

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

PAUL T. ST. GERMAIN and SANDRA C.	:	
ST. GERMAIN,	:	
	:	CIVIL ACTION
Plaintiffs,	:	
	:	NO. 98-5437
v.	:	
	:	
PENNSYLVANIA LIQUOR CONTROL	:	
BOARD, ROBERT W. GERKEN,	:	
ROBERT KOCH, and DAVID C. MARTIN,	:	
	:	
Defendants.	:	

MEMORANDUM

BUCKWALTER, J.

January 19, 2000

I. PROCEDURAL BACKGROUND

Plaintiffs, Paul St. Germain (“Mr. St. Germain”) and Sandra St. Germain (“Ms. St. Germain”), filed a complaint on October 14, 1998, raising federal and state law claims against the Pennsylvania Liquor Control Board (“Board”), and three Board employees, Robert Gerken (“Gerken”), the Chief of Investigations, Bureau of Licensing, Robert Koch (“Koch”), Labor Relations Officer, Bureau of Personnel, and David Martin (“Martin”), Director, Bureau of Licensing, in both their individual and official capacities. The Plaintiffs filed an amended complaint (“Amended Complaint”) on November 18, 1998. The Amended Complaint includes eight counts and Plaintiffs seek compensatory damages, punitive damages, attorney’s fees, and injunctive relief.

Plaintiffs' claims are related to their employment with the PLCB. Counts I and VII allege employment related claims under 42 U.S.C. § 1983 for violation of Plaintiffs' procedural and substantive due process and equal protection rights, and for retaliation due to political affiliation under the First Amendment (Count I), and for conspiring to interfere with their equal protection rights under 42 U.S.C. § 1985(3) (Count VII). These federal civil rights claims are alleged against all defendants. Counts II through VI are claims founded on state law against the individual defendants, Gerken, Koch, and Martin: Count II alleges violations of the Pennsylvania Civil Service Act, 71 P.S. § 741.1 et seq. ; Count III alleges several specified violations of the Constitution of the Commonwealth of Pennsylvania; Count IV alleges a claim for intentional infliction of emotional distress; Count V alleges a claim for negligent or fraudulent misrepresentations, and Count VI alleges a claim for breach of the covenant of good faith and fair dealing. Finally, Count VIII of the complaint alleges a breach of the collective bargaining agreement against the PLCB.

By an order dated January 15, 1999, this Court dismissed the Complaint as to Defendant Board as to all counts in which it was named (Counts I, VII and VIII). Therefore, the Board is dismissed from this action. The Court also dismissed Counts I and VII as against defendants Gerken, Koch, and Martin (the "Individual Defendants"), in their official capacities, to the extent that Plaintiffs seek monetary relief. Accordingly, there remains Counts I through VII against the Individual Defendants in their individual capacities and to the extent that non-monetary relief is sought, in their official capacities as well.

II. FACTUAL BACKGROUND

The Plaintiffs are long-time employees of the Board, currently serving as Licensing Analysts (“Analysts”). The job of an Analyst involves investigating liquor license applications. Analysts spend time in the field, visiting the sites of liquor license applicants. A significant portion of an Analyst’s working hours is spent at home or in an office preparing reports concerning applications. Plaintiffs are assigned to the Board’s Eastern Region Office (“ERO”) and since approximately 1985 have been investigating applications within the counties of Philadelphia, Chester and Delaware.

In February, 1997, the Plaintiffs put their Delaware County home on the market. During the of summer of 1997 Plaintiffs informed Pat Riley (“Riley”), the acting Chief of Investigations, that they wished to move to Lopez, Pennsylvania.¹ Mr. St. Germain requested work near Sullivan County for his wife and in Berks County for himself. He also indicated that he planned on retiring no later than April, 1998. At the time he requested these work assignments, Mr. St. Germain told Defendant Martin that his house had been sold and that Plaintiffs would be moving to Lopez within a week. Riley and Martin signed Plaintiffs’ request for a mailing and address change on October 27, 1997. Plaintiffs moved from Delaware to Sullivan County on October 31, 1997.

During the last week of October, 1997, Defendant Martin had directed ERO chief Lloyd Lineman (“Lineman”) to assign several Northern Tier² investigations to the Plaintiffs.

1. Lopez is located in Sullivan County, Pennsylvania. From Plaintiffs’ primary work area of Philadelphia, Chester and Delaware counties, Lopez is approximately 150 miles one way. Lopez is also 136 miles from Conshohocken, Pa., the site of the ERO’s headquarters.

2. Northern Tier refers to northern and northwestern counties of the ERO.

However, after Martin received an analysis by Defendant Gerken of the work loads within the Philadelphia and Northern Tier work areas, it was decided that the number of investigations within the Northern Tier could not justify the permanent reassignment of both Plaintiffs to that area. Plaintiffs were informed of this adverse decision by letter on November 3, 1994 by Defendant Gerken, the new Chief of Investigations. The November 3 Order required Plaintiffs to park their state owned vehicles at ERO headquarters in Conshohocken each day before returning home to Lopez in their privately owned vehicles. Additionally, Plaintiffs were to report to ERO headquarters each day before their “business hours” began to receive assignments and complete reports.

