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

SHAREEF DOWD	:	CIVIL ACTION
	:	
v.	:	04-294
	:	
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY	:	

MEMORANDUM AND ORDER

JOYNER, J. **May 16, 2006**

Via the motions now pending before this Court, Defendant, Southeastern Pennsylvania Transportation Authority ("SEPTA" or "Defendant"), moves for judgment as a matter of law or, in the alternative, a new trial, and Plaintiff, Shareef Dowd ("Officer Dowd" or "Plaintiff") moves to recover attorney fees and costs and for injunctive relief. For the reasons set forth below, Defendant's motion shall be DENIED, and Plaintiff's motion shall be GRANTED in part and DENIED in part.

I. Background

Plaintiff, a SEPTA police officer, brought this suit to recover for alleged racial discrimination in violation of 42 U.S.C. § 2000e ("Title VII), 42 U.S.C. § 1981 ("Section 1981"), and the Pennsylvania Human Relations Act ("PHRA"), 43 P.S. §§ 951, et seq.. Plaintiff presented claims based on both disparate treatment and hostile work environment theories.

Plaintiff, along with seven other SEPTA officers, filed a race discrimination complaint against SEPTA with the Pennsylvania

Human Relations Commission ("PHRC") as Officers United for Justice ("OUJ"). This complaint was simultaneously filed with the Equal Employment Opportunity Commission ("EEOC"). On February 25, 2003, four SEPTA officers and OUJ filed a Complaint in this Court. Gardner v. SEPTA, Civ. A. No. 03-1031. An amended complaint was filed in that action on July 8, 2003, removing OUJ as a plaintiff and adding additional individual officers, including Officer Dowd. This Court ordered each of the officers that wished to move forward against SEPTA to file individual civil actions. The Order of January 15, 2004 requiring these separate suits noted that the complaint in each action would be dated back to February 25, 2003, the date of the filing of the original complaint. Plaintiff submitted his individual complaint on January 26, 2004, initiating the action now before us. Each of the plaintiffs in the resulting actions is represented by the same attorney, Olubenga O. Abiona, Esquire. See Gardner; Blakeney v. SEPTA, Civ. A. No. 04-296; Johnson v. SEPTA, Civ. A. No. 04-297; Ross v. SEPTA, Civ. A. No. 04-293; Rushing v. SEPTA, Civ. A. No. 04-295; Walls v. SEPTA, Civ. A. No. 04-291.

Beginning on September 12, 2005, this Court presided over a three and one-half day jury trial for Plaintiff's discrimination claims. The evidence presented and legal determinations made during that trial are presented as necessary in the discussion

below. On September 15, 2005, the jury returned a verdict in favor of Plaintiff. The jury found that SEPTA had discriminated against Plaintiff on the basis of his race, and awarded Plaintiff $40,000.00 in monetary damages. Defendant now seeks judgment as a matter of law or, in the alternative, a new trial. Plaintiff seeks attorney's fees and costs, as well as injunctive relief.

II. Motion for Judgment as a Matter of Law

A. Legal Standard for Rule 50(b)

Defendant has moved for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(b). Judgment as a matter of law may be entered only when there is no legally sufficient basis for a reasonable jury to have found for the nonmoving party. See Fed. R. Civ. P. 50(a); see also Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 149-150 (2000). In considering a motion under Rule 50(b), a district court must view the record as a whole, drawing "all reasonable inferences in favor of the nonmoving party." Reeves, 530 U.S. at 150; McDaniels v. Flick, 59 F.3d 446, 453 (3d Cir. 1995). The court may not weigh the parties' evidence or determine the credibility of the witnesses. Reeves, 530 U.S. at 150; McDaniels, 59 F.3d at 453. The court must also disregard all evidence favorable to the nonmoving party that the jury is not required to believe. Reeves, 530 U.S. at 150. If the record contains even the "minimum quantum of evidence upon which a jury might reasonably afford relief," the

verdict must be sustained. Parkway Garage, Inc. v. City of Philadelphia, 5 F.3d 685, 691 (3d Cir 1993) (quoting Keith v. Truck Stops Corp. Of America, 909 F.2d 743, 745 (3d Cir. 1990)).

B. Discussion of Rule 50(b) Motion

1. Failure to Identify Right-to-Sue Letter

Defendant submits that Plaintiff's claims were procedurally defective and should never have been submitted to a jury because he did not identify a right-to-sue letter related to his claims. Defendant provides no legal authority, however, for the contention that discrimination claims must be dismissed where the plaintiff pleads, but does not affirmatively prove, receipt of a right-to-sue letter. The cases relied upon by Defendant are both non-binding and distinguishable from the instant case. In each of the cited cases, the defendant sought dismissal based on the fact that the plaintiff actually did not receive, and therefore could not even plead receipt of, a right-to-sue letter.

