

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

DONALD L. WARDLE :
 :
 : CIVIL ACTION
 :
 v. :
 : NO. 05-CV-3808
 :
 COUNTY OF MONTGOMERY, ET AL. :

SURRICK, J.

JULY 28, 2006

MEMORANDUM & ORDER

Presently before the Court are Defendants County of Montgomery and Ronald H. Ahlbrandt's Motion For Summary Judgment Pursuant To Federal Rule Of Civil Procedure 56 (Doc. No. 17). For the following reasons, Defendant's Motion will be granted.

I. FACTUAL BACKGROUND

Plaintiff Donald L. Wardle began working for the Montgomery County Department of Parks and Heritage Services ("Parks Department") in 1993. (Wardle Dep. at 23.) Prior to 1993, Plaintiff worked for the Brown Printing Company for twelve years, a Holiday Inn in Bethlehem, Pennsylvania, a company named Fresco in Telford, Pennsylvania, and for Woodward Toyota. (*Id.* at 26-29.) In 2005, the year in which the events leading to this lawsuit occurred, Plaintiff was a member of the Park Maintenance staff at the Hill Road section of Green Lane Park. (*Id.* at 13.) On January 18, 2005, Plaintiff delivered a letter to the office of the Montgomery County Commissioners in which he enumerated a series of complaints regarding alleged discrimination and harassment by Parks Department staff, use of public money and materials for religious events, and hiring practices that allegedly favored Catholics, Republicans, and associates of Parks Department supervisors. (*Id.* at 51.)

Plaintiff began his letter by stating that the examples he provided would

illustrate a consistent pattern of behavior and hiring practices of the Montgomery County Park's Department, giving preferential treatment and favoritism to provide employment and secure income for the Catholic Church and votes for the Republican Party at taxpayer expense in Montgomery County. Also, the following will illustrate a misuse of authority and the use of public property and funds for personal agendas.

(Plaintiff's Jan. 18, 2005 letter, Ahlbrandt Dep. at Ex. 2, p. 1.) Plaintiff set forth eight examples of specific instances and general allegations, which illustrated this "misuse of authority and the use of public property and funds for personal agendas." Example #1 described an incident in 1999 when a Parks Department tent and barrels were used at the dedication of a Catholic facility. Plaintiff had reported this incident in 1999 to District Attorney Castor and believed that his report resulted in an investigation and the early retirement of two County employees. (Wardle Dep. at 55-57.) In his January 18th letter, Plaintiff focused on the involvement of Pamela Murray, a Parks Department employee who, he complained, has since been promoted to Superintendent of one of the parks despite her involvement in the 1999 event. Plaintiff also complained about Parks Director Ronald Ahlbrandt and Ranger Sergeant Al Destefano, who, Plaintiff alleged, also knew of the use of the Parks Department tents and barrels for a religious event. (*Id.* at 61; Ahlbrandt Dep. at Ex. 2, p. 1.)

Example #2 claimed that Plaintiff was "harassed and discriminated against by Supt. Frank Ball and Asst. Supt. Patricia Butkowski in the matter involving a purchase from Sears Hardware." (Ahlbrandt Dep. at Ex. 2, p. 1.) This allegation refers to an incident in 2003 when Plaintiff made a purchase at Sears on behalf of the Parks Department. Plaintiff's attempt to obtain a discount on the purchase resulted in a dispute with Sears Customer Service that led

Sears to register a complaint with Plaintiff's supervisor, Frank Ball. Plaintiff contended that, as a result, he was no longer permitted to purchase items from Sears "or anywhere else." (Wardle Dep. at 62-69.) Plaintiff's second example made no mention of a Republican or Catholic preference in the Montgomery County Parks Department.

Example #3 alleged that Parks Department employees Frank Ball and Patricia Butkowski told other Parks Department employees not to patronize the Green Lane Texaco store located near the park, because the owner had refused to contribute to the annual Scottish/Irish Festival held in the park. (Ahlbrandt Dep. at Ex. 2, p. 2.) Plaintiff alleged that he nonetheless continued to make purchases from the store and that on one occasion, he and a co-worker were seen doing so by Butkowski, who later remarked to Maintenance Supervisor George Graham that they were "busted." (*Id.*) This third example contained no reference to a Catholic or Republican bias. When asked about the connection, Plaintiff testified that the festival had no overt religious theme but that "[i]t probably has some bias towards the Catholics . . . because the Irish contingent is probably 92 percent Catholic." (Wardle Dep. at 80.)

