

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

RACHARLOTTE L. TOWNES	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	No. 00-CV-138
	:	
CITY OF PHILADELPHIA,	:	
CAPT. WM. COLARULO and	:	
LIEUT. FRANCIS BACHMAYER	:	
	:	
Defendants.	:	

**MEMORANDUM**

BUCKWALTER, J.

May 11, 2001

Presently before this Court is a Motion for Summary Judgment on behalf of defendants, City of Philadelphia (“City”), Capt. William Colarulo (“Colarulo”) and Lieut. Francis Bachmayer (“Bachmayer”) (collectively “Defendants”).

Plaintiff Racharlotte Townes brought this suit under 42 U.S.C. §§ 1981, 1983 and 1985 alleging violation of her First Amendment free speech rights and Fourteenth Amendment equal protection rights on the basis of racial discrimination. For the reasons set forth below, Defendants’ Motion for Summary Judgment will be granted in its entirety.

**I. BACKGROUND**

Plaintiff, a recent graduate of the Police Academy and an African-American woman, was assigned to the Police Department’s 25<sup>th</sup> District where she was serving her routine six (6) month period of probation before she could be certified as a police officer. While off

duty, Plaintiff received a phone call from a relative who explained that Plaintiff's brother had been beaten and arrested by the police. Plaintiff proceeded to the 25<sup>th</sup> District police station and without identifying herself as a police officer entered the cell block where a number of officers were standing around her brother and one officer was conducting a search for weapons. Plaintiff approached her brother, she claimed, in an effort to ascertain his medical condition, and upon doing so, Plaintiff sought a supervisor.

Defendants described the situation differently stating that Plaintiff "stormed" into the cell block, pushed one of the officers out of the way and had to be ordered out of the cell block. Defendants also added that they did not know Plaintiff as she was new to the force, she was dressed in plain clothes, and she did not identify herself as an officer until the supervisor appeared on the scene.

Defendants also asserted that after Plaintiff left the station, Colarulo initiated an investigation of the incident, taking statements from several officers and Plaintiff herself. Based on the information he acquired, Colarulo filed a petition with Police Commissioner Timoney charging Plaintiff with Insubordination and Neglect of Duty and requesting the rejection of her probationary period. The Commissioner approved this petition, and Plaintiff was dismissed from the police force.

## **II. LEGAL STANDARD**

A motion for summary judgment shall be granted where all of the evidence demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A genuine issue of material fact

exists when “a reasonable jury could return a verdict for the nonmoving party.” Anderson v. Liberty Lobby Inc., 477 U.S. 242, 248 (1986). “Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” Id.

If the moving party establishes the absence of the genuine issue of material fact, the burden shifts to the nonmoving party to “do more than simply show that there is some metaphysical doubt as to the material facts.” Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

When considering a motion for summary judgment, a court must view all inferences in a light most favorable to the nonmoving party. See United States v. Diebold, 369 U.S. 654, 655 (1962). The nonmoving party, however, cannot “rely merely upon bare assertions, conclusory allegations or suspicions” to support its claim. Fireman’s Ins. Co. v. DeFresne, 676 F.2d 965, 969 (3d Cir. 1982). To the contrary, a mere scintilla of evidence in support of the nonmoving party’s position will not suffice; there must be evidence on which a jury could reasonably find for the nonmovant. Liberty Lobby, 477 U.S. at 252. Therefore, it is plain that “Rule 56(c)” mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In such a situation, “[t]he moving party is ‘entitled to a judgment as a matter of law’ because the non-moving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.” Id. at 323 (quoting Fed. R. Civ. P. 56(c)).

### III. DISCUSSION

#### A. Count I: Plaintiff's Claims under 42 U.S.C. § 1981 Against All Defendants<sup>1</sup>

In their Motion for Summary Judgment, Defendants argued that Plaintiff's claim under § 1981 for violation of free speech should be dismissed because § 1981 only provides a remedy for race based discrimination. Plaintiff responded to this allegation stating that her claim was based on racial discrimination and not free speech. Therefore, the Court will proceed with the analysis of the claim under § 1981 for disparate treatment on the basis of Plaintiff's race.

