, 184 (E.D. Pa. 1995).

Plaintiff states that the conspirators include Mr. Scott, Mr. Savitz, Mr. McNally, Mr. McAnally, Mr. O'Connor, Dr. Ross and Mayor Rendell. Plaintiff contends that the conspiracy essentially involved an agreement to amend without challenge by the union the specifications for the Program Director position. In his complaint plaintiff asserts that the objective of the conspiracy was intentionally to interfere with plaintiff's prospective contractual relations. In his brief, however, plaintiff appears to suggest that the objective was to deny him the Program Director position because of his race. In any event, plaintiff has failed to sustain his civil conspiracy claim against the union.

Plaintiff was not even employed by the City when the specifications were amended. No reasonable person could find that the specifications were amended with malice toward or a

specific intent to injure plaintiff because of race or otherwise. As further noted, the union had no standing to object to the specifications for non-bargaining unit positions. Also as noted, one cannot reasonably find from the competent evidence of record that there was a realistic probability plaintiff would have been appointed as Program Director even if the specifications had not been amended.

Conclusion

For the reasons set forth above, defendants are entitled to summary judgment on plaintiff's claims against them. Accordingly, the court has entered an order granting defendants' motions and entering judgment in their favor.

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

CECIL HANKINS	:	
	:	
v.	:	
	:	**CIVIL ACTION**
CITY OF PHILADELPHIA, AMERICAN FEDERATION OF STATE, CITY AND MUNICIPAL EMPLOYEES AND AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES DISTRICT COUNCIL 47, LOCAL 2187	:	**NO. 95-1449**

O R D E R

AND NOW, this day of April, 1998, consistent with the court's order of March 31, 1998 granting defendants' Motions for Summary Judgment, **IT IS HEREBY ORDERED** that the attached memorandum opinion be filed and made a part of the record in this case.

BY THE COURT:

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JAY C. WALDMAN, J.