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

WILLIAM SCHLICHTER and BARBARA SCHLICHTER	:	CIVIL ACTION
vs.	:	NO. 04-CV-4229
LIMERICK TOWNSHIP, W. DOUGLAS WEAVER, OFFICER ADAM MOORE, WALTER ZAREMBA, TOWNSHIP MANAGER, KEN SPERRING, TOWNSHIP SUPERVISOR, JOSEPH GRECO, TOWNSHIP SUPERVISOR, THOMAS DEBELLO, TOWNSHIP SUPERVISOR, FRANK GRANT, TOWNSHIP SUPERVISOR, FREDERICK FIDLER, TOWNSHIP SUPERVISOR, and JOHN DOE	:	

MEMORANDUM AND ORDER

JOYNER, J. **April , 2005**

Defendants have filed a motion to dismiss the plaintiffs' complaint in its entirety pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state any claim upon which relief may be granted. For the reasons which follow, the motion shall be granted in part and denied in part.

Factual Background

According to the allegations set forth in the complaint, "Plaintiff, William Schlichter ...is a former police officer" who "[a]t all times relevant hereto...was employed...at the rank of Sergeant for the Township of Limerick." (Complaint, ¶s 2, 11). "Plaintiff, Barbara Schlichter, is the wife of William

Schlichter." (Complaint, ¶5). During his employment with Limerick Township, Sgt. Schlichter alleges that he "was active in union activity;" "became aware of a hostile work environment of a female co-employee, Robin Scalisi;" "complained to Walter Zaremba that Robin Scalisi was subject to a hostile work environment," and that he "complained of the disciplinary procedures utilized by [Police Chief Douglas] Weaver because various police officers got disparate disciplinary treatment." (Complaint, ¶s 25-28).

Purportedly "[a]s a result of Plaintiff's speaking out on matters of public concern," Defendants began a series of allegedly retaliatory actions against Plaintiffs consisting of:

> 1. ...[O]n February 14, 2003, [Officer Adam] Moore, in concert with Weaver, caused to be published in the Pottstown Mercury Newspaper, a Valentine's Day message which stated:
>
> > "Dear Sgt., Spring is right around the corner, just like me. Look outside, see a Robin by the tree. Love Azalea.
>
> 2. On May 17, 2003, Weaver, in concert with Moore, had a hotel room key and package of condoms placed on Plaintiff's Ford 150 truck which was found by Plaintiffs and their daughter.
>
> 3. On May 19, 2003, ...a bumper sticker was placed by Moore, in concert with Weaver, on the right bumper of Plaintiff's truck which showed the rear end of a woman in a thong bikini with the words, "Ass, Gas, or Grass, Nobody Rides for Free."
>
> 4. On or about July 30, 2003, Moore mailed an envelope to Wife [Barbara Schlichter], which contained a photograph he had taken of Plaintiff's police vehicle parked outside Ms. Scalisi's home on Azalea Court. The photograph also contains words superimposed upon it which states:

Limerick Township Police Cruiser	$26,000;
Sergeant Salary (without overtime)	$60,000;
House on Azalea Court	$160,000;
Bill lying to Barb about why he's parked in front of his girlfriend's house while on duty	PRICELESS

5. This photograph with superimposed language was also posted at the Limerick Township Police Department Building and viewed by numerous employees of Limerick Township.

(Complaint, ¶s29, 33, 35, 39, 40).

Plaintiffs allege that after each of these incidents, which they found humiliating and embarrassing, Sgt. Schlichter complained to Township Manager Zaremba, who promised to investigate, but did nothing. Thereafter, "Defendant Weaver only spoke to Plaintiff out of necessity and let it be known throughout the work place that he was displeased with Plaintiff for speaking out about various matters of public concern." (Complaint, ¶48). Plaintiff contends that as a result of these occurrences, his authority as a commanding officer of subordinate police officers was undermined, he was subjected to verbal tirades by Weaver and embarrassed within the police department which caused him "new medical problems including high blood pressure and stress," and "to be constructively discharged from the Township." (Complaint, ¶50).

After receiving a dismissal and right to sue notice from the Equal Employment Opportunity Commission on July 8, 2004, Plaintiffs instituted this lawsuit on September 7, 2004 alleging violations of Title VII of the Civil Rights Act of 1964, as

amended, 42 U.S.C. §2000e, *et. seq.,* violations of his First and Fourteenth Amendment rights pursuant to 42 U.S.C. §§1983, 1985, 1986 and 1988 and his rights under the Pennsylvania Constitution and under the common law theories of civil conspiracy, intentional infliction of emotional distress, and false light/invasion of privacy. As noted, Defendants now move to dismiss all of the claims raised in the complaint.

