

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

DIANA RIVERA O'BRYANT,	)	
	)	Civil Action
Plaintiff	)	No. 03-CV-06635
	)	
vs.	)	
	)	
CITY OF READING;	)	
JOSEPH EPPIHIMER;	)	
JEFFREY WHITE;	)	
NAN BALMER;	)	
JESUS PENA;	)	
ERIC GALOSI; and	)	
TAMMIE KIPP,	)	
	)	
Defendants	)	

\* \* \*

APPEARANCES:

H. FRANCIS DELONE, JR., ESQUIRE  
On behalf of Plaintiff

STEVEN K. LUDWIG, ESQUIRE  
MAREN REICHERT, ESQUIRE  
On behalf of Defendants

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O P I N I O N

JAMES KNOLL GARDNER,  
United States District Judge

This matter is before the court on Defendants City of Reading, Joseph Eppihimer, Jeffrey White, Nan Blamer, Jesús Peña, Tammie Kipp, and Eric Galosi's Motion for Summary Judgment filed September 20, 2004.<sup>1</sup> Plaintiff's Memorandum in Opposition to

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<sup>1</sup> By Order dated November 17, 2004, the undersigned granted defendants leave to file a reply brief in conformity with our Rule 16 Status Conference Order dated April 8, 2004. Defendants' Reply Brief to Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment was filed November 18, 2004.

Defendants City of Reading, Joseph Eppihimer, Jeffrey White, Nan Blamer, Jesús Peña, Tammie Kipp, and Eric Galosi's Motion for Summary Judgment was filed October 8, 2004.<sup>2</sup> For the reasons expressed below, we grant defendants' motion for summary judgment.

### **Procedural History**

On December 9, 2003 plaintiff Diana Rivera O'Bryant initiated this matter by filing a five-count Complaint against defendants City of Reading ("City"), Joseph Eppihimer, Jeffrey White, Nan Balmer and Jesús Peña. According to the Complaint, Eppihimer was the City's Mayor; White was the City's Managing Director; Balmer was the City's Director of Community

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<sup>2</sup> In her memorandum, plaintiff asserts that "[p]laintiffs can and often do bring Title VII employment discrimination actions and § 1983 denial of equal protection actions in the same lawsuit . . . [Plaintiff] has done that in this case." While we agree that plaintiffs are permitted to aver causes of action pursuant to Title VII of the Civil Rights Act of 1866, 1964, and 1991 (42 U.S.C. §§ 2000(e) to 2000(e)-17) and Section 1983 (42 U.S.C. § 1983) in the same lawsuit, we disagree that plaintiff has done so in this matter.

After review of the Amended Complaint in the light most favorable to plaintiff, as we are required to do, we find that plaintiff has not asserted a cause of action under Title VII. Initially, we note that plaintiff specifically delineated federal statutory causes of action under 42 U.S.C. § 1983 and the Fair Labor Standards Act of 1938 ("FLSA") (29 U.S.C. §§ 201-219). See Paragraph 9 of plaintiff's Amended Complaint filed May 18, 2004. Plaintiff further characterized the alleged discrimination as a violation of her constitutional right to equal protection of the law, a reference to the Fourteenth Amendment of the United States Constitution, not Title VII. See Paragraphs 22-23 and 27-30 of plaintiff's Amended Complaint. In her claim for retaliation, plaintiff characterized defendants' actions as violating her First Amendment right of free speech, not as violating her rights under Title VII. See Paragraph 34 of plaintiff's Amended Complaint. Nowhere in plaintiff's Amended Complaint, or prior submissions to the court for that matter, does plaintiff identify any federal claims brought under Title VII.

Accordingly, we analyze plaintiff's discrimination and retaliation claims under Section 1983, not Title VII.

Development; and Pena was the City's Director of the Department of Human Resources. The City, Eppihimer, White, Balmer, and Pena filed their answer to plaintiff's Complaint on February 17, 2004.

On April 30, 2004, plaintiff filed a Motion for Leave to Amend the Complaint seeking to add Eric Galosi and Tammy Kipp<sup>3</sup> as defendants. By Order of the undersigned dated May 14, 2004, plaintiff's motion was granted, and her Amended Complaint was filed on May 18, 2004. According to the Amended Complaint, Galosi was the City's Acting Director of Community Development or the Division Manager of Housing<sup>4</sup> and Kipp was the City's Director of Finance. The City, Eppihimer, White, Balmer, Pena, Galosi, and Kipp filed their answer to plaintiff's Amended Complaint on June 4, 2004.

Count I of plaintiff's Amended Complaint asserts a federal cause of action pursuant to 42 U.S.C. § 1983 by virtue of an alleged violation of the Fourteenth Amendment of the United States Constitution as the underlying basis of her Section 1983 claim. Count II asserts a federal cause of action for retaliation pursuant to 42 U.S.C. § 1983 by virtue of an alleged

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<sup>3</sup> Although defendants indicate in their answer to plaintiff's Amended Complaint that plaintiff misspelled Tammie Kipp's first name, the caption of this case was never changed to reflect the proper spelling of Kipp's first name as "Tammy".

<sup>4</sup> In their answer to plaintiff's Amended Complaint, defendants aver that Galosi was presently serving as the City's Division Manager of Housing and Neighborhood Development and that he had previously served as Acting Director of the City's Community Development Department.

violation of the First Amendment of the United States Constitution as the underlying basis of her Section 1983 claim. Count III asserts a federal cause of action pursuant to the Fair Labor Standards Act of 1938 ("FLSA").<sup>5</sup> Count IV asserts a pendent state law cause of action for breach of contract. Count V asserts a state law cause of action for fraudulent misrepresentation and concealment.

### **Facts**

Based upon the pleadings, record papers, affidavits, exhibits and depositions, the pertinent facts are as follows:

Plaintiff Diana Rivera O'Bryant, an African American female, who is also part Hispanic, was first employed in September 1998 by the City as a part-time Fair Housing In-take Specialist. Plaintiff's salary was \$14.00 per hour and did not include benefits. Plaintiff was advised that her offer of employment did not constitute a contract and that she was an at-will employee.

As a part-time Fair Housing In-take Specialist, plaintiff staffed the City's Fair Housing Office and performed intake functions related to complaints of alleged housing discrimination in violation of federal or state law. More specifically, plaintiff interviewed complainants, documented complaints, filed complaints with the United States Department of

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<sup>5</sup> 29 U.S.C. §§ 201-219.

Housing and Urban Development ("HUD"), and submitted investigated complaints to the Solicitor for the City's Human Relations Commission for disposition.

Plaintiff was advised by correspondence dated December 1, 1998 from the City's Human Resources Department that effective that date the position of Fair Housing In-take Specialist was being expanded from part-time to full-time. In addition, plaintiff was extended a benefit package, including pension, medical, dental, vision, prescription and life insurance benefits. She was informed that this expansion of her position did not constitute a contract and that she was an at-will employee. Plaintiff accepted these terms of employment by her execution of the correspondence on December 7, 1998. As of January 1, 1999, plaintiff was no longer paid by the hour but was paid a salary of \$26,244.00 per year.

