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

CARLO MCKINNIE and SONYA SAMS, Plaintiffs	:	CIVIL ACTION
v.	:	
TERESA CONLEY and CHEYNEY UNIVERSITY OF THE STATE SYSTEM OF HIGHER EDUCATION, Defendants	:	NO. 04-932

MEMORANDUM AND ORDER

Gene E.K. Pratter, J. June 12, 2006

Plaintiffs Carlo McKinnie and Sonya Sams are African-American police officers who have accused their employer, Cheyney University, a historically African-American university and its Director of Public Safety, Teresa Conley, of racially discriminatory, retaliatory and harassing activity. Defendants Teresa Conley and Cheyney University move for summary judgment in this 42 U.S.C. § 1983 and employment discrimination and harassment case. Although Defendants labored mightily to characterize this case as one where there are no genuine issues of material fact, they have not succeeded in that effort inasmuch as Plaintiffs have identified material factual issues that must be decided by a jury. Therefore, the Court denies the defense motion for summary judgment.

I. FACTUAL BACKGROUND[1]

Plaintiff Carlo McKinnie began working as a police officer for the Cheyney Department of Public Safety on January 3, 2001. Plaintiff Sonya Sams became a police officer for the

[1] While the parties have submitted detailed and conflicting factual accounts, the Court includes this recitation of the facts to provide the necessary context for Court's conclusion that genuine issues of material fact mandate the denial of the motion. Incidentally, roughly 57 pages of the parties' 115-plus pages of briefing focused on factual rather than legal issues.

Cheyney on December 28, 1998. Defendant Teresa Conley came to Cheyney in September of 2002 as the Interim Director of Public Safety. In November of 2002[2], Ms. Conley became the permanent Director of Public Safety and served in that capacity until her resignation. Dr. Clinton Pettus was the President of Cheyney, George Banks was the Cheyney Vice President of Finance and Administration, and Phaedra DeShields was the Cheyney Director of Human Resources at all times material to this litigation.

Of the 15 full-time officers under Ms. Conley's supervision, most were African-American. Ms. Conley, who is Caucasian, reported to Mr. Banks, an African-American. Mr. Banks reported to former President Pettus, who is also African-American. Dr. Pettus was the ultimate decision maker on questions of hiring and firing personnel. Mr. Banks consulted with President Pettus concerning such employment matters.

The primary factual disputes in this case are whether Ms. Conley disciplined white officers more leniently than she did Plaintiffs, whether Ms. Conley provided training opportunities and promotion to white officers over black officers in the Department, whether Ms. Conley generally favored white officers over black officers, and whether statements made by Ms. Conley were indicative of racial animus. Of particular significance to the pending motion, the events surrounding the dismissal of the Officers Sams and McKinnie involve factual disputes as described below.

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[2] While Ms. Conley states in her deposition that she began working at Cheyney in 2003, a memo from Ms. Conley dated November 2003 states that she had begun working nearly one year earlier as the director of Public Safety at Cheyney. (Conley Exhibit 40). During oral argument on the motion Plaintiffs' counsel also identified the relevant time period as an eleven month period from September 2002 to August 2003. See Transcript of January 5, 2006 Oral Argument at 29.

A. Ms. Conley's Observations of Plaintiffs' Conduct

Ms. Conley asserts that the Cheyney Department of Public Safety was not functioning properly and the general conditions and procedures at the Department were poor when she arrived in 2002. For example, she stated in her deposition that as a result of suspected sleeping on duty by Department of Public Safety personnel during the night shift, with Mr. Banks's approval, Ms. Conley made an unscheduled visit to the campus during the night of July 1, 2003. When Ms. Conley arrived at the station, she stated in her deposition that the front door was locked and she discovered Officer Sams, as well as two other officers, sleeping. Ms. Conley next attempted to radio Officer McKinnie. Ms. Conley asserts she had to call several times on the radio before she received any response. However, Officer McKinnie claims he was responding to a fire alarm at the time. After meeting Officer McKinnie on campus and telling him what she had observed or otherwise learned, Ms. Conley then returned to the station for the patrol logs, but, she alleges, no logs were available and, moreover, the required dispatch log for the shift had not been started.

In keeping with Cheyney employment discipline procedures, Plaintiffs' pre-disciplinary conferences (PDC's) took place on July 7, 2003. Ms. Conley asserts, and Plaintiffs do not dispute, that she suggested that the employment of the two officers should not be terminated, but that they should be given another opportunity. Officers Sams and McKinnie, as well as two other officers involved in the incident, received suspensions as a result of the PDC procedure.

A month later, on the evening August 3, through the early morning of August 4, 2003, Ms. Conley made a second unscheduled visit to the station during the night shift. She told Mr. Banks of her plan ahead of time. During her surveillance, Ms. Conley asserts that she made a

digital voice recording of her observations and took notes which she later converted into a typed document with side by side comparisons of her own observations to the entries made in Officer Sams's dispatch log and Officer McKinnie's patrol log.