Standards Governing Rule 12(b)(6) Motions to Dismiss

It has long been the rule that in considering motions to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), the district courts must "accept as true the factual allegations in the complaint and all reasonable inferences that can be drawn therefrom." Allah v. Seiverling, 229 F.3d 220, 223 (3d Cir. 2000)(internal quotations omitted). See Also: Ford v. Schering-Plough Corp., 145 F.3d 601, 604 (3d Cir. 1998). A motion to dismiss may only be granted where the allegations fail to state any claim upon which relief may be granted. See, Morse v. Lower Merion School District, 132 F.3d 902, 906 (3d Cir. 1997). The inquiry is not whether plaintiffs will ultimately prevail in a trial on the merits, but whether they should be afforded an opportunity to offer evidence in support of their claims. In re Rockefeller Center Properties, Inc., 311 F.3d 198, 215 (3d Cir. 2002). Dismissal is warranted only "if it is certain that no relief can be granted under any set of facts which could be proved." Klein v. General Nutrition

Companies, Inc., 186 F.3d 338, 342 (3d Cir. 1999)(internal quotations omitted). It should be noted that courts are not required to credit bald assertions or legal conclusions improperly alleged in the complaint and legal conclusions draped in the guise of factual allegations may not benefit from the presumption of truthfulness. In re Rockefeller, 311 F.3d at 216. A court may, however, look beyond the complaint to extrinsic documents when the plaintiff's claims are based on those documents. GSC Partners, CDO Fund v. Washington, 368 F.3d 228, 236 (3d Cir. 2004); In re Burlington Coat Factory Securities Litigation, 114 F.3d 1410, 1426. See Also, Angstadt v. Midd-West School District, 377 F.3d 338, 342 (3d Cir. 2004).

Discussion

A. First and Fourteenth Amendment Claims Pursuant to 42 U.S.C. §1983

In Counts I, II, VII and XII of their Complaint, the plaintiffs invoke 42 U.S.C. § 1983, which provides in relevant part that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable...

The purpose of §1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails. Wyatt v. Cole, 504 U.S. 158, 161, 112 S.Ct. 1827, 1830, 118 L.Ed.2d 504 (1992). Section 1983 is thus not itself a source of substantive rights but rather provides a cause of action for the vindication of federal rights. Rinker v. Sipler, 264 F.Supp.2d 181, 186 (M.D.Pa. 2003), citing Graham v. Connor, 490 U.S. 386, 393-394, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989).

To make out a claim under Section 1983, a plaintiff must demonstrate that the conduct of which he is complaining has been committed under color of state or territorial law and that it operated to deny him a right or rights secured by the Constitution or laws of the United States. Gomez v. Toledo, 446 U.S. 635, 640, 100 S.Ct. 1920, 1923, 64 L.Ed.2d 572 (1980); Sameric Corp. v. City of Philadelphia, 142 F.3d 582, 590 (3d Cir. 1998); Moore v. Tartler, 986 F.2d 682, 686 (3d Cir. 1993). Local governing bodies may be sued directly under §1983 for monetary, declaratory or injunctive relief where the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, decision, or custom whether officially adopted or informally approved through the government body's offices and/or official decision-making channels. Monell v. New

York City Department of Social Services, 436 U.S. 658, 690, 98 S.Ct. 2018, 2035-2036, 56 L.Ed.2d 611 (1978). A municipality, therefore, can not be held liable solely on the basis of its employees' or agent's actions under the doctrine of *respondeat superior*. Board of County Commissioners of Bryan County v. Brown, 520 U.S. 397, 403, 117 S.Ct. 1382, 1388, 137 L.Ed.2d 626 (1997); Must v. West Hills Police Department, No. 03-4491, 2005 U.S. App. LEXIS 4504 at *15 (3d Cir. March 16, 2005). Rather, the plaintiff must also demonstrate that, through its *deliberate* conduct, the municipality was the "moving force" behind the injury alleged. Bryan County, 520 U.S. at 404, 117 S.Ct. At 1388. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a causal link between the municipal action and the deprivation of federal rights. Id. In other words, to recover against a municipality, a plaintiff must demonstrate that municipal policymakers, acting with deliberate indifference or reckless indifference, established or maintained a policy or well-settled custom[1] which caused a municipal employee to violate

[1] "Policy" is said to be made when a decisionmaker possessing final authority to establish municipal policy with respect to an action issues an official proclamation, policy or edict. "Customs" are practices of state officials so permanent and well-settled as to virtually constitute law. Berg v. County of Allegheny, 219 F.3d 261, 275 (3d Cir. 2000), quoting Pembaur v. City of Cincinnati, 475 U.S. 468, 481, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986), Monell, 436 U.S. at 691, 98 S.Ct. 2018; Kneipp v. Tedder, 95 F.3d 1199, 1212 (3d Cir. 1996).

plaintiffs' constitutional rights and that such policy or custom was the moving force behind the constitutional tort. Padilla v. Township of Cherry Hill, No. 03-3133, 110 Fed. Appx. 272, 278 (3d Cir. Oct. 5, 2004).

In Counts I, VII and XII of their Complaint, plaintiffs assert that the defendants violated his right to hold employment without infringement of his First Amendment rights to freedom of speech, assembly and association, that Defendants engaged in a pattern of harassment creating a hostile work environment designed to deny Plaintiff his First Amendment rights to freedom of speech, assembly and association, and that the defendants' actions "were designed to penalize and retaliate against Plaintiff for his exercise of fundamental First Amendment rights and to prevent Plaintiff from opposing and reporting practices of sexual discrimination and retaliation policies and practices within the Township, which are a matter of public concern to the citizens of the Township and to the citizens of the Commonwealth of Pennsylvania."

