

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

VICTORIA ROADCLOUD, <u>et al.</u>	:	
	:	
v.	:	NO. 05-3787
	:	
PENNSYLVANIA BOARD OF PROBATION and PAROLE, <u>et al.</u>	:	
	:	

MEMORANDUM AND ORDER

Kauffman, J.

January 6, 2006

Plaintiffs Victoria Roadcloud (“Roadcloud”), Henry Williams (“Williams”), Carmen Clemente (“Clemente”), Martha Holman (“Holman”) and Dianne Drayton (“Drayton”) (collectively, “Plaintiffs”) bring this action for violations of 42 U.S.C. § 1983 (“§ 1983”) (Count One), 42 U.S.C. § 1981 (“§ 1981”) (Count Two), and Article I, § 26 of the Pennsylvania Constitution (Count Six)¹ against Defendants Pennsylvania Board of Probation and Parole (“the Board”), Gary Scicchitano (“Scicchitano”), Maria Marcinko (“Marcinko”), Willie Jones (“Jones”), Daniel Solla (“Solla”) and Mark Weinstein (“Weinstein”) (collectively “Defendants”).² Now before the Court are three Motions to Dismiss: (1) by the Board, (2) by Scicchitano, Marcinko, Jones and Weinstein, and (3) by Solla. For the reasons that follow the Motions will be granted.

I. BACKGROUND

¹ The Complaint omits Counts Three, Four, and Five.

² The Complaint is silent as to whether Plaintiffs are suing Scicchitano, Marcinko, Jones, Solla, Weinstein in their individual or official capacities. For the purpose of this opinion, the Court will assume Plaintiffs intended the former. In any event, claims against the individual defendants in their official capacities would be governed by the Court’s analysis of Plaintiffs’ claims against the Board.

Accepting for purposes of the Motions to Dismiss the truth of the allegations in the Complaint, the relevant facts are as follows. Plaintiffs are current and former employees of the Board and are all either African-American or Hispanic. Complaint ¶ 12. The Board is an agency of the Commonwealth of Pennsylvania. Defendants Scicchitano, Marcinko, Jones, Weinstein and Solla hold various managerial/supervisory positions with the Board. Id. ¶¶ 7-11. The gravamen of the Complaint is that beginning in 1998, Defendants engaged in a pattern of racial discrimination against Plaintiffs, including disparate treatment, retaliation, and the creation of “a sham investigative group entitled ‘Office of Professional Responsibility.’” See Id. ¶¶ 13-26.

II. LEGAL STANDARD

When deciding a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court may look only to the facts alleged in the complaint and its attachments. Jordan v. Fox, Rothschild, O’Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994). The Court must accept as true all well-pleaded allegations in the complaint and view them in the light most favorable to the plaintiff. Angelastro v. Prudential-Bache Sec., Inc., 764 F.2d 939, 944 (3d Cir. 1985). A Rule 12(b)(6) motion will be granted only when it is certain that no relief could be granted under any set of facts that could be proved by the plaintiff. Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988).

III. ANALYSIS

A. The § 1981 claims

Plaintiffs have brought claims under § 1981 against all Defendants. Section 1981, as amended, provides that:

All persons within the jurisdiction of the United States shall have the same right in

every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and no other.

42 U.S.C. § 1981. Defendants are not at this stage of the proceeding challenging whether the conduct Plaintiffs have alleged constitutes a violation of § 1981; rather, their contention is that there is no private right of action under § 1981. They base their argument mainly on Jett v. Dallas Independent School District, 491 U.S. 701 (1989).

The plaintiff in Jett, like Plaintiffs here, asserted a claim under § 1981. Recognizing that the language of § 1981 does not establish a cause of action, the plaintiff in Jett argued that the Supreme Court should “create or imply” one. The Court declined on the grounds that doing so would contravene Congress’ intention that “the explicit remedial provisions of § 1983 be controlling in the context of damages actions brought against state actors alleging violations of the rights declared in § 1981.”³ Jett, 491 U.S. at 731. Accordingly, the Court held “that the express ‘action at law’ provided by § 1983 ... provides the exclusive federal damages remedy for

³ 42 U.S.C. § 1983 provides in pertinent part:

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. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

the violation of the rights guaranteed by § 1981 when the claim is pressed against a state actor.”
Id. at 736.

Defendants read Jett to require the dismissal of Plaintiffs’ § 1981 claims. Plaintiffs offer two arguments to the contrary:

1. *The § 1981 Claim against the Board*

Plaintiffs seek to salvage their § 1981 claim against the Board with a narrow reading of Jett: that the Court’s holding was limited to defendants who could be reached by § 1983. Essentially, Plaintiff’s argument is that Jett is distinguishable from the facts in this case. The defendants in Jett, a school district and a school principle, were indisputably subject to suit under § 1983. See Monell v. New York City Dept. Of Social Services, 436 U.S. 658 (1978). In contrast, the Board, as a state agency, is not. Will v. Michigan Dep’t. of State Police, 491 U.S. 58 (1989).

