

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

MARGARET A. TOMASELLI and	:	
JOSEPH TOMASELLI, her husband	:	
2602 North Charlotte St.	:	
Pottstown, PA 19464	:	CIVIL ACTION
Plaintiff	:	
	:	NO. 04-2646
v.	:	
	:	
UPPER POTTS GROVE TOWNSHIP	:	
1409 Farmington Avenue	:	
Pottstown, PA 19464	:	
	:	
UPPER POTTS GROVE TOWNSHIP	:	
POLICE DEPARTMENT	:	
1409 Farmington Avenue	:	
Pottstown, PA 19464	:	
and	:	
CHARLES MADONNA	:	
35 Rattlesnake Hill Road	:	
Douglasville, PA 19518	:	
Defendants	:	

**MEMORANDUM**

**Baylson, J.**

**December 22, 2004**

**I. Introduction**

Presently before the Court is a Motion to Dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(6), filed by Defendants Upper Pottsgrove Township, Upper Pottsgrove Township Police Department, and Police Chief Charles Madonna. For the reasons stated below, the Motion will be granted in part and denied in part.

## II. Factual Background

According to the Complaint, Margaret Tomaselli (“Plaintiff”) had been employed by Upper Pottsgrove Township (“Defendant Township”) and Upper Pottsgrove Police Department as a police officer for seventeen years prior to her resignation in October 2002. (Compl. ¶¶ 9, 10, 17). At the time of her resignation, Plaintiff was the senior police officer in the Police Department with regard to years of service and was the first full-time female police officer hired by Defendants. Id. at ¶¶ 9, 10.

In late 2001, Plaintiff learned she was pregnant. Id. at ¶ 11. Defendants initially afforded Plaintiff the opportunity to perform light duty police work during her pregnancy, but subsequently reversed their position after a grievance claim was filed by other officers stating light duty work was not permitted under police contract. Id. Plaintiff claims that, in the past, other officers had been afforded light duty responsibilities. Id. at ¶ 12. Further, Plaintiff claims she had been assured by Chief of Police, Charles Madonna (“Defendant Chief”), that upon her return from maternity leave, Plaintiff would resume working her normal hours of 9:00 a.m. to 5:00 p.m. despite negotiations by the bargaining unit to transition from eight to twelve hour shifts. Id.

On June 17, 2002, Plaintiff attended a Township meeting where she voiced her concerns over the implementation of twelve hour shifts. Id. at ¶ 13. Plaintiff claims at this meeting, Defendants “presented false, defamatory and gender biased opinions and statements about [] Plaintiff’s position and her work within the department.” Id. at ¶ 14. From this meeting forward, Plaintiff alleges Defendant Chief began to engage in a pattern of discriminatory and harassing conduct towards Plaintiff (including issuing to Plaintiff two “undeserved written warnings”) and

fellow officers continued to direct derogatory comments at Plaintiff. Id. at ¶¶ 15, 16, 18.

Plaintiff asserts that Defendant Chief refused Plaintiff's request that remedial action be taken. Id. at ¶ 17.

In July 2002, Plaintiff alleges that Defendant Township approved the plan to implement twelve hour shifts. Id. at ¶ 21. At this time Defendant Township's Board of Supervisors stated that they believed Defendant Chief could accommodate Plaintiff's request to continue working eight hour shifts. Id. In August 2002, Plaintiff requested that Defendant Chief clarify Plaintiff's position in light of the impending implementation of the twelve hour shifts; Defendant Chief acknowledged, but never responded to Plaintiff's request. Id. at ¶ 23. Immediately before implementation of the longer shifts, Plaintiff appeared before Defendant Township's Board of Supervisors and claimed she was being forced to resign due to Defendant Chief's failure to accommodate Plaintiff in regard to the twelve hour shifts. Id. at ¶ 27. In October 2002, Plaintiff resigned her position as a police officer "because of conduct of the Defendant Chief, the failure of Defendant Chief to hire another officer and the failure of Defendant Chief to accommodate her." Id. at ¶¶ 17, 27. On November 1, 2002, the twelve hour shifts were implemented. Id. at ¶ 24.

