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

WILLIAM SCHLICHTER and BARBARA SCHLICHTER	:	
v.	:	CIVIL ACTION
	:	NO. 04-CV-4229
LIMERICK TOWNSHIP, W. DOUGLAS WEAVER, OFFICER ADAM MOORE, WALTER ZAREMBA, TOWNSHIP MANAGER, KEN SPERRING, TOWNSHIP SUPERVISOR, JOSEPH GRECO, TOWNSHIP SUPERVISOR, THOMAS DEBELLO, TOWNSHIP SUPERVISOR, FRANK GRANT, TOWNSHIP SUPERVISOR, FREDERICK FIDLER, TOWNSHIP SUPERVISOR, and JOHN DOE	:	

MEMORANDUM AND ORDER

JOYNER, J. **August 14, 2006**

Via the motion now pending before this Court, Defendants move for summary judgment on Plaintiff William Schlichter's § 1983 claims and Plaintiffs William and Barbara Schlichter's Pennsylvania state law claims. For the reasons set forth below, Defendants' motion is GRANTED in part and judgment is entered in favor of Defendants and against Plaintiff William Schlichter as a matter of law on his § 1983 claims in Counts I, VII, and XII. Plaintiffs William and Barbara Schlichter's Pennsylvania state law claims in Counts IX and XI are DISMISSED with leave to Plaintiffs to re-file in an appropriate Pennsylvania state court.

Procedural History

Plaintiffs William Schlichter (hereinafter "Plaintiff") and

Barabara Schlichter (hereinafter "Plaintiff-wife") initiated this lawsuit in September 2004 against Limerick Township, Police Chief Weaver, Police Officer Moore, Township Manager Zaremba, Township Supervisor Ken Sperring, Township Supervisors Joseph Greco, Thomas DeBello, Frank Grant, and Frederick Fidler, and John Doe alleging numerous civil rights and common law violations.[1] By Order dated April 26, 2005, this Court dismissed a number of the counts of their Complaint. See Schlichter v. Limerick Twp., et al., 2005 WL 984197(dismissing Counts II, III, IV, V, VI, VIII, X and XIII in their entirety and Counts IX and XI against Defendants Limerick Township, Zaremba, Sperring, Greco, DeBello, Grant and Fidler). By Order dated August 25, 2005, this Court approved the parties' Stipulation to Dismiss all claims against Defendants Sperring, Greco, DeBello, Grant, and Fidler. The remaining claims at issue are:

(1) Count I: Plaintiff against all remaining defendants for violations of the First Amendment, pursuant to 42 U.S.C. § 1983;

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[1]For the purposes of this motion, this Court will consider Defendants Zaremba, Weaver, and Moore only to be sued in their individual capacities. To the extent that these Defendants were sued in their official capacities as Township Supervisor, Chief of Police, and Police Officer, respectively, Plaintiff's claims are redundant and are nothing more than additional claims against Limerick Township, which is already a named defendant, because a public official sued in his official capacity is "legally indistinct from the municipality for which he serves." Satterfield v. Borough of Schuylkill Haven, 12 F.Supp.2d 423 (E.D. Pa. 1998).

(2) Count VII: Plaintiff against Defendants Zaremba and Weaver, as policymakers, for acquiescing to the violation of Plaintiff's civil rights, pursuant to 42 U.S.C. § 1983;

(3) Count IX: Plaintiff and Plaintiff-wife against Defendants Weaver and Moore for common law invasion of privacy;

(4) Count XI: Plaintiff and Plaintiff-wife against all remaining defendants for common law placing in false light;

(5) Count XII: Plaintiff against John Doe policymaker for violating Plaintiff's rights and for acquiescing to the violation of Plaintiff's rights by others, pursuant to 42 U.S.C. § 1983.

Discovery is now closed, and the Defendants have filed this motion for summary judgment.

Factual Background

Plaintiff William Schlichter was hired by the Limerick Township Police Department as an officer in 1985, and in 1990 he was promoted to the position of Sergeant, in which capacity he served until his resignation from the department in 2003. (Ex. 1 to Def.' Mot. for Summ. J. (hereinafter "Def.'s Mot."), Dep. of William Schlichter of October 24, 2005 (hereinafter "Pl.'s Dep. 1") at 49, 55.) During his tenure as Sergeant, Plaintiff served under Defendant Douglas Weaver as the Chief of Police. (Id. at 59.) During the same relevant time period, Defendant Officer

Adam Moore was employed as a patrol officer for Limerick Township and was under the direct command of Plaintiff as Sergeant. (Id. at 63; Ex. Q to Pl.'s Opp. to Def.'s Mot. for Summ. J. (hereinafter "Pl.'s Opp."), Transcript of Police Tenure Act Hearing (hereinafter "Trans. PTAH") at 134.) Defendant Walter Zaremba was the acting Township Manager, and as such was responsible for overseeing all municipal departments, including the Police Department, and reporting Township affairs to the Board of Supervisors, the five-member board responsible for governing the Township. (Trans. PTAH at 40-41.) Plaintiff claims that while he was employed as Sergeant of the Limerick Township Police Department, he was subject to multiple acts of harassment by Defendants Weaver and Moore in retaliation for his exercise of his first amendment rights of free speech and association which ultimately resulted in his constructive discharge from the Police Department on August 5, 2003 when he tendered his resignation. (Compl. ¶ 3,4.) Additionally, Plaintiff and Plaintiff-wife allege that the actions of Defendants Weaver and Moore invaded their privacy and placed them in a false light. (Compl. ¶ 117-120, 131.)