In August 2000 plaintiff filed charges of race and sex discrimination against the City with the Pennsylvania Human Relations Commission ("PHRC") and the United States Equal Employment Opportunity Commission ("EEOC"). In January 2001 plaintiff filed additional charges of race and age discrimination with the PHRC and the EEOC, alleging retaliation. The PHRC did not issue findings on either charge. The EEOC did not issue a right to sue letter with respect to either charge.

By correspondence dated December 14, 2001, the City

offered plaintiff a management position, Human Relations Commission Administrator, at a salary of \$32,000.00 per year. The correspondence explained that the Human Relations Commission Administrator "is responsible for administration, management, and intake functions related to the implementation and enforcement of the City's Human Relations Ordinance."

Plaintiff's responsibilities included, among other things, preparing an annual program budget for the Commission; preparing grant applications and reports; approving purchases and bill payment for the Commission; maintaining Commission case files; providing public education and information services; and providing intake services to individuals interested in filing a complaint of discrimination with the Commission.

On December 18, 2001 plaintiff accepted the Human Relations Commission Administrator position, at which time her promotion became effective. In addition to the above responsibilities, plaintiff produces and hosts a local television show; develops informational materials to disseminate to the public, including a book about renting, fair housing and home ownership; supervises other Commission staff;<sup>6</sup> screens all

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<sup>6</sup> Plaintiff testified in her deposition that she supervises a part-time fair housing investigator and a part-time clerk. See Exhibit A, page 62, of Defendants City of Reading, Joseph Eppihimer, Jeffrey White, Nan Blamer, Jesús Peña, Tammie Kipp, and Eric Galosi's Motion for Summary Judgment filed September 20, 2004 ("Summary Judgment Motion"). In addition, plaintiff has supervised college interns from Reading Area Community College. See Summary Judgment Motion, Exhibit A, page 64.

housing discrimination complaints made to the Human Relations Commission; interviews complainants; determines whether a complaint should be filed; and initiates and files complaints. Plaintiff also coordinates with members of the Human Relations Commission and its Solicitor regarding Commission meetings and cases, and with other City staff regarding administration of the Commission.

In 2003 plaintiff's salary as Human Relations Commission Administrator was raised to \$32,960.00. Plaintiff continues to serve as the City's Human Relations Commission Administrator. She has not been terminated or suspended at any time. Plaintiff has never had her salary reduced or had support staff taken away from her.

### **Contentions of the Parties**

#### **Plaintiff's Contentions**

Plaintiff contends that when she was promoted to the full-time position of Executive Director<sup>7</sup> of the Human Relations Commission in January 1999, her hourly rate decreased because she

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<sup>7</sup> Defendants contend that no such change in plaintiff's title was ever effectuated by the City and that no such position has ever been included in the City's full-time position ordinance, which establishes the full-time employment positions within the City.

Plaintiff submits no evidence, other than her own assertion, to support her contention that she was promoted to "Executive Director" of the City's Human Relations Commission in January 1999. On the contrary, the December 1, 1998 correspondence to plaintiff provides, in pertinent part: "[o]n behalf of the City of Reading, I am pleased to inform you that the position of Fair Housing In-Take Specialist has been changed from part-time to full-time effective Tuesday, December 1, 1998." See Summary Judgment Motion, Exhibit C. No mention is made of a promotion to "Executive Director."

regularly worked over 40 hours per week.<sup>8</sup> Specifically, plaintiff avers that if her hourly rate were calculated on the basis of a forty-hour workweek, her hourly rate for the full-time position would be less than the hourly rate she received when she was working part-time.<sup>9</sup> Plaintiff further contends that whatever hourly calculation figure is used, her pay is far below what a person who is supposedly a manager of a City department should be getting and far below what white employees in comparable positions have been and are getting.<sup>10</sup>

Plaintiff claims that she is the lowest paid administrator for the City or for Berks County. Plaintiff further contends that she is paid less than some white secretaries employed by the City and less than some white City employees whose jobs are to clean City Hall. In addition, she maintains that while white administrative employees of the City of Reading have been receiving salary increases averaging around

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<sup>8</sup> Plaintiff contends that she worked over 40 hours "about every week" and that she usually worked "[a]t least six or seven hours over during the week." See Summary Judgment Motion, Exhibit A, page 323.

<sup>9</sup> Plaintiff asserts that she received an hourly rate of \$12.62 ( $\$26,244.00 \div 2080$  hours per year = \$12.62 per hour) when she was promoted to the full-time position. Plaintiff's salary for the part-time position was \$14.00 per hour.

<sup>10</sup> Plaintiff contends that the following Caucasian employees held positions comparable to hers and were paid significantly more: defendant Balmer, Executive Director of Community Development from late 2000 until mid-2002, was paid \$55,000.00 per year; defendant Galosi, Division Manager of Housing since 2002, is paid \$50,000.00 per year; defendant Kipp, Finance Director since December 2001, is paid \$61,800.00; and Adam Mukerji (predominately Caucasian), Division Manager of Community and Economic Development since 2002, is paid \$75,000.00 per year.

four to five percent each year, her increases have averaged far less.

Plaintiff also contends that she is aware of several other minority employees of the City, including Linda Burns Glover, Richard Bailey, and Evelyn Morrison, who believe that they have been the victims of race or ethnic discrimination.

Plaintiff asserts that in August 2000, while she was the Executive Director, she filed charges with the PHRC and EEOC alleging that the City was discriminating against her because of her race by paying her far less than white employees in comparable positions. She maintains that, soon after she filed these charges, defendants retaliated by demoting her back to the position of Fair Housing In-Take Specialist and later hiring Balmer, a white woman, as the City's Director of Community Development and as plaintiff's supervisor. Plaintiff contends that because she was doing a good job as the Executive Director, there was no valid reason to demote her.

Plaintiff claims that defendants' retaliation and racial discrimination against her have not been limited to demotion and low pay. She claims that she has not received the recognition and respect which she deserves for being a quality worker and person; has regularly been harassed and belittled by white supervisory personnel with whom, or for whom, she works; has been prevented from doing her job properly and from receiving

the training required for her job; and has not been invited to the planning and policy meetings defendant Eppihimer regularly held with most white department or division managers. Plaintiff further contends that defendants' alleged racial discrimination<sup>11</sup> and retaliation<sup>12</sup> have been continuing practices and consist of numerous retaliatory and discriminatory acts.

Plaintiff also contends that the City has refused to compensate her for the many overtime hours she has worked since becoming a full-time employee in 1999. She asserts that her duties consist primarily of implementing the City's Human Relations Ordinance, implementing programs for the United States Department of Housing and Urban Development ("HUD"), and providing intake services related to the City's ordinance and HUD program. Plaintiff claims that she did not draft or create the City's ordinance or HUD programs and that she is not free to deviate from or change the City's ordinance or HUD programs.