A claim under § 1981 for race based discrimination against a state actor<sup>2</sup> requires the same primary analysis that is used to assess a claim under § 1983. See Patterson v. McLean Credit Union, 491 U.S. 164, 186 (1989); *accord* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506. n.1 (1993). In both instances, Plaintiff must establish purposeful discrimination on the part of the defendant. See St. Mary's Honor Ctr. 509 U.S. at 506. n.1 (1993) Accordingly, the Court will analyze Plaintiff's claims for racial discrimination under § 1981 and § 1983 together. See infra. at III.B.

---

<sup>1</sup> As Plaintiff would need to prove essentially the same prima facie case against Colarulo and Bachmayer as individual defendants as they would against the municipality, this analysis will be conducted simultaneously.

<sup>2</sup> The Court notes that the circuits remain divided on the question of whether § 1981 applies to state actors and moreover whether § 1983 affords the exclusive remedy for violations of § 1981 by state actors. See Stinson v. Pennsylvania State Police, No. 98-1706, 1998 U.S. Dist. LEXIS 17649, at \*8, n.3 (E.D. Pa. Nov. 2, 1998). However, the Court does not believe this case supports a claim under § 1981, so an involved analysis of the state of the law is unnecessary.

**B. Count II: Plaintiff's 42 U.S.C. §§ 1981 and 1983 Claims  
For Race Discrimination Against All Defendants**

1. Purposeful Discrimination

In analyzing claims for purposeful racial discrimination under § 1981 and § 1983, the Court must apply a three-prong test. See Boykins v. Lucent Technology, 78 F. Supp.2d 402, 409-410 (E.D. Pa. 2000) (explaining that this Title VII analysis is also appropriate for evaluating claims under § 1981 and § 1983). First, Plaintiff must establish a four-part prima facie case. See infra. Then, Defendant is required to offer a “legitimate, nondiscriminatory reason” for its personnel decision. Boykins, 78 F. Supp.2d at 409-10. Finally, if a legitimate reason is provided, then Plaintiff bears the burden of revealing that an employer’s stated reason is actually a pretext. Id.

The prima facie case requires Plaintiff to demonstrate that: (1) she is a member of a protected class; (2) she was qualified for the position; (3) she suffered an adverse job action; and (4) employees who are not members of the protected class were treated differently. Plaintiff here failed to establish a prima facie case. Assuming *arguendo* that Plaintiff established the first three elements of the claim, she failed to prove that her employer had previously discriminated against her or against others within her protected class. Plaintiff anchored her claim in part on her recollection that other officers, specifically non-African-American officers, would enter the cell block in plain clothes. However, Plaintiff is not only unable to provide any names, dates or corroborating testimony to support her assertions, but also in her deposition she concedes that she was not aware of the circumstances under which those other officers had entered the cell block, leaving open the possibility that they were plain clothes officers or had received authorization to

enter that area. Plaintiff's inability to provide any evidence that she or others in her protected class were treated differently than similarly situated employees should eliminate her claim.

Even if the Court believed Plaintiff established a prima facie case, Defendants still met their burden of demonstrating that they had a valid reason for the adverse employment decision. First, Defendants' stated reason for Plaintiff's rejection, Plaintiff's behavior in the cell block, seems reasonable on its face. Second, Plaintiff even agreed in her signed statement taken as part of the investigation into her conduct that her behavior was inappropriate and exhibited poor judgment. As Defendants offered a legitimate cause for dismissal, the burden returns to Plaintiff. Simply stated, Plaintiff failed to provide any evidence that this admittedly legitimate reason for discipline was a pretext for race discrimination. Consequently, Plaintiff could not make out a claim for disparate treatment against any of the defendants.

## 2. Hostile Environment

Plaintiff filed a claim under § 1981 on the basis of a hostile environment. In support of this claim she alleged conduct that included 1) officers refusing to speak to her; 2) destruction of her car window while the automobile was parked in the department lot; and 3) frequent assignment to the van detail. Not one of the incidents, however, involved a racial slur or any evidence of racial motivation.