In Tori v. Shark Information Services, Civ. A. No. 1995 U.S. Dist. LEXIS 19018, *3-4 (E.D. Pa. Dec. 18, 1995), the plaintiff attempted to go forward with a Title VII claim before receiving a right-to-sue letter. The plaintiffs claimed that the EEOC should have, consistent with its own policies, issued such a letter before the suit was filed, but that some clerical error had occurred. Tori, 1995 U.S. Dist. LEXIS at *2. The plaintiffs assured the court that they would immediately request the

issuance of a right-to-sue letter. Id. The court found that such anticipated receipt of a right-to-sue letter insufficient to support a claim. Id. In distinguishing the Third Circuit's holding that failure to plead the issuance of a right-to-sue letter was not fatal where a letter was actually issued, they noted that the plaintiffs before them not only failed to plead the existence of a right-to-sue letter, but also admitted that no such letter was issued or received. Id. (distinguishing Gooding v. Warner-Lambert Co., 744 F.2d 354, 358 (3d Cir. 1984)). Such is not the case here. Plaintiff plead the receipt of an individual right-to-sue letter, and has maintained throughout that it was actually received. Defendant does not claim that the letter was never issued or received, but instead asserts that Plaintiff had a burden to prove receipt of the letter.

Similarly, in Styles v. Phila. Elec. Co., Civ. A. No. 93-4593, 1994 U.S. Dist. LEXIS 7486, *3-5 (E.D. Pa. June 6, 1994), the plaintiff acknowledged that she had never received a right-to-sue letter. Finding that plaintiff's counsel had made no effort to obtain a letter, the court refused to waive the prerequisite of issuance of a right-to-sue letter. See also Arizmendi v. Lawson, 914 F. Supp. 1157, 1160 (E.D. Pa. 1996) (recognizing receipt of right-to-sue letter even though letter was submitted by defendant, not plaintiff). This determination does not support Defendant's assertion that Plaintiff had the

burden of proving actual receipt for the case to continue. Thus, to the extent that SEPTA asks the Court to rule that, as a matter of law, Plaintiff's case should not have proceeded to the jury because Plaintiff did not present a copy of or other proof of receipt of a right-to-sue letter, the law presented does not mandate judgment in Defendant's favor.

Furthermore, Defendant did not present evidence at trial suggesting that Plaintiff did not actually receive a right-to-sue letter. Nor did Defendant request that the factual issue of whether such a letter was received be placed before the jury. (See Def.'s Proposed Jury Interrogatories, Def.'s Pre-trial Memorandum, Def.'s Proposed Jury Instructions.) In the absence of both evidence presented on this issue and submission of this question to the jury, we cannot conclude that there was no legally sufficient evidence for the jury to have found for Plaintiff. See Fed. R. Civ. P. 50(b).

2. Timeliness of Title VII and PHRA Claims

Defendant argues that judgment as a matter of law is appropriate because Plaintiff's claims under Title VII and the PHRA are time-barred because Plaintiff failed to file suit within ninety days of receipt of a right-to-sue letter. (Def.'s Br. at 9.) Upon receipt of a right-to-sue letter sent as a result of a Title VII complaint, a complainant has ninety days to file a law suit. 42 U.S.C. § 2000e-5(f)(1). This ninety day period acts as

a statute of limitations, and generally will not be extended unless it is equitably tolled. See, e.g., McCray v. Correy Manufacturing, Co., 61 F.3d 224, 229 (3d Cir. 1995).

Arguments that a claim is barred by a statute of limitations are treated as affirmative defenses. See Ebbert v. DaimlerChrysler Corp., 319 F.3d 103, 108 (3d Cir. 2003). The burden of proving that a claim is time-barred, including presenting proof of the start date of the statute of limitations, thus rests with the defendant asserting such defense. Id.

As discussed above, Defendant presented no evidence at trial or in support of earlier motions either showing that Plaintiff did not receive a right-to-sue letter, or establishing when any such letter was received. Although Plaintiff presented no evidence regarding his receipt of a right-to-sue letter, it was Defendant's burden, not Plaintiff's, to present evidence in support of an affirmative defense that Plaintiff's complaints were filed outside of the relevant statute of limitations. In the absence of any evidence from Defendant or submission to the jury of the question of when and whether Plaintiff received an individual right-to-sue letter, we cannot conclude that there was no legally sufficient evidence for the jury to have found in Plaintiff's favor.

To the extent that Defendant asks this Court to determine that, as a matter of law, Plaintiff's case should not have been

placed before a jury because Plaintiff did not timely file this suit, Defendant's argument must fail. Plaintiff asserted in his Complaint, and later in his deposition, that he received a right-to-sue letter based on his individual complaint on June 10, 2003. (See Compl. at ¶ 6; Pl.'s Mem. of Law in Opp. to Def.'s Mot. for Summary Judgment at 57.) Defendant's arguments focus on Plaintiff's failure to provide or prove the receipt of the right-to-sue letter. (See, e.g., Def.'s Mot. for Summary Judgment at 10-13.)

These arguments could be interpreted in two ways. Either (1) Defendant sought to create a question of fact for jury by challenging the receipt or existence of the letter, or (2) Defendant did not dispute that such a letter had been received, but instead argued only that Plaintiff's claim failed as a matter of law because he did not present such letter in support of the pleadings. If Defendant intended the former, it has now waived the right to have that issue of fact submitted to a jury because Defendant presented no evidence on this matter, did not include this question on its proposed special verdict slip, and made no objection to either the verdict slip or the instructions given to the jury by this Court. If Defendant intended the latter, the fact of receipt remains undisputed, and Plaintiff's claim is not time-barred because he filed his first complaint on July 8, 2003, well within the ninety day period. Thus, either way we interpret

Defendant's arguments, judgment as a matter of law is not appropriate.[1]

3. Timeliness of Administrative Complaints

Defendant argues that Plaintiff's claims, to the extent they seek redress for the written reprimand issued to Plaintiff in 1999, must be dismissed because no timely administrative complaint was filed based on that incident of alleged discrimination. Given that Plaintiff, during trial, decided not to pursue any claim based on the 1999 written reprimand as a separate incident of discrimination, this argument is moot in so far as it asks the Court to dismiss any separate claim based on that incident. (See Trial Tr. Day 3 at 32.)