Ms. Conley asserts that at 11:22 p.m. on the evening of this inspection, she set off the audible alarm at Biddle Hall on the Cheyney campus and subsequently stationed herself in a room at the Vaux-Logan building with the lights off, where she could observe the front of the station and listen to the police radio she had with her. From her vantage point, she also could see the Biddle building. From 1:20 a.m. to 3:00 a.m., Ms. Conley alleges she only heard a radio call at 1:32 a.m. when Officer McKinnie reported that he had checked the outer perimeter of the campus. At 3:00 a.m. she asserts that she left Vaux-Logan, propping the door open with a plastic knife. She then notes that she proceeded to drive around the campus and parked her car outside the gate near the stadium and walked to the Marcus-Foster lot where she found Officer McKinnie's unoccupied duty car parked on the sidewalk outside the Foster building. At 3:33 a.m. Ms. Conley asserts that she then entered the station and found Officer Sams nodding off, with her eyes closed and head bobbing. Ms. Conley then recounts that she watched Officer Sams for about two minutes before Officer Sams woke up and looked at Ms. Conley. At that point, according to Ms. Conley, Officer Sams called Officer McKinnie and asked for a landline. There was no response from Officer McKinnie until Officer Sams called again about ten minutes later and he responded with a "standby" which Ms. Conley thought sounded as though it was coming from inside a building. At 4:00 a.m., Ms. Conley left the campus. Sometime after that night shift ended, Ms. Conley collected Officer Sams's dispatch log and Officer McKinnie's patrol log, to compare with each other and with her own observations.

Ms. Conley noted several discrepancies between the logs. For instance, Officer McKinnie had recorded on his patrol log that from 11:40 p.m. to 12:19 a.m., he made dorm checks. However, Ms. Conley alleges that she saw him walk into the station with a bag at 12:08 a.m. and saw him leave the station at 12:50 a.m.. Officer McKinnie's log also did not mention finding the door propped open at the Vaux Logan building and the alarm ringing at Biddle Hall. Ms. Conley also asserts that Officer McKinnie wrote that from 3:36 to 4:00 a.m. he was at the track, Officer Sams, however, recorded that he was at the station. Ms. Conley notes that at that time, Officer McKinnie's car was parked outside the Marcus-Foster building. Ms. Conley also noted Officer McKinnie should have heard the alarm if he was on foot patrol in the area. Additionally, when Ms. Conley heard Officer Sams radio Officer McKinnie asking for a landline she notes that Officer McKinnie sounded as if he were in a building, not at the track. According to Officer Sams' dispatch log, however, Officer McKinnie was in the station with her.

Plaintiffs assert that Ms. Conley's view of the events that night is not entirely accurate. Officer McKinnie argues he was in radio contact with Officer Sams during the shift and also used a landline telephone and his cell phone to call in several building checks, becuase the radios were often unreliable. Officer McKinnie argues he logged all of his activities that evening as he always had. Officer McKinnie also points out that while Ms. Conley states that, at 11:22 p.m., she set off the alarm in Biddle Hall, and Officer McKinnie never responded to it, Ms. Conley does not recall what that alarm sounded like. In addition, Officer McKinnie points to a memorandum which he alleges indicates that the building alarms were not functioning at the time in question.[3] Officers McKinnie and Sams also assert that, while Ms. Conley claims that

[3] Ms. Conley responds by arguing that this memo only refers to the alarms inside the police station, rather than outside the building, and that a construction crew called Facilities the next

the following morning she prepared a report of her observations from the night before, and compared her observations to the logs of Officer McKinnie and Officer Sams to the effect of determining that there were "obvious discrepancies in both logs," Officers McKinnie and Sams had actually not completed their shifts or finished preparing their logs at the time Ms. Conley left campus that morning.

B. The PHRC Complaints and the August 20, 2003 PDC's

On July 25, 2003, Officer McKinnie and Officer Sams filed complaints against Ms. Conley with the Pennsylvania Human Relations Commission ("PHRC") for discriminating against them on the basis of race regarding discipline, training, and promotions. Those complaints were received by Ms. Conley on August 13, 2003. At that time, PDC's regarding the incidents of August 4, 2003 had not yet been scheduled, and Officer McKinnie and Officer Sams allege that they had not been informed that they had committed any infraction that evening or that they would in any way be disciplined regarding the events of that August 4 shift. On August 13, 2003, (the date on which Ms. Conley allegedly received the PHRC complaints) Officer McKinnie alleges that Ms. Conley's attitude toward him changed. Officer McKinnie claims that only a few days earlier, Ms. Conley had told him that she was pleased with his performance. But on August 13, 2003, Officer McKinnie asserts that Ms. Conley seemed angry with him. That day Ms. Conley informed Officer McKinnie that she no longer felt he was competent and that she was relieving him of his supervisory duties; he would no longer be Officer-In-Charge of the third shift.

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morning to reset the alarm. However, this same memorandum dated August 5, 2003 also states: "The Alarm system has been serviced and is back on line." (Conley Exhibit 43.)