Plaintiffs found these conditions placed on their employment to be unfair and in violation of the Collective Bargaining Agreement (“CBA”), under which analysts operate. They believed that they were entitled to reimbursement for costs incurred during the commute from Lopez to their primary work area. Plaintiffs believed that their primary work area had been changed from the Philadelphia area to the northern tier of the ERO. Defendant Gerken and Lineman continued to deny the Plaintiffs’ requests for overtime pay and reimbursement for travel costs. Plaintiffs then, through the grievance procedures authorized under the CBA, grieved the issue concerning the Board’s refusal to change their permanent job assignments and refusal to pay for their costs related to extensive commuting. The issues were grieved through three steps required under the collective bargaining agreement. Plaintiffs did not pursue their grievance through Steps 4 and 5, which would likely have lead to Arbitration.

III. LEGAL STANDARD

Rule 56 allows the trial court to grant summary judgment if it determines from its examination of the allegations in the pleadings and any other evidential source available that no genuine issue as to a material fact remains for trial, and that the moving party is entitled to judgment as a matter of law. The purpose of the rule is to eliminate a trial in cases where it is unnecessary and would only cause delay and expense. Goodman v. Mead Johnson & Co., 534 F.2d 566,573 (3d. Cir. 1976). In evaluating a summary judgment motion, the court may examine the pleadings and other material offered by the parties to determine if there is a genuine issue of material fact to be tried. Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Movant “bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any which it believes demonstrate the absence of a genuine issue of material fact”. Celotex, 477 U.S. at 323. When movants do not bear the burden of persuasion at trial, as is the case here, they need only point to the court “that there is an absence of evidence to support the nonmoving party’s case. Id. at 325. A fact is material if it might affect the outcome of the suit under the governing substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

IV. DISCUSSION

A. State Law Claims

Generally, officials and employees of the Commonwealth of Pennsylvania acting within the scope of their duties enjoy the same immunity as the Commonwealth itself. See

Moore v. Commonwealth, 538 A.2d 111, 115 (Pa. Cmmw. Ct. 1988). Therefore, Commonwealth officials are immune from state law tort claims unless the General Assembly has specifically waived immunity. See Seymour/Jones v. Shellenberger, 1997 WL 9793 (E.D. Pa., Jan 8, 1997). The Sovereign Immunity Act waives the immunity of the Commonwealth and its officials only in nine narrow categories of negligence cases.³ See 42 Pa. C.S.A. §§ 8521-22. The Plaintiffs' claims against the Individual Defendants in each of Counts II-VI do not fit into any of these exceptions. Therefore, the Individual Defendants, if acting within their official duties, will enjoy sovereign immunity. See Faust v. Dep't of Revenue, 592 A.2d 835, 839 (Pa. Cmmwlth 1991) (intentional torts and civil rights actions are not within the narrow exceptions to sovereign immunity of Commonwealth and its officials).

When determining whether conduct of an employee is within the scope of her duties, Pennsylvania courts have applied the Restatement (Second) of Agency § 228, which reads in pertinent part, that "Conduct of a servant is within the scope of employment if, but only if:

- (a) it is of the kind he is employed to perform;
- (b) it occurs substantially within the authorized time and space limits;
- (c) it is actuated, at least in part, by a purpose to serve the master; and
- (d) if force is intentionally used by the servant against another, the use of the force is not unexpected by the master.

Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits or too little actuated by a purpose to

3. These include cases involving (1) vehicle liability, (2) medical-professional liability, (3) care, custody or control of personal property, (4) a dangerous condition of Commonwealth real estate, highways and sidewalks, (5) a dangerous condition of Commonwealth highways, particularly potholes or sinkholes, (6) care, custody or control of animals, (7) liquor store sales, (8) National Guard activities, and (9) toxoids and vaccines.

serve the master. See Hass v. Barto, 829 F.Supp. 729, 733-34 (M.D. Pa. 1993); Natt v. Labar, 117 Pa. Cmmw. 207, 543 A.2d 223, 225 (1988).

The actions of the Individual Defendants that the Plaintiffs complain of were all conducted within the scope of their official duties. For example, the decision to not assign the Plaintiffs to jobs closer to their new home was a business decision. See (S. St. Germain Dep. at 323-324). Ms. St. Germain also admits that the actions of Koch were within his duties as a personnel officer. (S. St. Germain. Dep. at 327-28). The decisions that required that the Plaintiffs report to the ERO at the start of the workday, and to work in the Philadelphia area were standard business decisions. (Martin Dep. at 300). The Defendants may have resented the Plaintiffs, but their actions still fell within their official duties. See Jones. v. Penn. Minority Business Development Authority, 1998 WL 199653 (E.D. Pa. April 23, 1998) (even when assuming prejudicial motivations behind defendant's denial of loan to plaintiffs, Court still recognized that decision was within scope of duties). Also, the challenged decisions would never been made if the Individual Defendants as were not granted the authority to do so as Commonwealth officials. No reasonable jury could find that the Individual Defendants, regardless of their motivations, were acting outside of the scope of their employment when they made the decisions that anger Plaintiffs. Therefore, they are entitled to summary judgment on the Plaintiffs' state law claims, Counts II through VI.