It has long been held that a state cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression. Connick v. Myers, 461 U.S. 138, 142, 103 S.Ct. 1684, 1687, 75 L.Ed.2d 708 (1983), citing, *inter alia*, Branti v. Finkel, 445 U.S. 507, 515-16, 100 S.Ct. 1287, 1293, 63 L.Ed.2d 574 (1980),

Perry v. Sinderman, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972) and Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). To be protected by the First Amendment, speech by a government employee must be on a matter of public concern and the employee's interest in expressing himself on a given matter must not be outweighed by any injury the speech could cause to the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees. Waters v. Churchill, 511 U.S. 661, 668, 114 S.Ct. 1878, 1884, 128 L.Ed.2d 686 (1994), quoting Connick, 461 U.S. at 142 and Pickering, 391 U.S. at 568.

Thus, a balance must be struck between the interests of the employee as a citizen in commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees. Connick, supra., quoting Pickering, 391 U.S. at 568, 88 S.Ct. At 1734. In performing this balancing, the manner, time, place and entire context of the expression are relevant. Swartzwelder v. McNeilly, 297 F.3d 228, 235 (3d Cir. 2002), citing Connick and Waters, both supra. Other pertinent considerations include "whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the

speaker's duties or interferes with the regular operation of the enterprise." Id., quoting Rankin v. McPherson, 483 U.S. 378, 388, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987). In order to show a First Amendment violation, the burden is on the public employee to show that his conduct was constitutionally protected and that this conduct was a substantial or motivating factor in the employer's adverse employment decision. Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 287, 97 S.Ct. 568, 573, 50 L.Ed.2d 471 (1977). If the employee carries that burden, the employer must show by a preponderance of the evidence that it would have reached the same decision as to the employee even in the absence of the protected conduct. Crawford-El v. Britton, 523 U.S. 574, 592, 118 S.Ct. 1584, 1594, 140 L.Ed.2d 759 (1998); Mt. Healthy, supra. Where, however, a public employee speaks not as a citizen upon matters of public concern but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a government employer's personnel decision. Swartzwelder, 297 F.3d at 235.

Likewise, a public employee has a constitutional right to speak on matters of public concern without fear of retaliation. Baldassare v. State of New Jersey, 250 F.3d 188, 194 (3d Cir. 2001). A public employee's retaliation claim for engaging in protected activity must also be evaluated under a three-step

process. Green v. Philadelphia Housing Authority, 105 F.3d 882, 885 (3d Cir. 1997). First, the employee must demonstrate that the speech involves a matter of public concern and the employee's interest in the speech outweighs the government employer's countervailing interest in providing efficient and effective services to the public. Curinga v. City of Clairton, 357 F.3d 305, 310 (3d Cir. 2004) citing Pro v. Donatucci, 81 F.3d 1283, 1288 (3d Cir. 1996). See Also, Ambrose v. Township of Robinson, 303 F.3d 488, 493 (3d Cir. 2002). Next, the speech must have been a substantial or motivating factor in the alleged retaliatory action. Id., citing Baldassare, 250 F.3d at 194-195. Finally, the employer can show that it would have taken the adverse action even if the employee had not engaged in the protected conduct. Id. See Also, Ober v. Evanko, No. 02-3725, 80 Fed. Appx. 196, 199-200, 2003 U.S. App. LEXIS 23040 (3d Cir. Oct. 31, 2003); Bounds v. Taylor, No. 02-2644, 77 Fed. Appx. 99, 102, 2003 U.S. App. LEXIS 20631 (3d Cir. Sept. 18, 2003). The second and third factors are questions of fact, while the first factor is a question of law. Curinga, 357 F.3d at 310, citing Pro, 81 F.3d at 1288.

In this case, Plaintiffs premise their First Amendment claims upon the complaints which husband-plaintiff made to the defendant township manager and to Defendant Sperring, a township supervisor, about the hostile work environment surrounding both

himself and another township employee, Robin Scalisi, and upon the complaints which Mr. Schlichter made concerning the disparate disciplinary treatment which various township police officers received under the disciplinary procedures utilized by Police Chief Weaver. "A public employee's speech involves a matter of public concern if it can be fairly considered as relating to any matter of political, social or other concern to the community," such as if it attempts to bring to light actual or potential wrongdoing or breach of public trust on the part of government officials." Baldassare, 250 F.3d at 195. Speech by public employees is not considered to be on a matter of public concern when it is "upon matters only of personal interest." Costenbader-Jacobson v. Pennsylvania Department of Revenue, 227 F.Supp.2d 304, 311 (M.D.Pa. 2002), quoting Czurlanis v. Albanese, 721 F.2d 98, 103 (3d Cir. 1983). Generally, "speech disclosing public officials' misfeasance is protected while speech intended to air personal grievances is not." Id., quoting Swineford v. Snyder County, 15 F.3d 1258, 1271 (3d Cir. 1994). As the Third Circuit has found that complaints of racial and/or sexual discrimination and harassment may constitute speech on a matter of public concern as a matter of law, where the content of the complaints, if made public, "would be relevant to the electorate's evaluation of the performance of the office of an elected official," we find that the plaintiffs here have pled

sufficient facts to satisfy the "public interest" requirement for pleading a claim under the First Amendment. See, Azzaro v. County of Allegheny, 110 F.3d 968, 978 (3d Cir. 1997); Bianchi v. City of Philadelphia, 183 F.Supp.2d 726, 745 (E.D.Pa. 2002).