Defendant further argues that the reprimand could not have been part of a continuing violation. Defendant asserts that the other, undated, incidents presented by Plaintiff were too disparate in nature to be considered part of a continuing violation. We find, however, that Plaintiff presented evidence "legally sufficient" for the jury to conclude that the written reprimand was part of a continuing violation of Plaintiff's rights. Defendant relies on Rush v. Scott Specialty Gases, Inc., 113 F.3d 476 (3d Cir. 1997) in concluding that the written

[1]As Defendant points out, Title VII and PHRA claims are treated consistently. Finding that Defendant's arguments of untimeliness under Title VII fail, we need not address the timeliness of the PHRA claims, particularly because PHRA right-to-sue letters allow an even longer time to file after receipt.

reprimand cannot be part of a continuing violation. (Def.'s Br. at 12.) In Rush, the Third Circuit found that the plaintiff's claims that her employer failed to promote and train her because of her gender could not be part of a continuing violation by virtue of plaintiff's additional claim based on a hostile work environment. Rush, 113 F.3d at 478. Defendant's application of this holding, and the factors considered in reaching it, however, is far too broad. Unlike the plaintiff in Rush, Plaintiff does not bring claims based on two different theories of discrimination. Plaintiff's case, including the 1999 written reprimand, is based on various instances of allegedly disparate discipline and monitoring. The difference between a written reprimand and a verbal reprimand or excessive monitoring in the hopes of an opportunity for a reprimand is hardly equivalent to the difference between failure to promote because of gender and inappropriate sexual behavior in the workplace. See, e.g., Davis v. Gen'l Accident Ins. Co. of Am., Civ. A. No. 98-4736, 2000 U.S. Dist. LEXIS 17356, *6-8 (E.D. Pa. Dec. 1, 2000) (finding that the differences between various instances of failure to promote or actions intending to discourage the plaintiff from seeking or obtaining promotion were not comparable to the disparity between the two claims in Rush). Based on the testimony of various ongoing disparate monitoring techniques, we cannot say that, as

matter of law, the written reprimand cannot be part of a continuing violation.

In addition to arguing that any claims based on the written reprimand should be dismissed, Defendant also argues that all evidence thereof should have been excluded. Defendant never actually moved to strike testimony as to the written reprimand, and did not object to this Court's instruction to the jury that prior instances of discrimination may be considered in determining whether Defendant should be liable for later incidents. (See Trial Tr. Day 3 at 34-36; Day 4 at 79.) Even if Defendant had properly objected, such objection would have been correctly overruled. A discriminatory act for which a claim is time-barred may, nonetheless, be relevant evidence to support timely-filed discrimination claims. See Stewart v. Rutgers, The State Univ. of N.J., 120 F.3d 426, 432 (3d Cir. 1997) (citing United Air Lines v. Evans, 431 U.S. 553, 558 (1977)). Not only does the above discussion belie Defendant's claim that the written reprimand is too remote in time and nature from the other alleged discriminatory acts, but this argument is even less convincing in light of the legal principals directing consideration of such acts.

4. Timeliness of § 1981 Claim

Defendant argues that Plaintiff failed to file his claim pursuant to 42 U.S.C. § 1981 within the two year statute of

limitations. Defendant seeks dismissal of Plaintiff's § 1981 claim to the extent that it seeks recovery for the 1999 written reprimand. For the reasons outlined in the above discussion of Defendant's substantially similar arguments with regard to the timeliness of the administrative filings, we find judgment as a matter of law inappropriate.[2]

5. Failure to Bring 1983 Claim with 1981 Claim

Defendant seeks judgment as a matter of law based on Plaintiff's failure to bring a claim pursuant to 42 U.S.C. § 1983 as the remedial vehicle for his § 1981 claim. Defendant admits that neither the Third Circuit nor the Supreme Court has ruled definitively on the issue of whether amendments to § 1981 effectively negated an earlier Supreme Court opinion that determined that § 1983 the "exclusive federal damages remedy" for violations of § 1981 by state actors. See Jett v. Dallas Independent School District, 491 U.S. 701 (1989); 42 U.S.C. § 1981(c) (as amended 1991). The apparent, though not explicit, trend in the Third Circuit and its district courts is to continue to require § 1981 claims against state actors to be accompanied by claims pursuant to § 1983. We need not, however, attempt to resolve this unsettled question of law. Even were we to find

[2]Like PHRA claims, § 1981 claims are treated consistently with Title VII claims. This consistent treatment includes the applicability of continuing violation theory, where appropriate. See Verdin v. Weeks Marine Inc., 124 Fed. Appx. 92, 96 (3d Cir. 2005).

that Plaintiff's § 1981 claim should not have proceeded, such a finding would not disturb the verdict. Plaintiff's Title VII and § 1981 claims were not presented separately. The jury was not provided with any instructions specific to § 1981. The damages awarded – $40,000.00 – are significantly below even the most restrictive statutory maximum applied to Title VII claims.[3] Absent the alleged procedural defects of Plaintiff's Title VII claims considered and rejected above, whether the § 1981 claim goes forward has no practical impact, yet requires us to venture into unsettled questions of law. Thus, judgment as a matter of law on the § 1981 claim is not appropriate.