That distinction matters, Plaintiffs argue, because the Jett Court’s holding was premised on the availability of a remedy under § 1983. The Court declined to imply a remedy under § 1981 out of deference to Congress’ intention that § 1983 serve as the remedy for violations of § 1981. That logic, Plaintiffs argue, applies only so long as the defendants in question are susceptible to suit under § 1983. Where, as in this case, the defendant is not subject to suit under § 1983, there should be no bar to implying a cause of action, since doing so would not undermine Congressional intent. Plaintiffs would thus read Jett as holding that there is no cause of action under § 1981 against defendants subject to a § 1983 suit. Where, however, the entity alleged to have violated rights protected under § 1981 is not susceptible to suit under § 1983, a cause of action under § 1981 should be implied.

This reading of Jett does not survive scrutiny. First, the language the Court employed suggests that its holding was meant to reach state governments, not merely individuals acting under color of state law. Jett, 491 U.S. at 733 (“[T]he express cause of action for damages created by § 1983 constitutes the exclusive federal remedy for violation of the rights guaranteed in § 1981 by state governmental units[.]”) (emphasis added).

Second, the principle behind the Jett decision is deference to Congressional intent: Congress created § 1983 as a remedy for violations of § 1981 and the Jett Court was guided by the need to avoid implying a cause of action that would replace or alter that remedy. Thus, in assessing Plaintiffs’ argument that Jett does not preclude the implication of a cause of action against state governments under § 1981, the central consideration is whether such a cause of action would be consistent with Congressional intent. Plaintiffs’ argument that a cause of action under § 1981 may be implied assumes that Congress was indifferent to the liability of state governments when it adopted § 1983.

That is an erroneous assumption. In addition to deciding who would be liable under § 1983, Congress also decided who would not. Thus, when it enacted § 1983, Congress made the deliberate choice to exclude state governments and their agencies from liability. Will, 491 U.S. at 66. To the extent that Congress understood § 1983 as a means of enforcing § 1981, implying a cause of action under § 1981, as Plaintiffs urge, would be tantamount to ignoring that Congressional choice. That is something this Court must not do. Jett, 491 U.S. at 732 (“[W]hatever the limits of the judicial power to imply or create remedies, it has long been the law that such power should not be exercised in the face of an express decision by Congress concerning the scope of remedies available under a particular statute.”). Neither the language nor

the reasoning in Jett supports Plaintiffs' narrow reading. Accordingly, the Court concludes that Plaintiffs lack a cause of action against the Board.⁴

2. The § 1981 Claims against the Individual Defendants

Plaintiffs concede that Jett does apply to the individual defendants because they are subject to suit under § 1983. They argue, however, that Jett has now been overruled by the 1991 amendments to the Civil Rights Act (the "1991 Amendments"), which, Plaintiffs contend, created a cause of action under § 1981.

Courts are divided as to the effect of the 1991 Amendments. At present, there is a conflict both among the circuits and courts in this district. The Third Circuit has not yet ruled on this issue.⁵ However, this Court has held that the 1991 Amendments did not overrule Jett, and that § 1983 remains the exclusive remedy for violations of § 1981 by a state actor. See Carlton v. City of Philadelphia, 2004 WL 633279, at *5 (E.D. Pa. Mar. 30, 2004) (Kauffman, J.).

Accordingly, Plaintiffs' § 1981 claims will be merged with their § 1983 claims.

B. The § 1983 Claims

⁴ The same analysis would apply to any § 1981 claims Plaintiffs are asserting against the individual defendants in their official capacities.

⁵ The Ninth Circuit has held that the 1991 Amendments create an implied right of action against state actors under § 1981. Federation of African American Contractors v. City of Oakland, 96 F.3d 1204, 1214 (9th Cir. 1996). The Fourth and Eleventh Circuits have held that § 1983 remains the exclusive remedy for violations of § 1981 by state actors. Dennis v. County of Fairfax, 55 F.3d 151, 156 (4th Cir. 1995); Johnson v. City of Fort Lauderdale, 903 F.Supp. 1520 (S.D. Fla. 1995), aff'd 114 F.3d 1089 (11th Cir. 1997). District courts within the Eastern District of Pennsylvania are divided on this issue. See Poli v. SEPTA, 1998 WL 405052, at *12 (E.D. Pa. July 7, 1998) (following the holding in Jett that § 1983 is the exclusive remedy for violations of § 1981); Watkins v. Penn. Bd. of Probation and Parole, 2002 U.S. Dist. LEXIS 23504 (E.D. Pa. Nov. 25, 2002) (adopting the Ninth Circuit's view that there is a private right of action under § 1981).

Plaintiffs concede that in light of Will, their § 1983 claim against the Board must be dismissed. See Will, 491 U.S. 58 (holding that § 1983 does not provide a cause of action against state governments and their agencies).