Plaintiff claims to have engaged in three separate activities protected by the First Amendment. First, Plaintiff claims that he exercised his First Amendment right to free speech by complaining to other police officers about the disparate

disciplinary practices of Defendant Police Chief Weaver. (Compl. ¶ 28.) These complaints stemmed from the discipline of Defendant Officer Moore for his involvement in a motor vehicle accident with his police vehicle in December 2001. (Pl.'s Dep. 1 at 83.) Plaintiff investigated the accident, and recommended to Chief Weaver that Officer Moore be suspended for one day, in light of his previous motor vehicle accidents and his alleged attempt to cover up his negligence by telling inconsistent versions of the events surrounding the accident. (Id.) Defendant Chief Weaver, however, did not suspend Officer Moore and only ordered that Plaintiff write him a letter directing him to operate cars more carefully. (Id. at 87.) The Chief did not consider the past accidents because, under the Police Department "Reckoning Period" policy, only violations from the previous year can be considered in the discipline of a police officer, and all of Officer Moore's past accidents occurred more than one year before. (Id. at 85.) Plaintiff agreed that Chief Weaver correctly applied the reckoning period, but did not agree with the outcome of its application. (Id. at 86.) Plaintiff subsequently complained to at least one officer under his command that he disagreed with the Chief's disciplinary decision and felt that Officer Moore deserved a harsher punishment. (Id. at 87-88.)

Second, Plaintiff claims that he exercised his First Amendment right to free speech by complaining to Defendant Walter

Zaremba, the Township Manager, about a "hostile work environment" being suffered by a female co-worker, Robin Scalisi, as a result of the harassing behavior of Defendant Officer Moore and Defendant Chief Weaver.[2] (Compl. ¶ 27.) According to Officer Moore, rumors began to circulate in early 2003 that Plaintiff and Robin Scalisi, an administrative assistant, were having an extramarital affair. (Trans. PTAH at 135, 157.) Chief Weaver admits that he joked with Officer Moore about rumors that Plaintiff and Robin Scalisi were often seen together outside of work and that Plaintiff's police vehicle was often seen parked outside Robin Scalisi's residence when her husband was not home. (Ex. F to Pl.'s Opp., Dep. of Douglas Weaver (hereinafter "Weaver Dep."), at 114.) Officer Moore then admittedly engaged in allegedly harassing behavior. See infra p. 7-9. (Trans. PTHA at 134-137.) Plaintiff claims that he "might have said something" about the "hostile work environment" suffered by Robin Scalisi when he spoke to Defendant Zaremba on August 5, 2003, the day he proffered his resignation. (Ex. 14 to Def.'s Mot., Dep. of William Schlichter of November 29, 2005 (hereinafter "Pl.'s Dep. 2") at 46, 111.)

Third, Plaintiff claims he engaged in union activity which

[2]By Order dated November 10, 2003, this Court dismissed all federal claims of hostile work environment alleged by Robin Scalisi in Scalisi v. Limerick Twp. et al., No. 05-3413, 2005 WL 3032507 (E.D. Pa. 2005).

was protected by his first amendment rights to free speech and association. (Compl. ¶ 25.) Plaintiff was actively involved in the Fraternal Order of Police and served as the Department Director in the 1990s, but resigned the position prior to 2003. (Pl.'s Dep. 1 at 122, 123.) During the summer of 2002, Plaintiff and other officers attended a meeting with a union representative from the teamsters union at a local restaurant. (Id. At 181.) Plaintiff was told at the meeting that he could not be part of the teamsters union because he was an administrative sergeant. (Id.) He did not attend any other meetings with the teamsters union or engage in any other union activity. (Id. at 186.)[3]

Plaintiff's allegations of retaliatory harassment by

[3]There are allegations, through second and third hand accounts in various depositions, that sometime during the summer of 2003, Township Supervisors Joseph Greco and Thomas DeBello met with Defendant Chief Weaver at the Ridge Bar and told him to "crack heads" at the police department. (Exhibit A to Pl.'s Opp., Dep. of Francis T. Grant (hereinafter "Grant Dep.") at 18; Exhibit B to Pl.'s Opp., Dep. of Walter T. Zaremba, Jr. (hereinafter "Zaremba Dep.") at 285-286, 302; Exhibit C to Pl.'s Opp., Dep. of Kenneth W. Sperring at 45.) While there is no evidence that the Supervisors directly stated that this was in retaliation for those officers attending a union meeting, these same witnesses referenced statements by Joseph Greco naming the five officers who had attended the union meeting and declaring that they were on a "hit list" and had to go. (Grant Dep. at 17; Zaremba Dep. at 286, 291, 303.) There are objections to this evidence on the grounds that it may be inadmissable as hearsay. (Def.'s Brief in Reply to Pl.'s Opp. at 1.) This court will not decide on the admissibility of the evidence because, as outlined below, the alleged acts of retaliation against Plaintiff do not meet the standard for a first amendment violation and therefore such evidence as to possible retaliatory motivation is irrelevant.