Example #4 alleged "a continual pattern of hiring part and full-time employees for boat rentals and the maintenance department showing favoritism to friends and persons of the same affiliation." (Ahlbrandt Dep. at Ex. 2, p. 2.) Plaintiff alleged that a majority of the employees who handle boat rentals are Catholic and detailed specific employees who he believed were hired because of their relationships to other Parks Department workers and because they are Catholic and Republican. (*Id.*)

Example #5 complained that the Green Lane Park office was closed in 2004 on election day and the day before, "which allowed them 2 days to pursue their political/religious agendas."

(Id.)

Example #6 alleged that Plaintiff is “1 of 5 full-time maintenance employees at the Montgomery County Green Lane Park who are continually harassed, intimidated and feel threatened.” *(Id.)* He contended that these five employees are called “just Valley people” because they are not Catholic or Republican. *(Id.)* Plaintiff’s letter did not elaborate on the identities of these additional four employees nor did he offer examples of the harassment or intimidation.¹ *(Id.)*

Example #7 complained that the management staff of Green Lane Park spent over \$300 for a plaque commemorating former President Ronald Reagan, presumably suggesting that this public money was inappropriately spent on a Republican president. *(Id.)*

Finally, Example #8 alleged that the Green Lane Park Nature Center’s auditorium has been used for training by Superintendent Frank Ball’s baseball team and that team members have been hired for temporary positions at the park. This example made no mention of a Catholic or Republican bias. *(Id.)*

Plaintiff’s letter offered no evidence to substantiate these allegations, and Plaintiff was generally unable to do so when later questioned at his deposition. While Plaintiff indicated in his letter that he had observed a pattern of hiring that showed favoritism to Catholics and Republicans, he later admitted that he knew of no one who was turned down for a position because of religious or political affiliation. (Wardle Dep. at 82.) In addition, Plaintiff’s contention that a majority of the boat rental agents are Catholic was, he admitted, based on his

¹ When questioned, Plaintiff testified that the “five employees” referenced in his letter were Plaintiff, Ron Collins, Mike Bonenberger, Clarence Stewart, and Rex Saul. (Wardle Dep. at 91.)

own investigation and his “own perception of what’s going on.” (*Id.*) Plaintiff explained that he often learned of his co-workers’ religious affiliation by examining their last names, assuming that an Italian last name indicated a member of the Catholic faith. (*Id.*) While Plaintiff alleged that he was one of five employees who was “harassed, intimidated, and [felt] threatened” because they were not Catholic or Republican (Ahlbrandt Dep. at Ex. 2, p. 2), Plaintiff later admitted that he was unsure of the religious or political affiliations of all four of the employees he referenced in this example. (Wardle Dep. at 90-95.) Finally, Plaintiff’s complaint regarding \$300 spent on a plaque to commemorate Ronald Reagan was, he conceded, based purely on information provided to him by George Graham. Plaintiff never saw or investigated the plaque himself. (*Id.* at 97-98.)

Plaintiff has admitted that his January 18, 2005 letter expressing complaints of pro-Catholic and pro-Republican bias at the Parks Department was not the first time that he experienced and reported such bias. Plaintiff testified that he assumed that he was not granted an interview at Merck & Co., Inc. because he was not Catholic. Plaintiff based this assumption on the experiences of a Catholic relative of his who worked for Merck, left to start his own business, and was rehired by Merck when that business failed. (*Id.* at 108.) In addition to this experience with Merck, Plaintiff raised similar concerns when he worked for the Brown Printing Company. Plaintiff testified that he alerted the vice president of operations that a number of employees who worked for the human resources director all appeared to be from the same church. (*Id.* at 103-04.) Based on this information, Plaintiff contends that the human resources manager was terminated. (*Id.* at 104.) Finally, in 1999, when Plaintiff first reported the incident involving a Parks Department tent and barrels being used for a church function, he did so in a letter to

District Attorney Bruce Castor. In that letter, Plaintiff alleged that “approx[imately] 90% of the management [and] office staff with access to confidential information are Catholic” and asserted that “if this is happening in many work places it would certainly help explain why the Catholic Church has so many members [and] is so wealthy by keeping its members employed.” (Ahlbrandt Dep. at Ex. 2, Ex. A.)

