

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

Jeffrey Curran,	:	
	:	
Plaintiff,	:	
	:	
v.	:	CIVIL ACTION
	:	NO. 97-CV-8121
Southeastern Pennsylvania	:	
Transportation Authority,	:	
Ronald Sharpe, and	:	
Lieutenant Vandyke Rowell,	:	
	:	
Defendants.	:	

MEMORANDUM OF DECISION

McGlynn, J.

January___, 1999

In this civil action filed on January 12, 1998, against the defendants, the Southeastern Pennsylvania Transportation Authority ("SEPTA") and several of its supervising employees, the plaintiff, Jeffrey Curran ("Curran"), a SEPTA police officer, claims that the defendants retaliated against him for exercising his right of free speech.

The protected speech was a complaint filed by Curran on July 7, 1994 and his subsequent statements to an investigator of the Internal Affairs Division of SEPTA's Police Department that a fellow officer mishandled drugs found at or near a train platform. Following an investigation by SEPTA's office of Inspector General the offending officer was reprimanded, removed from the police force and transferred to the Regional Rail

Division. Although disciplinary procedures had been initiated against Curran for insubordination, that action was rescinded and his personnel file purged following the Inspector General's investigation.

Nevertheless, Curran contends that adverse job actions were taken against him because of his complaint to Internal Affairs. As summarized in his memorandum, these actions were as follows:

SUMMARY OF RELEVANT EVENTS

July 6, 1994 until March 18, 1995	Sergeant Jones throws away crack vials, and then begins to harass and intimidate Officer Curran
February 3, 1995	Officer Curran given written warning for sick time violation
June, 1995	Officer Curran given three (3) day suspension for car accident
August, 1996	Request for unpaid personal leave denied by SEPTA
November 26, 1996	Three (3) day suspension for car accident reduced to written warning making Officer Curran eligible for promotion to sergeant effective September 24, 1995
November 1, 1998	Sergeant Curran transferred for the fourth time in just over one (1) year since making sergeant

Curran's Mem. Opp'n Mot. Summ. J. at 8.

Curran's complaint asserted claims under 42 U.S.C. § 1983 and Article I, Section 7 of the Constitution of the Commonwealth of Pennsylvania. Contending that Curran's claims are either

barred by the Statute of Limitations or are not actionable, the defendants have moved for summary judgment.

The court will not rehearse the now familiar rules governing summary judgment motions except to point out that the court must view the record and all reasonable inferences drawn therefrom in the light most favorable to the party opposing summary judgment. See Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986); Rossi v. Standard Roofing, Inc., 156 F.3d 452, 466 n.9 (3d Cir. 1998). However, to survive a motion for summary judgment, the nonmovant must adduce "more than a mere scintilla of evidence in its favor and may not merely rely on unsupported assertions, conclusory allegations, or mere suspicions." Harley v. McCoach, 928 F.Supp. 533, 535 (E.D.Pa. 1996) (internal quotations omitted) (citing Williams v. Borough of W. Chester, 891 F.2d 458, 460 (3d Cir. 1989)).

A. Section 1983 Claim

The defendants argue that Curran's 42 U.S.C. § 1983 First Amendment retaliation claim must be dismissed because several alleged retaliatory acts are barred by the statute of limitations and the remaining incidents simply are not actionable. Curran argues that the acts within the statute of limitations period are independently actionable and that conduct beyond the statute of limitations is also actionable on a continuing violation theory.

Federal courts apply the state's statute of limitations for personal injury to 42 U.S.C. § 1983 actions. See Wilson v. Garcia, 471 U.S. 261, 276-78, 105 S.Ct. 1938, 1947-48, 85 L.Ed.2d 254 (1985); Sameric Corp. of Delaware v. City of Philadelphia, 142 F.3d 582, 599 (3d Cir. 1998). Since Pennsylvania's statute of limitations for personal injury is two years, see 42 Pa. Cons. Stat. Ann. § 5524 (West Supp. 1998), Curran's 42 U.S.C. § 1983 claim is subject to a two-year statute of limitations. See Osei-Afriyie v. Medical College of Pennsylvania, 937 F.2d 876, 885 (3d Cir. 1991). Therefore, Curran's claim ordinarily would be time-barred in so far as it is based on acts that occurred before January 12, 1996. He concedes that three incidents: 1) his harassment by Jones from July 6, 1994 to March 18, 1995, 2) his written warning on February 3, 1995 for his sick leave violation and 3) his suspension in June 1995 for his involvement in a police patrol vehicle accident, occurred outside the statute of limitations; but argues that the remaining incidents occurred within the statute of limitations.¹

