

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

COLLINS MILES : CIVIL ACTION
 :
 v. :
 :
 CITY OF PHILADELPHIA, :
 CAPT. THOMAS NESTEL and :
 LT. JOHN LaCON : NO. 98-5837

M E M O R A N D U M

WALDMAN, J.

May 5, 1999

I. Introduction

Plaintiff has asserted claims pursuant to 42 U.S.C. §§ 1981 and 1983 as well as the Pennsylvania Whistleblower Law, 43 P.S. § 1421 et seq., for racial discrimination in employment and retaliation for speaking out against wrongdoing in the Philadelphia Police Department. Presently before the court is defendants' motion to dismiss plaintiff's federal claims pursuant to Fed. R. Civ. P. 12(b)(6).

II. Legal Standard

Dismissal for failure to state a claim is appropriate only when it clearly appears that plaintiff can prove no set of facts in support of the claim which would entitle him to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Robb v. Philadelphia, 733 F.2d 286, 290 (3d Cir. 1984). Such a motion tests the legal sufficiency of a claim while accepting the veracity of the claimant's allegations. See Markowitz v.

Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990); Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987); Winterberg v. CNA Ins. Co., 868 F. Supp. 713, 718 (E.D. Pa. 1994), aff'd, 72 F.3d 318 (3d Cir. 1995). A complaint may be dismissed when the facts alleged and the reasonable inferences therefrom are legally insufficient to support the relief sought. See Pennsylvania ex rel. Zimmerman v. PepsiCo., Inc., 836 F.2d 173, 179 (3d Cir. 1988).

III. Facts

The facts as alleged by plaintiff are as follow.

Plaintiff is a Philadelphia police officer. He is black. Prior to 1996, plaintiff consistently received satisfactory evaluations and was considered by his peers to be an excellent, reliable police officer. In January 1996, a white police officer drew his service revolver and pointed it in a threatening manner at Officer Angela Brown, a black woman. Officer Brown reported the incident to supervisory officers in the 14th District who responded by publicly insulting her.

Plaintiff and other nonwhite officers in the 14th District expressed their support for Officer Brown and requested that the officer who pointed his weapon at her be disciplined. The nonwhite officers were advised by unidentified persons "to stay out of the Angela Brown" incident. The officer who pointed his weapon at Officer Brown was suspended for three days and then

transferred to another platoon within the 14th District. Nonwhite officers who had committed offenses involving the drawing of their weapons were regularly disciplined more severely. Such discipline included extensive investigations, board hearings and suspensions exceeding three days.

Plaintiff and other nonwhite officers in the 14th District complained about what they perceived to be the minimal disciplinary action taken against the white officer. Plaintiff also spoke out against the physical assault of a prisoner by an unidentified sergeant assigned to the 14th District, the "suggested planting of a weapon on a suspect" and the generally "deteriorating and hostile racial atmosphere [and] the increasing retaliatory conduct towards himself and the other minority officers."

Plaintiff expressed his concerns to his supervisors at the 14th District and other unidentified "responsible parties." Captain Nestel and Lieutenant LaCon responded to the nonwhite officers' complaints by taking unspecified actions which the nonwhite officers "believed to be threats to their person and safety." Defendants Nestel and LaCon perceived plaintiff as the principal spokesman for the 14th District's nonwhite officers and began to give him "out of the way assignments."

In March 1997, plaintiff reported his concerns regarding allegedly illegal actions by 14th District officers

against him, other nonwhite officers and the public at large to the Department's Internal Affairs Bureau. In April 1997, Officer Brown was detailed out of the 14th District and the white officer who had pointed his service revolver at Officer Brown was transferred back to the platoon to which he had been assigned before his post-misconduct transfer. Plaintiff protested these personnel changes as discriminatory, but to no avail. Plaintiff was then assigned to foot patrol and given out-of-the-way assignments. Plaintiff also was given poor evaluations, was shunned by unidentified persons and was subjected to excessive scrutiny for the purpose of making his employment record suffer. In September 1997, an unidentified sergeant in the 14th District berated plaintiff for his allegedly "insufficient activity."