Approximately one month after Plaintiff delivered his January 18th letter to the County Commissioner’s Office, his supervisors informed him that his job location in Green Lane Park was going to be changed. On February 14, 2005, Plaintiff was informed by his supervisor, George Graham, that he was to be transferred from the Hill Road section of Green Lane Park to the Green Lane Nature Center (the “Nature Center”), another section of the same park. (Wardle Dep. at 33.) Plaintiff asked if he had a choice in the matter and was told by Graham that he did not. (*Id.*) Notwithstanding the change in job location, Plaintiff maintained the same job title, Construction/Maintenance, at the new location. (*Id.* at 13; Montgomery County Position Description, Oct. 21, 1997.) In addition, at the Nature Center, Plaintiff’s salary remained the same, and Plaintiff pointed to no job opportunities that he has missed out on as a result of his transfer. (*Id.* at 14, 17.) Despite the fact that his job title and official job description did not change, Plaintiff contends that, as a practical matter, his job responsibilities differ at the Nature Center from those at Hill Road. At Hill Road, Plaintiff did small engine repairs on boat motors, weed whackers, chain saws, and hand and push blowers. (*Id.* at 14.) In addition, he was often sent to purchase and pick up supplies from local vendors on behalf of the park. (*Id.*) In his new location, Plaintiff maintains the weed whacker and the hand blower and does minor repairs. (*Id.* at 16.) He characterizes the majority of his work, however, as janitorial but provides no

additional insight into the reason for this characterization. (*Id.* at 15-16.) In addition to the practical differences between the two jobs, Plaintiff asserts that the transfer led him to feel a “personal demoralization, loss of respect.” (*Id.* at 10.) He contends that he experienced this loss of respect “through [his] personal interaction with fellow employees,” stating that he “can sense that.” (*Id.* at 17.)

Plaintiff asserts that the job transfer that occurred on February 14, 2005 was in retaliation for his comments in the January 18, 2005 letter.² (Doc. No. 19 at 2.) Parks Director Ronald Ahlbrandt testified that in January 2005, he approached Superintendent Frank Ball to discuss a problem with the maintenance of the Nature Center. (Ahlbrandt Dep. at 25.) Ahlbrandt reached the conclusion that there was a problem through his observation of the site and after receiving input from Christine Gephart, Education Coordinator at the Nature Center. Having concluded that the Nature Center required an additional staff member in maintenance, Ball suggested Plaintiff as a good candidate for the position. (*Id.* at 30.) Graham believed that Ball made this recommendation because Plaintiff had experience at the Nature Center site and because “Don likes to work independently and that’s what this site would be and he thought—he mentioned his interaction with Christine was good.”³ (*Id.* at 31.)

² Ahlbrandt, on the other hand, testified that he was ultimately responsible for the transfer and asserted that the transfer was unrelated to any letter sent by Plaintiff to the County Commissioners.

³ Frank Ball similarly testified that there were several reasons why Wardle was suggested for the position at Green Lane Nature Center:

No. 1 was that he was paid at a higher level because he was—at one time he was a maintenance foreman and his salary was never reduced. . . . The other reason was that he worked very well independently and prefers to work alone. No. 3 was, is that Christine Gephert [sic] actually said that if she was going to get somebody,

In March 2005, Plaintiff filed a grievance regarding his transfer as well as other complaints about the Nature Center. (Wardle Dep. at 37.) As a result of the grievance, Plaintiff met with Parks Director Ahlbrandt, Human Resources Director Peter Lees, and Plaintiff's new supervisor, Christine Gephart at the Green Lane Nature Center. (*Id.* at 38.) Plaintiff asserts that he raised the subject of his January 18, 2005 letter with those present at the meeting. (*Id.* at 39.) Plaintiff contends that Ahlbrandt and Lees initially denied having seen or received the letter but that at some point in the meeting, both admitted to having seen it. (*Id.* at 39-40.) Plaintiff could not recall if he raised the notion that his transfer was related to this letter. (*Id.* at 40-41.) In contrast to Plaintiff's testimony, Ahlbrandt testified that he never saw or knew of Plaintiff's January 18th letter until it was forwarded to him in June 2005 as part of a package of information regarding Plaintiff's federal lawsuit.⁴ (Ahlbrandt Dep. at 39, 42.)