B. 42 U.S.C. § 1983

To make out a cause of action under § 1983, a plaintiff must show that (1) the defendants acted under color of law; and (2) their actions deprived him of rights secured by the Constitution or federal statutes. See Kost v. Kozakiewicz, 1 F.3d 176, 184 (3d Cir.1993).

As the previous section concerning Plaintiff's state law claims discusses, the Individual Defendants were clearly acting under the color of law because the actions complained of were within the scope of their official duties. Therefore, the only issue is whether the Individual Defendants deprived plaintiffs of any rights protected by the Constitution or federal law.

1. Free Speech

The First Amendment to the Constitution protects public employees who speak out on issues of public concern. Stephens v. Kerrigan, 122 F.3d 171 (3d Cir. 1997). The Third Circuit has stated that in order to state a claim for actionable retaliation under the First Amendment, the plaintiff must allege facts which, if proven, would establish that the plaintiff's protected First Amendment activity was a "substantial or motivating factor in the alleged retaliatory action". Feldman v. Philadelphia Hous. Auth., 43 F.3d 823, 829 (3d Cir.1994). If the Plaintiff meets these burdens, then defendants can defeat the claim by demonstrating that they would have taken the same action absent the protected conduct. See Swineford v. Snyder City, 15 f.3d 1258, 1270 (3d Cir. 1994). An alternative manner of phrasing this test in a political discrimination case is:

To make out a prima facie case, public employees who claim that they suffered from an adverse employment action based on their exercise of a constitutional right must show that they worked for a public agency in a position that does not require a political affiliation, that they were engaged in constitutionally protected conduct, and that the conduct was a substantial or motivating factor in the government's employment decision. See Robertson v. Fiore, 62 F.3d 596, 599 (3d Cir.1995).

a. Protected Speech

The Court must first inquire into what Plaintiffs' conduct, if any, was protected. A court should consider the content, form and context of speech when determining whether it addresses a matter of public concern. Rankin v. McPherson, 483 U.S. 378, 383 (1987). Because of the nature of their employment, speech by public employees is deemed to be speech about public concern when it relates to their employment so long as it is not speech "upon matters of only personal interest." Swineford, 15 F.3d at 1271. Secondly, the value of the expression must outweigh the "government's interest in the effective and efficient fulfillment of its responsibilities to the public. See Azzaro v. County of Allegheny, 110 F.3d 968, 976 (3d Cir. 1997) (en banc).

Defendants concede that Mr. St. Germain engaged in protected conduct at various points in his career. For example, he participated in union activity during the early and mid 1990's. He also challenged the Board's method of investigating the ethnic breakdown of the neighborhoods in which the businesses analysts investigated were located. Defendants point out that during the time that Mr. St. Germain concededly engaged in protected speech his evaluations were "good". Def. Mem. at 36. They generally deny that Ms. St. Germain engaged in any protected speech whatsoever.

The Plaintiffs disagree with the contention that Mr. St. Germain did not engage in any protected speech within a year of October 1997. For example, between July, 1996 and February 1997, Mr. St. Germain complained to Martin about discrimination and retaliation against him and his wife. He also objected to race and sex discrimination by a supervisor, but this was mainly to disagree with the evaluation he had received. See Engle Decl. The Plaintiffs

have raised many instances of unprotected expression in which they complain of “unfair” or discriminatory policies or evaluations that apply to them. See Connick v. Myers, 461 U.S. 138, 153 (1983) (where speech concerning office policy arises from an employment dispute concerning the very application of that policy to that speaker, additional weight must be given to the supervisor’s view that the employee has threatened the employer’s authority to run the office). These are generally matters of personal interest that do not fall within the category of public concern and are not protected. On balance, though, Mr. St. Germain has raised enough evidence of protected expression to meet the first element of a prima facie case of retaliation because of protected speech or political beliefs. Mrs. St. Germain’s protected activities are not as extensive as her husband’s. However, in light of the fact that the Plaintiffs were closely identified with one another by the Defendants, the Court finds that she has also demonstrated enough activity to support the first element of her prima facie case.

b. Protected Conduct as motivation behind alleged retaliatory action

The Plaintiffs must also show that their protected speech was a motivation behind the alleged retaliatory action taken against them. "The mere fact that adverse employment action occurs after a complaint will ordinarily be insufficient to satisfy the plaintiff's burden of demonstrating a causal link between the two events." Robinson v. City of Pittsburgh, 120 F.3d 1286, 302 (3d Cir.1997). In order to infer a causal link between an adverse action and a complaint (or other “protected activity”), the timing must be unusually suggestive of a retaliatory motive. Id. For example, an adverse action taken only two days after the supervisor received a

notice of employee's EEOC complaint was considered unusually suggestive of a retaliatory motive. See Jalil v. Arvdel Corp. 873 F.2d 701, 708 (3d Cir. 1989).