The following day, August 14, 2003, notices for another PDC went out to Officer McKinnie and Officer Sams regarding the incidents of August 4, 2003. This was ten days after the alleged incidents giving rise to the PDC occurred. The PDC notices for the July 7, 2003 sleeping incident had been issued on the following day immediately after the objectionable conduct. Mr. Banks admits he finds it unusual that it took ten days to issue a PDC notice. The record also indicates that Ms. Conley knew that Officer McKinnie and Officer Sams had filed PHRC complaints against her at the time that their notices of a PDC went out which, Ms. Conley concedes, "could have looked like retaliation."

Officer McKinnie's and Officer Sams's PDC's concerning the events from the August 4, 2003 shift were held on August 20, 2003. Ms. Conley, Officer McKinnie, and Officer Sams were the only witnesses at the PDC's. After the PDC's, and based on input from Ms. Conley, Mr. Banks determined that, on August 4, 2003, Officer McKinnie and Officer Sams had falsified their logs and had failed to follow Cheyney procedure in that they had failed to adequately keep in radio contact during the shift. As discipline, it was determined that the two officers' employment would be terminated, effective August 26, 2003. Officer Sams's position as the Cheyney Cheerleading coach was terminated as well.

C. Summary of the Amended Complaint

In Count I of the Amended Complaint, Plaintiffs assert a 42 U.S.C. § 1983 claim for First Amendment violations against defendant Ms. Conley based on retaliation, including actions taken "to penalize Plaintiffs for opposing and reporting Defendant's unfair employment practices."

In Counts II and III of the Amended Complaint, Officer Sams and Officer McKinnie, respectively, assert claims under 42 U.S.C. Section 2000(e) et seq. (Title VII), and the Pennsylvania Human Rights Act (PHRA), against Cheyney University and the State System of Higher Education, claiming that Cheyney discriminated against them on account of their race and subjected them to a hostile work environment.

II. Legal Analysis

A. 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(c). 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 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. Id.

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the moving party's initial burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325. After the moving party has met its initial burden, "the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue

for trial." FED. R. CIV. P. 56(e). Summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. Under Rule 56, the Court must view the evidence presented in the motion in the light most favorable to the opposing party. Anderson, 477 U.S. at 255.

B. Retaliation for Protected Activities

Concerning the standard for establishing a *prima facie* case under Section 1983 for retaliation resulting from the exercise of one's First Amendment rights, both parties cited Sloan v. City of Pittsburgh, 110 Fed. Appx. 207, 211 (3d Cir. Aug. 31, 2004) (citing Weston v. Pennsylvania, 251 F.3d 420, 430 (3d Cir. 2001)) which states that a plaintiff must show that: (1) he engaged in a protected employee activity; (2) his employer took an adverse employment action after or contemporaneous with the employee's protected activity; and (3) a causal link exists between the employee's protected activity and the employer's adverse action. While the parties framed their respective arguments around this standard as enunciated in Sloan, the Third Circuit Court of Appeals has also explained that to prevail on a First Amendment Section 1983 retaliation claim, a plaintiff must establish that (1) he engaged in protected speech, (2) his interest in the protected speech outweighs the employer's countervailing interest in promoting the efficiency of the public services it provides through its employees, and (3) the protected activity was a substantial or motivating factor in the alleged retaliatory action. The defendant can, however, rebut the claim by showing that she would have acted no differently in the absence of the protected conduct. Baldassare v. New Jersey, 250 F.3d 188, 194-95 (3d Cir. 2001). The question of whether the speech is a protected activity is a question of law for the court, while

determining whether the activity was a substantial or motivating factor in the retaliation or whether the same result would have occurred regardless of the protected activity is a question of fact for the jury. Id. at 195. The Court will analyze the parties' arguments as they have presented them under the Sloan standard as well as under the standard articulated in Baldassare.

Ms. Conley does not dispute that the filing of the PHRC complaints, which were dual filed with the EEOC, and the initiation of disciplinary action and ultimate employment termination of the Plaintiffs amount to protected activity and adverse employment action.[4] However, Ms. Conley does dispute the existence of the causal link between the protected activity and the employer's adverse employment actions. She also argues that she would have acted no

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[4] While not specifically part of the dispute here, the Court notes that it concurs with the district court's interpretation in O'Bryant v. City of Reading, No. 03-6635, 2005 U.S. Dist. LEXIS 17013, at *30, 31 (E.D. Pa. Aug. 11, 2005), of the applicable Third Circuit Court of Appeals precedent.

> 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.
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> In accordance with Anderson, plaintiff's filing of complaints with the PHRC and the EEOC in this case constitutes a protected activity.

O'Bryant v. City of Reading, No. 03-6635, 2005 U.S. Dist. LEXIS 17013, at *30, 31 (E.D. Pa. Aug. 11, 2005). See also Roberts v. Pa. Dep't of Pub. Welfare, 199 F. Supp. 2d 249, 252 (E.D. Pa. 2002) ("The First Amendment right to petition protects the filing of EEOC and other administrative charges and applies even though the issue does not refer to a matter of public concern . . . .").