The Third Circuit has held that a claim for hostile environment based upon race requires an individual to demonstrate as a threshold matter that she suffered intentional discrimination because of her membership in the protected class. See West v. Philadelphia Elec. Co., 45 F.3d 744, 753 (3<sup>d</sup> Cir. 1995). As Plaintiff does not provide any evidence, even by inference, that the alleged harassment derived from racial animus, Plaintiff is unable establish the

intentional discrimination prong of this analysis. Therefore, Plaintiff's claim failed under this theory.

**C. Plaintiff's Claim for Violation of Her Free Speech Rights under § 1983**

Plaintiff brought another claim under § 1983 alleging that the rejection of her probation and the poor post-rejection recommendations were forms of retaliation in response to Plaintiff's statements about the alleged mistreatment of her brother on April 30, 1998. In order to state a claim for unlawful retaliation under the First Amendment and § 1983, Plaintiff must show: (1) she was engaged in a protected activity; and (2) the protected activity was a substantial or motivating factor for the adverse employment action. If Plaintiff can meet this burden, then Defendant may refute Plaintiff by demonstrating that the same action would have been taken absent the protected activity. See Swineford v. Snyder County, 15 F.3d 1258, 1270 (3<sup>d</sup> Cir. 1994). In the case at bar, the Court does not have to assess prongs two or three as Plaintiff fails to satisfy even the first step of the analysis.

The threshold question for the first prong is whether the protected activity is of public concern. The Supreme Court distinguished this form of speech by public employees stating that when "a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest..." then the speech is not a protected activity. Connick v. Myers, 461 U.S. 138, 147 (1983). Plaintiff indicated two particular instances when she believed her speech may have led to her retaliation. One occurred on May 11, 1998 when she participated in an interview about her behavior in the cell block on the day of her brother's arrest. However, during this meeting, Plaintiff spoke about *her* conduct

as a probationary member of the police force and agreed that she had acted inappropriately. This meeting was purely a matter of personal interest because Plaintiff exercised this speech as an employee discussing her poor behavior rather than as a citizen of a community making comments on the general operation of the police department. Since the speech was not a matter of public concern, it was not a protected activity and does not afford Plaintiff grounds to bring a claim for retaliation.<sup>3</sup> Similarly, as it was this meeting and the related investigation into Plaintiff's suitability as a police officer that resulted in the rejection of Plaintiff's probation, Plaintiff cannot demonstrate that exercising her first amendment rights prompted retaliatory action.

The second instance of speech Plaintiff mentioned occurred on July 6, 1998 when Plaintiff spoke with the police department's internal affairs department about the circumstances surrounding her brother's arrest. During this session, Plaintiff made statements that contradicted those of officers in the department. Plaintiff alleged that these comments were of public concern and prompted the denial of her probation. However, these statements could not have motivated retaliation in the form of rejection of her probation because they occurred after June 30, the date Plaintiff's dismissal had been recommended to the police commissioner. For these reasons, Plaintiff's claim for retaliation must be dismissed and Defendants' motion for summary judgment on these grounds is granted.

#### **D. Conspiracy under § 1985**

---

<sup>3</sup> The Court notes that the Third Circuit recently announced an opinion in which it held that a public employee cannot be fired because the efforts to expose wrongdoing created a "disruption" to the office. See Baldassare v. State of New Jersey, No. 00-5263, 2001 U.S. LEXIS 7991, at \*26-7 (3d Cir. May 2, 2001). This holding applies to the balancing test in which the Court should engage if it must determine whether the individual's speech is outweighed by the government's legitimate interest in efficiently providing public services. See Connick, 461 U.S. at 150-51. As the court in this case did not need to reach this analysis, Baldassare does not affect the outcome here.

Plaintiff alleged that individual defendants, Colarulo and Bachmayer, conspired to violate her free speech rights and to discriminate against her on the basis of race. As § 1985 does not establish substantive rights but merely offers a remedy for violation of other rights, success on this claim is dependent upon success of the underlying § 1981 and § 1983 claims. See Great American Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 372 (1979). As discussed *supra*, Plaintiff failed to make out claims under either of these provisions and therefore, Plaintiff's claim of conspiracy must also fail.

#### **IV. CONCLUSION**

For the foregoing reasons, Defendants' Motion for Summary Judgment is GRANTED in its entirety as to all claims and all defendants.

An appropriate order follows.