III. Motion for a New Trial

A. Legal Standard for Rule 59

In contrast to judgment as a matter of law, ordering a new trial is squarely within the sound discretion of the district court. Bonjorno v. Kaiser Aluminum & Chemical Corp., 752 F.2d 802, 812 (3d Cir. 1984), cert. denied, 477 U.S. 908 (1986). Rule 59(a) states, in pertinent part:

> (a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in

[3]42 U.S.C. § 1981A provides for caps on the total damages available for Title VII suits based on the number of people employed by a defendant. The lowest cap – $50,000.00 – is for those employing "more than 14 and fewer than 101 employees," while the highest – $300,000.00 – is for those who employ more than five hundred workers.

> an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States . . .

Fed. R. Civ. P. 59(a). A court may grant a new trial if doing so is required to prevent injustice or to correct a verdict that was against the weight of the evidence. Ballarini v. Clark Equipment Co., 841 F. Supp. 662, 664 (E.D. Pa. 1993), aff'd, 96 F.3d 1431 (3d Cir. 1996). A court may also grant a new trial based on a prejudicial error of law. See M.B. v. Women's Christian Alliance, 2003 U.S. Dist. LEXIS 10105, (E.D. Pa. June 16, 2003) (citing Klein v. Hollings, 992 F.2d 1285, 1289-90 (3d Cir. 1993)).

A new trial, however, cannot be granted merely because the court would have weighed the evidence differently or reached a different verdict. Markovich v. Bell Helicopter Textron, Inc., 805 F. Supp. 1231, 1235 (E.D. Pa. 1992), aff'd, 977 F.2d 568 (3d Cir. 1992); See also Olefins Trading, Inc. v. Han Yang Chemical Corp., 9 F.3d 282, 290 (3d Cir. 1993). A court should grant a new trial "only when the record shows that the jury's verdict resulted in a miscarriage of justice or where the verdict, on the record, cries out to be overturned or shocks our conscience." Williamson v. CONRAIL, 926 F.2d 1344, 1353 (3d Cir. 1991) (citing EEOC v. Del. Dep't Health, 865 F.2d 1408, 1413 (3d Cir. 1988)).

Thus, absent a showing of substantial injustice or prejudicial error, a new trial is not warranted and it is the court's duty to respect a plausible jury verdict. Montgomery County v. Microvote Corp., 2001 U.S. Dist. LEXIS 8727, *26 (E.D. Pa. June 25, 2001) (citing Goodwin v. Seven-Up Bottling Co. of Philadelphia, Civ. A. No. 96-2301, 1998 U.S. Dist. LEXIS 11853 (E.D. Pa. July 31, 1998).

B. Discussion of Rule 59(e) Motion

1. Evidence of Time-Barred Claims

Defendant argues that a new trial is warranted because the jury was prejudiced by Plaintiff's presentation of evidence of discriminatory acts for which Plaintiff's claims were time-barred. We have already addressed and rejected this argument. See supra, II.B.3.

2. References to "Other Black Officers"

Defendant argues that Plaintiff's counsel repeatedly referenced discrimination claims brought by "other black officers." Defendant, in its Omnibus Motion in Limine, moved to preclude "testimony concerning complaints of discrimination/retaliation and discrimination/retaliation lawsuits filed against SEPTA by other SEPTA police officers." (Def.'s Mem. of Law in Supp. of its Omnibus Mot. in Limine at 5.) At the beginning of trial, this Court ruled that the testimony of other officers concerning Sergeant Reynolds' treatment of black

officers under his supervision was admissible only to the extent that it related to Officer Dowd – an even broader prohibition than that requested in Defendant's motion in limine. (See id., Trial Tr. Day 1 at 9.)

Defendant asserts that, despite this Court's ruling, Plaintiff continued to "elicit testimony and argue to the jury that Sergeant Reynolds discriminated against Plaintiff and other African American police officers." (Def.'s Br. at 23.) The jury was, according to Defendant, informed of the existence of "other cases out there" stemming from allegations of discrimination against SEPTA and Sergeant Reynolds. (Id.) Defendant claims that it was prejudiced by this evidence, which it argues was inadmissible as offered to show propensity, and by being forced to object to the extent that it appeared that Defendant was attempting to hide information from the jury.

Particularly in the civil context, courts presume that a jury can – and will – follow instructions. Johnson v. Elk Lake Sch. Dist., 283 F.3d 138, 148 (3d Cir. 2001) (quoting Opper v. United States, 348 U.S. 84, 95 (1954)). There are, however, "exceptional situations in which a new trial should be granted due to an attorney's inappropriate remarks even when the trial judge issues curative instructions." Id. This extraordinary remedy may be appropriate where it is "reasonably probable that the verdict was influenced by prejudicial statements." Id. at

148 n.5 (quoting Greenleaf v. Garlock, Inc., 174 F.3d 352, 363-64 (3d Cir. 1999)).