Defendants Weaver and Moore begin with an apparent series of inappropriate practical jokes mocking the rumored romantic relationship between Plaintiff and Robin Scalisi. The alleged harassment began on February 14, 2003, when Defendant Moore placed a personal ad in the Pottstown Mercury Newspaper containing a Valentine's Day message which read, "Dear Sgt., Spring is right around the corner, just like me. Look outside, see your Robin by the tree. Love, Azalea." (Ex. 26 to Def.'s Mot., Dep. of Adam Moore (hereinafter "Moore Dep."), at 30.) Robin Scalisi, who lives on Azalea Court, notified Plaintiff of the ad because she felt it was in reference to them. (Pl.'s Dep. 1 at 6.) Plaintiff showed the ad to Defendant Zaremba, who agreed to investigate. (Id. at 7.) Defendant Moore admits to placing the ad as a joke with his own money and on his own time while off-duty. (Trans. PTHA at 138, 157.)

On May 17, 2003, Plaintiff and his young daughters found a hotel room key and a package of condoms in the passenger side door compartment of his pickup truck. (Pl.'s Dep 2 at 23.) Defendant Weaver admits that he stayed at the Cherry Hill Lodge, the hotel from which the key card came, in Spring 2003, but claims he threw the key away in the police station locker room and denies any involvement with the placement of the key and condoms in Plaintiff's truck. (Weaver Dep. at 80-83.) Plaintiff reported the incident to Defendant Zaremba. (Pl.'s Dep 2 at 22.)

On May 29, 2003, Plaintiff discovered a bumper sticker on his truck which depicted a woman in a thong bikini hitchhiking, with the words "Ass, Gas or Grass, Nobody Rides for Free." (Id. at 52.) Plaintiff does not know when or how the bumper sticker was placed on his truck, but alleges that Defendants Weaver and Moore were involved. (Id. at 52, 56.) Plaintiff also reported the bumper sticker to Defendant Zaremba. (Id. at 55.) In or around the same time period, Plaintiff found an artificial decoration robin in his mailbox. (Pl.'s Dep. 1 at 145.) Again, Plaintiff reported the incident to Defendant Zaremba. (Id.)

On July 31, 2003, Plaintiff-wife received a doctored photo in the mail at their home. (Pl.'s Dep. 2 at 29.) The photo showed Plaintiff's unmarked police vehicle parked outside of Robin Scalisi's residence. (Trans. PTAH at 14.) Superimposed over the image was the text:

> Limerick Township Police Cruiser: $ 26,000
> Sergeant's salary (without overtime): $ 60,000
> House on Azalea Court: $160,000
> Bill lying to Barb about why he's parked in front of his girlfriend's house while on duty: Priceless

(Id. at 14-15; Ex. K to Pl.'s Opp., Doctored Photo.) Plaintiff brought the photo to work with him the next day he was scheduled to work, August 3, 2003, and showed it to Defendant Zaremba. (Pl.'s Dep. 2 at 39.) After an investigation, Defendant Officer Moore admitted to taking the photograph and adding the text with the assistance of a friend. (Trans. PTAH at

135.) He claims he brought the photograph to work in a manila envelope and left it on his desk, after which he never saw it again until his deposition. (Moore Dep. at 39.) He denies mailing the photograph to Plaintiff-wife. (Trans. PTAH at 137.) Following a Police Tenure Act Hearing conducted before an independent hearing examiner after Plaintiff's resignation, Defendant Moore was suspended for 45 days without pay for his actions related to the Valentine's Day Ad and the doctored photo. (Ex. 34 to Def.'s Mot., Order of Hearing Examiner.)

During the same relevant time period in 2003, Plaintiff alleges he was also subject to harassment unrelated to his rumored relationship with Robin Scalisi. First, Plaintiff cites that he was sent home one day with pay. (Pl.'s Dep. 1 at 188.) Sometime in early 2003, Plaintiff and Defendant Weaver attended an evening meeting together, and drove back to the station together. (Id. at 184.) On the drive back, Plaintiff told Defendant Weaver about the teamsters meeting he had attended the summer before. (Id.) Defendant Weaver then "became very upset," told Plaintiff that "unions are nothing but gangsters," and slammed the car door. (Id.) Defendant Weaver does not deny that he yelled at Plaintiff, but claims that he was only disappointed that Plaintiff had not told him about the union meeting sooner. (Weaver Dep. at 40-41.) The next time that Plaintiff reported to work, Defendant Weaver overheard Plaintiff telling a secretary

that the Chief had gone "berserk" during an argument the night before. (Id. at 45, 47.) When Defendant Weaver asked Plaintiff if he was talking about him, Plaintiff said no and that he was talking about himself going berserk at Home Depot. (Id.) After Plaintiff left the room, the secretary told Defendant Weaver that Plaintiff had actually been talking about the Chief going berserk and that he had lied. (Id. at 48.) Defendant Weaver then asked Plaintiff to meet with him, and during the meeting he told Plaintiff that he was disappointed in him as second in command for lying to him, and that he wanted him to go home for the rest of the day, with pay, to think about his character flaws. (Id. at 49.) Plaintiff went home and wrote a letter to Defendant Zaremba about the incident. (Pl.'s Dep. 1 at 190.)