In late September and early October 1997, plaintiff filed complaints of discrimination, harassment, retaliation and other illegal actions against the 14th District administration, including defendants Nestel and LaCon, with Internal Affairs, the Department's internal equal employment opportunity office and "other outside agencies." In October and November 1997, plaintiff gave interviews to Internal Affairs and the EEOC regarding this allegedly discriminatory, retaliatory and illegal conduct.

Plaintiff was subsequently served with a notice of discipline charging him with insubordination in connection with

the incident of September 1997, presumably the undescribed conduct for which he was "berated" by a sergeant for "insufficient activity." Inspector Frankie Heyward refused to approve the notice of discipline. Defendant Nestel nevertheless processed the disciplinary charge and required plaintiff to appear at a Police Board of Inquiry hearing. Plaintiff was detailed out of the 14th District and ultimately transferred to the 5th District. In July 1998, plaintiff was given a notice of suspension relating to the September 1997 incident in which a sergeant berated him for insufficient activity.

Defendants' actions have caused plaintiff "considerable distress" for which medical treatment has been required. Plaintiff's reputation and career have been adversely affected because his peers and supervisors view him as having had disciplinary problems and as having violated "the unstated 'code of silence' for the Police Department." The retaliatory actions taken against him have resulted in economic loss including lost wages, benefits "and other work related emoluments."

IV. Discussion

Defendants concede that the 1991 amendments to § 1981 expanded the Act's definition of making and enforcing contracts to encompass the "performance, modification and termination of contracts." See 42 U.S.C. § 1981(b); Rivers v. Roadway Express, Inc., 511 U.S. 298, 300 (1994); Spriggs v. Diamond Auto Glass,

165 F.3d 1015, 1017-18 (4th Cir. 1999). They argue that plaintiff's § 1981 claim nevertheless fails because he had no individual employment contract with the City and lacks standing to assert his rights under the collective-bargaining agreement because only the authorized collective-bargaining representative may assert a union member's rights under the agreement.

If defendants are correct, no employee who is a member of a union may assert a claim in court under § 1981 for post-hiring discrimination by his employer, at least before exhausting all grievance and arbitration procedures provided in the collective bargaining agreement. Defendants cite no authority for this proposition. Defendants merely argue that plaintiff had no "contract" with the City other than the collective bargaining agreement since he had no written individual employment contract and because public contracts must be in writing to be enforceable under Pennsylvania law. The single case to which defendants cite is Malone v. City of Philadelphia, 23 A. 628 (Pa. 1892). That case, however, dealt with municipal liability under public construction contracts. There is no reported decision applying the statute addressed in Malone or its modern-day successor, 53 P.S. § 12671, in any context other than public works projects by outside contractors.

Moreover, defendants' argument presumes that plaintiff is seeking a contractual recovery from the City. He is not.

See, e.g., McAlester v. United Airlines, 851 F.2d 1249, 1255 (10th Cir. 1988) (§ 1981 claims sound in tort rather than contract); McElveen v. CSX Transportation, Inc., 1996 WL 481105, *4 (D.S.C. Aug. 21, 1996) (purpose of § 1981 is not to enforce contractual obligations but was to create independent actionable right of equal opportunity); Randolph v. Cooper Industries, 879 F. Supp. 518, 522 & n.4 (W.D. Pa. 1994) (§ 1981 claim alleges violations of federal antidiscrimination statute and not breach of collective bargaining agreement); Partin v. St. Johnsbury Co., Inc., 447 F. Supp. 1297, 1300 (D.R.I. 1978) (§ 1981 guarantees rights derived from the Thirteenth Amendment and not from implied or express provisions in a private agreement between two parties). The fact that plaintiff is covered by a collective bargaining agreement does not mean that only his collective bargaining representative may advance his § 1981 claim. Plaintiff is not alleging that defendants committed an unfair labor practice or violated his rights under the collective bargaining agreement. Plaintiff alleges that defendants violated his individual rights under federal antidiscrimination statutes.