Defendants' argument in favor of dismissal is as to the second step of Plaintiff's First Amendment claim.[2] In this regard, while they recognize that an adverse employment action short of actual termination is potentially actionable by a public employee, Defendants contend that the actions which they allegedly undertook against the plaintiffs here were so trivial as to not be adverse or actionable.

Determining whether a plaintiff's First Amendment rights were adversely affected by retaliatory conduct is a fact intensive inquiry focusing on the status of the speaker, the status of the retaliator, the relationship between the speaker and the retaliator and the nature of the retaliatory acts. Brennan v. Norton, 350 F.3d 399, 419 (3d Cir. 2003), quoting Suarez Corp. v. Industries v. McGraw, 202 F.3d 676, 686 (4th Cir. 2000). Consequently, to properly balance these interests, courts have required that the nature of the retaliatory acts committed

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[2] This step actually contains two separable inquiries: "Did the defendants take an action adverse to the public employee and, if so, was the motivation for the action to retaliate against the employee for the protected activity." Muti v. Schmidt, No. 03-1206, 96 Fed. Appx. 69, 74, 2004 U.S. App. LEXIS 7933, *12 (3d Cir. April 21, 2004), quoting Merkle v. Upper Dublin School District, 211 F.3d 782, 800, n.3 (3d Cir. 2000).

by a public employer be more than *de minimus* or trivial. Id. The critical question is whether the retaliatory act would be likely to "deter a person of ordinary firmness" from exercising his or her First Amendment rights. Schneck v. Saucon Valley School District, 340 F.Supp.2d 558, 569 (E.D.Pa. 2004), quoting Suppan v. Dadonna, 203 F.3d 228, 235 (3d Cir. 2000). Thus, a public employer may be said to have adversely affected an employee's First Amendment rights when it refuses to rehire an employee because of the exercise of those rights or when it makes decisions which relate to promotion, transfer, recall and hiring, based on the exercise of an employee's First Amendment rights. Brennan, supra., quoting Suarez, also supra. On the other hand, courts have declined to find that an employer's actions have adversely affected an employee's exercise of his First Amendment rights where the employer's alleged retaliatory acts were criticism, false accusations, or verbal reprimands. Id. See Also, McKee v. Hart, Civ. A. No. 3:CV-02-1910, 2004 U.S. Dist. LEXIS 11685 at *24 (M.D.Pa. Feb. 12, 2004); Young v. Bensalem Township, Civ. A. No. 04-1292, 2004 U.S. Dist. LEXIS 15412 (E.D.Pa. July 23, 2004).

In application of the preceding principles to the case at hand, we would agree with the defendants that the publication of the message in the newspaper, the placement of the condoms, note and bumper sticker upon Plaintiffs' truck and the posting of the

photograph in the township building, are little more than trivial annoyances not severe enough to cause "reasonably hardy individuals to refrain from protected activity." Muti, 96 Fed. Appx. at 74. However, Plaintiffs also aver that the defendants undermined Sgt. Schlichter's authority as a commanding officer and that Chief Weaver engaged in "verbal tirades" against him. Although we would agree with the defendants that these allegations lack much detail and are very broad and sweeping in nature, given that this matter is only at the initial pleading stage, we believe they are sufficient to withstand a Rule 12(b)(6) motion. We therefore shall deny the defendants' motion to dismiss Counts I, VII and XII with leave to re-assert these arguments via motion for summary judgment.

Defendants also assert that the plaintiffs' claim in Count II of their complaint that they were deprived of a liberty interest protected by the Fourteenth Amendment is factually unsupported and therefore subject to dismissal.

The Fourteenth Amendment forbids state actors from depriving persons of life, liberty or property without due process of law. Gardner v. McGroarty, No. 02-1984, 68 Fed. Appx. 307, 310, 2003 U.S. App. LEXIS 11452 (3d Cir. June 9, 2003). Ordinarily when a plaintiff alleges that state actors have failed to provide procedural due process, we must determine "whether the asserted individual interests are encompassed within the Fourteenth

Amendment's protection of life, liberty or property," and "if protected interests are implicated, we then must decide what procedures constitute due process of law." Id., quoting Robb v,. City of Philadelphia, 733 F.2d 286, 292 (3d Cir. 1984). See Also, Gikas v. Washington School District, 328 F.3d 731, 737 (3d Cir. 2003). The procedural protections required by the Due Process Clause are thus determined with reference to the particular rights and interests at stake in a case. Graham v. City of Philadelphia, No. 03-3372, 2005 U.S. App. LEXIS 4853 (3d Cir. March 25, 2005) at *15, citing Washington v. Harper, 494 U.S. 210, 229, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990) and Reynolds v. Wagner, 128 F.3d 166, 179 (3d Cir. 1997).

To have a property interest in a job, a person must have more than a unilateral expectation of continued employment; rather, he must have a legitimate entitlement to such continued employment. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). Property interests are not generally created by the Constitution but rather are created and their dimensions 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. Id.