Furthermore, the Third Circuit Court of Appeals observed in Anderson that the retaliation most often recognized as unlawful involves dismissal (as alleged here), but the court also found that unlawful retaliation for activities protected by the First Amendment is not limited to the context of employee dismissal. Anderson v. Davila, 125 F.3d 148, 163 (3d Cir. 1997).

differently in the absence of any arguably protected conduct by Plaintiffs. The Court interprets this argument to include an assertion that the Plaintiffs' protected activity was not a substantial or motivating factor in the alleged retaliatory action.

Ms. Conley argues that the disciplinary PDC process was set in motion immediately after the August 4 surveillance, when Ms. Conley informed Mr. Banks of the results of her surveillance, and they discussed convening another PDC. She responds to the suspicions voiced by Plaintiffs concerning the alleged delay between events at issue and the actual PDC by countering that there is always a time lag between an allegation of employee misconduct and the issuance of a PDC notice because University President Pettus wanted management to do preliminary work to ensure that a sufficient basis for a charge existed before invoking the PDC procedure.

Officers McKinnie and Sams respond by asserting that Third Circuit precedent concerning retaliation in the Title VII context has established that temporal proximity between the protected activity and the termination alone is sufficient to establish the necessary causal link. Woodson v. Scott Paper Co., 109 F.3d 913, 920 (3d Cir. 1997) (citing Jalil v. Avdel Corp., 873 F.2d 701, 708 (3d Cir. 1989)). Indeed "[t]iming alone raises the requisite inference when it is 'unusually suggestive of retaliatory motive'. . . ." Jensen v. Potter, 435 F.3d 444, 450 (3d Cir. 2006) (quoting Krouse v. American Sterilizer Co., 126 F.3d 494, 503-04 (3d Cir. 1997)). See also Ambrose v. Twp. of Robinson, 303 F.3d 488, 494 (3d Cir. 2002) (confirming that the court has found "suggestive timing" to be relevant "to establishing a causal link between protected conduct and retaliatory action" in First Amendment retaliation cases. (citing Rauser v. Horn, 241 F.3d 330, 334 (3d Cir. 2001), and recognizing that "other courts of appeals have more explicitly

recognized the relevance of temporal proximity in First Amendment retaliation cases.") (citing Nethersole v. Bulger, 287 F.3d 15, 18 (1st Cir. 2002); Gorman-Bakos v. Cornell Coop. Extension of Schenectady County, 252 F.3d 545, 554-55 (2d Cir. 2001); Cockrel v. Shelby County Sch. Dist., 270 F.3d 1036, 1056 (6th Cir. 2001), Hudson v. Norris, 227 F.3d 1047, 1051 (8th Cir. 2000); Allen v. Iranon, 283 F.3d 1070, 1077 (9th Cir. 2002). But see Wagner v. Wheeler, 13 F.3d 86, 91 (4th Cir. 1993); Butler v. City of Prairie Vill ., 172 F.3d 736, 746 (10th Cir. 1999)).

Here, Officer McKinnie and Officer Sams successfully have identified a genuine issue of material fact concerning whether there was causal connection between their protected activity and adverse employment action. They filed complaints against Ms. Conley with the PHRC claiming discrimination against them on the basis of race in July 2003. Those complaints were received by Ms. Conley on August 13, 2003. At the time Ms. Conley received the complaints from Officer McKinnie and Officer Sams, no PDC regarding the incidents of August 4, 2003 had been scheduled, and the officers assert that they had not been informed that they had committed any infraction on August 4 or that they would in any way be disciplined regarding the events during that shift.

Plaintiffs further allege that on August 13, 2003, Ms. Conley's attitude toward Officer McKinnie changed as described above. Officer McKinnie and Officer Sams argue that the following day, August 14, 2003, notices of the PDC were issued to them regarding the incidents of August 4, 2003. Concerning this ten day delay between the actual incident and the PDC

scheduling, Plaintiffs attempt to make much from the fact that Mr. Banks stated that he found that passage of time unusual.[5]

While a jury may very well agree that no retaliation occurred, this Court finds that when the record facts are viewed in a light most favorable to the non-movant, as it must be for the purposes of deciding a motion for summary judgment, a reasonable jury could find by a preponderance of the evidence Ms. Conley, after learning of the PHRC claims, engineered the process that would result in the Plaintiffs' terminations, and thus the protected activity was a substantial or motivating factor behind Ms. Conley's action, establishing the causal link between the protected acts and the retaliatory response. Additionally, whether the logs were indeed falsified, thereby justifying Ms. Conley's actions in spite of the Plaintiffs' protected activity,[6] is another factual issue that is appropriate for the jury to decide. Thus, genuine issues of material fact remain to be determined by a jury.

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[5] Officers McKinnie and Sams also argue that Ms. Conley herself has "practically admitted" that a question of fact exists regarding whether she has retaliated against Plaintiffs. They argue that at her deposition she initially admitted that she had received the Plaintiffs' PHRC complaints on August 13, 2003, prior to the PDC notices being sent, but, then on her second day of deposition, she denied this, stating that she had not received PHRC complaints at the time the PDC notices went out. Later in the deposition, when confronted by her first statement, Ms. Conley allegedly conceded that her original testimony regarding this subject was in fact accurate that she received the PHRC complaint before the PDC notice was issued and "it could have looked like retaliation." Furthermore, the Plaintiffs argue that Ms. Conley declined to inform Mr. Banks and Dr. Pettus that the plaintiffs had filed PHRC complaints.