Additionally, during early 2003, Defendant Chief Weaver corrected Plaintiff's written memos and reports with red ink, making corrections for grammar and spelling. (Id. at 153.) It is unclear whether this was done to the written work of any other officers. (Id. at 152-153.) At one point, Defendant Weaver wrote, "say hi to Chuck for me" on one of Plaintiff's requests for a personal day. (Id. at 154.) Chuck is Plaintiff's neighbor and an attorney that Defendant Weaver knew very well. (Id. at 154-155.) Plaintiff felt that Defendant Weaver was insinuating that he might retain Chuck as a lawyer as a result of the other harassment he was allegedly experiencing at the police

department. (Id. at 155.) Plaintiff was also assigned by Chief Weaver to prepare a report on overtime expenses to help explain why revenue was down for the year in the police department. (Id. at 159; Exhibit 11 to Def.'s Mot., Assignment Letter.) Plaintiff contends that this assignment fell outside of his job description and that the Chief should have been responsible for preparing the financial report. (Pl.'s Dep 1 at 159-160.) Plaintiff reported his feelings to Defendant Zaremba, who instructed him to complete the assignment, which he did. (Id. at 161, 164.) Plaintiff also found job applications in his mailbox, some of which he claims were placed there by Defendant Chief Weaver. (Id. at 145.)

Plaintiff also received voicemails from Defendant Chief Weaver that he feels were harassing. (Pl.'s Dep. 2 at 121-142.) Many of the messages were about normal police business, but Plaintiff feels they were harassing because Defendant Weaver used to speak to him in person about such matters rather than leave voicemails. (Id. at 128, 140.) In one message, left on June 30, 2003, Defendant Weaver expressed that he was unaware of a schedule change made by Plaintiff. (Id. at 133.) Plaintiff feels this message was harassing because he had notified Defendant Weaver of the change and disputes Defendant Weaver's claim that he did not know about it. (Id. at 134.) In another message, left on July 23, 2003, Defendant Weaver asks Plaintiff about a situation in which a patrol shift was not covered and

asks him to document in writing why the shift was not covered. (Id. at 141-142.) Plaintiff claims this message was harassing because he never had to document such incidents in writing before. (Id. at 142.)

Plaintiff asserts that the result of this allegedly harassing behavior was that his authority was undermined within the police department. (Compl. ¶ 50.) Plaintiff cites two situations in which his orders were disobeyed by subordinate officers. First, on one occasion, Officer Kennedy refused to carry out a speed detail, ordered by Defendant Chief Weaver, because he did not want to write citations for revenue. (Pl.'s Dep. 1 at 104.) Officer Kennedy asked if he could speak directly to Defendant Chief Weaver about the orders, and Plaintiff allowed him to do so. (Id.) Second, Plaintiff cites that Defendant Officer Moore disobeyed a direct order by leaving early one day, which left a patrol shift uncovered. (Id. at 102.) Plaintiff, however, admits that Officer Moore was approved to leave by either himself or Defendant Chief Weaver, and that he's not sure "who dropped the ball." (Pl.'s Dep. 2 at 143-144.) Plaintiff cannot recall any other instances where an officer disobeyed an order. (Pl.'s Dep 1 at 111.)

After his wife's receipt of the doctored photo, Plaintiff decided to quit his position at the Limerick Township Police Department. (Id. at 46.) On August 5, 2003, Plaintiff hand

delivered a letter to Defendant Walter Zaremba informing him that he was retiring from the police department. (Pl.'s Dep. 1 at 49.) On August 7, 2003, Defendant Zarember wrote a letter to Plaintiff informing him that he did not qualify for retirement at that time, and Plaintiff thereafter wrote a letter on August 14, 2003 to Township Supervisor Thomas DiBello officially resigning from the police department. (Id. at 50; Exhibit 6 to Def.'s Mot., Resignation Letter.) Prior to proffering his resignation, Plaintiff had applied for a position at the Western Center for Technical Studies, where he is currently employed as a vocational instructor. (Pl.'s Dep. 1 at 6.) He applied for the position on July 15, 2003 and was offered the position before the end of the month of July. (Id. at 8; Pl.'s Dep. 2 at 47.) In a letter dated August 5, 2003, Ronald Dutton, the Business Administrator of the Western Center for Technological Studies, affirmed that Plaintiff was hired and detailed his salary and start date. (Pl.'s Dep. 1 at 18.) Plaintiff contends that he began looking for a new job in Spring 2003 not because he wanted to leave his position with Limerick Township, but just to see if he was "marketable" and if there were other things he could do in law enforcement. (Id. at 39-40.) On June 25, 2003, Plaintiff inquired with the Township finance manager, Tracy Nonamaker, about what the impact on his pension would be if he was to leave the Township at that time rather than at retirement. (Pl.'s Dep.

2 at 75-76.) At other times during 2001 and 2002 Plaintiff applied for other jobs, including a detective position in Montgomery County and a police chief position in Upper Perkiomen Township. (Id. at 149.)