Plaintiff further contends that because her administrative duties are limited to the Human Relations Commission office, her "primary duty" is not the performance of work directly related to the management or general business operations of the City. Based on the foregoing, plaintiff

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<sup>11</sup> Plaintiff contends that defendants' racial discrimination against her began in 1999.

<sup>12</sup> Plaintiff contends that defendants' retaliation against her began in 2000.

maintains that she is not an exempt employee under the FLSA.

Defendants' Contentions

Defendants contend that plaintiff has failed to adduce sufficient evidence that they took any action against her amounting to disparate treatment or retaliation for purposes of a constitutional violation actionable under Section 1983. On the contrary, defendants maintain that plaintiff has never been discharged, suspended or had her hours cut. Plaintiff's pay has never been docked and her rate has never been reduced. Furthermore, defendants assert that plaintiff's position has evolved from one primarily focused on intake duties to one that also focuses largely on outreach and education in the community regarding fair housing and discrimination issues.

Defendants claim that plaintiff has provided no evidence of any adverse employment actions or that defendants had any involvement in the alleged conduct. Defendants assert that the conduct alleged by plaintiff does not reach the threshold of improper actionable harassment under Section 1983, whether as a result of race or protected First Amendment activity. On the contrary, defendants maintain that any difficulties perceived by plaintiff did not result in any discipline or loss to plaintiff and would not deter a person of ordinary firmness from engaging in protected activity. Moreover, defendants argue that even if plaintiff could establish actionable conduct, she is unable to

show a connection between the alleged retaliatory action and her protected activity.

Defendants maintain that plaintiff meets the United States Department of Labor standard for an exempt administrative employee and, therefore, has no entitlement to additional compensation for overtime hours worked. In support thereof, defendants assert that plaintiff has been paid on a salary basis since January 1, 1999. In addition, defendants contend that plaintiff exercises discretion and independent judgment with respect to the intake functions of the City's Human Relations Commission, the development of outreach and educational programs on fair housing and anti-discrimination topics, and the overall functioning of the Human Relations Commission as set forth in the City's human relations ordinance. Moreover, defendants argue that plaintiff's work affects the operations of the Human Relations Commission and the City to a substantial degree.

Defendants contend that plaintiff lacks any evidence of a contractual promise by the City to pay overtime. Specifically, defendants assert that the terms and conditions of plaintiff's employment as the Human Relations Commission Administrator do not contain a provision for additional compensation for overtime work. Further, defendants maintain that plaintiff has failed to produce any other writing between the parties suggesting that she was entitled to overtime compensation.

Defendants assert that plaintiff has not produced any evidence of an intentional misrepresentation regarding her FLSA exemption status. Defendant contends that plaintiff has not shown that any defendant made a representation to her regarding her FLSA exemption status. Moreover, defendants contend that plaintiff has not shown that any communication regarding her classification as an exempt employee was false or was made with knowledge of its falsity or with reckless disregard for the truth.

#### **Standard of Review**

In considering a motion for summary judgment, the court must determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Federal Home Loan Mortgage Corporation v. Scottsdale Insurance Company, 316 F.3d 431, 433 (3d Cir. 2003). Only facts that may affect the outcome of a case are "material". Moreover, all reasonable inferences from the record are drawn in favor of the non-movant. Anderson, supra.

Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the

non-movant must then establish the existence of each element on which it bears the burden of proof. See Watson v. Eastman Kodak Company, 235 F.3d 851, 857-858 (3d Cir. 2000). A plaintiff cannot avert summary judgment with speculation or by resting on the allegations in her pleadings, but rather must present competent evidence from which a jury could reasonably find in her favor. Ridgewood Board of Education v. N.E. for M.E., 172 F.3d 238, 252 (3d Cir. 1999); Woods v. Bentsen, 889 F.Supp. 179, 184 (E.D. Pa. 1995).

#### **Discussion**

Section 1983 provides for the imposition of liability on any person who, acting under color of state law, deprives another of rights, privileges, or immunities secured by the Constitution or the laws of the United States. Gruenke v. Seip, 225 F.3d 290, 298 (3d Cir. 2000). Section 1983 does not itself provide any substantive rights but merely provides a federal remedy for violation of federally protected rights. Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 617-618, 99 S.Ct. 1905, 1916, 60 L.Ed.2d 508, 522-523 (1979).

To state a claim under Section 1983, plaintiff must show that: (1) the offending conduct was committed by a person acting under color of state law; and (2) such conduct deprived plaintiff of rights secured by the Constitution of the United States. Parratt v. Taylor, 451 U.S. 527, 535, 101 S.Ct. 1908,

1913, 68 L.Ed.2d 420, 428 (1981), overruled on other grounds, Daniels v. Williams, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986). In this case, no party disputes that defendants were acting under color of state law.

#### Discrimination

To bring a successful claim under 42 U.S.C. § 1983 for a denial of equal protection, plaintiff must prove the existence of purposeful discrimination. Andrews v. City of Philadelphia, 895 F.2d 1469, 1478 (3d Cir. 1990), citing, Batson v. Kentucky, 476 U.S. 79, 93, 106 S.Ct. 1712, 1721, 90 L.Ed.2d 69, 85 (1986). In other words, plaintiff must demonstrate that she received different treatment from that which was received by other individuals similarly situated. Specifically, to prove racial discrimination, a plaintiff must show that any disparate treatment she received was based upon her race. Andrews, 895 F.2d at 1478.

A defendant in a civil rights action must have personal involvement in the alleged wrongs. Liability cannot be predicated solely on the operation of respondeat superior. See Monell v. New York City Department of Social Services, 436 U.S. 658, 692-695, 98 S.Ct. 2018, 2036-2039, 56 L.Ed. 2d 611, 636-639; Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir. 1988), citing, Parratt, 451 U.S. 527, 537 n.3, 101 S.Ct. 1908, 1914, 68 L.Ed.2d 420, 430 (1981). Personal involvement can be

shown through allegations of personal direction or of actual knowledge and acquiescence. Allegations of participation or actual knowledge and acquiescence, however, must be made with appropriate particularity. Rode, 845 F.2d at 1207.

In order to obtain a judgment against a municipality, plaintiff must prove that the municipality itself supported the violation of rights alleged. Monell, 436 U.S. at 692-695, 98 S.Ct. at 2036-2039, 56 L.Ed.2d at 636-639. Thus, Section 1983 liability attaches to a municipality only when "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." Monell, 436 U.S. at 694, 98 S.Ct. at 2037-2038, 56 L.Ed.2d at 638.

As noted above, in support of her claim of discrimination, plaintiff avers that her pay is considerably lower than similarly situated white employees and that she is the lowest paid administrator for the City or for the County of Berks. In addition, plaintiff maintains that white administrative employees of the City have been receiving salary increases averaging around four to five percent each year. Plaintiff avers that her increases have averaged far less.

Plaintiff also claims that she has been regularly belittled and subjected to offensive remarks by white supervisors (including the individual defendants) for whom or with whom she

works. Plaintiff asserts that many of the defendants have demeaned the importance of her job and have taken steps to make her job more difficult.<sup>13</sup> Plaintiff maintains that it is clear that the foregoing acts have been perpetuated against her because of her race and ethnic background.