However, temporal proximity is not the only means by which a retaliatory activity can be demonstrated. Causation, not temporal proximity itself, is the element of plaintiff's prima facie case of discriminatory retaliation under Title VII, and temporal proximity merely provides evidentiary basis from which inference can be drawn. Kachmar v. Sunguard, 109 F.3d 173, 177 (3d Cir. 1997). Where there is lack of temporal proximity for purposes of prima facie case of discriminatory retaliation under Title VII, circumstantial evidence of a "pattern of antagonism" following protected conduct can give rise to inference that employee's protected activity was a likely reason for an adverse action. Id. Therefore, it is important to focus on the entire scenario to determine whether or not the motive behind the Individual Defendant's adverse action was retaliatory. See Waddell v. Small Tube Products, Inc. 799 F.2d 69, 73 (3d Cir. 1986).

The Plaintiffs, of course, dispute the fact that Mr. St. Germain's last protected speech was made no later than the summer of 1996. But they also point to evidence which could lead a reasonable jury to believe that the denial of benefits to the Plaintiffs was a retaliatory measure. For example, there are several pieces of evidence showing that Defendant Martin wanted to have Mr. St. Germain retire and used his ability to control Mrs. St. Germain's assignments to help force Plaintiff's hand. (Pl. Mem. at 15). There is also evidence that Mr. St. Germain may have been pressured into silencing his views by promises of more ideal work assignments. There are certainly alternative explanations for why the adverse action was taken besides Plaintiffs' belief that Defendants concocted an elaborate scheme merely to punish Mr. St. Germain for his outspokenness during his many years of employment with the Board. But that

requires a balancing of the evidence and a determination of credibility that this Court is not authorized to make at this time. The Plaintiffs have satisfied their burden of showing that a reasonable jury could believe that adverse action may have been caused by a retaliatory motive for Plaintiffs' exercise of first amendment rights. The Defendants claim their actions were a result of a reasonable business decision. To defeat a First Amendment retaliation claim if a plaintiff demonstrates that his protected First Amendment activity was a substantial or motivating factor for the retaliatory action, a defendant must establish not merely that he "could properly" have taken the same adverse action based on an independent "legally sufficient" reason, but also that he "would have" done so in the absence of protected conduct. Bradley v. Pittsburgh Bd. of Educ., 913 F.2d 1064, 1075 (3d Cir.1990). The Plaintiffs do not deny that Martin had the power to deny their request for legitimate business reasons. However, although the Defendants raise a neutral reason for the denial of Plaintiffs' requests, there is enough evidence to suggest that this reason may be pretextual. The fact finder must decide this issue.

c. Qualified Immunity

The Defendants argue that they are entitled to qualified immunity because they reasonably believed that most of the Plaintiffs' conduct, especially that proximate in time to the challenged October-November, 1997 decisions, was not protected. They claim that even if the Court were to find such speech was protected under existing law, then the uncertainty of the law at the time of the adverse action decision would give them qualified immunity. The qualified immunity analysis requires a determination as to whether reasonable officials could believe that their conduct was not unlawful even if it was, in fact, unlawful. See In re City of

Philadelphia Litig., 49 F.3d at 961 n. 14. In the context of a First Amendment retaliation claim, that determination turns on an inquiry into whether officials reasonably could believe that their motivations were proper even when their motivations were in fact retaliatory. See Larsen v. Senate of Com. of Pa., 154 F.3d 82, 94 (3d. Cir. 1998). Defendants here have not undisputedly demonstrated that their motivations were fair. A jury could believe first, that the Board had approved Plaintiffs' move and secondly, that this decision was then reversed, not for legitimate business reasons, but in retaliation for Plaintiff's engaging in protected activities. If a jury were to make these determinations, it would likely follow that Defendants could not reasonably have believed that such retaliatory activity was proper. Therefore, summary judgment as to Mr. St. Germain's First Amendment activities is denied.