[6] Ms. Conley asserts that because the Plaintiffs falsified their logs, she would have taken the same actions regardless of whether the Plaintiffs had engaged in protected conduct.

C. Qualified Immunity

Ms. Conley argues that she is entitled to qualified immunity from Plaintiffs' §1983 claim. In general, government officials performing discretionary functions are shielded from liability for civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 817-18 (1982). Courts apply a two-part test to determine whether qualified immunity applies in a particular case. First, a court must consider whether the facts, considered in a light most favorable to the allegedly injured party, show that the official's conduct violated a constitutional right. Saucier v. Katz, 533 U.S. 194, 201 (2001). Once it is shown that a constitutional right was violated, a court must then consider whether the right was clearly established, such that the official had reason to know that what he or she is doing violates that right. Id.; Anderson v. Creighton, 483 U.S. 635, 639-40 (1987). A "good faith" belief in the legality of conduct is not sufficient to support a finding of qualified immunity. Parkhurst v. Trapp, 77 F.3d 707, 712 (3d Cir. 1996). Rather, a court must determine whether "a reasonable person could have believed the defendant's actions to be lawful in light of clearly established law and the information he possessed." Id. To find that a right is clearly established, "there must be sufficient precedent at the time of the action, factually similar to the plaintiff's allegations, to put the defendant on notice that his or her conduct is constitutionally prohibited." McKee v. Hart, 436 F.3d 165, 171 (3d Cir. 2006) (quoting McLaughlin v. Watson, 271 F.3d 566, 572 (3d Cir. 2001)). This inquiry is necessary because public officials need to be given fair warning that their conduct is unlawful. Hope v. Pelzer, 536 U.S. 730, 739-40 (2002). Furthermore, in McLaughlin v. Watson, 271 F.3d 566, 571 (3d Cir. 2001), the court of appeals

has interpreted the phrase "clearly established" to mean "some but not precise factual correspondence" between relevant precedents and the conduct at issue, and that "although officials need not predict the future course of constitutional law, they are required to relate established law to analogous factual settings." (citations omitted). Of relevance here, as discussed above, the Third Circuit Court of Appeals has ruled that retaliation by way of dismissal for the filing of a discrimination claim violates the First Amendment. See note 4 supra.

"[Q]ualified immunity is an objective question to be decided by the court as a matter of law. The jury, however, determines disputed historical facts material to the qualified immunity question." Carswell v. Borough of Homestead, 381 F.3d 235, 242 (3d Cir. 2004) (citations omitted). In this case, the facts that would establish a violation of the plaintiffs' First Amendment rights are in dispute as discussed above. For example, jury determinations that the protected activity was not a substantial or motivating factor in the alleged retaliatory action or that there was in fact no causal link between the protected activity and adverse employment action would render an analysis with respect to qualified immunity irrelevant. However, because the Court is not prepared on this record to hold that qualified immunity would apply to Ms. Conley's actions when the facts are taken in a light most favorable to the Plaintiffs, the Court's determination of this issue must follow a jury's finding of the facts.

Ms. Conley, however, relies on McLaughlin, 271 F.3d at 573, in which the Third Circuit Court of Appeals stated:

> When a public official is sued for allegedly causing a third party to take some type of adverse action against plaintiff's speech, we have held that defendant's conduct must be of a particularly virulent nature. *It is not enough that defendant speaks critically of plaintiff or even urges or influences the third party to take adverse action. Rather, the defendant must 'threaten' or 'coerce' the third party to act.*

271 F.3d at 573 (emphasis added).

Ms. Conley argues that even according to the Plaintiffs, Ms. Conley's statements and conclusions were erroneous and unfair, but that such claims do not amount to allegations that Ms. Conley "coerced" or "threatened" any of the decision makers. Because it is not clearly established that submitting erroneous or negative information to a third party amounts to conduct that is actionable under the First Amendment, Ms. Conley argues that she therefore is entitled to qualified immunity as a matter of law.

While Ms. Conley frames the facts in such a way that may amount to a situation where the law is not "clearly established," Ms. Conley's argument amounts to the application of qualified immunity based on a particular characterization of the factual record which the Court at the summary judgment stage cannot adopt. When the Court views the facts in a light most favorable to the Plaintiffs, the adverse actions taken by Ms. Conley are not just the submission of erroneous or negative information to a third party, but, rather, arguably the directing and manipulating of the entire disciplinary process in retaliation for filing PHRC complaints. Plaintiffs maintain that Ms. Conley's role was "not only influential but crucial and ultimately responsible for Plaintiffs' termination." Therefore, while Ms. Conley did not actually terminate Plaintiffs' employment herself, her actions could be interpreted by a jury as far more than just "urging" or "influencing" the actual decision makers. Thus, qualified immunity is not available to the defense at this stage of the litigation.

