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

PETER HOCK,	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	
	:	
COUNTY OF BUCKS, et al.,	:	NO. 04-CV-4517
	:	
Defendants.	:	

Baylson, J. **December 16, 2005**

MEMORANDUM and ORDER

I. Introduction

Plaintiff, Peter Hock, is a former Corrections Officer ("CO") at the Bucks County Correctional Facility. On September 24, 2004, Plaintiff filed a complaint under 42 U.S.C. § 1983 against County of Bucks and Bucks County Department of Corrections ("Defendants"). The complaint alleges that Plaintiff was discharged in retaliation for exercising his First Amendment free speech rights. Presently before the Court is Defendants' Motion for Summary Judgment (Doc. No. 10).

II. Factual Allegations

There are no disputes of material fact. Plaintiff was hired as a CO in the spring of 2002. On August 6, 2002, Plaintiff responded to an emergency situation arising from a physical altercation between an inmate and two other COs. An investigation into the possible use of excessive force followed and internal disciplinary charges were brought against the two COs

involved in the altercation. Because he witnessed part of the altercation, Plaintiff was required as part of his duties to submit an incident report containing his observations. On August 8, 2002, Plaintiff submitted a written report and orally reported his observations of the incident in question. Plaintiff's observations were limited primarily to the aftermath of the altercation. Specifically, Plaintiff reported seeing other inmates (not involved in the altercation) contriving and rehearsing a version of the incident that alleged the COs used excessive force against the inmate.

In a mandatory 120-day evaluation dated August 7, 2002, Captain Jack Brown noted that Plaintiff was hard-working, steadily improving and seemed interested in the job. Captain Brown gave Plaintiff a rating of "acceptable." On September 10, 2002, Plaintiff was on duty and observed an inmate among the general prison population that Plaintiff believed was supposed to be in protective custody, and therefore segregated from the general prison population. Plaintiff confirmed that the inmate was not meant to be among the general prison population and immediately reported the situation to the prison counselor. The inmate was subsequently transferred to protective custody. However, in the interval between Plaintiff's report to the prison counselor and the inmate's transfer out of the general population, the inmate had an altercation with another inmate. Plaintiff acted to break up the altercation, and Plaintiff physically restrained the inmate who was meant to be in protective custody. On the same day, per department guidelines, Plaintiff filed an incident report regarding the inmate and the altercation.

On September 31, 2004, Captain Brown wrote the following in a mandatory 150-day evaluation of Plaintiff:

> Supervisors have reported that Officer Hock lacks IPC skills and has been overly aggressive with inmates. I counseled him about this on 9/9/02. On 9/10/02 Officer Hock was again involved in excessive use of force on an inmate. Therefore I am recommending termination at this time.

Captain Brown later advised Plaintiff that the weighted average of his evaluation scores by Plaintiff's supervisors resulted in an overall score of 59—an "unacceptable" score by a margin of one percentage point. Plaintiff was then terminated on September 31, 2002.[1]

III. Legal Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56©. An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. Id.

Furthermore, it is axiomatic that Plaintiff must identify evidence of record sufficient to establish every element essential to the claim. Williams v. Greyhound Lines, Inc., 1998 U.S. Dist. LEXIS 12986 (E.D. Pa. 1997). Where Plaintiff has not submitted evidence beyond conclusory allegations or his own beliefs to support his prima facie case, the Defendants are entitled to summary judgment. Davis v. Ashcroft, 2002 U.S. Dist. LEXIS 9309 (D.N.J. 2002).

[1] Because Plaintiff was still a probationary employee at the time of his termination, he had no recourse to file a grievance through the union.