Plaintiff must prove purposeful discrimination in order

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<sup>13</sup> With respect to defendant Eppihimer, plaintiff alleges that she heard from unidentified persons that he was going to terminate her employment and that he was upset that she had named him in the PHRC charge which she filed in 2000. Plaintiff also avers that defendant Eppihimer indirectly retaliated against her by demoting her from the "Executive Director" position she believed she had held.

Plaintiff asserts that defendant White harassed her because he did not take steps to ensure adequate staffing for the Human Relations Commission. Plaintiff also avers that he made a condescending comment regarding his hesitation to deal adversely with another person because that person was African-American. More specifically, plaintiff testified that defendant White said something to the effect that he could not do anything to remove Hazel Black (an African-American woman) from the Commission because people would say "who do those white men, sitting up in their ivory white tower, think they are? This is an African-American woman that has been on the commission for many years, a do-gooder in the community." See Summary Judgment Motion, Exhibit A, page 200.

Plaintiff contends that defendant Pena acquiesced in her being paid less than other employees. Plaintiff also believed that Pena retaliated against her following her filing of charges with the PHRC and EEOC because she was told to speak with his assistant and because he no longer "saluted" her when they would walk past one another.

Plaintiff maintains that defendant Balmer refused to give her compensatory time or overtime pay for the many hours of overtime she worked, threatened to demote her if she did not perform the duties of an Executive Director as well as her Fair Housing In-Take Specialist duties, and required her to do typing and clerical work in addition to her other duties.

Plaintiff asserts that defendant Galosi prevented her from getting the staff and funds necessary to run the Human Relations Commission properly, took steps to demean the importance of her job as the head of the Human Relations Commission, and took steps to keep her from receiving pay comparable to the pay received by Caucasians holding jobs of similar importance. Plaintiff also claims that defendant Galosi retaliated against her for filing her PHRC charge by telling unidentified persons that she was filing frivolous complaints.

Plaintiff contends that defendant Kipp prevented her from doing her job properly and from receiving the training required for that job.

to be successful under a Section 1983 action for denial of equal protection. Andrews, supra. In this regard, plaintiff offers no evidence, other than her own testimony and declaration, to support her claim that she received different treatment from that which was received by white individuals similarly situated.

Plaintiff does not offer any competent evidence concerning the salaries or raises of other white individuals who are similarly situated. Although plaintiff asserts that several white administrative employees are earning more than she earns,<sup>14</sup> she does not offer any evidence concerning the job duties, education, or experience of those other administrative employees to enable a comparison to be made.<sup>15</sup>

Plaintiff also avers that she is the lowest paid administrative employee in the City and the County of Berks, but does not offer any evidence to support this conclusion other than

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<sup>14</sup> Plaintiff contends that the following Caucasian employees held positions comparable to hers and were paid significantly more: defendant Balmer, Executive Director of Community Development from late 2000 until mid-2002, was paid \$55,000.00 per year; defendant Galosi, Division Manager of Housing since 2002, is paid \$50,000.00 per year; defendant Kipp, Finance Director since December 2001, is paid \$61,800.00; and Adam Mukerji (predominately Caucasian), Division Manager of Community and Economic Development since 2002, is paid \$75,000.00 per year.

<sup>15</sup> Plaintiff avers that the question of who is a similarly situated or comparable employee is a factual question that must be determined on the basis of all of the circumstances. However, we find that the mere assertion by plaintiff of the titles and salaries of other white administrative employees, without more, is not enough to create a genuine issue of material fact to avoid summary judgment. Plaintiff has presented no evidence from which a jury could find that those positions were similar to her own. Presumably, plaintiff could have conducted depositions of those individuals to illicit information about their respective job duties, education, and experience. The record does not indicate that she has done so. Accordingly, we find that there is no genuine issue of material fact on this issue which would preclude summary judgment.

her unsupported assertions. As noted above, plaintiff cannot avert summary judgment with speculation or by resting on the allegations in her pleadings, but rather must present competent evidence from which a jury could reasonably find in her favor. Ridgewood, supra. Furthermore, the County of Berks is neither plaintiff's employer, nor a defendant in this action.

In order to prove the personal involvement of the individual defendants, plaintiff must show, with particularity, that they directly participated, or had knowledge of and acquiesced, in the alleged discriminatory acts. Rode, supra. However, other than her own testimony, plaintiff has no competent evidence that any of the defendants demeaned the importance of her job, made her job more difficult, belittled her, or made offensive remarks to her.<sup>16</sup>

Specifically, plaintiff has presented no evidence to support her assertions that the Human Relations Commission was inadequately staffed or improperly funded, that she did not receive the proper training to perform her job, and that she was excluded from meetings which defendant Eppihimer held regularly with other department or division managers. In addition,

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<sup>16</sup> We find that the alleged comment made by defendant White regarding Hazel Black noted in footnote 13, supra, does not reflect a discriminatory animus with respect to plaintiff as an African-American. If anything, it demonstrates that defendant White was hesitant to take any potential adverse action against another member of a protected class.

In addition, information obtained by plaintiff from unidentified persons is not competent evidence and will not defeat summary judgment.

plaintiff's assertions concerning what she learned from unidentified persons, (defendant Eppihimer's alleged threat to terminate plaintiff and defendant Galosi's comment about plaintiff's filing frivolous lawsuits), are unsupported allegations which are insufficient to withstand summary judgment. Thus, we conclude that plaintiff has not established that she received different treatment from that which was received by other individuals similarly situated.

Further, we conclude that even if plaintiff had proven disparate treatment, which she did not, she has not produced any evidence that any alleged unfavorable treatment she received was based on her race. More specifically, plaintiff has adduced no evidence that any of the defendants suppressed her salary because of her race. The mere assertion that plaintiff believes she should be paid akin to white employees who work in other capacities does not lead to the conclusion that the perceived pay differential was based on her race. Further, plaintiff acknowledges in her testimony that she did not believe that the City's confidential secretaries, each of whom is Caucasian, were paid more than she because they are white and she is black.<sup>17</sup>

Plaintiff similarly produces no evidence, other than

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<sup>17</sup> In addition to the administrative employees listed in footnote 14 above, plaintiff contends that she is paid less than some Caucasian secretaries employed by the City as well as some City employees whose jobs are to clean City Hall. Again, we find that plaintiff has failed to provide any competent evidence that these employees are either, in fact, paid more than she or that these positions are comparable to her position.

her own belief, that the alleged failure to provide additional staffing for the Human Relations Commission was because of her race. In addition, plaintiff fails to establish that any of the other alleged acts of defendants, including defendant Pena's refusal to "salute," and defendant Balmer's alleged threat to demote and refusal to give compensation time, were racially motivated.