In Pennsylvania, a public employee generally serves at the pleasure of his employer and thus has no legitimate entitlement

to continued employment. Elmore v. Cleary, 399 F.3d 279, 282 (3d Cir. 2005). This is because a local government in Pennsylvania such as a township cannot provide its employees with tenure status unless there exists express legislative authority for doing so; thus, given the absence of explicit enabling legislation from the Pennsylvania General Assembly, a township such as Limerick cannot employ its workers on anything other than an at-will basis. Elmore, 399 F.3d at 282-283.

In this case, the complaint avers that Sgt. Schlichter was a police officer employed by Limerick Township until he was "caused" to be "constructively discharged from the Township" by virtue of the defendants' alleged harassment and retaliatory actions. (Complaint, ¶50). In light of the Third Circuit's holding in Elmore and given the absence of any other averments suggesting that Sgt. Schlichter had a legitimate entitlement to continued employment as a police officer, we find that he has failed to state a claim for deprivation of a property interest without due process of law.

Of course, Plaintiff also alleges that the defendants' actions deprived him of his liberty interest in his reputation and employment position in that "[t]he forced resignation...imposed upon him a stigma which foreclosed his freedom to take advantage of future law enforcement employment opportunities and which seriously damaged his standing in the

community of his peers in his profession." (Complaint, ¶70). Injury to reputation by itself is not a "liberty" interest protected under the Fourteenth Amendment. Siegert v. Gilley, 500 U.S. 226, 233, 111 S.Ct. 1789, 1794, 114 L.Ed.2d 277 (1991), citing Paul v. Davis, 424 U.S. 693, 708-709, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976). Where, however, stigma to reputation is accompanied by a deprivation of present or future employment, a plaintiff may have a cognizable liberty interest. See, Codd v. Velger, 429 U.S. 624, 628, 97 S.Ct. 882, 51 L.Ed.2d 92 (1977); Robb, 733 F.2d at 294. That interest, however, is not accorded substantive due process protection; rather, the right accorded is that of procedural due process or more specifically the right to an opportunity to refute the charges and clear one's name. Pulchaski v. School District of Springfield, 161 F.Supp.2d 395, 406 (E.D.Pa. 2001), citing, *inter alia*, Codd, 429 U.S. at 627; Paul, 424 U.S. at 710 and Roth, 408 U.S. at 573. Thus, a federal constitutional claim arises not from the defamatory or stigmatization conduct *per se* but from the denial of a name-clearing hearing. Id. It follows that to sustain a §1983 stigmatization claim, an aggrieved employee must plead and prove that he timely requested a name-clearing hearing and that the request was denied. Id.; O'Connell v. County of Northampton, 79 F.Supp.2d 529, 536 (E.D.Pa. 1999), citing Freeman v. McKellar, 795 F.Supp. 733, 739 (E.D.Pa. 1992)("Even a discharged employee

must allege that he timely requested a hearing to clear his name and that the request was denied.")

Nowhere in the plaintiffs' complaint do they allege that they requested a name-clearing hearing for Sgt. Schlichter or that such request was denied. Consequently, we conclude that they have likewise failed to state a claim for deprivation of a protected liberty interest under the Fourteenth Amendment. Count II is therefore dismissed in its entirety with prejudice.

B. Plaintiffs' Claim Under Title VII (Count III)

Defendants next move to dismiss Count III of the plaintiffs' complaint, which alleges that the defendant township created a hostile work environment for and otherwise discriminated against Sgt. Schlichter because of and in retaliation for his opposing and attempting to remedy the hostile work environment of his co-worker Robin Scalisi.

Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-3(a),

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment...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 manner in an investigation, proceeding, or hearing under this subchapter.

In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) and Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981),

the U.S. Supreme Court first set forth the basic allocations of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment. First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. Burdine, 450 U.S. at 252-253, 101 S.Ct. at 1093, quoting McDonnell Douglas, 411 U.S. at 802, 804. To establish a prima facie case, a plaintiff must show that he belongs to a protected class, that he was qualified for but was rejected for a job for which the employer was seeking applicants, and that non-members of the protected class were treated more favorably. McDonnell Douglas, 411 U.S. at 802; Burdine, 450 U.S. at 252-253.

In slight contrast, to establish a prima facie case of hostile work environment, a plaintiff must show that (1) he suffered intentional discrimination because of his membership in a protected class; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected him; (4)

the discrimination would detrimentally affect a reasonable person of the same protected class in that position; and (5) the existence of respondeat superior liability. Verdin v. Weeks Marine, Inc., No. 03-4571, 2005 U.S. App. LEXIS 2649 at *7-8 (3d Cir. Feb. 16, 2005); Kunin v. Sears Roebuck & Co., 175 F.3d 289, 293 (3d Cir. 1999). Factors which may indicate a hostile work environment include: "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Sherrod v. Philadelphia Gas Works, No. 02-2153, 57 Fed. Appx. 68, 75, 2003 U.S. App. LEXIS 1428 at *18-19 (3d Cir. Jan. 29, 2003), quoting Harris v. Forklift Systems, Inc., 510 U.S. 17, 23, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993). To establish a hostile work environment, a plaintiff must show harassing behavior "sufficiently severe or pervasive to alter the conditions of employment." Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67, 106 S.Ct. 2399, 92 L.Ed.2d 49 (1986).