In support of its argument that this case is an exceptional situation warranting a new trial, Defendant relies on a group of civil cases in which a party was potentially subject to criminal charges for the same actions, but was not prosecuted. See Johnson, 283 F.3d at 147-48 (defense counsel in sexual harassment case mentioned in opening that defendant was not arrested for sexual assault); see also Rabon v. Great Southwest Fire Ins. Co., 818 F.2d 306, 308-309 (4th Cir. 1987) (plaintiff's counsel presented evidence/argument that client seeking fire insurance coverage was not prosecuted for arson); Roberts v. State Farm Fire & Casualty Co., 809 F.2d 1247, 1248 (6th Cir. 1987) (same). These cases are distinguishable from the instant case. Evidence or argument as to non-arrest, non-prosecution, or acquittal is generally inadmissible in a civil case based on the (potential) criminal charges because the significant disparity between civil and criminal burdens of proof make such information misleading. Johnson, 283 F.3d at 147 (citing Am. Home Assurance Co. v. Sunshine Supermarket, Inc., 753 F.2d 321, 325 (3d Cir. 1985)). Thus, while the cited cases involved improper comments or testimony that threatened to undermine the important distinction between a civil and a criminal case, the comments here, at most, informed the jury that other officers complained of similar

problems. The relatively modest verdict does little to suggest that the jury was influenced by reference to "other black officers," or that the verdict included compensation for injuries allegedly suffered by those other officers. Thus, we do not find that references to Sergeant Reynolds's allegedly discriminatory treatment of other black officers created such an "exceptional situation" that the jurors were not reasonably able to follow the curative instructions.

3. McKay Jones's Testimony

Defendant argues that this Court's decision not to strike the testimony of McKay Jones was reversible error because the testimony presented went beyond what was permitted under this Court's ruling limiting such evidence. Defendant objected to the admission of Mr. Jones' testimony on the basis that it was a "backdoor" way of presenting the complaints made by other officers. (Trial Tr. Day 1 at 6.) This Court prohibited Plaintiff from presenting the investigative report complied by Mr. Jones and its contents based on the determination that such testimony would constitute double hearsay that Plaintiff was unable to adequately cure. (Id.) At sidebar later in the trial, this Court ruled that Mr. Jones could testify for the limited purpose of rebutting testimony by Chief Evans that he had never been told that Sergeant Reynolds was using racial slurs. (Trial Tr. Day 3 at 19.)

Defendant argues that Mr. Jones's testimony did not satisfy Plaintiff's offer of proof because Mr. Jones testified that he met with Chief Evans in 2003 or 2004, while "Plaintiff filed suit in 2001."[4] Defendant incorrectly assumes that rebuttal of Chief Evans's claimed ignorance is relevant only to the extent that it might establish that the Chief knew of problems with Sergeant Reynolds before Plaintiff filed an administrative complaint. This is not the case, nor was Plaintiff's proffer so limited. (See Trial Tr. Day 3 at 5-6.) As this Court indicated when Defendant moved to strike Mr. Jones's testimony at trial, evidence rebutting Chief Evans's statements was for the jury to weigh. (See id. at 44-45.) Defendant presents no legal authority or logical reason that such evidence is not relevant and admissible as to Chief Evans's credibility. Thus, this Court properly denied Defendant's motion to strike on the basis that Plaintiff failed to address Chief Evans's testimony as per the offer of proof.

Defendant also complains that Mr. Jones presented previously precluded testimony regarding his investigation. Mr. Jones did describe that, at Chief Evans's request, he interviewed officers, summarized the results, and held a meeting with the Chief and others to discuss the results and address the issues they raised.

[4]Defendant apparently refers not to the filing of the instant suit in 2003, but to the initial filing of an administrative complaint.

(Trial Tr. Day 3 at 22.) Defendant did not object to this testimony when volunteered by Mr. Jones. (See id.) The extent to which Mr. Jones described any results was quite limited – he mentioned that the meeting discussed issues of discrimination, and that white officers had indicated there was a problem with Sergeant Reynolds. (See id. at 23.) The Court sustained Defendant's objection to further testimony on what officers told Mr. Jones and instructed Mr. Jones not to relate any further comments. (Id.) The Court then asked Mr. Jones from the bench whether, based on what he was told by the last out officers, he informed Chief Evans that Sergeant Reynolds was involved in racial discrimination, to which he answered in the affirmative. (Id.) There were no further objections, and no further testimony on direct examination about what the last out officers told Mr. Jones.

As above, Defendant's complaint here is that Plaintiff's counsel wrongfully "let the jury know that there were cases involving other African American police officers' claims of race discrimination against Sergeant Reynolds and SEPTA." (Def.'s Br. at 26.) Also as above, we find that the limited evidence of other complaints presented to the jury through Mr. Jones's testimony did not create prejudicial, reversible error warranting a new trial. The record, however, belies Defendant's claim that Mr. Jones was able to present the contents of his interviews and

reports at length. Defendant also failed to contemporaneously object to what it now claims was a glaring error. The verdict does not indicate that any compensation was awarded for any claims of discrimination other than Plaintiff's own. Furthermore, the fact that other complaints were made was allowed to be presented to the jury in the form of evidence that OUJ existed and sued SEPTA for race discrimination. Defendant does not challenge that ruling, nor does Defendant persuade us that the limited testimony of Mr. Jones created some prejudice for which a new trial is warranted.