Finally, plaintiff contends that she is aware of several other minority employees of the City, including Linda Burns Glover, Richard Bailey, and Evelyn Morrison, who believe that they have been the victims of racial or ethnic discrimination. Plaintiff asserts that evidence of such prior discrimination against minorities can be sufficient to prove discriminatory intent. Plaintiff cites the opinion of the United States Court of Appeals for the Third Circuit in Simpson v. Kay Jewelers, 142 F.3d 639 (3d Cir. 1998) as authority for this assertion.

Simpson is both procedurally and factually distinguishable from this case. In Simpson, plaintiff brought an age discrimination cause of action under the Age Discrimination in Employment Act ("ADEA")<sup>18</sup> and the Pennsylvania Human Relations Act ("PHRA")<sup>19</sup> which was analyzed by the Third Circuit under the

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<sup>18</sup> 29 U.S.C. §§ 621-634.

<sup>19</sup> Act of October 27, 1955, P.L. 744, No. 222, §§ 1-13, as amended, 43 P.S. §§ 951-963.

shifting burden analysis contained in the McDonnell Douglas<sup>20</sup> line of cases. Simpson, 142 F.3d at 643. In order to satisfy the third factor (that an invidious discriminatory reason was more likely than not a motivating or determinative cause for the employer's action), the Third Circuit suggested, among other things, that a plaintiff may show that the employer has discriminated against other persons within the plaintiff's protected class. 142 F.3d at 644-645.

In the case before this court, plaintiff has not asserted either an age discrimination claim or a Title VII claim which would be analyzed under McDonnell Douglas and its progeny. Further, plaintiff's assertions regarding discrimination allegedly experienced by others, unsupported by any admissions or findings, cannot salvage her Section 1983 for denial of equal protection of the law.

None of plaintiff's beliefs or assertions are supported by any of the documentary evidence provided. A plaintiff's own assertion of discriminatory animus does not give rise to an inference of unlawful discrimination. Williams-McCoy v. Starz Encore Group, No. Civ.A. 02-5125, 2004 U.S. Dist. LEXIS 2600 at \*26 (E.D. Pa. Feb. 5, 2004), citing, Sarullo v. U.S. Postal Service, 352 F.3d 789, (3d Cir. 2003) and Bullock v. Children's Hospital of Philadelphia, 71 F.Supp.2d 482 (E.D. Pa. 1999).

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<sup>20</sup> McDonnell Douglas Corporation v. Green, 411 U.S. 792, 802-804, 93 S.Ct. 1817, 1824-1825, 36 L.Ed.2d 668, 677-679 (1973).

A plaintiff cannot avert summary judgment with speculation or by resting on the allegations in her pleadings, but rather must present competent evidence from which a jury could reasonably find in her favor. Ridgewood, supra. Because plaintiff fails to submit any competent evidence that she suffered disparate treatment because of her race, her Section 1983 claim for denial of equal protection of the law fails.

Accordingly, we grant defendants' motion for summary judgment on plaintiff's claim for discrimination.

#### Retaliation

Plaintiff's Amended Complaint further alleges that defendants retaliated against her for filing discrimination charges with the PHRC and EEOC by demoting her in violation of her rights under the First Amendment of the United States Constitution, giving her a private cause of action pursuant to 42 U.S.C. § 1983. In assessing plaintiff's claim for retaliation we must apply a three-step, burden-shifting analysis. Baldassare v. New Jersey, 250 F.3d 188, 194 (3d Cir. 2001).

Initially, plaintiff must show that she engaged in conduct or speech which is protected by the First Amendment. Watters v. City of Philadelphia, 55 F.3d 886, 892 (3d Cir. 1995). Next, plaintiff must show that defendants responded with retaliation, and that the protected activity was a substantial or motivating factor in the alleged retaliatory action. Ballas v.

City of Reading, No. Civ.A. 00-2943, 2001 U.S. Dist. LEXIS 657, at \*21 (E.D. Pa. Jan. 25, 2001). Finally, defendants may defeat plaintiff's claim by demonstrating by a preponderance of the evidence that they would have taken the same action even in the absence of the protected conduct. Watters, 55 F.3d at 892.

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." Baldassare, 250 F.3d at 195 (citing, Green v. Philadelphia Housing Authority, 105 F.3d 882, 885-86 (3d Cir. 1997)), (quoting, Connick v. Myers, 461 U.S. 138, 146, 103 S.Ct. 1684, 1691, 75 L.Ed.2d 708, 721 (1983)). The content of the speech may involve a matter of public concern if it attempts "to bring to light actual or potential wrongdoing or breach of public trust" on the part of government officials. Connick, 461 U.S. at 146, 103 S.Ct. at 1691, 75 L.Ed.2d at 721.

Although a plaintiff ordinarily must show that her speech was a matter of public concern to qualify it as protected activity under the First Amendment, the Third Circuit has held that this requirement does not apply in cases where the speech itself constitutes the plaintiff's lawsuit. Anderson v. Davila, 125 F.3d 148, 162 (3d Cir. 1997). In Anderson, the Third Circuit found that "by lodging a complaint with the EEOC, itself a precursor to his employment discrimination suit, Anderson was

petitioning the government to 'fix' a problem with the Virgin Islands Police Department." 125 F.3d at 162.

In accordance with Anderson, plaintiff's filing of complaints with the PHRC and the EEOC in this case constitutes a protected activity. Defendants do not dispute that plaintiff filed charges of race and sex discrimination against the City with the PHRC and the EEOC in August 2000 or that she filed additional charges of race and age discrimination with the PHRC and the EEOC, alleging retaliation, in January 2001. Thus, plaintiff satisfies the first step in her retaliation claim.

Plaintiff must next show that defendants responded with retaliation, and that the protected activity was a substantial or motivating factor in the alleged retaliatory action. In support of this step, plaintiff maintains that, soon after she filed the charges with the EEOC and PHRC, defendants retaliated by demoting her back to the position of Fair Housing In-Take Specialist and later hiring Balmer, a white woman, as the City's Director of Community Development and plaintiff's supervisor.

Plaintiff also asserts that she has not received the recognition and respect she deserves for being a quality worker and person; has regularly been harassed and belittled by white supervisory personnel with whom or for whom she works; has been prevented from doing her job properly and from receiving the training required for her job; and has not been invited to the

planning and policy meetings defendant Eppihimer held regularly with most white department or division managers.

Despite her assertions, plaintiff has submitted no evidence that she was demoted from "Executive Director" back to Fair Housing In-Take Specialist after she filed charges with the PHRC and EEOC in August 2000. Further, there is no evidence that plaintiff ever held the title of "Executive Director." To the contrary, the record reflects that plaintiff was notified by correspondence dated December 1, 1998 of an expansion of her part-time position as Fair Housing In-Take Specialist to a full-time position as Fair Housing in-Take Specialist.<sup>21</sup> No mention is made of a promotion to an "Executive Director" position.

We note further that the Wage Pattern Record of the plaintiff does not reflect a change in title to "Executive Director."<sup>22</sup> On the contrary, the Wage Pattern Record submitted by defendants reflects that plaintiff was appointed as the part-time Fair Housing Coordinator in September 1998, was appointed as the full-time Fair Housing Coordinator in December 1998, and was promoted to Human Relation Commission Administrator in December 2001.