The remaining incidents include: 1) SEPTA's failure to

¹ The plaintiff, Curran, argues that the retaliation was continuous and therefore the Statute of Limitations is tolled but he has failed to show that at least one retaliatory act occurred within the statutory period. See West v. Philadelphia Elec. Co., 45 F.3d 744, 754 (3d Cir. 1995).

promote Curran on November 26, 1996 and February 2, 1997² to sergeant retroactive to September 24, 1995, 2) SEPTA's decision to condition Curran's leave request in August 1996 and 3) SEPTA's decision to transfer Curran to day work on November 1, 1998. The defendants contend that these incidents do not support Curran's 42 U.S.C. § 1983 claim.

The U.S. Court of Appeals for the Third Circuit utilizes a three step process in analyzing 42 U.S.C. § 1983 First Amendment retaliation claims. See Fultz v. Dunn, __F.3d__, Civ. Nos. 97-7378, 97-7503, 1998 WL 887786 at *3 (3d Cir. Dec. 21, 1998); Latessa v. New Jersey Racing Comm., 113 F.3d 1313, 1319 (3d Cir. 1997); Azzaro v. County of Allegheny, 110 F.3d 968, 975 (3d Cir. 1997) (in banc). The plaintiff must establish 1) that the speech was protected, 2) that the protected speech was a substantial or motivating factor in the adverse employment action, see Green v. Philadelphia Hous. Auth., 105 F.3d 882, 885 (3d Cir.) (citations omitted), cert. denied, --U.S.--, 118 S.Ct. 64, 139 L.Ed.2d 26 (1997); Morgan v. Rossi, No. Civ. A. 96-1536, 1998 WL 175604 at *6 (E.D.Pa. April 15, 1998), and 3) if the plaintiff meets his burden in the above two steps, the defendant may defeat the plaintiff's claim by "demonstrating that the same action would have been taken even in the absence of the protected conduct."

² The February 2, 1997 claim was raised for the first time at oral argument.

Green, 105 F.3d at 885 (quoting Swineford v. Snyder County Pa., 15 F.3d 1258, 1270 (3d Cir. 1994)).

The second prong of the three step process is at issue here.³ The defendants contend that Curran's exercise of free speech was not a substantial or motivating factor in SEPTA's subsequent job action decisions.

The facts in Fultz are analogous to those under consideration here. In Fultz, the plaintiff alleged that defendants miscalculated the plaintiff's seniority in retaliation for the plaintiff's success in a prior law suit. The prior law suit was settled by an agreement that provided for the plaintiff's reemployment. To comply with the settlement agreement, the plaintiff's personnel file was edited. The word "termination" was replaced with "voluntary resignation" to describe the break in the plaintiff's work history. The plaintiff claimed that this editing improperly precluded him from retaining his seniority and thus affected his eligibility for promotion.

The court determined that the plaintiff did not show defendants had "meaningful discretion to act other than . . ." they did in precluding him from retaining his prior seniority because civil service rules mandated that seniority can be

³ For the purposes of this motion, the court will assume that Curran's speech was protected.

recaptured only if the break in service is under one year and the plaintiff's break in service was over three years. See Fultz, 1998 WL 887786 at *4. The court also found that the plaintiff failed to bargain for his seniority in the prior settlement. The court concluded that the plaintiff failed to show his protected activity was a substantial or motivating factor for the defendants' actions.