Plaintiff commenced the instant action on July 22, 2005. (Compl., Doc. No. 1.) Plaintiff alleges two causes of action. He claims that Defendants Ahlbrandt and the County of Montgomery violated 42 U.S.C. § 1983 by depriving him of his "constitutional rights to freedom of speech and association . . . in retaliation for the concerns he expressed about religious and political discrimination and financial abuse within the Parks Department." (Doc. No. 1 at 6.) Plaintiff contends that "[i]n transferring [him] to a less desirable position, Defendants were

she would prefer to work with Don.

(Ball Dep. at 14.)

⁴ In addition, Frank Ball testified that he had never seen the January 18th letter prior to his deposition and that it was not discussed at the meeting on January 26, 2005 when Ball, Gephart and Ahlbrandt met to discuss the need for a staff person at the Nature Center and decided they would move Plaintiff into that position. (Ball Dep. at 9-10.)

motivated by a desire to silence him from any further criticisms or comments about matters of public concern, in violation of his rights under the First Amendment to the United States Constitution.” (*Id.*) In addition, Plaintiff claims that Defendants, by the same actions, also violated the Pennsylvania Whistleblower Law, 43 Pa. Cons. Stat. § 1421 *et seq.* (*Id.* at 7.) On May 26, 2006, Defendants filed the instant Motion for Summary Judgment.

II. 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). A genuine issue of material fact exists only when “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).

The party moving for summary judgment bears the initial burden of demonstrating that there are no facts supporting the nonmoving party’s legal position. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986). Once the moving party carries this initial burden, the nonmoving party must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (explaining that the nonmoving party “must do more than simply show that there is some metaphysical doubt as to the material facts”). “The nonmoving party . . . ‘cannot rely merely upon bare assertions, conclusory allegations or suspicions’ to support its claim.” *Townes v. City of Phila.*, Civ. A. No. 00-CV-138, 2001 U.S. Dist. LEXIS 6056, at *4 (E.D. Pa. May 11, 2001) (quoting *Fireman’s Ins. Co. v. DeFresne*, 676 F.2d 965, 969 (3d Cir. 1982)). Rather, the party opposing summary

judgment must go beyond the pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. *Celotex*, 477 U.S. at 324.

When deciding a motion for summary judgment, the court must view facts and inferences in the light most favorable to the nonmoving party. *Anderson*, 477 U.S. at 255; *Siegel Transfer, Inc. v. Carrier Express, Inc.*, 54 F.3d 1125, 1127 (3d Cir. 1995). We do not resolve factual disputes or make credibility determinations. *Siegel Transfer, Inc.*, 54 F.3d at 1127.

III. LEGAL ANALYSIS

A. First Amendment Claim

“A public employee has a constitutional right to speak on matters of public concern without fear of retaliation.” *Brennan v. Norton*, 350 F.3d 399, 412 (3d Cir. 2003) (quoting *Baldassare v. New Jersey*, 250 F.3d 188, 194 (3d Cir. 2001)). However, as the Supreme Court in *Pickering v. Board of Education*, 391 U.S. 563 (1968), stated, “[t]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.” *Id.* at 568. As a result, the Court must balance the interests of the public employee in exercising his right to freely speak on matters of public concern and the interests of the State in efficiently providing public services. *Id.*

Plaintiff, as an employee of the Montgomery County Parks Department, is a public employee, while Montgomery County is an arm of the State with an interest in efficient services. A public employee’s claim of retaliation for engaging in protected activity is analyzed under a three step process. *Watters v. City of Phila.*, 55 F.3d 886, 892 (3d Cir. 1995); *Baldassare*, 250 F.3d at 194-95. The three-step process involves the following: “First, plaintiff must show that

the activity in question was protected.” *Watters*, 55 F.3d at 892 (citing *Holder v. City of Allentown*, 987 F.2d 188, 194 (3d Cir. 1993); *Czurlanis v. Albanese* 721 F.2d 98, 103 (3d Cir. 1983)). To be considered protected speech, it must involve a “matter of public concern.” *Id.* In addition, the employee’s interest in this speech “must not be outweighed by any injury the speech could cause to the interest of the state as an employer in promoting the efficiency of the public services it performs through its employees.” *Id.* (internal citations omitted). “Second, plaintiff must show that the protected activity was a substantial or motivating factor in the alleged retaliatory action.” *Id.* (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)). Finally, if the plaintiff meets the first two prongs in this process, the “defendant may defeat plaintiff’s claim by demonstrating by a preponderance of the evidence that the same action would have been taken even in the absence of the protected conduct.” *Id.*