To make out a prima facie claim for retaliation under Title VII, a plaintiff must demonstrate that (1) he engaged in protected activity; (2) the defendant took an adverse employment action against him, and (3) that a causal link exists between the protected activity and the adverse action. Kidd v. MBNA America Bank, N.A., No. 02-4011, 93 Fed. Appx. 399, 401, 2004 U.S. Dist.

LEXIS 5694 at *6 (3d Cir. March 25, 2004), citing Kachmar v. Sungard Data Systems, Inc., 109 F.3d 173 (3d Cir. 1999); Sherrod 57 Fed. Appx. at 77.

It should also be noted that under the constructive discharge doctrine, an employee's reasonable decision to resign because of unendurable working conditions is assimilated to a formal discharge for remedial purposes. Pennsylvania State Police v. Suders, 542 U.S. 129, 124 S.Ct. 2342, 2351, 159 L.Ed.2d 204 (2004). The inquiry is objective: did working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign? Id.

In application of the foregoing, again it appears that the plaintiffs base their retaliation and hostile work environment claim on the publication of a Valentine's Day message in the local newspaper, the placement of a bumper sticker, hotel key and a condom on the plaintiffs' truck, and on the mailing and posting of the superimposed photograph over a six-month period of time. While these incidents are clearly rude and inappropriate, we do not find them to be sufficiently severe as to alter the terms of the plaintiff's employment or to render his working conditions so intolerable that a reasonable person in his position would have felt compelled to resign. Accordingly, and in as much as the complaint also fails to allege that these actions were taken as the result of the plaintiff being a member of a protected class,

we find that Count III fails to state a claim for an actionable hostile work environment or for retaliation under Title VII.

C. Plaintiffs' Claims Under 42 U.S.C. §§1985 and 1986

Defendants next move to dismiss Counts IV and V of the complaint, which endeavor to plead claims for relief under Sections 1985 and 1986 of the Civil Rights Act. As Plaintiffs agree that their complaint fails to plead viable causes of action under these Sections, Counts IV and V of the Complaint are dismissed with prejudice.

D. Plaintiffs' Claim under 42 U.S.C. §1988

Defendants contend that Count VI of the Complaint should also be dismissed as Section 1988 does not give rise to an independent cause of action. The law is clear and Plaintiffs agree that Section 1988 does not create an independent federal cause of action; it is merely intended to complement the various acts which do create federal causes of action for the violation of civil rights. Moor v. County of Alameda, 411 U.S. 693, 702, 93 S.Ct. 1785, 1791-1792, 36 L.Ed.2d 596 (1973); Turnstall v. Office of Judicial Support, 820 F.2d 631, 633 (3d Cir. 1987); Petaccio v. Davis, Civ. A. No. 02-2098, 2002 U.S. Dist. LEXIS 20289 at *9 (E.D.Pa. Oct. 9, 2002). Accordingly, and since the plaintiffs have included demands for reasonable costs and attorney's fees in all of the other counts of their complaint, we find Count VI duplicative of relief previously sought. Count VI

is therefore also dismissed with prejudice.

E. Plaintiffs' State Law Claim for Civil Conspiracy

Defendants next seek dismissal of Plaintiffs' claim under Pennsylvania common law for civil conspiracy.

In Pennsylvania, to state a cause of action for civil conspiracy, the following elements are required: (1) a combination of two or more persons acting with a common purpose to do an unlawful act or to do a lawful act by unlawful means or for an unlawful purpose; (2) an overt act done in pursuance of the common purpose; and (3) actual legal damage. General Refractories Company v. Fireman's Fund Insurance Company, 337 F.3d 297, 313 (3d Cir. 2003). A claim of civil conspiracy cannot be pled without also alleging an underlying tort. Boyanowski v. Capital Area Intermediate Unit, 215 F.3d 396, 405 (3d Cir. 2000), citing, *inter alia*, In re Orthopedic Bone Screw Products Liability Litigation, 193 F.3d 781, 789, n.1 (3d Cir. 1999) and Nix v. Temple University, 408 Pa. Super. 369, 569 A.2d 1132, 1137 (1991).

In Count VIII, the plaintiffs allege that:

> 113. The aforesaid Defendants in this count of this complaint entered into a conspiracy to deprive members of this community of their civil rights for the malicious purpose and bias motives of co-Defendants.
> 114. There (sic) aforesaid Defendants shared in a general motive to conceal the misconduct of co-Defendants and to deprive members of the community of their constitutional rights.
>
> 115. One or more of the Defendants participating in this

> conspiracy did in fact deprive members of the community of their civil rights, including deprivation of Plaintiff's Civil rights by Defendants as alleged in this Complaint, in furtherance of the conspiracy between these Defendants.