There is scant support for defendants' suggestion that plaintiff must pursue arbitration pursuant to the grievance procedure in the collective bargaining agreement to vindicate his § 1981 rights. A divided panel of the Third Circuit has held that the provisions of a collective bargaining agreement may

subject statutory employment claims under Title VII and § 1981 to mandatory arbitration. See Martin v. Dana Corp., 1997 WL 313054 (3d Cir. June 12, 1997). The Third Circuit, however, vacated that opinion in favor of en banc rehearing, see 1997 WL 368629 (3d Cir. Jul. 1, 1997), and then panel rehearing, see 124 F.3d 590 (3d Cir. 1997), and ultimately held in an unpublished opinion that the arbitration provision in plaintiff's collective bargaining agreement did not bar his lawsuit. See 135 F.3d 765 (3d Cir. 1997). Even the holding in the vacated Martin opinion was limited to collective bargaining agreements under which an employee can compel arbitration without union approval and which explicitly provide for arbitration of statutory discrimination claims.

The Sixth, Seventh, Eighth, Tenth and Eleventh Circuits have all held in post-1991 cases that a collective-bargaining agreement may not prospectively waive a union member's right to bring statutory discrimination claims in court. See Penny v. United Parcel Serv., 128 F.3d 408, 414 (6th Cir. 1997) (ADA claim); Pryner v. Tractor Supply Co., 109 F.3d 354, 363 (7th Cir.) (collective bargaining agreement does not consign enforcement of statutory rights under § 1981, Title VII or ADA to union-controlled grievance and arbitration machinery), cert. denied, 118 S. Ct. 294 (1997); Varner v. National Super Markets, Inc., 94 F.3d 1209, 1213 (8th Cir. 1996) (collective bargaining agreement may not impose requirement of arbitral exhaustion),

cert. denied, 519 U.S. 1110 (1997); Harrison v. Eddy Potash, Inc., 112 F.3d 1437, 1453-54 (10th Cir. 1997) (Title VII), cert. granted and judgment vacated on other grounds, 118 S. Ct. 2364 (1998); Brisentine v. Stone & Webster Engineering Corp., 117 F.3d 519, 526 (11th Cir. 1997) (ADA). See also Tran v. Tran, 54 F.3d 115, 117 (2d Cir. 1995) (no requirement of arbitral exhaustion for Fair Labor Standards Act claim), cert. denied sub nom Dinh Tuong Tran v. Tho Dinh Tran, 517 U.S. 1134 (1996). The Fourth Circuit is the only circuit which has reached a contrary result. See Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875, 880-81 (4th Cir.), cert. denied, 117 S. Ct. 432 (1996). Cf. Penny, 128 F.3d at 413 (noting that "Austin has not inspired many followers").

Although not argued by defendants, plaintiff has clearly failed to state a cognizable § 1981 claim insofar as it is predicated on claims of harassment and retaliation for the exercise of his First Amendment rights. See Ferrill v. The Parker Group, Inc., 168 F.3d 468, 473 (11th Cir. 1999) ("§ 1981 proscribes discrimination solely on the basis of race"); Tarin v. County of Los Angeles, 123 F.3d 1259, 1264 (9th Cir. 1997); Bisciglia v. Kenosha Unified Sch. Dist. No. 1, 45 F.3d 223, 229 (7th Cir. 1995) ("Section 1981 only provides relief for discrimination based on one's race"); Daemi v. Church's Fried Chicken, Inc., 931 F.2d 1379, 1387 n.7 (10th Cir. 1991) (§ 1981 proscribes "only discrimination on the basis of race"); Evans v. McKay, 869 F.2d 1341, 1344 (9th Cir. 1989) (to sustain § 1981

claim plaintiff must "show intentional discrimination on account of race"); Berger v. Iron Workers Reinforced Rodmen Local 201, 843 F.2d 1395, 1412 n.7 (D.C. Cir. 1988) (Section 1981 plaintiff must prove different treatment from similarly situated persons "because of his race"). Although the complaint is not a model of clarity or specificity, it appears that plaintiff may be alleging that defendants discriminated against him not only because of his protesting and whistleblowing, but also because of his race. In the absence of any contrary argument by defendants to which plaintiff then might be expected to respond, the court will not dismiss his § 1981 claim on that basis at this juncture.