### **III. Jurisdiction and Legal Standard**

Plaintiff filed a Complaint against Defendants on June 15, 2004. Count I claims that all Defendants violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e) et seq. Count II makes related state claims against all Defendants under the Pennsylvania Human Relations Act, 43 Pa.C.S.A. §951 et seq. Count III and IV claim that Defendants violated the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment, respectively. On

August 23, 2004, Defendants collectively moved to dismiss Plaintiff's Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

This Court has jurisdiction over Plaintiff's claims pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343<sup>1</sup>.

When deciding a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court may look only to the facts alleged in the complaint and its attachments. Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1251, 1261 (3d Cir. 1994). The Court must accept as true all well-pleaded allegations in the complaint and view them in the light most favorable to the plaintiff. Angelastro v. Prudential-Bache Sec., Inc., 764 F.2d 939, 944 (3d Cir. 1985). A Rule 12(b)(6) motion will be granted only when it is certain that no relief would be granted under any set of facts that could be proved by the plaintiff. Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988).

#### **IV. Discussion**

Defendants move for dismissal on several grounds. First, Defendants argue that Plaintiff failed to state a claim for a violation of her civil rights under Title VII. Second, Defendants contend Plaintiff failed to state a Fourteenth Amendment due process claim. Lastly, Defendants

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<sup>1</sup> 28 U.S.C. § 1331 provides "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

28 U.S.C. § 1343 provides in pertinent part:

[t]he district court shall have original jurisdiction of any civil action authorized by law to be commenced by any person: To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

assert that the Complaint is procedurally deficient in that Plaintiff-husband, Joseph Tomaselli, has failed to state any claims and that Plaintiff has failed to state a claim against both the Upper Pottsgrove Township Police Department and Defendant Chief.

For the reasons set forth below, Defendants' Motion to Dismiss will be granted in part and denied in part.

**A. Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000(e), *et seq.*) and Pennsylvania Human Relations Act (43 Pa. C.S.A. § 951, *et seq.*)**

It is unlawful under Title VII of the Civil Rights Act of 1964 ("Title VII") and the Pennsylvania Human Relations Act ("PHRA") for an employer to "discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of such individual's race, color, religion, sex or national origin." Weston v. Pennsylvania, 251 F.3d 420, 425 (3d Cir. 2001) (quoting 42 U.S.C. § 2000e-2(a)(1)). Because the analysis for both the PHRA claim and the claim arising under Title VII are identical, they will be addressed simultaneously. Goosby v. Johnson & Johnson Medical, Inc., 228 F.3d 313, 317 (3d Cir. 2000) (citing Jones v. School District of Philadelphia, 198 F.3d 403, 410-411 (3d Cir. 1999)).

**1. Gender-Based Employment Discrimination**

In Count I of the Complaint, Plaintiff avers she was the victim of gender-based discrimination in violation of Title VII. Compl. at ¶ 31. Title VII gender-based employment discrimination claims can be brought under theories of hostile work environment, disparate treatment, or disparate impact.

### **a. Hostile Work Environment**

Although not entirely clear from the Complaint, Plaintiff appears to be claiming gender discrimination under a theory of hostile work environment resulting from continual harassment. Id. at ¶ 33. In their Motion to Dismiss, Defendants argue Plaintiff has failed to plead sufficient facts to establish a hostile work environment claim. Defendants' Brief at 6.

The Third Circuit has consistently held five factors must be satisfied to bring a successful Title VII claim for a sexually hostile work environment: “(1) the employees suffered intentional discrimination because of their sex; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected the plaintiff; (4) the discrimination would detrimentally affect a reasonable person of the same sex in that position; and (5) the existence of respondeat superior liability.” Spain v. Gallegos, 26 F.3d 439, 447 (3d Cir. 1994) (reversing summary judgment).