It is well established that a private actor and a public actor working in concert can form a civil conspiracy to violate an individual's civil rights under section 1983 but in order to do so, the plaintiffs must plead the circumstances of the alleged wrong with particularity so as to place the defendants on notice of the precise misconduct with which they are charged. Hennessy v. Santiago, 708 A.2d 1269, 1277 (Pa. Super. 1998), citing Adickes v. Kress & Co., 398 U.S. 144, 150-152, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970), Rose v. Bartle, 871 F.2d 331, 366 (3d Cir. 1987) and Labalokie v. Capitol Area Intermediate Unit, 926 F.Supp. 503, 508-509 (M.D. Pa. 1996). Only allegations of conspiracy which are particularized, such as those addressing (1) the period of the conspiracy, (2) the object of the conspiracy, and (3) certain actions of the alleged conspirators taken to achieve that purpose, will be deemed sufficient. Id.

In application of the foregoing, we find that the Plaintiffs' pleading in this matter clearly fails to aver the requisite elements to state a claim upon which relief may be granted for civil conspiracy. Furthermore, under the Pennsylvania Political Subdivision Tort Claims Act, 42 Pa.C.S. §8541, "[e]xcept as otherwise provided in this subchapter, no

local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person."[3] As noted, there are exceptions to this general grant of immunity. Under 42 Pa.C.S. §8542(a), a party seeking to recover against a local agency or its employee(s) acting within the scope of his or her office or duties, must plead and prove that he has a common law or statutory cause of action in *negligence* against the local agency *and* that the local agency's alleged act of negligence which caused the injury complained of falls within one the following categories enumerated in Section 8542(b): (1) vehicle liability, (2) care, custody or control of personal property, (3) real property, (4) trees, traffic controls and street lighting, (5) utility service facilities, (6) streets, (7) sidewalks, and (8) care, custody or control of animals. Given that the tort of civil conspiracy does not fall within any of the statutorily-prescribed categories and is not a cause of action sounding in negligence, Count VIII is also properly dismissed against the township and all of the other defendants in their official capacities.

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[3] A "local agency" is defined under the Act as "[a] government unit other than the Commonwealth government. The term includes an intermediate unit." Limerick Township is thus a local agency within the meaning of the Tort Claims Act and is generally immune from suit, together with its employees. See Also, 42 Pa.C.S. §8545.

F. Plaintiffs' Claim Under the Pennsylvania Constitution

In Count XIII, Plaintiffs endeavor to state a cause of action on the grounds that the defendants "individually and in concert have violated Plaintiffs' rights under the Pennsylvania Constitution, and particularly the Declaration of Rights which explicitly stated that 'all power being originally inherent in, and consequently derived from, the people; therefore all officers of the government, whether legislative or executive, are their trustee and servants, and at all times accountable to them..." (Complaint, ¶148).

The Supreme Court of Pennsylvania has not ruled on the issue of whether there is a private cause of action for damages under the state Constitution and the majority of the federal courts in this Circuit that have considered the issue have concluded that there is no such right under the Pennsylvania Constitution. See, e.g., Ryan v. General Machine Products, 277 F.Supp.2d 585, 595 (E.D.Pa. 2003) and Douris v. Schweiker, 229 F.Supp.2d 391, 405 (E.D.Pa. 2002) and the cases cited therein. We shall therefore grant the defendants' motion to dismiss Count XIII of the complaint as well.

G. Plaintiffs' Claims for Invasion of Privacy

In Counts IX and XI, Plaintiffs assert that Defendants Weaver, Moore and John Doe invaded their privacy by intruding upon their solitude and seclusion and published information which

placed them in a false light.

The right of privacy is a qualified right to be let alone, and to be actionable the invasion of that right must be unlawful or unjustifiable. Primus v. Burnosky, Civ. A. No. 02-713, 2003 U.S. Dist. LEXIS 6713 at *40 (E.D.Pa. April 17, 2003), citing Lynch v. Johnston, 76 Pa. Cmwlth. 8, 463 A.2d 87 (1983). There are four types of invasion of privacy in Pennsylvania: (1) publicity given to private life; (2) intrusion upon seclusion; (3) appropriation of name or likeness; and (4) publicity placing a person in a false light. Tucker v. Merck & Co., No. 03-2616, 102 Fed. Appx. 247, 256, 2004 U.S. App. LEXIS 13347 at *21 (3d Cir. June 29, 2004), citing Vogel v. W.T. Grant Co., 458 Pa. 124, 327 A.2d 133, 136 (1974). The Supreme Court of Pennsylvania has adopted the Restatement's definition of invasion of privacy and thus adheres to the Restatement's definition of the sub-tort of invasion of privacy, false light:

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of privacy, if
>
> (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
>
> (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Fanelle v. Lojack Corporation, Civ. A. No. 99-4292, 2000 U.S. Dist. LEXIS 17767 at *30 (E.D.Pa. Dec. 7, 2000), citing

Restatement (Second) of Torts, §652E (1977) and Vogel, 458 Pa. at 129, n.9. Stated otherwise, the tort of false light/invasion of privacy involves "publicity that unreasonably places the other in a false light before the public." Rush v. Philadelphia Newspapers, Inc., 732 A.2d 648, 654 (Pa. Super. 1999), quoting Strickland v. University of Scranton, 700 A.2d 979, 987 (Pa. Super. 1997) and Curran v. Children's Services Center of Wyoming County, Inc., 396 Pa. Super. 29, 578 A.2d 8, 12 (1990). A cause of action for invasion of privacy will be found where a major misrepresentation of a person's character, history, activities or beliefs is made that could reasonably be expected to cause a reasonable man to take serious offense. Id. The elements to be proven are publicity, given to private facts, which would be highly offensive to a reasonable person and which are not of legitimate concern to the public. Id.