In addition, plaintiff acknowledges that she has never

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<sup>21</sup> "On behalf of the City of Reading, I am pleased to inform you that the position of Fair Housing In-Take Specialist has been changed from part-time to full-time effective Tuesday, December 1, 1998." See Summary Judgment Motion, Exhibit C.

<sup>22</sup> See Summary Judgment Motion, Exhibit D.

been discharged, suspended, or had her hours cut. The City has never docked her pay or reduced her wage rate. Plaintiff also admits that she never had support staff taken away from her. Rather, the only finding supported by the evidence is that plaintiff has continued to progress after filing her complaints.

As detailed in the preceding section, plaintiff also has presented no evidence, other than her own testimony, that any of the defendants demeaned the importance of her job, made her job more difficult, belittled her, or made offensive remarks to her. Further, plaintiff has not presented any evidence to support her assertions that the Human Relations Commission was inadequately staffed or improperly funded, that she did not receive the proper training to perform her job, and that she was excluded from meetings defendant Eppihimer held regularly with other department or division managers.

Moreover, plaintiff fails to establish that the allegedly retaliatory actions, taken as a whole, were sufficiently serious enough for purposes of the retaliation claim. In a First Amendment retaliation case, the alleged retaliatory action itself does not have to infringe on a federally protected right independent of the First Amendment. Kelleher v. City of Reading, No. Civ.A. 01-3386, 2002 U.S. Dist. LEXIS 9408, \*18 (E.D. Pa. May 29, 2002) (citing, Perry v. Sindermann, 408 U.S. 593, 596-98, 577 92 S.Ct. 2694,

2697, 33 L.Ed.2d 570 (1972)).

Not every action of harassment is actionable under Section 1983 in a retaliation case. To the contrary, the actions must be such that they would "deter a person of ordinary firmness" from exercising her First Amendment rights. Suppan v. Dadonna, 203 F.3d 228, 235 (3d Cir. 2000). In Suppan, the United States Court of Appeals for the Third Circuit held:

In the field of constitutional torts de minimis non curat lex. Section 1983 is a tort statute. A tort to be actionable requires injury. It would trivialize the First Amendment to hold that harassment for exercising the right of free speech was always actionable no matter how unlikely to deter a person of ordinary firmness from that exercise....

203 F.3d at 235 (quoting, Bart v. Telford, 677 F.2d 622, 625 (7th Cir. 1982)).

We find that the evidence in this case does not establish that plaintiff has suffered a campaign of harassment which reaches the threshold of actionability under Section 1983. In light of plaintiff's failure to adduce evidence that the perceived difficulties of which she complains actually occurred, it is unlikely that such actions would deter a person of ordinary firmness from the exercise of protected activity. See Kelleher v. City of Reading, No. Civ.A. 01-3386, 2002 U.S. Dist. LEXIS 9408, at \*18 (E.D. Pa. May 29, 2002).

Further, even if plaintiff had established with

competent evidence that the alleged retaliatory actions in fact occurred, she fails to establish a nexus between the alleged retaliatory actions and her filing of charges with the PHRC and the EEOC. Viewing the evidence in the light most favorable to plaintiff, we find that she fails to offer evidence that her protected activity was a substantial or motivating factor in the alleged retaliatory action.

It is plaintiff's burden to overcome a motion for summary judgment by submitting evidence on every element of the cause of action. Watson, supra. Plaintiff's evidentiary showing is insufficient to establish genuine issues of material fact. Because we find that plaintiff has failed to meet her burden to show that the protected activity was a substantial or motivating factor in the alleged retaliatory actions, we do not need to consider the third step in plaintiff's retaliation claim.

Accordingly, we grant defendants' motion for summary judgment on plaintiff's claim for retaliation.

#### Overtime Compensation

Plaintiff's Amended Complaint also asserts a federal cause of action against the City pursuant to the Fair Labor Standards Act of 1938. In short, plaintiff contends that the City has refused to compensate her for the many overtime hours she has worked since she became a full-time employee in 1999.

The FLSA provides, in pertinent part:

Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 207(a)(1). Certain employees are exempt from the FLSA's overtime pay requirement. Specifically, employees are not required to be compensated in excess of forty hours if they are "employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1).

The authority to define the term "administrative employee" has been granted by the FLSA to the Secretary of Labor, who has issued regulations which define and interpret 29 U.S.C. § 213(a)(1). These regulations have the binding force and effect of law. See Auer v. Robbins, 519 U.S. 452, 456, 117 S.Ct. 905, 909, 137 L.Ed.2d 79, 87 (1997), which holds that FLSA grants the Secretary broad authority to define and delimit the scope of FLSA exemptions; see generally Batterton v. Francis, 432 U.S. 416, 425 n.9, 97 S.Ct. 2399, 2405, 53 L.Ed.2d 448, 456 (1977), which holds that regulations issued by an administrative agency pursuant to a grant of statutory authority have the force and effect of law.

To show that an employee is an exempt "administrative employee," an employer must demonstrate that the employee is:

(1) Compensated on a salary or fee basis at a rate of not less than \$455 per week...;

(2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and

(3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

29 C.F.R. § 541.200(e)(2) (2004).

FLSA exemptions are narrowly construed and the employer has the burden to establish affirmatively that its employees are exempt from FLSA's overtime requirements. See Corning Glass Works v. Brennan, 417 U.S. 188, 196-197, 94 S.Ct. 2223, 2229, 41 L.Ed.2d 1, 11 (1974), which articulates the "general rule that the application of an exemption under the Fair Labor Standards Act is a matter of affirmative defense on which the employer has the burden of proof"; Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392, 80 S.Ct. 453, 456, 4 L.Ed.2d 393, 396 (1960), which states that FLSA exemptions "are to be narrowly construed against the employers seeking to assert them".

With respect to the first prong, an employee is considered to be paid on a "salary basis" within the meaning of the regulations "if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined

amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. § 541.602(a) (2004).

Plaintiff does not dispute that she is paid on a salary basis. Moreover, the record reflects that plaintiff has been paid on a salary basis since January 1, 1999. Specifically, the Wage Pattern Record indicates that plaintiff was paid a salary of \$26,244 per year (\$504.69 per week) beginning January 1, 1999. Plaintiff's wage rate has increased during her employment with the City and, according to her Declaration, she presently earns \$32,960 per year (\$633.85 per week). Thus, defendants have satisfied the first prong of the administrative-employee test.

In order to establish the second prong, defendants must demonstrate that plaintiff's primary duty is the performance of office or non-manual work directly related to the management or general business operations of the City. Plaintiff contends that because her administrative duties are limited to the City's Human Relations Commission office, her "primary duty" is not the performance of work directly related to the management or general business operations of the City. On the contrary, defendants argue that plaintiff's work affects the operations of the Human Relations Commission and the City to a substantial degree.