First, Plaintiff has alleged she was discriminated against because of her sex as “she was treated adversely during her pregnancy and after her child was born.” Compl. at ¶ 31. Plaintiff also claims she was not accommodated by Defendant Township or by Defendant Chief as was promised. Further, Plaintiff was told “she was not carrying her weight, was just collecting a paycheck and [] that she should have planned her pregnancy more appropriately if she did not want to work twelve hour shifts.” Id. Moreover, not only did Defendant Chief allegedly refuse to take action or meet with Plaintiff about the situation despite Plaintiff making known both the situation and her desire for remedial action, Defendant Chief “joined in concert with the harassing police officers by unfairly disciplining and refusing to appoint or hire a replacement police officer which would have allowed . . . Plaintiff to be accommodated.” Id. at ¶ 33.

Aside from these allegations, Plaintiff's Complaint fails to set forth in further detail how she was treated adversely during her pregnancy and after her child was born. More specifically, the Complaint contains little detail about the accommodations refused or the content of the comments made. However, based on the liberal notice pleading requirement of Rule 8(a)(2) of the Federal Rules of Civil Procedure, Plaintiff's Complaint withstands Defendants' Motion to Dismiss with regard to the Title VII hostile work environment claim. "Generally, in federal civil cases, a claimant does not have to set out in detail the facts upon which a claim is based, but must merely provide a statement sufficient to put the opposing party on notice of the claim." Weston, 251 F.3d at 428.

As "[d]iscrimination and other civil rights claims are clearly subject to notice pleading," Weston, 251 F.3d at 429, Plaintiff has alleged sufficient facts to state a Title VII gender discrimination claim based on a theory of hostile work environment.

### **b. Disparate Treatment**

Again, while the Complaint is not entirely clear, Plaintiff also appears to be claiming gender discrimination under a theory of disparate treatment. Defendants respond that two written warnings, the failure to accommodate light duty, and the treatment of the other female police officer on the force are insufficient to establish a claim under disparate treatment.

To state a claim for gender-based discrimination under a theory of disparate treatment, Plaintiff must demonstrate employer intent by showing "he is a member of a [protected class], qualified for the job from which he was discharged, and that others not in the protected class were treated more favorably." Id. at 797.

Plaintiff has sufficiently pleaded a claim of disparate treatment, particularly in light of the liberal pleading requirement of Rule 8(a). Under the allegations, Plaintiff is a member of a protected class in that she is claiming gender discrimination; Plaintiff was clearly qualified for her job. Plaintiff was initially a part-time police officer, Compl. at ¶ 8, but became the first full-time female police officer for Defendant Township, *Id.* at ¶ 9. Furthermore, Plaintiff had worked for Defendant for seventeen years and “[a]t the time of her forced termination, she was the senior officer in the department with regard to years of service.” *Id.* at ¶ 10. Finally, Plaintiff has alleged others not in the protected class, i.e. males, were treated more favorably than she. Plaintiff’s male co-workers “were given the opportunity to select shifts due to physical limitations or personal needs . . . .,” *Id.* at ¶ 19, whereas Plaintiff was not afforded the same opportunity. Furthermore, Plaintiff was allegedly reprimanded for failure to follow standard operating procedures while male police officers did not receive any written or verbal warnings for violation of the same procedures. *Id.* at ¶ 18.

Plaintiff has therefore alleged sufficient facts to state a claim for gender-based employment discrimination under Title VII under a theory of disparate treatment.

### **c. Disparate Impact**

Disparate impact claims “involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.” *Hampton*, 98 F.3d at 112. To state a claim for gender-based employment discrimination under a theory of disparate impact, a plaintiff must show a facially neutral policy affects members of a protected



class in a significantly discriminatory manner. Lanning v. Southeastern Pennsylvania Transportation Authority, 181 F.3d 478, 485 (3d Cir. 1999) (reversing trial court's decision regarding business necessity justification).