2. Due Process

The Plaintiffs claim a violation of due process under Section 1983. The Due Process Clause of the XIV Amendment reads that a state may not "deprive any person of life, liberty or property without due process of law". The Supreme Court has made it clear that XIV Amendment due process is only required when the state interferes with a protected liberty or property interest. See Ohio Adult Parole Authority v. Woodward, 118 S.Ct. 1233, 1249-51 (1988). Therefore, to prevail under Section 1983, a plaintiff has to show both that she held a protected property interest and that interest was taken without due process being provided.

a. Property Interest

While state law governs the existence of a property right, federal constitutional law determines if that right is protectable under the Due Process Clause. See Memphis Light, Gas and Water Div. v. Craft, 436 U.S. 1, 9 (1976). Not all state-created property

rights are protected by the Due Process Clause; only a right which is substantial enough warrants protection in the federal courts. Mark v. Borough of Hatboro, 51 F.3d 1137 (3d Cir. 1995). Even a violation by a public employer of a state law or contractual obligation is not necessarily sufficient to sustain a § 1983 claim. See Ferraro v. City of Long Branch, 23 F.3d 803, 806 (3d Cir. 1994) (no constitutionally protected property interest violated when city gave plaintiff duties not within job description at the same salary level even though this action may have violated state law). The Third Circuit has recognized that one type of contractual right, a “just cause termination” provision, requires constitutional due process protection. See Unger v. National Residents Matching Program, 928 F.2d 1392,1399 (3d Cir. 1991) (termination of residency program was just one of many contracts with state entities that the XIV Amendment does not protect).

"To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Board of Regents v. Roth, 408 U.S. 564, 577 (1972). The Supreme Court identified the sources to which courts should look to determine a plaintiff's "entitlement" to a claimed property interest. Property interests, the Court declared, "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." Id. at 578. According to the teachings of Roth, therefore, Plaintiffs may not pursue its procedural due process claims against the

Defendants unless" an independent source such as state law" affords it a "legitimate claim of entitlement" to the benefits it claims.⁴

The Court is reluctant to declare that the Plaintiffs' perks are constitutionally protected property interests. The language of the Collective Bargaining Agreement ("CBA") does not explicitly require employees to have state owned cars for use between work and the regional headquarters. It also does not require that employees be provided home office equipment. Plaintiffs do not identify a source of these rights, but assume that since the Board instituted policies that gave other experienced Analysts such benefits. Plaintiffs were likewise entitled to the benefits. The Court does not believe that the Constitution mandates that this Court monitor government employment policies. While the employees' continued employment is a protectable interest, not every benefit associated with the job rises to that status. The conditions that the Board placed on Plaintiffs' employment does not rise to the level of constructive discharge. The Third Circuit has not definitively stated that an adverse employment action short of constructive discharge would never rise to the level of a protected interest. See Ferraro, 23 F.3d at 807. In this case, the adverse employment action does not rise to that level. The Court generally agrees with Plaintiffs' contention that they may be entitled under the CBA to some reimbursement for travel time and related costs. See Def. Ex. D-1 at 6. But even if the Board's denial of travel time pay violates the CBA, employment decisions that violate employment contracts do not necessarily form the basis for § 1983 actions. See Rode v. Dellarciprete, 845 F.2d 1195, 1205 (3d Cir. 1988). However, assuming for the moment that

4. The benefits that Plaintiffs claim a property interest in are payment for travel time, home office with computer and equipment, the use of state vehicles from their home in Sullivan county, reimbursement for tolls and mileage and a subsistence allowance.

Plaintiffs did have some property interests protected by procedural due process, the Court now examines whether they received the process due.

b. Procedural Due Process

The Plaintiffs claim that they were entitled to a hearing before Defendants' made their adverse employment decision. The Supreme Court in Cleveland Bd. of Education v. Loudermill, 470 U.S. 532, 545-46 (1985), has held that a public employee with a property interest in his employment is entitled to a pre-termination hearing. The Third Circuit has extended the necessity of a pre-deprivation hearing to a situation in which the employee is suspended without pay. See Homar v. Gilbert, 89 F.3d 1009, 1014 (3d Cir. 1996) (right to a hearing before suspension without pay is not abridged by post-deprivation remedies). However, this case does not involve anything as drastic as termination or suspension without pay. While not discounting the potential costs associated with travel which the Plaintiff might be entitled to under the CBA, the Plaintiffs' livelihood is not threatened. Many courts have held, including this Circuit, that due process is met if a plaintiff is afforded the opportunity to follow grievance procedures under a collective bargaining agreement. See Dykes v. SEPTA, 68 F.3d 1564, 1571 (3d Cir. 1995); Buttita v. City of Chicago, 9 F.3d 1198, 1206 (7th Cir. 1993); Armstrong v. Meyers, 964 F.2d 948 (9th Cir. 1992), Jackson v. Temple University, 721 F.2d 931 (3d Cir. 1983). As this Court recognized in its previous Opinion concerning the Defendants' motion to dismiss, due process is not met merely because grievance procedures exist. In this case, the Court finds that the CBA procedures in place meet the due process standard under the test established in Mathews v. Eldridge, 424 U.S., 319, 335 (1975). In order to determine whether a

particular process meets due process requirements, three factors must be considered; (1) the private interests affected by the official action, (2) the risk of an erroneous deprivation, and (3) finally the government's interests involved and the fiscal and administrative burdens that a substitute procedural requirement would entail. Id. The Plaintiffs' interests in receiving the denied benefits may be significant, but are not substantial in so far as they do not face termination. Secondly, the grievance procedures allow for arbitration if the Plaintiffs are not satisfied by the results. This significantly decreases the risk of erroneous deprivation. See Armstrong, 964 F.2d at 951 (risk of erroneous determination in arbitration is not large and the value of additional procedures not great). Finally, the government counts on collective bargaining agreements like the one Plaintiffs rely upon to handle many employment disputes. Public employers utilize such procedures precisely because they have been deemed the most efficient way of handling the countless disputes with which the government is involved as an employer. Therefore, the procedures under Plaintiffs' CBA were constitutional.