Pennsylvania has also adopted the definition for intrusion upon seclusion invasion of privacy set forth by the *Restatement (Second) of Torts*, §652B:

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy if the intrusion would be highly offensive to a reasonable person.

Larsen v. Philadelphia Newspapers, Inc., 375 Pa. Super. 66, 543 A.2d 1181 (1988), citing Marks v. Bell Telephone Co. of Pennsylvania, 460 Pa. 73, 331 A.2d 424 (1975). To maintain a

claim for intrusion upon seclusion, a plaintiff must plead and prove that (1) there was an intentional intrusion, (2) upon the solitude or seclusion of the plaintiff, or his private affairs or concerns, and (3) that the intrusion was substantial and (4) highly offensive. Tucker, 102 Fed. Appx. at *21.

In this case, the plaintiffs allege that Defendants Weaver and Moore published a Valentine's Day message in the local newspaper and posted a photograph with superimposed language over it essentially accusing Sgt. Schlichter of having an extra-marital affair with Robin Scalisi. Assuming the falsity of this accusation, we find these allegations to be sufficient to plead claims for false light and intrusion upon seclusion invasion of privacy against Defendants Weaver and Moore only.[4]

H. Plaintiffs' Claims for Intentional Infliction of Emotional Distress

Finally, Plaintiffs also contend that in publishing the photograph and newspaper message, placing the bumper sticker, key and condoms on Plaintiffs' truck and in undermining Plaintiffs' authority as a police supervisor, Defendants Weaver and Moore acted intentionally and for the purpose of causing Plaintiffs

[4] Count XI charges false light invasion of privacy against all of the defendants. Given that this tort does not fall within any of the exceptions to governmental immunity set forth in 42 Pa.C.S. §8542(b), we find that the complaint fails to plead a viable claim against Limerick Township or any of the other township defendants save for Moore and Weaver, the individual alleged actors.

emotional distress.

Although the tort of intentional infliction of emotional distress has been acknowledged but never formally adopted by the Pennsylvania Supreme Court, the Pennsylvania Supreme Court *has* held that *if* the tort were adopted, it would require that "the conduct must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society." See, Hoy v. Angelone, 554 Pa. 134, 151, 720 A.2d 745, 754 (1998), quoting with approval, Buczek v. First National Bank of Mifflintown, 366 Pa. Super. 551, 558, 531 A.2d 1122, 1125 (1987); Kazatsky v. King David Memorial Park, 515 Pa. 183, 184, 527 A.2d 988, 989 (1987). See Also, Taylor v. Albert Einstein Medical Center, 562 Pa. 176, 181, 754 A.2d 650, 652 (2000). Moreover, "it is extremely rare to find conduct in the employment context that will rise to the level of outrageousness necessary to provide a basis for recovery for the tort of intentional infliction of emotional distress." EEOC v. Federal Express Corp., Civ. A. No. 1:02-CV-1194, 2005 U.S. Dist. LEXIS 5835 at *24-25 (M.D. Pa. Jan. 13, 2005), quoting Cox v. Keystone Carbon Co., 861 F.2d 390, 395 (3d Cir. 1988).

In evaluating the conduct complained of here in the context of the preceding principles, we find that while it is undeniably inappropriate, unprofessional and in poor taste, we cannot find

that it is so extreme and outrageous in character as to meet the threshold for an intentional infliction of emotional distress claim. We shall therefore grant the motion to dismiss Count X as well.

For all of the preceding reasons, the defendants' motion to dismiss is partially granted pursuant to the annexed order.

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

WILLIAM SCHLICHTER and BARBARA SCHLICHTER	:	CIVIL ACTION
vs.	:	NO. 04-CV-4229
LIMERICK TOWNSHIP, W. DOUGLAS WEAVER, OFFICER ADAM MOORE, WALTER ZAREMBA, TOWNSHIP MANAGER, KEN SPERRING, TOWNSHIP SUPERVISOR, JOSEPH GRECO, TOWNSHIP SUPERVISOR, THOMAS DEBELLO, TOWNSHIP SUPERVISOR, FRANK GRANT, TOWNSHIP SUPERVISOR, FREDERICK FIDLER, TOWNSHIP SUPERVISOR, and JOHN DOE	:	

ORDER

AND NOW, this day of April, 2005, upon consideration of Defendants' Motion to Dismiss Plaintiffs' Complaint and Plaintiffs' Response thereto, it is hereby ORDERED that the Motion is GRANTED IN PART and DENIED IN PART and Counts II, III, IV, V, VI, VIII, X and XIII are DISMISSED in their entirety and Counts IX and XI are DISMISSED as against Defendants Limerick Township, Walter Zaremba, Ken Sperring, Joseph Greco, Thomas DeBello, Frank Grant and Frederick Fidler only. In all other respects, the Motion is DENIED.

BY THE COURT:

_____
J. CURTIS JOYNER, J.