1. SEPTA's Failure to Promote Curran

Curran concedes that when he was passed over for promotion on September 24, 1995, SEPTA had a valid reason for doing so, i.e. a suspension on his record. See Curran's Mem. Opp'n Mot. Summ. J. at 12.⁴ But Curran contends that SEPTA's failure to promote him on November 26, 1996 and February 2, 1997 retroactive to September 24, 1995 constituted retaliation for his actions in 1994.

He argues that on November 26, 1996 when an arbitrator reduced the three day suspension to a written reprimand and directed that he be placed in "next in line status," the failure to immediately promote him retroactive to September 24, 1995 constituted retaliation. First of all, the arbitrator did not state that Curran be promoted retroactively; secondly, there is no evidence that a sergeant's position was available on November

⁴ This concession is a reversal of his previous position. See Curran's Sept. 24, 1998 Dep. at 318:5-321:6; First Am. Compl. ¶ 34.

26, 1996 or that he asked to be promoted at that time; and finally, the lapse of time between Curran's protected speech in July 1994 and November 1996 is too great to permit an inference that retaliation played a part.

On February 2, 1997 another officer was promoted to sergeant but when the plaintiff filed a grievance on the basis of his "next in line status" in June 1997 he received the promotion retroactive to February 2, 1997. Again the purported connection between his exercise of free speech and the adverse job action almost three years later is too remote. In any event, whatever adverse consequence that the February 2, 1997 job action may have had was cured by the retroactive promotion four months later.

2. Curran's Conditioned Leave Request

Curran asserts that because SEPTA interpreted a contractual provision regarding family leave differently than his union, his alleged protected speech in 1994 was a substantial or motivating factor in SEPTA's decision to condition his leave request. However, like the plaintiff in Fultz, Curran cannot show that the defendants would have acted differently than they did in conditioning his leave request. SEPTA has consistently followed its interpretation of the contractual provision on requests for leave. See May 13, 1998 Arbitration Award and Op. at 7 (finding that the condition follows established past practice and the SEPTA's family leave policy). The arbitrator found no evidence

that SEPTA conditioned Curran's leave request "in an arbitrary or discriminatory fashion." Id. The fact that Curran's union challenged SEPTA's long standing family leave policy does not create an inference that Curran's protected speech was a substantial or motivating factor in SEPTA's decision to condition Curran's leave request.

There simply is no evidence to support a finding that Curran's exercise of free speech in 1994 was in any way related to SEPTA's decision to condition Curran's leave request in August 1996. Accordingly, this claim must fail.

3. Curran's Transfer to Day Work

Similarly, the record fails to support Curran's contention that his protected speech in 1994 was a substantial or motivating factor in SEPTA's decision in November 1998 to transfer him to day work. Curran argues that SEPTA transferred him to day work after learning that he had been working during the day at his own construction business and that the day work assignment was further retaliation for Curran's exercise of free speech in 1994.

In support of this argument Curran cites his own deposition testimony which, inexplicably, does not show that SEPTA was made aware of the time of day that Curran conducted his private construction work. See Curran's Sept. 24, 1998 Dep. at 23:12-24:20. Similarly, Curran's contention that he was transferred more than other SEPTA sergeants is belied by the record. He

relies on the testimony of SEPTA police officer, Stephen Johnson, among others who, the record shows, had more transfers as a sergeant than Curran. Stephen Johnson's Dep. at 27-28. In any event, a change in work assignments made more than four years after his protected speech is not sufficient to make out a case of retaliation.

B. Pennsylvania Constitutional Claim

The second count of the First Amended Complaint is a claim alleging the defendants violated Article I, Section 7 of the Constitution of the Commonwealth of Pennsylvania. The defendants argue that no private right of action exists for violations of Article I, Section 7. This raises a difficult and unsettled question of Pennsylvania law. Under the circumstances, having dismissed all federal claims I will exercise my discretion by declining jurisdiction over that claim. See 28 U.S.C. § 1367(c); Borough of West Mifflin v. Lancaster, 45 F.3d 780, 788 (3d Cir. 1995).

III. CONCLUSION

For the above reasons, the defendants' motion for summary judgment will be granted as to the 42 U.S.C. § 1983 claim. The Pennsylvania constitutional claim will be dismissed without prejudice.