IV. Motion for Attorney's Fees and Costs and Affirmative Action

A. Attorney's Fees and Costs

1. Legal Standard for Attorney's Fees and Costs

Reasonable attorney's fees may, at the discretion of the Court, be awarded to a party that successfully litigates claims pursuant to § 1981 or Title VII. See 42 U.S.C. §§ 1988(b) and 2000e-5(k). To determine the appropriate fee award for a prevailing party, the Court must determine the reasonable hourly rate for Plaintiff's counsel, as well as the number of hours reasonably expended in litigating the case. See Interfaith Community Organization v. Heller-Jersey City, L.L.C., 426 F.3d 694, 703 n.5 (3d Cir. 2005) (internal citations omitted). The product of these two figures is the "lodestar." Id.

The burden of showing the reasonableness of requested fees

rests squarely on the party seeking the fee award. Interfaith, 426 F.3d at 703 n.5 (citing Rode v. Dellarciprete, 892 F.3d 1177, 1183 (3d Cir. 1990). The requesting party must establish the billing rate charged within the community by counsel of similar skill and experience for comparable work. Evans v. Port Auth. of NY and NJ, 273 F.3d 346, 360-61 (3d Cir. 2001) (internal citations omitted). The requestor must also submit evidence supporting the hours worked. Interfaith, 426 F.3d at 703 n.5 (citing Hensley v. Eckerhart, 461 U.S. 424 (1983)). Defendants may challenge the requested fees by objecting "with sufficient specificity" to the request. Id.

B. Discussion of Reasonable Fees and Costs

Plaintiff seeks a fee award of $234,492.80. (Pl.'s Mot. for Attorney's Fees and Costs and Affirmative Action ("Pl.'s Fee Mot.") at ¶ 11.) This figure includes $216,492.50 in fees for the legal services of Mr. Abiona, $8,010.00 in fees for the paralegal services of Anna Maxwell, and $9,990.30 in litigation expenses. (See Pl.'s Fee Motion Ex. 1.)

1. Reasonable Rates

Plaintiff asserts that Mr. Abiona's hourly rate of $350.00 per hour is reasonable within the community for an attorney of like experience performing comparable work. Plaintiff presents the certifications of George Styliades, Esquire, and Willan Joseph, Esquire in support of the reasonableness of the requested

rate. (See Pl.'s Fee Mot. Exs. C and D.) Mr. Abiona further certifies that $350.00 has been his hourly rate since January 1, 2003, and that Judge Schiller approved an hourly rate of $250.00 for Mr. Abiona in 2001. (See Pl.'s Fee Mot. Ex. 1.)

Defendant argues that the requested rate is unreasonable in light of Mr. Abiona's performance at trial.[5] (Def.'s Opp. to Pl.'s Mot. for Attorney's Fees and Costs and for Affirmative Action ("Def.'s Opp.") at 8.) Much of Defendant's argument relies on a conclusion that, contrary to our decision above, Mr. Abiona's mistakes warrant judgment for Defendant or a new trial. (See id. at 8-9.) Defendant also asserts that reduction of the rate is appropriate in light of the quality of the pleadings submitted by Mr. Abiona, which were plagued by poor grammar and other apparently careless errors. (See id. at 9.) Defendant submits that an hourly rate of $150.00 would be appropriate. (Id.)

While we disagree that Plaintiff's counsel's performance warrants such a drastic decrease, we are not convinced that the requested rate is reasonable within the community. First, Mr. Abiona's certification that his hourly rate has been $350.00

[5]Defendant does not object to the $75.00 hourly rate requested for the time expended by paralegal Anna Maxwell. We find this rate to be reasonable within the community for paralegals assisting counsel in employment litigation. See CLS Fee Schedule, infra. (listing range of $70.00 to $90.00 per hour for paralegals in Philadelphia).

since January 1, 2003 is of little probative value, particularly where Mr. Abiona apparently initially claimed a $500.00 hourly rate in the case before Judge Schiller on which he now relies. (See Pl.'s Fee Mot. Ex. A James v. Norton, Civ. A. No. 99-2548, Slip Op. at 15 n.5 (E.D. Pa. Nov. 30, 2001) (Schiller, J.) (noting that Plaintiff initially requested $500.00 per hour for Mr. Abiona's work, but then reduced the request to $250.00)).

Second, we fail to see how, if Mr. Abiona now claims that $250.00 was an appropriate hourly rate of compensation for his employment litigation work in 2001, $350.00 is a reasonable rate five years later. This is a forty percent increase.