It appears Plaintiff may be asserting a claim for gender-based employment discrimination under a theory of disparate impact based on her mention of a second female police officer who had been hired and subsequently fired by Defendants. Compl. at ¶ 26. Assuming, arguendo, Plaintiff has brought such a claim, it will not survive Defendants' Motion to Dismiss even in light of the liberal pleading requirements of Rule 8(a) because disparate impact is an appropriate theory only when there is a facially neutral employment practice. Watson v. Ft. Worth Bank & Trust, 487 U.S. 977 (1988) (vacating judgment and remanding case for determination under disparate impact analysis because employer asserted that it had racially neutral reasons for denying employee). Because Plaintiff is alleging she and the second female police officer were outwardly discriminated against by Defendant, Compl. at ¶ 26, leads to the conclusion that non-neutral employment practices were being utilized. Further, nowhere in the Complaint does Plaintiff assert that a neutral employment practice, i.e. extending police working hours, affects women in a discriminatory or disproportionate manner. Therefore, Plaintiff has not adequately stated a Title VII gender-based discrimination claim based on a theory of disparate impact.

As Plaintiff has sufficiently alleged facts supporting theories of hostile work environment and disparate treatment upon which to base her Title VII gender-based employment discrimination claims, the Defendants' Motion to Dismiss as it relates to

Plaintiff's Title VII claims is denied.

## 2. Retaliation

To state a prima facie case for retaliation under Title VII, a plaintiff must show “(1) he was engaged in protected activity; (2) he was discharged subsequent to or contemporaneously with such activity; and (3) there is a causal link between the protected activity and the discharge.”<sup>2</sup> Woodson v. Scott Paper Co., 109 F.3d 913, 920 (3d Cir. 1997).

It appears Plaintiff is claiming retaliation based on her opposition to Defendants' conduct. Plaintiff has pleaded a claim of retaliation sufficient to withstand Defendants' 12(b)(6) Motion to Dismiss when her Complaint is considered in light of the liberal notice pleading requirements of Rule 8(a) as discussed above.

First, Plaintiff's complaints to her supervisor, Defendant Chief, were protected activities. (Compl. at ¶ 33). See Weston, 251 F.3d at 430 (stating an employee's complaints of harassment to a supervisor are protected activities).

Secondly, Plaintiff has claimed that she suffered an adverse employment action. An adverse employment action has been defined by the Supreme Court of the United States as a “significant change in employment status, such as hiring, firing, failing to

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<sup>2</sup> Section 704(a) of Title VII forbids an employer from discriminating against an employee “because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any matter in an investigation . . . under this subchapter.” See Woodson v. Scott Paper Co., 109 F.3d 913, 919 (3d Cir. 1997) (quoting 42 U.S.C. § 2000e-3(a)). “It is similarly unlawful under § 5(d) of the PHRA for an employer ‘to discriminate in any manner against any individual because such individual has opposed any practice forbidden by this act, or because such individual has made a charge . . . under this act.’” Id. at 919-20 (quoting 43 Pa.S. § 955(d)).

promote, reassignment, or a decision causing a significant change in benefits.” Weston, 251 F.3d at 430-31 (citing Burlington Indus. Inc. v. Ellerth, 524 U.S. 742, 749 (1998)). An employee’s resignation may be treated as an adverse employment action for the purposes of establishing a retaliation claim. Duffy v. Paper Magic Group, Inc., 265 F.3d 163, 167 (3d Cir. 2001) (affirming grant of summary judgment). To do so, an employee must prove he was forced to resign his job because “the employer knowingly permitted conditions of discrimination in employment to persist so intolerable that a reasonable person subject to them would resign,” Cardenas v. Massey, 269 F.3d 251, 263 (3d Cir. 2001) (affirming dismissal of retaliation claim).