In our analysis, we will assume for the sake of argument that Plaintiff has met the first step and has established that his speech, the January 18th letter delivered to the County Commissioner’s office, was, in fact, protected. We will make this assumption without further discussion because we are compelled to conclude that even if the speech was protected, Plaintiff has failed to establish the second prong of the analysis, that is that the protected activity was a substantial or motivating factor in the alleged retaliatory action.

The second prong necessitates a finding of two separate elements. First, the factfinder must determine that the alleged retaliatory action was in fact punitive such that it would chill the exercise of protected speech. Second, the factfinder must be persuaded that there is some causal connection between the protected speech and the alleged punitive action. *See Rutan v. Republican Party of Ill.*, 497 U.S. 62, 73 (1990); *McKee v. Hart*, 436 F.3d 165, 169-171 (3d Cir.

2006); *Suppan v. Dadonna*, 203 F.3d 228, 234-35 (3d Cir. 2000). We agree that the temporal proximity between Plaintiff's January 18th letter and the February 14th location change provides the requisite inference of causal connection to establish the causation element of the second prong in the retaliation analysis.⁵ See *Ambrose v. Twp. of Robinson*, 303 F.3d 488, 494 (3d Cir. 2002) (in a First Amendment case, "'suggestive temporal proximity' is relevant to establishing a causal link between protected conduct and retaliatory action" (citing *Rauser v. Horn*, 241 F.3d 330, 334 (3d Cir. 2001))); see also *McKinnie v. Conley*, Civ. A. No. 04-932, 2006 WL 1687037, at *6 (E.D. Pa. June 12, 2006) (in a Title VII action, "timing alone raises the requisite inference when it is unusually suggestive of retaliatory motive" (citing *Jensen v. Potter*, 435 F.3d 444, 450 (3d Cir. 2006))). However, we are convinced that Plaintiff has failed to provide evidence sufficient to establish that the change in Plaintiff's job location and the consequential changes to his daily duties is in any way punitive.

Plaintiff contends that on February 14, 2005, his supervisor, George Graham, told him that the Parks Department was transferring him from the Hill Road section of Green Lane Park to the Nature Center in Green Lane Park. This transfer did not result in any change in Plaintiff's job description or job title. Moreover, it had no impact on his salary or benefits and did not exclude him from any job opportunities. Plaintiff claims that there were changes to his daily

⁵ We note that there is a factual dispute regarding whether or not Ahlbrandt had seen or knew of Plaintiff's letter prior to the job transfer. Ahlbrandt asserts that he had no knowledge of the letter before June 2005 whereas Plaintiff claims that both Ahlbrandt and Lees admitted in a meeting with Plaintiff in March 2005 that they had both seen the letter. Cf. *Ambrose*, 303 F.3d at 493 (finding for defendant where plaintiff has offered no evidence showing that the decision makers were aware of the protected conduct prior to the alleged retaliation.) Because we view the facts in the light most favorable to the Plaintiff, and because there is a clear factual dispute, we have not based our legal conclusions on these facts.

duties by virtue of the new location. Whereas Plaintiff formerly worked on small engine repair on a number of tools and boats, in his new location, Plaintiff only worked on the weed whacker and hand blower. In addition, it appears that at the Nature Center, Plaintiff was no longer asked to purchase and pick up supplies from local vendors.⁶ Plaintiff describes this transfer as “degrading” (Wardle Dep. at 10) and contends that he could “sense” that his fellow employees had lost respect for him. (*Id.* at 17.) Plaintiff points to no comments by employees that led him to feel this way, and he offers no evidence that the position at the Nature Center was viewed by management or by his co-workers as a demotion or any kind of punishment.⁷ (*Id.* at 18.)