Last, the claimed rate does not comport with the Community Legal Services, Inc. Attorney's Fees Charged to Opposing Parties Schedule of Hourly Rates ("CLS Fee Schedule"). See CLS Fee Schedule, Effective April 1, 2006, available at <http://www.clsphila.org/PDF%20folder/schedule_of_hourly_rates_2006.pdf>. Courts in this district routinely turn to this schedule to determine the reasonableness of fees. See, e.g., Maldonado v. Houstoun, 256 F.3d 181, 187 (3d Cir. 2001). According to the CLS Fee Schedule, attorneys in the Philadelphia community with sixteen to twenty years of experience are compensated at hourly rates from $275.00 to $315.00. See CLS Fee Schedule, supra. Mr. Abiona's seventeen years of experience place him in the the lower segment of this range.

Upon considering all relevant evidence, we find that the requested rate of $350.00 per hour is not reasonable. We therefore reduce the hourly rate to $285.00, and will apply this reasonable rate in our lodestar calculation.

2. Reasonable Time Expended

a. January 24, 2003 to July 6, 2003

Defendant objects to Plaintiff's claim for fees for time expended between January 24, 2003 through July 6, 2003. Defendant argues that time expended on Plaintiff's unsuccessful attempt to file suit as part of Officers United for Justice cannot be recovered. Defendant focuses on Plaintiff's failure to affirmatively show that he was merely substituting his name for that OUJ and that he could properly do so. The more important question here is whether time expended on the suit brought by OUJ can be considered time reasonably expended towards Plaintiff's eventual individual success.

Attorney's fees are only available on successful claims. The amended complaint filed on July 8, 2003 – the first to name Officer Dowd as an individual plaintiff – was submitted in lieu of a response to Defendant's motion to dismiss the original complaint for, among other things, OUJ's lack of standing to file suit on behalf of itself, its members, and other officers. The amended complaint removed OUJ as a plaintiff and added individual officers, including Officer Dowd. The initial complaint,

therefore, can hardly be said to have asserted a successful claim such that recovery for time expended in preparing and filing it is recoverable by Officer Dowd. Thus, for the most part, only time expended subsequent to Officer Dowd's inclusion as an individually named plaintiff can be reasonably payable to him as a prevailing party under the statute. Those items, however, that were, as a practical matter, necessary to initiate any case on behalf of Plaintiff, and were not later repeated when Plaintiff was named as an individual, will not be excluded. The claimed time expended for the period starting January 24, 2003 and ending July 6, 2003, will be reduced by the hours claimed for the drafting, typing and filing of the original complaint. This will subtract nine hours from Mr. Abiona's time, and six hours from Ms. Maxwell's time. In keeping with this determination, the $76.00 in costs expended on the original complaint shall be subtracted.

b. Overlap with other officers' cases

Defendant argues that Plaintiff cannot recover all the claimed fees for work performed and costs incurred prior to January 11, 2005 because such efforts were undertaken on behalf of all the plaintiffs named in the amended complaint. Defendant asserts that, as a result of this joint effort, Plaintiff is entitled to recover for only one-sixth of the work performed. Plaintiff responds that Mr. Abiona has "already adjusted the

total amount of the time spent on matters that were jointly performed for any of the other Plaintiffs, and has billed Plaintiff in this case for his own portion of those services." (Pl.'s Reply Br. to Def.'s Opp. to Pl.'s Fee Motion ("Pl.'s Reply") at 2.)

Plaintiff denounces Defendant's argument as failing to point to specific instances in which costs should have been distributed among multiple clients. (Id.) It is Plaintiff, however, who ultimately bears the burden of showing that the time expended was reasonable. Interfaith, 426 F.3d at 703 n.5 (citing Rode v. Dellarciprete, 892 F.3d 1177, 1183 (3d Cir. 1990). Plaintiff's reply offers no additional documentation to support his claim that the time entries have already been adjusted to distribute the cost among all of the officers who benefitted from the work performed. Mr. Abiona's certification does not claim that the hours expended or the hourly rate was split among all benefitted clients, that only one client was charged for each event, or that certain events have been omitted from his certified time entries. Nor do the entries submitted support that such adjustments have been made.

For example, while we agree with Plaintiff that fees for the depositions of the other officers may be properly sought to some extent, Plaintiff has not shown that the amount of time expended

was reasonable.[6] Despite the admitted overlap between the cases with regards to the depositions of other officers also suing SEPTA, none of the evidence submitted shows that anything less than the full amount of time spent preparing for and attending the deposition is sought. In the absence of such evidence presented by Plaintiff, we cannot find that the entirety of the time sought is reasonably expended on behalf of Plaintiff.[7]

Plaintiff complains that Defendant's suggestion of dividing the time sought among the clients sharing the benefit of the work is arbitrary and meritless. Plaintiff's counsel is not, by virtue of seeking statutory fees, relieved of ethical obligations, including the obligation to charge a reasonable fee and to forthrightly communicate with his clients concerning the basis of that fee. This obligation has been interpreted to preclude attorneys from charging multiple clients for the same time or work. See, e.g., ABA Comm. on Ethics and Professional

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[6]Defendant objected to allowing Plaintiff to recover fees for the depositions of Jamison Ross, Luke Gardner, Kenneth Rushing, Marcus Blakeney, and Steven Johnson, who were co-plaintiffs in the amended complaint.