The regulations define "primary duty" as the

"principal, main, major or most important duty that the employee performs." 29 C.F.R. § 541.700(a) (2004). According to the regulations, "[d]etermination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole. 29 C.F.R. § 541.700(a) (2004). The regulations further provide that "employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement." 29 C.F.R. § 541.700(b) (2004).

To meet the requirement that the employment be directly related to the management or general business operations, "an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment."

29 C.F.R. § 541.201(a) (2004). The regulations provide that work directly related to management or general business operations includes

work in functional areas such as tax;  
finance; accounting; budgeting; auditing;  
insurance; quality control; purchasing;  
procurement; advertising; marketing;  
research; safety and health; personnel  
management; human resources; employee  
benefits; labor relations; public relations,  
government relations; computer network,  
internet and database administration; legal  
and regulatory compliance; and similar  
activities.

29 C.F.R. § 541.201(b) (2004).

The record demonstrates that plaintiff, as the City's Human Relations Commission Administrator, "is responsible for administration, management, and intake functions related to the implementation and enforcement of the City's Human Relations Ordinance."<sup>23</sup> Furthermore, plaintiff acknowledges that her duties consist primarily in implementing the City's Human Relations Ordinance, implementing programs for HUD, and providing intake services related to the City's ordinance and HUD program.

According to the job description for the City's Human Relations Commission Administrator, responsibilities include preparing an annual program budget for the Commission, preparing grant applications and reports, approving purchases and bill payment for the Commission, maintaining Commission case files, providing public education and information services, and providing intake services to individuals interested in filing a complaint of discrimination with the Commission.

In addition, plaintiff testified at her deposition that, in her position as Human Relations Administrator, she produces and hosts a local television show; develops informational materials to disseminate to the public, including a book about renting, fair housing and home ownership; supervises other Commission staff; screens all housing discrimination

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<sup>23</sup> See Summary Judgment Motion, Exhibit F.

complaints made to the Human Relations Commission; interviews complainants; determines whether a complaint should be filed; and initiates and files complaints. Plaintiff also relates with members of the Human Relations Commission and its Solicitor regarding Commission meetings and cases as well as other City staff regarding the administration of the Commission.

We find persuasive the comprehensive analysis and reasoning of United States District Judge Richard D. Rogers in Mayer v. Board of County Commissioners of Chase County, Kansas, 5 F.Supp.2d 914 (D. Kan. 1998). In Mayer Judge Rogers noted that the administrative exemption is "not limited to persons who participate in the formulation of management policies or in the operation of the business as a whole" but also covers employees "whose work is 'directly related' to management policies or to general business operations [and those whose] work affects policy or whose responsibility it is to execute or carry it out." 5 F.Supp.2d at 917.

In Mayer, the district court concluded that the fact that plaintiff gave policy recommendations and advice to county commissioners, proposed a budget, paid and sent out bills, determined a work schedule for herself and the volunteers, and worked with little supervision, demonstrated that "plaintiff managed and was responsible for the day-to-day operations of the Chase County EMS" and that "her work affected the business

operations of the EMS to a substantial degree." 5 F.Supp.2d at 918.

In this case, plaintiff acknowledges that she is responsible for implementing the human relations ordinance which the City has devised. She also oversees the operations of an office in a position that, according to plaintiff, was created at the insistence of HUD, which is a source of the City's funding.<sup>24</sup> In this capacity, plaintiff supervises and coordinates the schedules of part-time employees and works with little direct supervision.<sup>25</sup>

Plaintiff's responsibilities also include preparing an annual program budget, preparing grant applications and reports, and approving purchases and bill payment for the Commission. Plaintiff also produces and hosts a local television show, develops informational materials to disseminate to the public, and screens all housing discrimination complaints made to the Human Relations Commission.

Viewing the evidence in the light most favorable to plaintiff, we find that plaintiff's primary duty was the performance of work directly related to assisting with the

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<sup>24</sup> See Exhibit B, paragraphs 4-5 of Plaintiff's Memorandum in Opposition to Defendants City of Reading, Joseph Eppihimer, Jeffrey White, Nan Blamer, Jesús Peña, Tammie Kipp, and Eric Galosi's Motion for Summary Judgment, which memorandum was filed October 8, 2004.

<sup>25</sup> Plaintiff testified that she works independently. More specifically, plaintiff acknowledges that no one within the City tells her what to do on a daily or weekly basis. See Summary Judgment Motion, Exhibit A, page 113.

running or servicing of the City as a whole, as opposed to just the City's Human Relations Commission. Thus, we find that plaintiff's duties satisfy the second prong of the administrative-employee test.

In order to establish the third prong, defendants must show that plaintiff's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance. Defendants contend that plaintiff exercises discretion and independent judgment with respect to the intake functions of the City's Human Relations Commission, the development of outreach and educational programs on fair housing and anti-discrimination topics, and the overall functioning of the Human Relations Commission as set forth in the City's human relations ordinance.

The regulations provide that "the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. 29 C.F.R. § 541.202(a) (2004). Matters of significance refer "to the level of importance or consequence of the work performed." 29 C.F.R. § 541.202(a) (2004).

The regulations provide that there are certain factors which should be considered when determining whether an employee exercises discretion and independent judgment with respect to

matters of significance. These factors include:

whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

29 C.F.R. § 541.202(b) (2004).

The exercise of discretion and independent judgment implies that the employee has authority to make an independent choice, free from immediate direction or supervision.

29 C.F.R. § 541.202(c) (2004). The fact that an employee's decision may be subject to review and that her decisions could be revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment.

29 C.F.R. § 541.202(c) (2004).

In this case, plaintiff screens all housing discrimination complaints made to the Human Relations Commission, interviews complainants, determines whether a complaint should be filed, and initiates and files complaints. Plaintiff also conducts public outreach by producing and hosting a local television show and developing informational materials to disseminate to the public. Plaintiff also relates with members of the Human Relations Commission and its Solicitor regarding Commission meetings and cases as well as other City staff regarding the administration of the Commission.

Based on the foregoing, we find that plaintiff exercises discretion and independent judgment because she implements the policies and operating practices of the City's ordinance; performs work that affects the City's operations to a substantial degree, even though her assignments are related to the operation of a particular segment of the City, the Human Relations Commission; investigates matters of significance, namely housing discrimination; and represents the Commission in handling complaints.

Plaintiff's work involves comparing and evaluating possible course of conduct, including, but not limited to, whether to investigate and file a complaint with HUD or whether to address a particular topic with the public. Thus, we find that plaintiff satisfies the final prong of the administrative-

employee test.

Because plaintiff satisfies the administrative-employee exemption pursuant to 29 U.S.C. § 213(a)(1) and the regulations which define and interpret 29 U.S.C. § 213(a)(1), we conclude that plaintiff is not required to be compensated for work in excess of forty hours under the FLSA.

Accordingly, we grant defendants' motion for summary judgment on plaintiff's claim for retaliation.

#### Breach of Contract

In her Amended Complaint, plaintiff asserts a state-law cause of action for breach of contract against the City. Specifically, plaintiff contends that, pursuant to an employment contract she had with the City, the City was required to either pay her or give her compensatory time for all of her overtime work but failed to do so.