The minor changes in Plaintiff’s daily duties along with Plaintiff’s unsupported statements do not establish that the transfer was anything more than a neutral job change. As has been noted by another court in this district, “[t]he non-moving party must raise ‘more than a mere scintilla of evidence in its favor’ in order to overcome a summary judgment motion.” *Parasco v. Pac. Indem. Co.*, 920 F. Supp. 647, 652 (E.D. Pa. 1996) (quoting *Williams v. Borough of W. Chester*, 891 F.2d 458, 460 (3d Cir. 1989)). Plaintiff’s mere assertions that his new position was degrading, unsupported by any evidence, is not sufficient to create a triable issue of fact. As the

⁶ It is unclear whether this change was a result of Plaintiff’s transfer to the Nature Center, where such duties were not needed, or whether Plaintiff was not permitted to fill this role after encountering problems when he made purchases from Sears. (*See* Wardle Dep. at 69.) If it is the latter, this change in Plaintiff’s duties came about before he drafted the January 18th letter, as it is discussed in example two in that letter.

⁷ We note that Christine Gephart, when asked if there was anything negative associated with the Nature Center position, testified: “It depends on who you’re asking. Some people might consider it a negative. Some other people, maintenance guys that would kill for the position.” (Gephart Dep. at 12.) She also noted that while she had not heard this from management staff, she had heard from Plaintiff and other employees that “George Graham liked to put people there that he didn’t like, but I never heard it from George Graham himself.” (*Id.* at 13.)

court stated in *Parasco*: “[T]he non-moving party cannot rely on unsupported assertions, conclusory allegations, or mere suspicions in attempting to survive a summary judgment motion.” *Id.*

In addition, the Third Circuit has recently determined that not all allegedly retaliatory actions are sufficiently punitive to “deter a person of ordinary firmness from exercising his First Amendment rights.” *McKee*, 436 F.3d at 170 (quoting *Suppan*, 203 F.3d at 235). We are aware of the fact that the Third Circuit has acknowledged that an employee need not experience an actual adverse employment action in order to make out a claim of retaliation for protected speech. *See Suppan*, 203 F.3d at 235; *see also Rutan*, 497 U.S. at 76 n.8 (agreeing with the Seventh Circuit that the First Amendment “protects state employees . . . from ‘even an act of retaliation as trivial as failing to hold a birthday party for a public employee . . . when intended to punish her for exercising her free speech rights’”). However, in *McKee*, the court found that the alleged retaliatory actions, verbal reprimands, and criticism of the plaintiff by his supervisor, were not sufficient to rise to the level of retaliatory harassment under the First Amendment. *McKee*, 436 F.3d at 171. The *McKee* court explained that “[t]he effect of the alleged conduct on the employee’s freedom of speech need not be great in order to be actionable’ but it must be more than *de minimis*.” *Id.* at 170 (internal citations omitted). The court distinguished several critical comments by the plaintiff’s supervisor from the factual scenario in *Suppan* where the plaintiff alleged a “campaign of retaliatory harassment.” *Id.* Here, while we are dealing with a job transfer and not verbal comments, we are compelled to conclude that minor changes in Plaintiff’s duties as a result of the transfer do not amount to punitive conduct that would deter a person of ordinary firmness from exercising his free speech rights. Plaintiff’s feeling of a loss of

respect is an unsupported assertion and cannot, on its own, turn an otherwise neutral job change into an adverse retaliatory action.

The Fifth Circuit's opinion in the case of *Serna v. City of San Antonio*, 244 F.3d 479 (5th Cir. 2001), is instructive in this regard. In *Serna*, a police officer asserted claims of First Amendment retaliation and violations of the Texas Public Whistleblower Act because he was transferred from the Downtown Foot and Bike Patrol Unit to a regular patrol unit after complaining that his supervisor was giving illegal orders. *Id.* at 480-81. At trial, Serna and his fellow officers testified that the Foot and Bike Patrol Unit was one of the premier placements in the police department and that the unit's proactive tactics made it more desirable than regular patrol. *Id.* at 483-84. However, the officers also testified that these statements were "only a matter of personal preference." *Id.* at 484. After reviewing the trial testimony, the Fifth Circuit concluded that "all Serna's testimony established was that he felt stigmatized and injured by his transfer" and that "[t]here was no evidence to suggest that a transfer to a regular patrol unit was generally considered to be a demotion or any kind of punishment." *Id.* at 484. The Fifth Circuit rejected Serna's retaliation claims, finding that while a transfer that does not involve a reduction in pay or benefits may be considered an adverse employment action,

it is insufficient for a plaintiff to show merely that he has been transferred from a job he likes to one that he considers less desirable. Rather, a plaintiff must produce enough evidence to allow a reasonable trier of fact to conclude that, when viewed objectively, the transfer caused harm to the plaintiff, sufficiently serious to constitute a constitutional injury. . . . [t]he personal preferences and subjective perceptions of the plaintiff are insufficient to establish that his transfer inflicted a constitutional injury.