[7]Likewise, time entries for review of documents from this court that pertained to all of the officers appear to be attributed in full to this case. We fail to see how any adjustment was made to such entries as the review of this Court's order of January 15, 2004, requiring that each officer file an individual complaint when Mr. Abiona certifies that such review took him three-tenths of an hour, or twenty minutes. (See Pl.'s Fee Motion Ex. 1.) We cannot fathom that it actually took longer to review the brief order, and that the longer time was then apportioned among all of the officers.

Responsibility, Formal Op. 93-379 (1993). Although there is not a clear violation of this obligation here, neither is there sufficient evidence presented by Plaintiff to support that the hours expended are reasonable in light of the significant overlap between Plaintiff's case and those of other SEPTA police officers represented by Mr. Abiona.

As a result, for the period before separate cases were filed by each officer, the hours expended on Plaintiff's behalf will be reduced to one seventh of what has been claimed.[8] This includes all entries from the service of the amended complaint on June 6, 2003 through the first work on the individual pleadings on January 12, 2004.[9] Thus, we will reduce Mr. Abiona's hours for this period from 55.25 to 7.89, and Ms. Maxwell's hours from 17.6 to 2.51. Similarly, the costs from this period will be reduced by six-sevenths, from $83.30 to $11.90.

Determining the appropriate fees for the period following the filing of Plaintiff's individual complaint is more complicated. As discussed above, the full amount of the fees associated with the depositions of Ross, Gardner, Rushing,

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[8]The amended complaint listed seven plaintiffs. Defendants apparently treat Luke Gardner's case separately, and count only those plaintiffs that were added individually by the amended complaint. We see no reason for this distinction.

[9]It appears from the time entries that work began on the individual suits before the order of this Court ordering the filing of new complaints was entered.

Blakeney, and Johnson, appear to be sought in this case despite the fact that these individuals were also being deposed as plaintiffs in their own suits. In light of Plaintiff's failure to articulate any agreement or methodology by which the fees or the time claimed were "adjusted" to account for the overlap between the cases being handled by Mr. Abiona, we will reduce the claimed hours expended for these by six-sevenths. This adjustment allows for recovery for a portion of the deposition, but also acknowledges that the same reasons that any portion of the deposition time is recoverable here would apply to each of the officers represented by Mr. Abiona. Thus, the hours claimed by Mr. Abiona for these depositions and the preparation therefor will be reduced from 65.5 to 9.36. Likewise, the costs of these depositions will be proportionately reduced from $50.00 to $7.14.

It is less clear which of the other time expenditures benefitted other officers. Mr. Abiona claims already reduced the time expended for review of documents that were applicable to multiple cases. Yet, the cost of copying the documents produced by the PHRC has been claimed in full. Because these documents were from a complaint filed jointly by those officers that were plaintiffs in the amended complaint, we will again allow only one seventh of this cost to be assessed in this case. We will, therefore, subtract $1,472.15 from the claimed costs.

As for other depositions and discovery activity, neither Plaintiff nor Defendant provides any specific information regarding which witnesses were also used in other cases, and whether the claims of other officers were actually covered in those depositions.

c. Inaccurate entries

Defendant argues that Plaintiff's counsel's certification contains entries that overstate the time actually spent attending the noted events. Plaintiff responds that these entries include travel, preparation, and consultation time. Plaintiff also suggests that Defense counsel's recollection of Ms. Maxwell's early exit from trial is mistaken. Because Defendant does not argue that consultation and preparation are not compensable, we will not reduce these entries.

3. Lodestar Calculation

Based on the adjustments made above, we will calculate the lodestar amount for the reasonably expended time at a reasonable rate, plus reasonable expenses.

Claimed Hours		Reduced By		Total Hours	Rate	Sub-Total
618.55 hrs.	-	112.50 hrs.	=	506.05 hrs.	$280.00	$141,694.00
106.80 hrs.	-	21.09 hrs.	=	85.71 hrs.	$75.00	$6,428.25
$13,927.85	-	$1,662.41	=			$12,265.44
TOTAL						**$160,387.69**[10]

Given that Defendant's objections have already been accounted for above, we will not further adjust the fees and costs available to Plaintiff in this case.

V. Conclusions

For the reasons set forth in Parts II and III above, Defendant's motions for judgment as a matter of law or, in the alternative, for a new trial, are denied. For the reasons set forth in Part IV above, Plaintiff's motion for attorney's fees and costs and injunctive relief is granted in part and denied in part. An appropriate order follows.

[10]This lodestar amount is $74,105.11 less than the requested $234,492.80 total.

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

SHAREEF DOWD	:	CIVIL ACTION
	:	
v.	:	04-294
	:	
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY	:	

ORDER

AND NOW, this 16th day of May, 2006, upon consideration of Defendant's Post-Trial Motion (Doc. No. 36), and all responses thereto (Doc. No. 37), and Plaintiff's Motion for Attorney's Fees and Costs and Affirmative Action (Doc. No. 31), and all responses thereto (Doc. Nos. 39, 40), it is hereby ORDERED that:

(1) Defendant's motion is DENIED;

(2) Plaintiff's motion is DENIED to the extent it seeks injunctive relief;

(3) Plaintiff's motion is GRANTED to the extent it seeks fees and costs; and

(4) Plaintiff's recovery of fees and costs from Defendant is limited to $160,387.69.

BY THE COURT:

s/J. Curtis Joyner
J. CURTIS JOYNER, J.