Plaintiff has stated sufficient facts to support her allegation that her constructive discharge was an adverse employment action. Plaintiff states Defendant Chief knowingly permitted conditions of discrimination to continue as she allegedly told him about the derogatory comments made by fellow police officers. Compl. at ¶ 16. Plaintiff claims that not only did Defendant Chief refuse to take remedial action against the officers, but he participated in the harassing conduct. Id. at ¶¶ 16, 17. Further, under the liberal pleading requirement of Rule 8(a), Plaintiff alleges sufficient facts that the discrimination created conditions so intolerable that a reasonable person would resign in that:

- She was not afforded light duty work during her pregnancy while other (male) officers were accommodated due to their physical limitations, Id. at ¶¶ 12;
- Defendant Chief and fellow officers made gender-biased statements about Plaintiff’s position and work within the Department, Id. at ¶¶ 14, 16;
- Plaintiff was reprimanded for violating standard operating procedures that Plaintiff’s male counterparts had violated without punishment, Id. at ¶ 18;
- Plaintiff’s requests to both Defendant Township and Defendant Chief to

discuss the implementation of twelve hour shifts as they applied to her were denied or ignored, Id. at ¶¶ 20, 23; and

- Plaintiff was excluded from meetings and negotiation sessions concerning the implementation of the twelve hour shifts, Id. at ¶ 25.

Lastly, Plaintiff alleges there was a causal link between the protected activity and Plaintiff's constructive discharge. The Third Circuit has held that "temporal proximity between the protected activity and the termination is sufficient to establish a causal link."<sup>3</sup> Woodson, 109 F.3d at 920. Plaintiff claims that from the latter part of 2001 upon learning of her pregnancy until her forced termination in October 2002, Compl. at ¶¶ 11, 17, she was antagonized by Defendant Chief and her male co-workers. Thus, a causal link is pleaded. As Plaintiff has adequately pleaded the elements of retaliation, the Court will not dismiss Plaintiff's claim for retaliation.

## **B. Fourteenth Amendment**

### **1. Equal Protection Clause**

In their Motion to Dismiss, Defendants have failed to challenge Plaintiff's Fourteenth Amendment Equal Protection claims against Defendants brought pursuant to 42 U.S.C.A. § 1983, except as it relates to the dismissal of charges against Defendant Madonna discussed below. Accordingly, except as discussed below, Plaintiff's Fourteenth Amendment Equal Protection claims will not be dismissed.

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<sup>3</sup> However, it was also noted that the "mere passage of time is not legally conclusive proof against retaliation." Woodson, 109 F.3d at 920.

## **2. Due Process Clause**

Under the due process clause of the Fourteenth Amendment, a state shall not “deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV. Defendants argue that Plaintiff failed to establish sufficiently a claim for either procedural or substantive due process based on property or liberty interests.

To be entitled to the procedural due process afforded under the Fourteenth Amendment, a deprivation of a property or liberty interest must be established. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 569 (1972) (reversing grant of summary judgment for plaintiff). “However, not all property interests worthy of procedural due process protection are protected by the concept of substantive due process.” Nicholas v. Pennsylvania State University, 227 F.3d 133, 140 (3d Cir. 2000). To establish a substantive due process claim the interest being deprived must be deemed fundamental under the Constitution. Id.

### **a. Property Interest**

#### **I. Procedural Due Process**

To state a claim for procedural or substantive due process, a Plaintiff must first show that she has a constitutionally protected property interest.

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 for it. He must, instead, have a legitimate claim of entitlement to it . . . . Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem

from an independent source such as state law- -rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Board of Regents, 408 U.S. at 577. Second, the Plaintiff must identify a comparison class of similarly situated individuals who have been given preferential treatment. See Olmstead v. L. C. by Zimring, 527 U.S. 581, 613 (1999) (finding it necessary to show that a comparable or similarly situated group received differential treatment) (J. Kennedy, concurring).