Id. at 483 (internal citations omitted).

Considering all of the evidence presented in the light most favorable to Plaintiff Wardle,

we are compelled to conclude that he has failed to show that the transfer was anything more than a neutral change to a position that he subjectively deemed to be less desirable. Like the plaintiff in *Serna*, Plaintiff has only offered evidence of slightly altered job duties and his own perceptions of the negative import of his new position. Such subjective perceptions are insufficient to establish a constitutional injury. As a result, we are compelled to conclude that Plaintiff's transfer does not rise to the level of retaliatory action under the First Amendment. Accordingly, we will grant summary judgment on Count I of Plaintiff's Complaint.⁸

B. Pennsylvania's Whistleblower Law

Count II of Plaintiff's Complaint alleges a violation of Pennsylvania's Whistleblower Law, 43 Pa. Cons. Stat. § 1421 *et seq.* Section 1423 provides:

No employer may discharge, threaten or otherwise discriminate or retaliate against an employee regarding the employee's compensation, terms, conditions, location or privileges of employment because the employee or a person acting on behalf of the employee makes a good faith report or is about to report, verbally or in writing, to the employer or appropriate authority an instance of wrongdoing or waste.

43 Pa. Cons. Stat. § 1423(a). Pennsylvania's Commonwealth Court has observed that the Whistleblower Law requires an analysis involving a shifting burden of proof:

⁸ While we agree with Defendants that summary judgment is appropriate in this case, we note that Defendants have mischaracterized the nature of Plaintiff's claims and the key issue in a First Amendment claim such as this. Defendant suggests that Plaintiff believes that Defendant violated his First Amendment rights "because he is not a Catholic and not a Republican" and claims that the "fundamental argument" is that Defendants did not even know of Plaintiff's religious or political affiliations. (Doc. No. 21 at 2.) This is a claim of retaliation for protected speech, not a discrimination suit under Title VII. Plaintiff's religion and political party affiliation are irrelevant as is Defendants' knowledge of those affiliations. The relevant questions are whether the speech itself is protected, whether the alleged retaliatory action was motivated by the protected speech, and whether Defendant can prove by a preponderance of the evidence that the alleged retaliatory action would have been taken absent the speech.

Initially, an employee is obligated to show that he reported wrongdoing prior to being subjected to adverse action. The burden then shifts to the employer to establish that there was a legitimate reason for the adverse action. Once the employer offers such evidence, the burden then shifts back to the employee to demonstrate that this reason was merely pretextual.

Watson v. City of Phila., 638 A.2d 489, 492 (Pa. Commw. Ct. 1994); *see also Golachevsky v. Commonwealth*, 720 A.2d 757, 760 (Pa. 1998) (Nigro, J., concurring).

Because Plaintiff has failed to produce sufficient evidence to establish that his transfer constituted a punitive retaliatory action, he may not recover on his claim under Pennsylvania's Whistleblower Law. The absence of an adverse action is fatal to this state law claim as well. Accordingly, we will grant summary judgment on Count II of Plaintiff's Complaint.

An appropriate Order follows.

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

DONALD L. WARDLE	:	
	:	CIVIL ACTION
	:	
v.	:	
	:	NO. 05-CV-3808
	:	
COUNTY OF MONTGOMERY, ET AL.	:	

ORDER

AND NOW, this 28th day of July, 2006, upon consideration of Defendants County of Montgomery and Ronald H. Ahlbrandt's Motion For Summary Judgment Pursuant To Federal Rule Of Civil Procedure 56 (Doc. No. 17), and all papers submitted in support thereof and in opposition thereto, it is ORDERED that Defendants' Motion is GRANTED. Judgment is ENTERED in favor of Defendants County of Montgomery and Ronald H. Ahlbrandt and against Plaintiff Donald L. Wardle.

IT IS SO ORDERED.

By the Court:

/s R BARCLAY SURRECK

R. Barclay Surrick, Judge