The Plaintiffs here agree that they followed several steps in the grievance procedure, but then state that their grievances were held in abeyance by agreement between the parties. Plaintiffs attempt to avoid summary judgment by raising the dispute as to whether their grievances were held in abeyance. However, they have evidently not pursued the grievance procedures since early 1998. The Plaintiffs do not allege or support the notions that they were stopped from going to arbitration with their grievance or that the procedures that the CBA provided were defective. Even if they had, the Third Circuit has held that an employee's ability to take his grievance to arbitration under a collective bargaining agreement satisfies due process even when the previous steps in the grievance procedure have been considered biased. See Jackson, 721 F.2d at 933. Similarly, in Dykes, the Third Circuit found, that due process is

satisfied if there are grievance and arbitration procedures in place. Therefore, the Plaintiffs were afforded an opportunity to avail themselves of a constitutional procedure with which they could dispute the denial of benefits. Summary judgment will be granted to Defendants on the Plaintiffs' procedural due process claims.

c. Substantive Due Process

Not all property interests worthy of procedural due process protections are protected by the concept of substantive due process. Reich v. Beharry, 883 F.2d 239, 244 (3d Cir.1989). In order to state a substantive due process claim, "a plaintiff must have been deprived of a certain quality of property interest." See DeBlasio v. Zoning Board of Adjustment, 53 F.3d 592, 600 (3d Cir. 1995). Only the strongest property interests receive substantive due process consideration. See Reich, 883 F.2d at 244; Mauriello v. U. of Med. & Dentistry of N.J., 781 F.2d 46 (3d Cir.), cert. denied, 479 U.S. 818 (1986) (student's continuation in doctoral program bore little resemblance to the fundamental interests protected under the constitution's due process clause).

Assuming that the Plaintiffs have a property interest worthy of substantive due process protection, the Court must decide whether due process has been violated. A violation of substantive due process rights is proven: (1) if the government's actions were not rationally related to a legitimate government interest; or (2) "if the government's actions in a particular case were in fact motivated by bias, bad faith or improper motive...." Parkway Garage v. City of Philadelphia, 5 F.3d 685, 692 (3d. Cir. 1993). The first inquiry is for the court to decide as a matter of law, while the second is a question of fact for the jury. Id. The Plaintiffs do not contend that the challenged actions of the Board Defendants are not rationally related to a

government interest. Therefore, the Court must decide whether as a matter of law, a jury could decide that the government's actions in this case were of such a degree of bias or bad faith as to violate substantive due process.

The Supreme Court, when addressing substantive due process claims arising from abusive executive action, have repeatedly emphasized that only the most egregious official conduct can be said to be "arbitrary in the constitutional sense," Collins v. Harker Heights, 503 U.S. 115, 129 (1992). It has made it clear that the due process guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm. See Paul v. Davis, 424 U.S. 693, 701, (1976) (Fourteenth Amendment is not a "font of tort law to be superimposed upon whatever systems may already be administered by the States). The Supreme Court has described the standard for arbitrary government action that violates the substantive component of due process as that which shocks the conscience. See County of Sacramento v. Lewis, 118 S.Ct. 1708, 1717 (1998). The shock the conscience standard is applied differently depending on the situation. For example in Sacramento v. Lewis, the reckless indifference of a police officer in a high speed chase did not "shock the conscience" whereas in Estelle v. Gamble, 429 U.S. 97 (1976), the reckless indifference of prison officials to the medical conditions of an inmate did "shock the conscience".⁵

The Plaintiffs claim that the shock the conscience standard does not apply when the allegation is that the government acted with improper motive. However, the Court finds that the shock the conscience standard is to be applied to the Board's actions because the case

5. Estelle actually involved a violation of the inmate's VIII Amendment rights, but the Supreme Court in Lee, describes this as the kind of behavior that would be found to violate substantive due process under the "shock the conscience" test.

involves alleged abusive executive decision making. Collins, 503 U.S. at 129. Even if the Defendants acted with some degree of bad faith, the ultimate result of its decision does not shock the conscience. Although the Plaintiffs present some evidence of bad faith on the part of Defendants, in light of the relatively small deprivation faced by Plaintiffs and the strong evidence that Defendants made a rational decision to favor strong government interests would not allow a finding that the Board's decision shocked the conscience. Therefore, summary judgment is also granted to Defendants on Plaintiffs' substantive due process claims.