Under Pennsylvania law, codified at 53 P.S. § 12638<sup>4</sup>, Plaintiff, a police officer, has a limited right to continued employment, thus, a property interest for purposes of procedural due process exists. However, “[i]f an employee retires of his own free will, even though prompted to do so by some action of his employer, he is deemed to have relinquished his property interest in his continued employment for the government, and cannot contend that he was deprived of his due process rights.” Leheny v. City of Pittsburgh, 183 F.3d 220, 227 (3d Cir. 1999). An employee’s resignation, however, is not considered of his own free will for due process purposes under the following two circumstances: “(1) when the employer forces the resignation . . . by coercion or duress, or (2) when the employer obtains the resignation . . . by deceiving or misrepresenting a material fact to the employee.” Id. at 228. Under the liberal pleading requirements of Rule 8(a), it cannot be said Plaintiff relinquished her property interest in continued

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<sup>4</sup> 53 P.S. § 12638 provides, in pertinent part, “[n]o police officer . . . except those dismissed during the probationary period, shall be removed or discharged, except for cause, upon written charges, and after an opportunity to be heard in his own defense.”

employment through retiring of her own free will as she asserts many facts which could lead a jury to conclude that she was forced by her employer to resign as a result of duress.

Further, Plaintiff has identified a comparison class of similarly situated individuals who have allegedly been given preferential treatment. Specifically, Plaintiff asserts that:

- “Other officers in the department were afforded light duty responsibilities at various times” while Plaintiff was denied this opportunity.<sup>5</sup> Compl. at ¶ 12.
- Plaintiff was reprimanded for violating standard operating procedures that male counterparts had violated without punishment. Id. at ¶ 18.
- “On other occasions male police officers were given the opportunity to select shifts due to physical limitations or personal needs. . .” while this was denied Plaintiff. Id. at ¶ 19.

Thus, Plaintiff has stated a claim for denial of procedural due process. Whether she can prove denial of a property interest in her continued employment in violation of the Fourteenth Amendment’s due process clause remains for discovery.

## **ii. Substantive Due Process**

To implicate substantive due process, a property interest must be fundamental under the United States Constitution. Nicholas, 227 F.3d at 141. Once a property interest is determined to fall within the ambit of substantive due process, it “may not be taken away by the state for reasons that are arbitrary, irrational, or tainted by improper motive.” Id. at 139. In Nicholas, the Third Circuit stated that “it cannot be reasonably maintained

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<sup>5</sup>The “other officers” are presumably male as Plaintiff was the only female officer on the police department with the exception of a second full-time female police officer who was hired in 2001 but did not outlast her probationary period. Compl. at ¶¶ 18, 26.

that public employment is a property interest that is deeply rooted in the Nation’s history and traditions.” Id. at 143.

In their Motion to Dismiss, Defendants contend that Plaintiff claims a substantive due process violation in a property interest; however, it is doubtful that Plaintiff has asserted such a claim. Assuming, arguendo, Plaintiff has, Plaintiff fails to state a claim for violation of substantive due process as such a claim is only afforded those rights which are fundamental to the United States Constitution. The Third Circuit has consistently held that there is no constitutional right to substantive due process protection concerning continued public employment. Id. at 142-43.

#### **b. Liberty Interest**

The liberty interest embodied in the due process clause is broad, encompassing not only the “freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.” Board of Regents, 408 U.S. at 572 (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)). For an employment action to implicate a Fourteenth Amendment liberty interest it must be

based on a ‘charge against [the individual] that might seriously damage his standing and associations in the community . . . , for example, that he had been guilty of dishonesty, or immorality’ or . . . ‘impose[] on him a stigma or other disability that forecloses his freedom to take advantage of other employment opportunities.’ Stigma to reputation alone, absent some accompanying deprivation of present or future employability, is not a



liberty interest protected by the fourteenth amendment.