D. Race Discrimination Claims

1. The Legal Standard

Title VII[7] provides in pertinent part that it is unlawful "for an employer . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race . . . or to limit segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race . . . ." 42 U.S.C. § 2000e-2(a)(1) and (2). At the summary judgment stage, the Court's task is "to determine whether, upon viewing all of the facts and reasonable inferences to be drawn therefrom in the light most favorable to the plaintiff, there exists sufficient evidence to create a genuine issue of material fact as to whether the employer intentionally discriminated against the plaintiff." Hankins v. Temple University, 829 F.2d 437, 440 (3d Cir. 1987) (citing Pollack v. American Telephone & Telegraph Long Lines, 794 F.2d 860, 864 (3d Cir. 1986); EEOC v. Hall's Motor Transit Co., 789 F.2d 1011, 1015 (3d Cir. 1986).

In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the Supreme Court set forth the now familiar test for establishing an inference of discrimination in the absence of direct evidence. Id. at 802-05. First, a plaintiff must establish a *prima facie* case of a discriminatory discharge. If the plaintiff satisfies this requirement, the defendant must articulate a legitimate, non-discriminatory reason for the discharge. To survive summary judgment when the defendant

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[7] The PHRA is construed consistently with interpretations of Title VII. Gomez v. Allegheny Health Servs., 71 F.3d 1079, 1084 (3d Cir. 1995) (citations omitted).

articulates a legitimate, non-discriminatory reason for the discharge, the plaintiffs must "point to some evidence, direct or circumstantial, from which a fact finder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action." Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994) (citing St. Mary's Honor Center v. Hicks, 509 U.S. 502, 510-111 (1993)). The court in Fuentes went on to explain that:

> In other words, because the factfinder may infer from the combination of the plaintiff's prima facie case and its own rejection of the employer's proffered non-discriminatory reasons that the employer unlawfully discriminated against the plaintiff and was merely trying to conceal its illegal act with the articulated reasons, a plaintiff who has made out a prima facie case may defeat a motion for summary judgment by either (i) discrediting the proffered reasons, either circumstantially or directly, or (ii) adducing evidence, whether circumstantial or direct, that discrimination was more likely than not a motivating or determinative cause of the adverse employment action.

Id. (citations omitted.)

2. Prima Facie Case of Race Discrimination

To establish a *prima facie* case of race discrimination, the plaintiff must prove by a preponderance of evidence that he or she was (1) a member of a protected class; (2) qualified for the position; (3) dismissed despite being qualified; (4) accorded less favorable treatment than those persons outside the protected class which gives rise to an inference of race discrimination. See Waldron v. SL Indus., 56 F.3d 491, 494 (3d Cir. 1995); Hankins v. Temple University, 829 F.2d at 440.

Ms. Conley and Cheyney argue that Officer McKinnie and Officer Sams have not established a *prima facie* case of race discrimination against Cheyney because they cannot meet the fourth prong of the test, i.e., that Cheyney accorded them less favorable treatment than

Caucasian officers in the Department because they are African-American. The arguments put forward by Ms. Conley and Cheyney focus on interpreting the facts surrounding the treatment of the officers in the Department, but the record allows for varied interpretations of the actions taken by Ms. Conley. Therefore, the issue is not appropriate for summary judgment.

Chief among the factual disputes are whether white officers were disciplined more leniently than Plaintiffs, whether Ms. Conley provided training opportunities and promotion to white officers over black officers in the Department, whether Ms. Conley generally favored white officers over black officers, and ultimately whether Plaintiffs were discharged for infractions for which similarly situated white officers were not.

While a jury may ultimately find the Defendants' explanation of the factual record more compelling than the Plaintiffs' version of events, when this evidence is viewed in a light most favorable to the Plaintiffs, a reasonable juror could find that Officer McKinnie and Officer Sams were accorded less favorable treatment than Caucasian officers under circumstances permitting an inference of race discrimination. Therefore, Plaintiffs have met their burden of establishing their *prima facie* case and the burden now shifts to the Defendants to establish a legitimate, non-discriminatory reason for the termination.

3. Legitimate, Non-Discriminatory Reasons for the Termination and Evidence of Pretext

Plaintiffs anticipated that the Defendants would argue with some success that their reasons for termination were valid and non-discriminatory. Therefore, Plaintiffs argued that Defendants' reasons for the terminations are pretextual. The Defendants did indeed argue that the events that occurred on July 1 and August 4, 2003 provided the legitimate, non-discriminatory reasons for the termination of the plaintiffs.