3. Equal Protection

In order to state a claim based on the Equal Protection Clause, Plaintiffs must allege that they are "member[s] of a protected class, [were] similarly situated to members of an unprotected class, and [were] treated differently from the unprotected class." Wood v. Rendell, No. CIV.A. 94-1489, 1995 WL 676418, at *4 (E.D. Pa. Nov. 3, 1995). In its most general sense, the Equal Protection Clause directs that "all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985). To maintain an action under the Equal Protection Clause, a plaintiff "must show intentional discrimination against him because of his membership in a particular class, not merely that he was treated unfairly as an individual." Poli v. SEPTA, No. CIV.A., 97-6766, 1998 WL 405052, at *10 (E.D. Pa. July 7, 1998).

As this Court recognized in its previous opinion, Plaintiffs have alleged a cognizable deprivation of equal protection based upon age and marital status. A classification involving neither fundamental rights nor suspect classifications does not violate the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some

legitimate government purpose. Central State Univ. v. Amer. Ass'n of University Professors, Central State Univ. Chapter, 119 S.Ct. 1162, 1163 (1999). Classification based upon marriage or age is not entitled to a higher standard of scrutiny than this “rational review”. Gregory v. Ashcroft, 501 U.S. 452 (1991) (age is not a suspect classification and subject to rational basis scrutiny); Smith v. Shalala, 5 F.3d. 135, 139 (7th Cir. 1993) (classification based on marriage not subject to strict scrutiny).

The Plaintiffs have shown that they were members of protected classes based on their age and marital status. The Court agrees that Plaintiffs have presented evidence showing that they were treated differently than other legislative analysts. However, the Court finds that Plaintiffs were in a significantly different position from the other analysts who were not denied state vehicles, home computer equipment and travel time pay. The distances that Pat Riley, Bernice Shaefer, John McNellis and William Tyler transverse on their respective travel days were only one-third to one-half the travel distance that Plaintiffs travel have to go from Lopez to their usual work assignments. Plaintiffs also do not show that they were treated intentionally different based on their age and marital status. See Def. Mem. at 42. In fact, the Plaintiffs present no evidence that other analysts over 40 years of age have been denied the benefits they claim their due. Likewise, the Plaintiffs do not demonstrate that the Davis', two analysts married to each other like Plaintiffs are, have been denied any benefits that Plaintiffs seek. Therefore, it seems as if the Plaintiffs are complaining about unequal treatment of them as individuals instead of as members of a protected class. While there are remedies provided for disparate treatment for employees as individuals, an equal protection claim is not among them.

Even assuming that Plaintiffs had shown that they, as married and older Analysts, were being treated differently than other Analysts not in these categories, the Defendants would prevail because their conduct is rationally related to government interests. Courts are to take a very deferential stance towards government decision under rational review. See FCC v. Beach Comm., Inc., 508 U.S. 307, 315 (1993); Kuromiya v. United States, 37 F.Supp.2d 717 (E.D. Pa. 1999) (government decision to place marijuana in different drug category from drug containing marijuana's active ingredient did not violate equal protection). The decision to not permanently reassign the Plaintiffs to another primary work zone was a management decision based on extremely plausible grounds. The Board had an interest in keeping costs low and setting a precedent for future moves. The Defendant disputes the Board's facts concerning the "needs" of the Board in various work areas of the ERO. However, assuming that Plaintiffs numbers are correct, summary judgment can still be appropriate because these are not material facts that change the Court's analysis of the law. Plaintiffs basically disagree with the accuracy of management's decisions and information. Mr. St. Germain disputed management's decisions throughout his career. However, equal protection analysis does not require the Court to examine the competence of the governmental decision maker. Rational basis does not require that the government decision makers conclude on the best policy. This relaxed standard of scrutiny only requires that there be some connection between what the government claims is its interest and the challenged policy or decision. The Board's interest in maintaining lower costs is met by the policy of denying certain benefits to Analysts that live extended distances from their work places. Plaintiffs may be correctly contending that these decisions violate the CBA, but that does not

mean that the Board Defendants have violated equal protection. Therefore, summary judgment will be granted with respect to Plaintiffs' equal protection claims.

C. 42 U.S.C. § 1985(3)

Plaintiffs allege that all of Defendants' actions violated 42 U.S.C. § 1985(3). Section 1985(3) authorizes an "action for the recovery of damages" against "two or more persons" who conspire to "deprive other persons of equal protection of the laws." 42 U.S.C. § 1985(3). Plaintiffs allege that Defendants violated § 1985(3) when they conspired to interfere with their rights to equal protection because of their political views, ages, and/or marital status. See Am. Compl. ¶ 60. To state a claim under 42 U.S.C. § 1985(3), a plaintiff must allege: (1) a conspiracy involving two or more persons; (2) for the purpose of depriving, directly or indirectly, a person or class of persons of the equal protection of the laws; and (3) an act in furtherance of the conspiracy; (4) which causes injury to a person or property, or a deprivation of any right or privilege of a citizen of the United States. United Brotherhood of Carpenters v. Scott, 463 U.S. 825, 834 (1983).