IV. Discussion

A. Municipal Liability

Municipalities and other local government units are among those persons to whom § 1983 applies. Monell v. New York City Dep't of Soc. Servs., 436 U.S. 658, 690 (1978). When a suit against a municipality is based on § 1983, the municipality can only be liable when the alleged constitutional transgression implements or executes a policy, regulation or decision officially adopted by the governing official or body, or informally adopted by custom.[2] Merkle v. Upper Dublin Sch. Dist., 211 F.3d 782, 791 (3d Cir. 2000); Beck v. City of Pittsburgh, 89 F.3d 966, 971 (3d Cir. 1996). "Only those municipal officials who have final policymaking authority may by their actions subject the government to § 1983 liability." Jacobs v. City of Philadelphia, 2004 U.S. Dist. LEXIS 24908, at *7 (E.D. Pa. Dec. 10, 2004). Furthermore, a Plaintiff must demonstrate causation, as "a municipality can be liable under § 1983 only where its policies are the moving force behind the constitutional violation." City of Canton v. Harris, 489 U.S. 378, 388-89 (1989) (internal quotations omitted).

After careful review of the pleadings and record, the Court concludes that Plaintiff has failed to adduce specific facts sufficient to establish the existence of any official policy, practice or custom that caused the alleged deprivation of Plaintiff's constitutional rights. Moreover, the Court concludes that Plaintiff has also failed to identify any "policymaker" with the ability to implement or countenance such a policy or custom. Plaintiff's sole argument to the contrary – a

[2] A course of conduct is considered to be a custom when, though not authorized by law, "such practices of state officials [are] so permanent and well-settled" as to virtually constitute law. Andrews v. City of Philadelphia, 895 F.2d 1469, 1480 (3d Cir. 1990) (citations omitted). Plaintiff does not advance a "custom" argument here.

conclusory assertion that Captain Brown is a policymaker for the purposes of § 1983 – is unpersuasive for two reasons. First, Plaintiff provides no factual support for the suggestion that Captain Brown had final policymaking authority – i.e., Plaintiff fails to describe the chain of command; the number of supervisors above the rank of captain; the procedure used by the County in creating and adopting policies; the general authority of a Captain; or the specific decisionmaking authority of Captain Brown. The mere fact that Captain Brown, as part of his duties, evaluated and rated the performance of probationary employees such as Plaintiff is, by itself, insufficient to confer "policymaker" status. Second, Plaintiff has also failed to demonstrate any statutory support for his contention that a Captain in a county prison is a policymaking official. Cf. McGreevey v. Stroup, 413 F.3d 359 (3d Cir. 2005) (reversing a grant of summary judgment where Pennsylvania statutory law specifically supported the conclusion that a school superintendent was the final policymaking official for purposes of employment ratings).

Without relevant factual or statutory support, Plaintiff is unable to establish that Captain Brown had the necessary authority to subject the Defendants to § 1983 liability. The Court will not presume such authority exists in the absence of evidence. See, e.g., Jacobs, 2004 U.S. Dist. LEXIS 24908 at *10 (noting that "even though the Third Circuit has held the police commissioner to be a policymaker for the purposes of § 1983 liability, police captains and lieutenants have not been similarly categorized"); Martin v. City of Philadelphia, 2000 U.S. Dist. LEXIS 49, *9 (E.D. Pa. 2000) (holding that there was no evidence that mid-level police officers, including a corporal and a commanding officer, were "policymakers" with the final authority to establish municipal policy for the City of Philadelphia).

B. First Amendment Retaliation

Even if Plaintiff were able to establish that Captain Brown was a policymaker for the purposes of § 1983 liability, the Court would nevertheless conclude that Defendants are entitled to judgment as a matter of law on the First Amendment retaliation claim.

A public employee's claim of retaliation for a protected activity, here speech, is analyzed in three steps. First, the plaintiff must demonstrate that his speech was protected. Pickering v. Board of Education of Township High School District 205, 391 U.S. 563 (1968); see also Green v. Philadelphia Housing Authority, 105 F.3d 882 (3d Cir. 1997). Second, the plaintiff must show that the speech was a motivating factor for the alleged adverse retaliatory action. Id. Third, a defendant may defeat the plaintiff's claim by establishing that the adverse action would have been taken even in the absence of the protected speech. Id. Because the first step of the analysis – i.e., whether the relevant speech is protected – is determinative here, the Court limits its discussion to the issue of whether Plaintiff's two internal incident reports are protected speech.