However, to rebut the legitimacy of the reasons given for a plaintiff's termination, in the context of religious discrimination the Third Circuit Court of Appeals has stated that "it is sufficient if those exhibiting discriminatory animus influenced or participated in the decision to terminate." Abramson v. William Paterson College, 260 F.3d 265, 286 (3d Cir. 2001) (citing Abrams v. Lightoilier Inc., 50 F.3d 1204, 1214 (3d Cir. 1995) (stating in ADEA case that if plaintiff's supervisor participated in decision to terminate him, even though president of company formally terminated him, evidence of supervisor's age-related animus could be relevant in determining if discriminatory motive at play); Russell v. McKinney Hosp. Venture, 235 F.3d 219, 226 (5th Cir. 2000) ("If the employee can demonstrate that others had influence or leverage over the official decision maker . . . it is proper to impute their discriminatory attitudes to the formal decision maker."); Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 55 (1st Cir. 2000) (stating that 'discriminatory comments ... made by ... those in a position to influence the decision maker' can be evidence of pretext); Griffin v. Washington Convention Ctr., 142 F.3d 1308, 1312 (D.C. Cir. 1998) ("[E]vidence of a subordinate's bias is relevant where the ultimate decision maker is not insulated from the subordinate's influence."); Roebuck v. Drexel University, 852 F.2d 715, 727 (3d Cir. 1988) ("[I]t is plainly permissible for a jury to conclude that an evaluation at any level, if based on discrimination, influenced the decisionmaking process and thus allowed discrimination to infect the ultimate decision.")).

Therefore, Plaintiffs highlight the following factual disputes that could lead a jury to reject Defendants' explanation for terminating the Plaintiffs. They argue that a jury could reasonably conclude that Ms. Conley manipulated the facts to support a finding by Mr. Banks and Dr. Pettus that the logs were falsified as opposed to merely innocently mistakenly filled out.

Plaintiffs note that Ms. Conley performed the alleged surveillance, notified her supervisors of her findings, requested a PDC, and presented the alleged facts against Plaintiffs at their hearing. Furthermore, Plaintiffs argue that Mr. Banks and Dr. Pettus have stated that they relied upon and believed Ms. Conley's assertions in finding that the Plaintiffs falsified their records. There is also a factual dispute as to whether Mr. Banks was present to observe any facts or testimony related to any facts or defense regarding Plaintiffs' termination.[8] Plaintiffs also argue that the initiation of the disciplinary process was also commenced only after Ms. Conley became aware of the PHRC complaints, further casting doubt on the Defendants' legitimate non-discriminatory reason for their actions. According to the Plaintiffs, the person who made racist comments[9], and treated whites more favorably than blacks was ultimately responsible for the Plaintiffs' termination of their employment.

Defendants respond by arguing Plaintiffs fail to establish that the legitimate reasons were only a pretext for a decision really based on Ms. Conley's alleged racial animus. But in making this argument, Defendants again attempt to refute Plaintiffs' version of the facts. Here, at the summary judgment stage, there are genuine issues of material fact concerning whether

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[8] Officer McKinnie and Officer Sams also argue that Ms. Conley's observations on the night of August 4, 2003 are suspect because the radios were known to be unreliable and the alarm system was faulty. Further, Officer McKinnie and Officer Sams note that at the time Ms. Conley performed her surveillance upon Plaintiffs, she claims she spent three hours staring out of a hot classroom at the police headquarters building while listening only to the dispatch radio. Plaintiffs argue that this in and of itself seems to be physically difficult, if not impossible, and the jury may find such testimony incredible.

[9] According to Plaintiffs, Ms. Conley stated that her dog did not like black people, and that while working as a swimming instructor, she observed that black children could not float. Ms. Conley on one occasion also instructed officers to wear their bulletproof vests, adding "this is Cheyney, for Christ's sake." Officer McKinnie did not object to wearing a vest, but felt that Ms. Conley was implying that Cheyney was dangerous because it was a historically black college.

Defendants' explanation was only a pretext for Ms. Conley's allegedly discriminatory actions and whether discrimination was a motivating or determinative factor behind Ms. Conley's actions. Indeed, after the full presentation of the evidence at trial, a factfinder might very well decide against the Plaintiffs, but Plaintiffs have raised a genuine issue of material fact as to the actual reason for their dismissal, and this suffices to allow them to present their race discrimination case at trial.

E. Hostile Work Environment

To establish a hostile work environment claim under Title VII, Plaintiffs must demonstrate that (1) they suffered intentional discrimination because of their race or sex; (2) the discrimination was severe or pervasive;[10] (3) it detrimentally affected them; (4) it would have detrimentally affected a reasonable person of the same protected class in their position; and (5) there is a basis for vicarious liability. Cardenas v. Massey, 269 F.3d 251, 260 (3d Cir. 2001); See Aman v. Cort Furniture Rental Corp., 85 F.3rd 1074, 1081 (3d Cir. 1996).

A racially hostile work environment occurs when unwelcome racial conduct unreasonably interferes with a person's performance or creates an intimidating, hostile, or offensive working environment. See Weston v. Pennsylvania, 251 F.3d 420, 425-26 (3d Cir.2001) (citing Meritor Sav. Bank FSB v. Vinson, 477 U.S. 57, 65-67 (1986)). To be actionable, the discrimination must be so severe or pervasive that it alters the conditions of the

[10] Cardenas v. Massey, 269 F.3d 251, 260 (3d Cir. 2001) uses the phrase 'pervasive and regular', but as the Third Circuit Court of Appeals has recently identified, "the Supreme Court's standard is 'severe or pervasive.'" Jensen v. Potter, 435 F.3d 444, 449 at n. 3 (3d Cir. 2006) (citing Pa. State Police v. Suders, 542 U.S. 129, 133 (2004).

victim's employment and thus creates an abusive environment. Weston, 251 F.3d at 425-26. "[S]imple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment." Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) (citations omitted). The Court must look at the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating or a mere offensive utterance; [and] whether it unreasonably interferes with an employee's work performance." Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993). Finally, Title VII prohibits discrimination against employees, but it does not impose a "general civility code" on the workplace. Faragher, 524 U.S. at 788 (citations omitted).