Plaintiffs also concede that only Plaintiffs Clemente and Drayton have § 1983 claims against Solla. See Brief in Opposition to Motion to Dismiss at 14. The § 1983 claims against Solla by Plaintiffs Roadcloud, Holman, and Williams will therefore also be dismissed.

Finally, Scicchitano, Marcinko, Jones and Weinstein argue that Williams' § 1983 claim against them is barred by the applicable statute of limitations. The statute of limitations period governing a § 1983 claim is determined by reference to the limitations period for a personal injury action in the forum state. Wilson v. Garcia, 471 U.S. 261, 276-80 (1985). Accordingly, in this case, the applicable statute of limitations period is two years. See 42 Pa. Cons. Stat. § 5524; Garving v. City of Philadelphia, 354 F.3d 215, 220 (3d Cir. 2003).

The two-year statute of limitations for Williams' claim, which alleges constructive discharge, began to run in 1998, when he left employment at the Board. See Genty v. Resolution Trust Corp., 937 F.2d 899, 919 (3d Cir. 1991) (holding that a § 1983 cause of action accrues on the date when a plaintiff knew or should have known his or her rights had been violated). However, Williams did not file the present action until May 2005, well after the two year period had expired. His § 1983 claims are therefore time-barred and will be dismissed.⁶

C. The Pennsylvania Equal Protection Claim

⁶ Williams argues that the statute of limitations should be tolled under 42 Pa. Cons. Stat. § 5103(b). However, that provision applies only to a state-law cause of action that a federal court has declined to hear under the doctrine of pendant jurisdiction, which is manifestly not the case here. See Commonwealth v. Lambert, 765 A.2d 306 (Pa. Super. Ct. 2000).

Defendants contend that sovereign immunity protects them from Plaintiffs' Equal Protection Claim under the Pennsylvania Constitution. 1 Pa. Cons. Stat. § 2310 and 42 Pa. Cons. Stat. § 8521 together grant immunity to "the Commonwealth, and its officials and employees acting within the scope of their duties[.]" That immunity has been found to apply equally to claims like Plaintiffs' based on violations of the Pennsylvania Constitution. See Faust v. Commonwealth of Pennsylvania, 592 A.2d 835, 839-40 (Pa. Commw. Ct. 1991); L.H. v. Evanko, 2001 WL 605214, at *4 (E.D. Pa. May 5, 2001) (holding that sovereign immunity statutes bar claims based on Pennsylvania constitutional violations absent waiver under Pennsylvania law); Robinson v. Ridge, 996 F. Supp. 447, 449 (E.D. Pa. 1997).⁷ Accordingly, the Court finds that Defendants are immune from Plaintiffs' equal protection claims.

IV. CONCLUSION

For the foregoing reasons, Count Two will be merged into Count One. Count One will be dismissed with prejudice as to the Board. The § 1983 claims by Roadcloud and Holman against Solla in Count One will be dismissed without prejudice and the § 1983 claims by Williams will be dismissed with prejudice. Finally, Count Six will be dismissed with prejudice as to all Defendants. An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT

⁷ Plaintiffs contend that the Pennsylvania sovereign immunity statute does not apply to their constitutional claim, in support of which they cite Jones v. City of Philadelphia, 68 Pa. D. & C. 4th 47 (2004). However, Jones deals with the sovereign immunity of Pennsylvania municipalities under 42 Pa. Cons. Stat. § 8541. At issue here is the Commonwealth's sovereign immunity, which is governed by a different provision, 42 Pa. Cons. Stat. § 8521. The analysis in Jones is therefore inapposite.

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

VICTORIA ROADCLOUD, <u>et al.</u>	:	
	:	
v.	:	NO. 05-3787
	:	
PENNSYLVANIA BOARD OF PROBATION	:	
and PAROLE, <u>et al.</u>	:	

ORDER

AND NOW, this 6th day of January, 2006, upon consideration of Defendants' Motions to Dismiss the Amended Complaint (docket nos. 4, 5, and 6), and for the reasons stated in the accompanying Memorandum, it is **ORDERED** that the Motions are **GRANTED**. It is **FURTHER ORDERED** that:

- (1) Count Two is **MERGED** into Count One;
- (2) Count One is **DISMISSED WITH PREJUDICE** as to the Pennsylvania Board of Probation and Parole;
- (3) The claims of Plaintiffs Victoria Roadcloud and Martha Holman under Count One against Defendant Daniel Solla are **DISMISSED WITHOUT PREJUDICE**;
- (4) The claims of Plaintiff Henry Williams under Count One are **DISMISSED WITH PREJUDICE**;
- (5) Count Six is **DISMISSED WITH PREJUDICE**.⁸

BY THE COURT:

/s/ Bruce W. Kauffman

⁸ The Complaint omits Counts Three, Four, and Five

BRUCE W. KAUFFMAN, J.