A claim under § 1985(3) requires that there must be "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." Id.; Hilliard v. Ferguson, 30 F.3d 649, 653 (5th Cir. 1994) (Plaintiff must show that the conspiracy was motivated by a class-based animus). The Third Circuit has reserved comment on whether § 1985(3) embraces private conspiracies to discriminate on the basis of factors other than race. See Stephens, 122 F.3d at 184. While the Third Circuit has yet to rule explicitly on the issues of marital and age discrimination, it has held that § 1985 protects individuals from discrimination on the basis of traits for which they bear no responsibility, such as race or gender. See Carchman

v. Korman Corp., 594 F.2d 354, 356 (3rd Cir. 1979), cert. denied 444 U.S. 898 (1979). In Robison v. Canterbury Village, Inc., 848 F.2d 424, 430 n.7 (3rd Cir. 1988), while the court acknowledged that other circuits have recognized a cause of action under § 1985(3) for political affiliations, the Third Circuit has declined to follow this authority. And indeed, courts in this circuit have continued to hold that membership in a political group is not a protected class under § 1985(3). See, e.g. Pierce v. Montgomery County Opportunity Bd., Inc., 884 F. Supp. 965, 978 (E.D. Pa. 1995).

Summary judgment will be granted to Defendants on two grounds. Plaintiffs present sufficient evidence of a conspiracy and an act in furtherance of this conspiracy to survive summary judgment. However, as discussed in the previous section concerning Plaintiffs' equal protection claims under § 1983, Plaintiffs have failed to demonstrate a deprivation of rights under the equal protection clause in light of the fact that Defendants actions are rationally related to their articulated goals of denying Plaintiffs certain benefits. They have also failed to show how the unequal treatment they received was a result of a class based animus. Plaintiffs version of the events surrounding this case suggest that Defendants treated Plaintiffs unequally because of personal dislike of them as individuals rather than Plaintiffs membership in a protected class. Therefore, Plaintiffs conspiracy claims fail and summary judgment is granted.

D. Punitive Damages

The Supreme Court has held that a court is permitted to “assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others”. Smith v. Wade, 461 U.S. 30, 56 (1983). Neither party has extensively briefed the issue

of whether Plaintiffs, assuming they prevail on their remaining § 1983 claim, can recover punitive damages against Defendants in their individual capacities. At this time, the Court can not decide as a matter of law that such damages would not be appropriate. Therefore, summary judgment as to punitive damages is denied.

V. CONCLUSION

Summary Judgment is Granted to Defendants Martin, Gerken and Koch on Counts II through VII. Summary Judgment is also Granted to Defendants on Plaintiffs' § 1983 Due Process and Equal Protection claims. However, Summary Judgment is Denied as to Plaintiffs' § 1983 claims for Free Speech Retaliation against Defendants in their individual capacities, and to the extent that Plaintiffs seek non-monetary relief, in their official capacities.

An appropriate Order follows.

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

PAUL T. ST. GERMAIN and SANDRA C.	:	
ST. GERMAIN,	:	
	:	CIVIL ACTION
Plaintiffs,	:	
	:	NO. 98-5437
v.	:	
	:	
PENNSYLVANIA LIQUOR CONTROL	:	
BOARD, ROBERT W. GERKEN,	:	
ROBERT KOCH, and DAVID C. MARTIN,	:	
	:	
Defendants.	:	

ORDER

AND NOW, this 19th day of January, 2000, upon consideration of Defendants' Motion for Summary Judgment (Docket No. 16), Plaintiffs' Response thereto (Docket No. 19), as well as Defendants' Plaintiffs' Reply (Docket No. 20) and Plaintiffs' Sur-Reply (Docket No. 22); it is hereby **ORDERED** that the Motion is **GRANTED** in part and **DENIED** in part.

More specifically, it is **ORDERED** that the Motion is:

1. **GRANTED** with respect to all Defendants as to Counts II through VII.
2. **GRANTED** with respect to all Defendants as to Count I for Plaintiffs' claims under Section 1983 of Due Process and Equal Protection violations.
3. **DENIED** as to Count I for Plaintiffs' claim under Section 1983 for retaliation for protected First Amendment activity with respect to all Defendants in their individual capacities, and to the extent that Plaintiffs do not seek monetary relief, in their official capacities as well.

The parties are directed to file pretrial memorandums by February 9, 2000.

TRIAL is scheduled for Tuesday, February 22, 2000 in Courtroom 14A, commencing at 10:00 a.m.

BY THE COURT:

RONALD L. BUCKWALTER, J.