Discussion

I. Legal Standard for Summary Judgment

Summary judgment is appropriate only when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, reveal no genuine issue of material fact, and the moving party is entitled to a judgment in their favor as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-332 (1986); Fed. R. Civ. P. 56(c). The district court's responsibility is not to resolve disputed issues of fact, but to determine whether any material factual issues exist to be tried. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-49 (1986). A genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. at 248. In making this determination, the court will view all of the facts in the light most favorable to the non-moving party and will draw all reasonable inferences in favor of the non-moving party. Id. at 256. The party seeking summary judgment bears the initial burden of identifying portions of the record that demonstrate the absence of material fact. Celotex, 477 U.S. at 323. The party opposing summary judgment

cannot rely on the allegations of the pleadings, but instead must set forth specific facts showing the existence of a genuine issue of material fact for trial. Id.; Fed. R. Civ. P. 56(e).

II. Plaintiff's First Amendment Claims in Counts I, VII, and XII Pursuant to 42 U.S.C § 1983

Plaintiff has failed, as a matter of law, to demonstrate a valid cause of action for First Amendment retaliation against any defendant. The First Amendment does not protect all speech, and when a government acts as an employer, it may constitutionally limit some speech in the workplace. Bianchi v. Phila., 183 F.Supp.2d 726, 745 (E.D. Pa 2002). A public employee, however, does not forfeit all First Amendment rights, and retains a constitutional right to speak on matters of public concern without fear of retaliation. Baldassare v. N.J., 250 F.3d 188, 194 (3d Cir. 2001). Therefore, a public employee's claim of retaliation for engaging in a protected activity is analyzed under a three step process. Green v. Phila. Hous. Auth., 105 F.3d 882, 885 (3d Cir. 1997). First, the plaintiff must demonstrate that the activity was in fact protected. Id. As a public employee, a plaintiff's activity will only be considered protected if it can be shown that the activity constitutes speech on a matter of public concern and that the public interest in favor of his or her expression outweighs the government employer's countervailing interest in providing efficient and effective services to the public. Id. (citing Pickering v. Bd.

of Educ. of Twp. High Sch. Dist., 391 U.S. 563 (1968)). Second, the plaintiff must show that the activity was a substantial or motivating factor in the alleged retaliatory action. Green, 105 F.3d at 885. Third, the defendants have the opportunity to defeat the plaintiff's claim by demonstrating that the same action would have been taken in the absence of the protected activity. Id. The second and third factors are questions of fact, while the first factor is a question of law. Curinga v. City of Clairton, 357 F.3d 305, 310 (3d Cir. 2004). While it seems that some of Plaintiff's alleged protected activities satisfy the first factor of the test, there are no issues of material fact that Plaintiff's claim has failed the second and third factors, and therefore Defendants are entitled to summary judgment on Counts I, VII, and XII as a matter of law.

1. Plaintiff's Protected Activity

Because Plaintiff is a public employee, his exercises of his First Amendment rights will only qualify as protected if they involve a matter of public concern and Plaintiff's interest in expressing himself outweighs the potential injury the speech could cause to the interest of Limerick Township, as an employer, in providing efficient and effective services to its residents. See Waters v. Churchill, 511 U.S. 661, 668 (1994). Courts have construed what constitutes a "matter of public concern" broadly, and take into consideration the "content, form, and context" of

the activity when doing so. Holder v. Allentown, 987 F.2d 188 (3d Cir. 1993). A public employee's speech is considered to involve a matter of public concern "if it can be fairly considered as relating to any matter of political, social or other concern to the community, such as if it attempts to bring to light actual or potential wrongdoing or breach of public trust on the part of government officials." Baldassare, 250 F.3d at 195. Generally, "speech disclosing public officials' misfeasance is protected while speech intended to air personal grievances is not." Swineford v. Snyder County, 15 F.3d 1258, 1271 (3d Cir. 1994). If it is determined that the public employee spoke on a matter of only personal interest, and not of public concern, a federal court is not the appropriate forum in which to review the wisdom of a government employer's personnel decision. Swartzwelder v. McNeilly, 297 F.3d 228, 235 (3d Cir. 2002).

A public employee's speech on a matter of public concern must then satisfy the Pickering balancing test, under which the speech will only be protected by the First Amendment if the public interest favoring the expression is not outweighed by any injury the speech could cause to the interest of the government, as an employer, in promoting the efficiency of the services it performs through its employees. Connick v. Myers, 461 U.S. 138, 142 (quoting Pickering, 391 U.S. at 568). In performing this balance, the manner, time, place and entire context of the

expression are relevant. Swartzwelder, 297 F.3d at 235. Other considerations include "whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." Id.

Plaintiff's alleged complaint about a potential hostile work environment being suffered by Robin Scalisi qualifies as a matter of public concern and passes the Pickering balancing test. In the Third Circuit, complaints of sexual harassment by a public or elected official constitute a matter of public concern when the alleged harasser is a supervisor and a public authority figure. Bianchi, 183 F.Supp.2d at 745-746 (citing Azzaro v. County of Allegheny, 110 F.3d 968, 978-980 (3d Cir. 1997)). Because Plaintiff complained that Robin Scalisi was suffering from harassment from both Defendant Officer Moore and Defendant Chief Weaver, a public authority figure and supervisor, his complaint qualifies as a matter of public concern. Additionally, the public interest in preventing sexual harassment by persons of public authority is greater than any potential harm to the public employer that could be caused by such a complaint when made to the appropriate supervisor.