Furthermore, a court must evaluate the sum total of abuse over time. Durham Life Ins. Co. v. Evans, 166 F.3rd 139, 154 (3d Cir. 1999).

> Discrimination continues to pollute the social and economic mainstream of American life, and is often simply masked in more subtle forms. It has become easier to coat various forms of discrimination with the appearance of propriety, or to ascribe some other less odious intention to what is in reality discriminatory behavior. In other words, while discriminatory conduct persists, violators have learned not to leave the proverbial 'smoking gun' behind.

Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1082 (3d Cir. 1996).

Due to the increased sophistication of modern violators, a court is obligated to be "increasingly vigilant" against subtle forms of discrimination. Aman, at 1081-82. The Aman court reversed a district court's grant of summary judgment because in light of the suspicious racially oriented remarks made in that case and harassment which "viewed in isolation, arguably may not have been motivated by racial animus," a reasonable jury could interpret facially neutral behavior "as part of a complex tapestry of discrimination." Id. at 1083.

Defendants assert that in this case no reasonable jury could find that Plaintiffs were subjected to a racially hostile work environment at Cheyney University. The Plaintiffs in response listed 17 examples of conduct allegedly based on racially discriminatory motives. This list includes assertions of hiring and promotion based on race, disparities in disciplinary actions based on race, unequal treatment with respect to training opportunities and access to other positions available, Ms. Conley exhibiting comradery with white officers but not black officers, and targeting of black officers for disciplinary violations. Officer McKinnie also recounted several statements by Ms. Conley that he perceived as racist. First, Ms. Conley stated as a swimming instructor at the YMCA, she had observed that black children could not float. Officer McKinnie also felt that it was insensitive and inappropriate of Ms. Conley to mention that her dog did not like black people. Officer McKinnie was again offended when Ms. Conley instructed officers to wear their bulletproof vests, adding "this is Cheyney, for Christ's sake." Officer McKinnie did not object to wearing a vest, but felt that Ms. Conley was implying that Cheyney was dangerous because it was an historically black college. Finally, a poster appeared in the station that stated, "There Are No Black or White Officers, We Are All Considered Blue." Officer McKinnie construed the poster as racially hostile, because he felt that white officers received special treatment.[11]

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[11] The defendants also cited four cases involving claims of sexual harassment where the respective court granted summary judgment in favor of the defendants, and suggests that these cases should persuade the Court to dismiss the Plaintiffs' claims. Here, if a jury finds the numerous incidents listed by the plaintiffs to be credible explanations of the facts, the activity in this case far surpasses the severity of the action in the cases listed by the defendants. See 178 Baskerville v. Culligan Intern. Co., 50 F.3d 428, 430 (7th Cir.1995); Bonora v. UGI Utils., Inc., No. 99-5539, 2000 U.S. Dist. LEXIS 15172 (E.D. Pa. Oct. 18, 2000); Shesko v. City of Coatesville, 292 F.Supp. 2d 719, 725-26 (E.D. Pa. 2003); Cooper-Nicholas v. City of Chester, No. 95-6493,1997 U.S. Dist. LEXIS 20810 (E.D. Pa. Dec. 30, 1997).

The Defendants offered explanations for each of these comments and incidents to prove that they were not based on racially discriminatory motivations. While the interpretation of the facts offered by the Defendants may be a reasonable one, a reasonable jury could also conclude that the Plaintiffs' opposing characterization of the record as evidence of a racially hostile work environment was accurate. Therefore, based on the fact that the parties have factual disagreements concerning the nature of the actions taken by Ms. Conley, it would be inappropriate to grant the Defendants' motion for summary judgment concerning Plaintiffs' claim of a hostile work environment because genuine issues of material fact exist concerning the actions taken at Cheyney and the reasons behind them.

III. CONCLUSION

For the reasons discussed above, the Court denies the Defendants' motion for summary judgment. An appropriate Order consistent with this Memorandum follows.

BY THE COURT:

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GENE E. K. PRATTER
UNITED STATES DISTRICT JUDGE

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

CARLO MCKINNIE and SONYA SAMS, Plaintiffs	:	CIVIL ACTION
v.	:	
TERESA Ms. Conley and CHEYNEY UNIVERSITY OF THE STATE SYSTEM OF HIGHER EDUCATION, Defendants	:	NO. 04-932

ORDER

Gene E.K. Pratter, J. June 12, 2006

AND NOW, this 12th day of June, 2006, upon consideration of Defendants' Motion to for Summary Judgment (Docket No. 19), and the response and reply thereto, (Docket Nos. 24 and 28), it is hereby ORDERED that Defendants' Motion is Denied.

BY THE COURT:

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GENE E. K. PRATTER
UNITED STATES DISTRICT JUDGE