Defendants also have not argued that § 1981 is unavailable to redress employment discrimination by a state actor. Because this is a critical issue and solely a matter of law, and as plaintiff himself candidly acknowledged the question in his response to defendants' motion, the court will address it.

The court finds most persuasive the analysis and opinions of those courts which have held that the 1991 amendments do not abrogate the holding of the Supreme Court in Jett v. Dallas Independent School Dist., 491 U.S. 701, 735-36 (1989) that § 1983 provides the exclusive remedy for violations of § 1981 by state actors. The legislative history of the 1991 amendments shows that § 1981(c) was intended only to codify existing case law. There is no indication that Congress intended to nullify Jett and to create a new civil cause of action. See Johnson v.

City of Fort Lauderdale, 903 F. Supp. 1520, 1522-23 (S.D. Fla. 1995), aff'd, 148 F.3d 1228 (11th Cir. 1998). See also Dennis v. County of Fairfax, 55 F.3d 151, 156 & n.1 (4th Cir. 1995) (§ 1983 is exclusive federal remedy for violation by state actor of rights guaranteed in § 1981); Williams v. Little Rock Municipal Water Works, 21 F.3d 218, 224 (8th Cir. 1994) (same); Villanueva v. City of Fort Pierce, 24 F. Supp.2d 1364, 1368 & n.8 (S.D. Fla. 1998) (Jett requires merger of § 1981 claim asserted against municipality into plaintiff's § 1983 claim); Tabor v. City of Chicago, 10 F. Supp.2d 988, 991-92 (N.D. Ill. 1998); Stinson v. Pennsylvania State Police, 1998 WL 964215, *3 n.3 (E.D. Pa. Nov. 2, 1998); Poli v. SEPTA, 1998 WL 405052, *12 (E.D. Pa. July 7, 1998). Compare Federation of African American Contractors v. City of Oakland, 96 F.3d 1204, 1214-15 (9th Cir. 1996) (1991 Civil Rights Act abrogated holding in Jett regarding exclusivity of remedy while maintaining the "policy or custom" requirement). Plaintiff's § 1981 claim will be merged into his § 1983 claim.

B. Section 1983 claims

A plaintiff may recover damages under § 1983 for injuries caused by the deprivation of his constitutional rights by persons acting under color of state law. See Farrar v. Hobby, 506 U.S. 103, 112 (1992); Squires v. Bonser, 54 F.3d 168, 172 (3d Cir. 1995). There is, however, no respondeat superior liability

under § 1983. See Robinson v. City of Pittsburgh, 120 F.3d 1286, 1295 (3d Cir. 1997).

A municipality is liable for a constitutional tort only "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury" complained of. Id. (quoting Monell v. Dept. of Social Services, 436 U.S. 658, 694 (1978)). "Policy" is made when a decisionmaker with final authority to establish municipal policy with respect to the action in question issues an official proclamation, policy or edict. A "custom" is a course of conduct which, although not formally authorized by law, reflects practices of state officials that are so permanent and well settled as to virtually constitute law. In either case, it is incumbent upon a plaintiff to show that a final policymaker is responsible for the policy or custom at issue. See Pembaur v. City of Cincinnati, 475 U.S. 469, 481-82 (1986); Andrews v. City of Philadelphia, 895 F.2d 1469, 1480 (3d Cir. 1990). A municipal official is not a final policymaker if his decisions are subject to review and revision. See Morro v. City of Birmingham, 117 F.3d 508, 510 (11th Cir. 1997), cert. denied, 118 S. Ct. 1299 (1998). Liability under § 1983 may be predicated on a final policymaker's omissions if this inaction evinces "deliberate indifference" to the rights of those

with whom an offending subordinate comes into contact. See Bonenberger v. Plymouth Twp., 132 F.3d 20, 25 (3d Cir. 1997).