Robb v. City of Philadelphia, 733 F.2d 286, 294 (3d Cir. 1984). However, “[i]t is the liberty to pursue a specific calling or occupation, and not the right to a specific job, that is secured by the Fourteenth Amendment.” Piecknick v. Commonwealth of Pennsylvania, 36 F.3d 1250, 1259 (3d Cir. 1994) (affirming District Court’s dismissal of complaint).

Plaintiff does not state a claim for deprivation of a liberty interest which would result in a deprivation of substantive due process. Her claims of denial of equal protection and procedural due process more precisely fit the facts alleged.<sup>6</sup>

For the foregoing reasons, Defendants’ Motion to Dismiss as it relates to Plaintiff’s procedural due process claim is denied but the motion as it relates to the substantive due process claims is granted.

## **C. Miscellaneous Procedural Issues**

### **1. Plaintiff Joseph Tomaselli’s Failure to State a Claim**

The Complaint names Plaintiff’s husband, Joseph Tomaselli, as an additional plaintiff. Plaintiff’s reply brief argues Plaintiff’s husband states a valid claim for loss of consortium, Plaintiff’s Reply Brief at 12-13, however, there are no counts in the Complaint which identify such a cause of action. Therefore, Plaintiff Joseph Tomaselli’s cause of action is dismissed without prejudice, with leave to amend, within ten (10) days.

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<sup>6</sup> The “Most Precise Claim” doctrine states that if a constitutional claim is covered by a specific constitutional provision, it “must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process.” Associates in Obstetrics & Gynecology v. Upper Merion Township, 2004 WL 2440779, \*4 (E.D.Pa. 2004) (quoting County of Sacramento v. Lewis, 523 U.S. 833, 843 (1998)).

## **2. Failure to State a Claim Against the Upper Pottsgrove Township Police Department**

Defendant Upper Pottsgrove Township Police Department must be dismissed as this Court has held “[i]n § 1983 actions, police departments cannot be sued in conjunction with municipalities, because the police departments are merely administrative agencies of the municipalities - - not separate judicial entities.” Pahle v. Colebrookdale Township, 227 F.Supp.2d 361, 367 (E.D. Pa. 2002). Plaintiff has acknowledged that dismissal of Defendant Upper Pottsgrove Township Police Department is proper. Plaintiff’s Reply Brief at 11. Therefore, the Motion to Dismiss Defendant Upper Pottsgrove Township Police Department as a Defendant is granted as unopposed.

## **3. Dismissal of All Claims Against Defendant Madonna Brought Under the Fourteenth Amendment or Title VII**

### **a. Fourteenth Amendment**

As stated above, Defendants’ Motion to Dismiss asserts Plaintiff’s Fourteenth Amendment Claim brought pursuant to 42 U.S.C. § 1983 fails to state a claim against Defendant Chief, Charles Madonna. Although Plaintiffs’ Complaint is silent as to whether Plaintiffs sue Chief Madonna in his official or personal capacity, or both, Plaintiffs’ Brief clarifies the intent to sue Chief Madonna in both capacities. The court interprets the Complaint consistent with this intent. Therefore, the claims against Defendant Chief Madonna arising under the Fourteenth Amendment in his official

capacity must be dismissed as a suit against a municipal officer in his or her official capacity is, in actuality, a suit against the municipality that the officer represents.

In Robinson v. City of Pittsburgh, 120 F.3d 1286, 1293 (3d Cir. 1997), the Third Circuit held that in order to hold a police chief “liable under § 1983 for an equal protection violation . . . [plaintiff is] required to prove that [he] personally participated in violating [her] rights, . . . that [he] directed others to violate them, or that [he] . . . had knowledge of and acquiesced in [his] subordinates’ violations.” A supervisor’s actual knowledge and acquiescence is sufficient to establish supervisory liability as it can be “equated with personal direction and direct discrimination by the supervisor.” Id. at 1294. See also Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir. 1988) (stating “[a] defendant in a civil rights action must have personal involvement in the alleged wrongs” and that “[p]ersonal involvement can be shown through allegations of personal direction or of actual knowledge and acquiescence”).