Plaintiff's complaints of disparate discipline by Defendant

Chief Weaver do not classify as protected speech under the First Amendment. Plaintiff admits that Defendant Weaver correctly applied the police "reckoning period" in determining the disciplinary action to be taken against Defendant Moore as a result of his motor vehicle accident in 2001. (Pl.'s Dep. 1 at 86.) Therefore, Plaintiff's complaints were not related to any wrongdoing on the part of Defendant Weaver, but were only related to his personal disagreement with a lighter punishment than he had recommended. Such comments by public employees related to "personal grievances" do not constitute a matter of public concern, and are not protected by the First Amendment. Swineford, 15 F.3d at 1271. Additionally, Plaintiff's comments would further not satisfy the Pickering balancing test because criticisms made about the Police Chief by his Sergeant have a high potential of impairing the Chief's ability to discipline and of having a detrimental impact on the working relationship between the Chief and Sergeant which requires personal loyalty and confidence. Thus, Plaintiff's remarks about the alleged disparate discipline of Defendant Weaver are not protected by the First Amendment.

Lastly, Plaintiff's union activity is protected by the First Amendment. The First Amendment's rights to freedom of speech and association extend to union activities. See Thomas v. Collins, 323 U.S. 516 (1945). While the Third Circuit Court of

Appeals has not decided whether the "public concern" test and Pickering balancing should be applied to First Amendment claims involving the right to associate,[4] the Court has held that "efforts of public employees to associate together for the purpose of collective bargaining involve associational interests which the First Amendment protects from hostile state action." Labov v. Lalley, 809 F.2d 220, 222-223 (3d Cir. 1987). It seems that even if the test were applied, a public employee's attempt to unionize would always be considered a matter of public concern and would not be outweighed by any countervailing government interest. See Hitchens v. County of Montgomery, No. 00-4282, 2002 WL 253939, *3 (E.D. Pa. 2002) (finding that "speech arising in the context of union organization efforts has long been held to be a matter of public concern" and that public employers' disruption of services by employee union organization is "minimal at best"). Indeed, Defendants agree in their motion that Plaintiff's union activities were protected by the First Amendment. (Def.'s Mot. at 17.)

2. Defendants' Harassing Activity

Once it is established that a Plaintiff engaged in protected activity, the Plaintiff must show that the protected activity was

[4]See Hitchens v. County of Montgomery, No. 00-4282, 2002 WL 253939, *3 (E.D. Pa. 2002) (comparing Sanguigni v. Pittsburgh Bd. of Pub. Educ., 968 F.2d 393 (3d Cir. 1992) with Labov v. Lalley, 809 F.2d 220 (3d Cir. 1987)).

a substantial or motivating factor in the retaliatory action. Green, 105 F.3d at 885. This actually involves two separate inquiries: (1) Did the defendants take an actionable adverse employment action against the public employee? and (2) If so, was the motivation for the action to retaliate against the employee for the protected activity? Merkle v. Upper Dublin Sch. Dist., 211 F.3d 782, 800 n. 3 (3d Cir. 2000). "Determining whether a plaintiff's First Amendment rights were adversely affected by retaliatory conduct is a fact intensive inquiry focusing on the status of the speaker, the status of the retaliator, the relationship between the speaker and the retaliator, and the nature of the retaliatory acts." Brennan v. Norton, 350 F.3d 399, 419 (3d Cir. 2003). To be actionable under the First Amendment, the nature of the retaliatory acts by a public employer need not be great, but must be more than de minimus or trivial. Id.; McKee v. Hart, 436 F.3d 165, 170 (3d Cir. 2006). The threshold question is whether the retaliatory actions would have deterred a person of ordinary firmness from exercising his or her First Amendment rights. McKee, 436 F.3d at 170. Courts have found that a public employer adversely affects an employee's First Amendment rights when it makes decisions related to termination, rehiring, promotion, transfer, or recall, based on the exercise of an employee's First Amendment rights. See Brennan, 350 F.3d at 419. On the other hand, Courts have

declined to find that an employer's actions have adversely affected an employee's exercise of his First Amendment rights when the employer's alleged retaliatory acts were criticisms, false accusations, or verbal reprimands. Id.[5] While this standard is usually applied to individual acts of alleged retaliation, an entire campaign of harassment which, though trivial in detail, might deter a person of ordinary firmness from exercising his or her First Amendment rights when viewed in the aggregate, can give rise to a claim for First Amendment retaliation. See Suppan, 203 F.3d at 235; McKee, 436 F.3d at 170 ("being the victim of petty harassment in the workplace as a result of speaking on matters of public concern is in itself retaliation. . . [which] could be actionable under the First Amendment").

To satisfy the second part of this inquiry, a plaintiff must show that the adverse employment action was taken in retaliation for the protected activity. Merkle, 211 F.3d at 800 n. 3. To meet this requirement, the employee need not show "but-for" causation, but must show that the protected activity was a "substantial" or "motivating factor" in the relevant decision.