Defendants argue that plaintiff has not identified, and cannot identify, any official "policy" of retaliating against outspoken police officers or whistleblowers because the only "policies" of the Philadelphia Police Department are Directives promulgated by the Commissioner and there is no Directive requiring or authorizing retaliation against outspoken officers or whistleblowers. Defendants cite Littlejohn v. City of Philadelphia, 1993 WL 79600 (E.D. Pa. Mar. 22, 1993) for the proposition that the Third Circuit has held that in the Philadelphia city government "only someone holding the rank of Commissioner may be considered the final decision-maker." Littlejohn was not in fact a decision of the Third Circuit. It was a district court opinion affirmed by an unpublished order of the Third Circuit. See 14 F.3d 48 (3d Cir. 1993). Moreover, the word "Commissioner" appears nowhere in Littlejohn.

Whether an official is a final policymaker in a particular area or on a particular issue depends upon the definition of his functions under pertinent state law. See McMillian v. Monroe County, 520 U.S. 781, 785 (1997); Garrison v. Burke, 165 F.3d 565, 572 (7th Cir. 1999); Myers v. County of Orange, 157 F.3d 66, 76 (2d Cir. 1998), cert. denied, 119 S. Ct. 1042 (1999); Garrett v. Kutztown Area School Dist.,

1998 WL 513001, *4 (E.D. Pa. Aug. 11, 1998). For many areas and issues, municipal department heads are in fact final policymakers. Defendants note that plaintiff in any event did not specifically allege the existence of an "official policy" promulgated by anyone who could be characterized as a "final decision-maker."

Insofar as plaintiff criticizes the requirement that only a high level decisionmaker may promulgate "official policy" binding upon the municipality as "rigid" and susceptible to an "ostrich-head in the sand defense," the short answer is that the requirement has been recognized and emphasized by the Supreme Court of the United States. Plaintiff's contention that "a panel of the Fifth Circuit rejected the high policy decision maker theory" is incorrect. Plaintiff points to Sharp v. City of Houston, 164 F.3d 923 (5th Cir. 1999). In fact, the Court in Sharp found that a policy, custom or practice was established by evidence that plaintiff's "supervisors all the way up the chain of command, including Nuchia," knowingly acquiesced in acts of retaliation against plaintiff for reporting misconduct of other police officers to the Internal Affairs Division. Id. at 935. Mr. Nuchia was the Chief of Police, the highest ranking policymaker within the Department. Id. at 926.

A "policy," however, is not limited to an edict or directive. A single decision by an official with final

discretionary decisionmaking authority over the subject matter can constitute a "policy." See Pembauer, 475 U.S. at 480; Kennan v. City of Philadelphia, 983 F.2d 459, 468 (3d Cir. 1992); Omnipoint Communications, Inc. v. Penn forest Twp., 1999 WL 181954, *10 n.4 (M.D. Pa. Mar. 31, 1999); Callahan v. Lancaster-Lebanon Intermediate Unit 13, 880 F.2d 319, 341 (E.D. Pa. 1994). An official with final decisionmaking authority also may delegate his power to a subordinate whose decision, if unconstrained, could then constitute an "official policy." See City of St. Louis v. Praprotnik, 485 U.S. 112, 126-27 (1988); Pembauer, 475 U.S. at 483 n.12; Ware v. Jackson County, Mo., 150 F.3d 873, 885-86 (8th Cir. 1998); Hyland v. Wonder, 117 F.3d 405, 414 (9th Cir.), amended on denial of rehearing, 127 F.3d 1135 (9th Cir. 1997), cert. denied, 118 S. Ct. 1166 (1998); Scala v. City of Winter Park, 116 F.3d 1396, 1399-1400 (11th Cir. 1997); Andrews v. City of Philadelphia, 895 F.2d 1469, 1481 (3d Cir. 1990). It is not clear from the face of the complaint that plaintiff will be unable to show the Commissioner delegates to district supervisors the unfettered authority to make work assignments and to discipline officers.