While Plaintiff may be unable to bring a Fourteenth Amendment claim against Defendant Chief in his official capacity, Plaintiff is able to bring such claims in an individual capacity by demonstrating Defendant Chief, as Plaintiff’s supervisor, had actual knowledge and acquiesced in the discrimination. Plaintiff has alleged sufficient facts to state such a claim. For example, Plaintiff claims that at a June 17, 2002 meeting, Defendant Chief and other officers “presented false, defamatory and gender biased opinions and statements about Injured Plaintiff [ ] . . . .” Compl. at ¶ 14. Further, Plaintiff alleges that she advised Defendant Chief about the derogatory comments made and directed at Plaintiff. Id. at ¶ 16. Not only did Defendant Chief allegedly refuse to

take remedial measures as Plaintiff requested, but also was allegedly “part of the pattern of harassment that continued from June of 2002 through Injured Plaintiff’s forced termination of October of 2002,” *Id.* at ¶ 17, including reprimanding Plaintiff with “undeserved written warnings,” *Id.* at ¶ 18.

Because the Complaint sets forth sufficient facts to state a claim for liability against Defendant Chief Madonna individually, Defendants’ Motion to Dismiss as it relates to all Fourteenth Amendment claims against Defendant Chief is denied.

### **b. Title VII**

Defendants allege that all claims brought against Chief Madonna under Title VII must be dismissed as “the Third Circuit held that individual supervisors and employees cannot be held liable under Title VII.” Defendant’s Brief at 10. The Third Circuit has stated “Congress did not intend to hold individual employees liable under Title VII” in dismissing claims against a plaintiff’s former supervisor. *Sheridan v. DuPont*, 100 F.3d 1061, 1078 (3d Cir. 1996) (concluding that Congress did not intend to hold individual employees liable under Title VII). Thus, Defendants’ Motion to Dismiss as it relates to claims against Defendant Chief arising under Title VII must be granted.

### **V. Conclusion**

The Court concludes that Defendants’ Motion to Dismiss will be granted in part and denied in part. Plaintiff Joseph Tomaselli will be granted leave to amend, within ten (10) days. All claims against Upper Pottsgrove Police Department must be dismissed because it is merely an administrative agency of Defendant Upper Pottsgrove Township.

The Court concludes that although Defendant Chief cannot be sued under Title VII, the Complaint states a claim against him in his individual capacity under the Fourteenth Amendment. Count IV asserting a Due Process Claim under the Fourteenth Amendment will be allowed to proceed except as to substantive due process.

An appropriate Order follows.

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

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and	:	
CHARLES MADONNA	:	
35 Rattlesnake Hill Road	:	
Douglasville, PA 19518	:	
Defendants	:	

**ORDER**

AND NOW this 22<sup>nd</sup> day of December, 2004 upon consideration of Defendants' Motion to Dismiss (Doc. No. and the responses thereto, it is ORDERED that the motion is granted in part and denied in part.

- As to Count I, the motion is denied in its entirety except as it relates to Defendant Charles Madonna as to whom the motion is granted. Count I is

dismissed as against Defendant Madonna.

- As to Count II, the motion is denied.
- As to Count III, the motion is denied.
- As to Count IV, the motion is granted in part as to the claim for substantive due process.
- The motion as it relates to the dismissal of Joseph Tomaselli as a Plaintiff is granted and Joseph Tomaselli is dismissed as a Plaintiff, without prejudice, with leave to amend, within ten (10) days.
- The motion is granted as it relates to the dismissal of Upper Pottsgrove Township Police Department as a Defendant. Upper Pottsgrove Township Police Department is hereby terminated as a party to this action.

**BY THE COURT:**

**s/Michael M. Baylson**

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**Michael M. Baylson, U.S.D.J.**