Under Pennsylvania law, the burden is on the plaintiff to prove by a preponderance of the evidence the existence of the contract to which the defendant is a party. Viso v. Werner, 471 Pa. 42, 46, 369 A.2d 1185, 1187 (1977). The test for enforceability of an agreement is whether both parties have manifested an intention to be bound by its terms and whether the terms are sufficiently definite to be specifically enforced. ATACS Corporation v. Trans World Communications, Inc., 155 F.3d 659, 665 (3d Cir. 1998).

Therefore, applying Pennsylvania law, we look to: (1) whether both parties manifested an intention to be bound by the agreement; (2) whether the terms of the agreement are sufficiently definite to be enforced; and (3) whether there was consideration. ATACS Corp., 155 F.3d at 666; Johnston the Florist, Inc. v. Tedco Construction Corporation, 441 Pa.Super. 281, 657 A.2d 511, 516 (1995).

Plaintiff has failed to present any evidence consistent with the type of contract alleged in her Amended Complaint, that is, a contract requiring the City to give plaintiff compensatory time for all overtime work performed by her or to pay her for such work at a rate of at least 150% of her regular hourly rate. Plaintiff has not pointed to, nor have we found in the record, any testimony or documents suggesting such an agreement.

Specifically, plaintiff has not produced any other writing between the parties indicating that she was entitled to overtime compensation. Plaintiff acknowledges in her deposition that she is not subject to a collective bargaining agreement between the City and the union.<sup>26</sup> Plaintiff also acknowledges in her deposition that she is not aware of any documentation, other than the offer letter, which delineates the terms and conditions

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<sup>26</sup> See Summary Judgment Motion, Exhibit A, page 302.

of her employment.<sup>27</sup>

Moreover, plaintiff acknowledges that she did not recall receiving any oral promises from anyone at the City concerning her employment. Plaintiff also admits that she did not have any conversations with anyone at the City as to whether she was entitled, under the law, to overtime compensation.<sup>28</sup>

Because plaintiff has failed to prove the existence of an employment contract with the City regarding an entitlement to overtime compensation, her breach of contract claim fails.

Accordingly, we grant defendants' motion for summary judgment on plaintiff's breach of contract claim.

#### Fraudulent Misrepresentation

In her Amended Complaint, plaintiff asserts a state-law cause of action for fraudulent misrepresentation and concealment. Specifically, plaintiff contends that certain defendants<sup>29</sup> misrepresented and concealed information about her entitlement to compensation for overtime work by advising her that she was exempt from FLSA requirements for compensation for overtime work.

To prove either fraud or fraudulent misrepresentation,

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<sup>27</sup> See Summary Judgment Motion, Exhibit A, page 302. The offer letter for her position with the City as Human Relation Commission Administrator contains no provision for additional compensation for overtime work, despite addressing her salary and her paid-time-off allowance. See Summary Judgment Motion, Exhibit E.

<sup>28</sup> See Summary Judgment Motion, Exhibit A, page 302.

<sup>29</sup> Plaintiff brings her cause of action for fraudulent misrepresentation and concealment against defendants City, White, Balmer and Pena.

plaintiff must provide clear and convincing evidence of

(1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance.

Manning v. Temple University, No. Civ.A. 03-4012, 2004 U.S. Dist. LEXIS 26129 at \*29-30 (E.D. Pa. December 30, 2004)(quoting, Gibbs v. Ernst, 538 Pa. 193, 207, 647 A.2d 882, 889 (1994)). The elements of fraudulent concealment are identical except that the wrongdoer intentionally conceals a material fact rather than making an affirmative misrepresentation. Gibbs, 538 Pa. at 208 n.12, 647 A.2d at 889.

Plaintiff has not presented any evidence that defendants White, Balmer, Pena, or any agent with authority to bind the City, made any representation to her regarding her FLSA exemption status. In fact, in her deposition she acknowledges that no one at the City ever told her that she was not covered under the FLSA. Further, she admits that she never had any conversations with anyone at the City as to whether she was entitled, under the law, to overtime pay.<sup>30</sup>

In addition, plaintiff fails to present any evidence that defendants White, Balmer, Pena, or any agent of the City,

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<sup>30</sup> See Summary Judgment Motion, Exhibit A, pages 302-303.

actively concealed information from her with respect to her FLSA exemption status or entitlement to overtime compensation. In fact, as noted above, we conclude that plaintiff satisfies the administrative-employee exemption pursuant to 29 U.S.C. § 213(a)(1). Thus, plaintiff is not entitled to overtime compensation under the FLSA.

As stated above, plaintiff cannot avoid summary judgment with mere speculation or by resting on the allegations in her pleadings, but rather must present competent evidence from which a jury could reasonably find in her favor. Ridgewood, supra. Because plaintiff fails to submit any competent evidence that defendants either actively concealed information or made an intentional and material misrepresentation regarding her FLSA exemption status with knowledge of its falsity or with reckless disregard for its truth, her claim for fraudulent misrepresentation and concealment fails.

Accordingly, we grant defendants' motion for summary judgment on plaintiff's fraudulent misrepresentation and concealment claim.

### **Conclusion**

For all the foregoing reasons, we grant Defendants City of Reading, Joseph Eppihimer, Jeffrey White, Nan Blamer, Jesús Peña, Tammie Kipp, and Eric Galosi's Motion for Summary Judgment and dismiss plaintiff's Amended Complaint.

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

DIANA RIVERA O'BRYANT,	)	
	)	Civil Action
Plaintiff	)	No. 03-CV-06635
	)	
vs.	)	
	)	
CITY OF READING;	)	
JOSEPH EPPIHIMER;	)	
JEFFREY WHITE;	)	
NAN BALMER;	)	
JESUS PENA;	)	
ERIC GALOSI; and	)	
TAMMIE KIPP,	)	
	)	
Defendants	)	

O R D E R

NOW, this 11<sup>th</sup> day of August, 2005, upon consideration of Defendants City of Reading, Joseph Eppihimer, Jeffrey White, Nan Blamer, Jesús Peña, Tammie Kipp, and Eric Galosi's Motion for Summary Judgment filed September 20, 2004; upon consideration of Plaintiff's Memorandum in Opposition to Defendants City of

Reading, Joseph Eppihimer, Jeffrey White, Nan Blamer, Jesús Peña, Tammie Kipp, and Eric Galosi's Motion for Summary Judgment, which memorandum was filed October 8, 2004; upon consideration of the briefs of the parties; upon consideration of the pleadings, exhibits, depositions and record papers; and for the reasons expressed in the accompanying Opinion,

IT IS ORDERED that defendants' motion for summary judgment is granted.

IT IS FURTHER ORDERED that plaintiff's Amended Complaint is dismissed.

IT IS FURTHER ORDERED that the Clerk of Court shall mark this case closed for statistical purposes.

BY THE COURT:

/s/ James Knoll Gardner  
James Knoll Gardner  
United States District Judge