Defendants argue that plaintiff has also failed to assert the existence of a "custom" because he has not alleged the existence of any documents acknowledging the "unstated code of silence" and has not identified specific witnesses who would

testify to the existence of the code. A plaintiff need not produce evidence or identify witnesses to survive a motion to dismiss for failure to state a claim. See, e.g., Hakimoglu v. Trump Taj Mahal Assocs., 876 F. Supp. 625, 628-29 (D.N.J. 1994), aff'd, 70 F.3d 291 (3d Cir. 1995). Even at a trial, a plaintiff obviously need not produce documentary evidence of a code which allegedly is "unstated."

Plaintiff has alleged that a district supervisor apparently authorized to make work assignments and take disciplinary action used this authority illegally to harass and retaliate against him. He has alleged that he complained to the Internal Affairs Bureau, presumably the office designated by the Commissioner to deter such conduct and resolve such complaints, and was retaliated against for doing so.

It is not clear from the face of the complaint that plaintiff will be unable to show that authority to take the preventive and remedial action implicated was delegated to district leadership and Internal Affairs officials who then encouraged or acquiesced in a practice of illegal retaliation. Indeed, it is not beyond doubt from the face of the complaint that plaintiff will be unable to show relevant knowledge and deliberate inaction by others in the chain of command including the Commissioner. See Carter v. City of Philadelphia, ___ F.3d ___, 1999 WL 250771, *13 (3d Cir. Apr. 28, 1999) ("insistence

that [plaintiff] must identify a particular policy and attribute it to a policymaker at the pleading stage, without benefit of discovery, is unduly harsh").

Defendants Nestel and LaCon have also moved to dismiss plaintiff's § 1983 claims as to them on the ground of qualified immunity. Individual government officials engaged in discretionary functions enjoy qualified immunity from suits under § 1983 when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Sherwood v. Mulvihill, 113 F.3d 396, 398-99 (3d Cir. 1997) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). The question is whether a reasonable officer in defendant's position could have believed his conduct was lawful in view of clearly established law and the information he possessed. See Parkhurst v. Trapp, 77 F.3d 707, 712 (3d Cir. 1996).

Defendants Nestel and LaCon argue that they are entitled to qualified immunity because "[t]here is nothing which would indicate to [them] that in performing their normal duties, which include the occasional initiation of disciplinary procedures, they might be violating plaintiff's constitutional rights." At this juncture, the court must assume to be true all of plaintiff's factual allegations. A police supervisor who takes disciplinary or retaliatory action against a subordinate

for speaking out against police misconduct or racial discrimination would be violating a clearly established right of which a reasonable police supervisor would be aware. See, e.g., Watters v. City of Philadelphia, 55 F.3d 886, 892-93 (3d Cir. 1995); Bennis v. Gable, 823 F.2d 723, 733 (3d Cir. 1987) (right not to be subjected to adverse employment action in retaliation for engaging in protected First Amendment activity clearly established since 1982); McDonald v. City of Freeport, Tex., 834 F. Supp. 921, 930-32 (S.D. Tex. 1993) (police officers who retaliate against subordinates for reporting police misconduct not entitled to qualified immunity from § 1983 suit).

V. Conclusion

Consistent with the foregoing, plaintiff's § 1981 claim will be treated as merged into his § 1983 claim and defendants' motion to dismiss will be denied. An appropriate order will be entered.

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O R D E R

AND NOW, this day of May, 1999, upon
consideration of defendants' Motion to Dismiss (Doc. #3) and
plaintiff's response thereto, consistent with the accompanying
memorandum, **IT IS HEREBY ORDERED** that said Motion is **DENIED**.

BY THE COURT:

JAY C. WALDMAN, J.