Courts undertake a two-step analysis to determine whether speech is protected in the employment context. First, the speech in question must be on a matter of public concern. See Green, 105 F.3d at 885. 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." Green 105 F.3d at 885-86 (citations omitted). Speech by an employee that is on a matter of public concern is distinguished from speech upon matters of only personal interest. "[W]hen a public employee speaks 'upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum' for review." Zamboni v. Stamler, 847 F.2d 73, 77 (3d Cir. 1988) (quoting Connick v. Myers, 461 U.S. 138, 146-147

(1983)). Second, Plaintiff must demonstrate that his interest in the speech "outweighs the state's countervailing interest as an employer in promoting the efficiency of the public services it provides through its employees." Baldassare v. New Jersey, 250 F.3d 188, 195 (3d Cir. 2001) (citing Pickering, 391 U.S. at 568).

As a general rule, purely internal communications are usually not viewed by the courts as protected speech. However, the Court is mindful that this is not absolute rule, and that "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form and context of a given statement. . . ." Connick v. Myers, 461 U.S. 138, 147-48 (1983); see also Brennan v. Norton, 350 F.3d 399, 413 (3d Cir. 2003).

Although the Court acknowledges that the reports at issue here may not concern a purely "personal" subject, the Court finds that, at the very most, they contain personal grievances that do not rise to the level of raising a matter of public concern. Plaintiff did not express dissatisfaction with the policies of the County Department of Corrections, nor seek to unearth and inform the public about prison misconduct.[3] Rather, in the reports – submitted pursuant to department guidelines and Plaintiff's job requirements – Plaintiff merely reported observations of incidents that occurred during his normal course of duties. Because there is no evidence of any attempt by Plaintiff to bring a policy matter of concern before the light of the public,[4] the Court finds that the particular internal incidents reports at issue do not rise to the level of protected speech. See,

[3] In the two reports, Plaintiff also did not challenge government practices as being inefficient, wasteful or fraudulent, see Skepton v. County of Bucks, 628 F. Supp. 177, 180 (E.D. Pa. 1986), or make an allegation of public corruption, see Drexel v. Vaughn, 1998 U.S. Dist. LEXIS 4294, *20-21 (E.D. Pa. 1998).

[4] Plaintiff admits that he did not report anything verbally that was not in his reports, and that he did not provide a copy of the reports to anyone other than shift command.

e.g., Connick, 461 U.S. at 141 (finding parts of written questionnaires did not contain speech on a matter of public concern in part because the Plaintiff had expressed only personal dissatisfaction and did not seek to "inform the public" or "bring to light actual or potential wrongdoing or breach of the public trust"); Edmundson v. Borough of Kennett Square, 881 F. Supp. 188, 194 (E.D. Pa. 1995) (granting summary judgment because speech regarding the police chief's disciplinary procedures was not intended to "unearth official misconduct," and comments over "[i]nternal office procedures that do not evidence any official wrongdoing have consistently been held not to be on a matter of public concern"); Connor v. Clinton County Prison, 963 F. Supp. 442, 446-50 (M.D. Pa. 1997) (where Plaintiff's claim was based on a private log of workplace events, finding the speech at issue did not involve a matter of public concern in part because "[t]here [was] no indication that [Plaintiff] intended to make the issue one for public debate"). To find otherwise would inappropriately transform a vast array of purely internal reports into inappropriate fodder for constitutional litigation.

IV. Conclusion

Based on the foregoing discussion, the Court will grant the Defendants' Motion for Summary Judgment. An appropriate Order follows.

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Baylson, J. **December 16, 2005**

ORDER

AND NOW this 16th day of December, 2005, upon consideration of Defendants' Motion for Summary Judgment (Doc. No. 10), and the response thereto, it is ORDERED that the motion is GRANTED. Judgment is entered in favor of Defendants and against Plaintiff. The Clerk shall close this case.

BY THE COURT:

/s/ MICHAEL M. BAYLSON
Michael M. Baylson, U.S.D.J.