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[5]For example, in Brennan, the court found that the defendant's refusal to use an employee's title or to capitalize his name did not meet the level of a constitutional violation, while the defendant's acts of removing the plaintiff from payroll for a month and issuing multiple suspensions did support a cause of action for First Amendment retaliation. 350 F.3d at 419.

Suppan, 203 F.3d at 235-236. If the plaintiff meets this burden, the burden shifts to the defendant to show "by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct." Id. (citing Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977)).

None of the alleged acts of retaliation in this case rise to the level required to state a First Amendment violation. The Valentine's Day ad, the condoms and key card, the bumper sticker, the doctored photograph, the artificial robin, the job applications, the red-penned work product, the voicemails, the overtime calculation assignment, and the discipline of being sent home one day with pay, are trivial annoyances that would not deter a "reasonably hardy individual from engaging in protected activity." Muti v. Schmidt, No. 03-1206, 96 Fed. Appx. 69, 74, 2004 WL 857389, *5 (3d Cir. 2004). Even viewed in aggregate, these petty harassments do not meet the threshold of deterring a reasonable person from exercising his or her First Amendment rights.

Plaintiff claimed that these harassments undermined his authority in the Police force, which could have made them more serious in aggregate, but the facts show that this claim is baseless. Plaintiff's two cited incidents in which officers did not follow orders cannot reasonably be considered to be related to the alleged harassment. In the first case, Officer Kennedy

had a legitimate personal reason not to follow the order, which was actually an order handed down from Defendant Chief Weaver. (Pl.'s Dep 1 at 104.) In the other case, Plaintiff admitted that Defendant Officer Moore did not disobey an order, but was approved to leave early. Plaintiff admits that there were no other instances in which officers disobeyed his orders. (Id. at 111.) Therefore, no reasonable jury would find the Plaintiff's authority was undermined in the Police department as a result of the alleged retaliatory harassment.

Additionally, no reasonable jury would find that Plaintiff was constructively discharged as a result of the alleged harassment. Under the constructive discharge doctrine, an employee's reasonable decision to resign because of "unendurable working conditions" constitutes the equivalent of a formal discharge for remedial purposes. Pa. State Police v. Suders, 542 U.S. 129, 141 (2004). The test to establish a constructive discharge asks: "Did working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign?" Id. Because we find that the alleged harassment constituted only trivial annoyances, we do not find that any reasonable juror would agree that such trivial annoyances could make working conditions so intolerable for

Plaintiff that a reasonable person in his position would resign.[6]

Even if some of Plaintiff's allegations were considered to rise to the level of a First Amendment violation, which they do not, his claims would still fail because he cannot establish a causal nexus between his protected conduct and the alleged retaliation. First, Plaintiff's complaint regarding the hostile work environment of Robin Scalisi could not have been a substantial or motivating factor for any of the alleged harassment. According to Plaintiff, he only "might have said something" about the hostile work environment on the day he resigned, and therefore none of the alleged harassment, which all occurred before Plaintiff's resignation, could have been in retaliation for that complaint. (Pl.'s Dep. 2 at 111.) Thus, Plaintiff would have to show that the substantial or motivating factor behind alleged harassment was his participation in union activities in the Summer of 2002, and he has failed to do so with regard to each Defendant.

For some of the alleged retaliatory conduct, there is not enough evidence to determine which defendant or defendants, if any, were responsible for those acts with sufficient precision to

[6]There is substantial evidence that Plaintiff had secured another position prior to his resignation, suggesting that his constructive discharge claim may be disingenuous. (Pl.'s Dep 1 at 6, 8, 18.) This evidence, however, is not necessary to this Court's determination that the complained of conduct did not create a working environment so intolerable that Plaintiff was constructively discharged.

assess liability, including the artificial robin in Plaintiff's mailbox, the bumper sticker, and the condoms and hotel key card. See Brennan, 350 F.3d at 419. Out of the activities attributed to Defendant Chief Weaver, there is no evidence that Plaintiff's union activities were the motivating factor behind any of them, with the possible exception of Plaintiff's being sent home one day with pay the day after telling Defendant Weaver about the union meeting. While it has already been decided that this discipline does not rise to the level of a constitutional violation even if it was in retaliation for Plaintiff's union activities, Defendant Weaver has also met the burden of showing that the same action would have been taken in the absence of Plaintiff's protected activity. Plaintiff admittedly was caught lying to his direct supervisor and faced a reasonable discipline which was not excessive enough to indicate that it was also meant to be in retaliation for Plaintiff's participation in union activities. With regard to Defendant Officer Moore, he was admittedly responsible for both the Valentine's Day ad and the doctored photo, but there is no evidence that these practical jokes were related in any way to Plaintiff's union activities. Therefore, Plaintiff has failed to establish the necessary causal nexus between the alleged retaliatory harassment and the protected activity to assess liability to either Defendant Weaver or Defendant Moore for First Amendment retaliation.

Plaintiff has also failed to establish the direct causal link necessary to assess supervisory liability against Defendant Zaremba, the Township Supervisor, or municipal liability against Defendant Limerick Township, for violations of his first amendment rights. See Brown v. Muhlenberg Twp., 269 F.3d 205, 214-215 (3d Cir. 2001). A supervisor can only be found liable for a constitutional violation pursuant to § 1983 when a plaintiff can show a direct causal link between the supervisor's "affirmative actions" and the violation. Baker v. Monroe Twp., 50 F.3d 1186, 1190 (3d Cir. 1990). A municipality can only be found liable for a constitutional violation pursuant to § 1983 when it is found to have directly caused a violation through a "policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers" or an informal "custom or usage." Brown, 269 F.3d at 215 (quoting Monell v. New York City Dep't of Soc. Servs., 436 U.S. 658 (1978)). No causal link can be established with regard to either supervisor or municipal liability when no constitutional violation by any individual state actor has been found. See L.A. v. Heller, 475 U.S. 796, 799 (1986). Because it has been determined that Plaintiff's claims of First Amendment retaliation against Defendants Weaver and Moore have failed to establish a constitutional violation, there can be no supervisory or municipal liability assessed against Defendants Zaremba and

Limerick Township.

3. Qualified Immunity

Defendants are also entitled to summary judgment on Plaintiff's First Amendment claims on the ground that they are protected by qualified immunity. "Qualified immunity insulates government officials performing discretionary functions from suit insofar as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." McKee, 436 F.3d at 169. An official has lost qualified immunity, and is subject to suit, when (1) a constitutional right would have been violated on the facts alleged and (2) that right was clearly established. Id. (citing Saucuer v. Katz, 533 U.S. 194, 200 (2001). Defendants, as public officials, are entitled to qualified immunity because (1) their actions did not violate Plaintiff's First Amendment rights and (2) even if they did, that right was not clearly established.

For a right to be clearly established, "there must be sufficient precedent at the time of the action, factually similar to plaintiff's allegations, to put the defendant on notice that his or her conduct is constitutionally prohibited." Id. at 171. This inquiry into whether the right was clearly established "must be undertaken in light of the specific context of the case, not as a broad general proposition." Id. (quoting Brosseau v. Haugen, 543 U.S. 194 (2004)). While it is clearly established

that a public employee has the right to speak on matters of public concern without fear of retaliation, there is not sufficient precedent as to when a pattern of trivial harassments may qualify as retaliatory harassment to qualify the right to be free from such a pattern of harassment as clearly established. McKee, 436 F.3d at 173 (citing Suppan, 203 F.3d at 230 (denied promotion); Baldassare, 250 F.3d at 194 (demotion); Brennan, 350 F.3d at 419 (suspensions)). The Third Circuit Court of Appeals has noted that there is a "dearth of precedent of sufficient specificity" regarding when trivial harassments may qualify as a First Amendment violation. McKee, 436 F.3d at 173. Therefore, even if Defendants were found to have violated a constitutional right, it would be one that was not clearly established at the time of the action. The Defendants are thus entitled to qualified immunity on the second, as well as the first, prong of the qualified immunity test.

III. Plaintiff and Plaintiff-wife's State Law Invasion of Privacy Claims in Counts IX and XI

The remaining claims are grounded in Pennsylvania state law. Because this Court has granted summary judgment on all claims over which it had original jurisdiction, we decline to exercise supplemental jurisdiction over Plaintiff and Plaintiff-wife's Pennsylvania state law claims in Counts IX and XI. See 28 U.S.C. § 1367(a)(3). Those claims are dismissed without prejudice.

Conclusion

For the foregoing reasons, this Court finds that Plaintiff has failed to present any issues of material fact which could lead a reasonable jury to return a verdict in his favor as to Counts I, VII, and XII for First Amendment violations pursuant to § 1983. Plaintiff's claims on those counts have failed because (1) the alleged retaliatory harassment does not rise to the level of a constitutional violation and (2) even if it did, Defendants are protected by qualified immunity. Thus, Defendants' motion for summary judgment will be granted as to Counts I, VII, and XII. This Court declines to exercise supplemental jurisdiction over the remaining state law claims in Counts IX and XI. Accordingly, those claims will be dismissed with leave to Plaintiffs to re-file them in state court.

An appropriate order follows.

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

WILLIAM SCHLICHTER and BARBARA SCHLICHTER	:	
v.	:	CIVIL ACTION
	:	NO. 04-CV-4229
LIMERICK TOWNSHIP, W. DOUGLAS WEAVER, OFFICER ADAM MOORE, WALTER ZAREMBA, TOWNSHIP MANAGER, KEN SPERRING, TOWNSHIP SUPERVISOR, JOSEPH GRECO, TOWNSHIP SUPERVISOR, THOMAS DEBELLO, TOWNSHIP SUPERVISOR, FRANK GRANT, TOWNSHIP SUPERVISOR, FREDERICK FIDLER, TOWNSHIP SUPERVISOR, and JOHN DOE	:	

ORDER

AND NOW, this 14th day of August, 2006, upon consideration of Defendants' Motion for Summary Judgment (Doc. No. 27), and all responses thereto (Docs. No. 28, 29, 31), it is hereby ORDERED that the Motion is GRANTED and judgment is entered as a matter of law against Plaintiff and in favor of Defendants as to Counts I, VII, and XII.

The remaining state law claims in Counts IX and XI are DISMISSED with leave to the Plaintiffs to re-file them in the appropriate Pennsylvania state court.

BY THE COURT:

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