

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

BRENDA JOYCE FORTES,	:	CIVIL ACTION
Plaintiff,	:	NO. 06-0878
	:	
v.	:	
	:	
BOYERTOWN AREA SCHOOL	:	
DISTRICT, et. al.,	:	
Defendants.	:	

MEMORANDUM AND ORDER

Stengel, J.

October 20, 2006

This employment action¹ involves claims of race discrimination and retaliation brought by a high school English teacher against her employer and supervisors. Brenda Joyce Fortes ("Plaintiff") contends that defendants Boyertown Area School District ("School District"), Steven Kline ("Kline") and Charles D. Amuso ("Amuso") (collectively "Defendants") discriminated against her because of her race during her employment. There are two motions to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure: one filed by Defendant School District and another by Defendants Kline and Amuso. For the reasons that follow, I will grant the motions in part and deny them in part.

¹The Court would like to note that portions of Plaintiff's complaint are unclear. Although there are three defendants, Plaintiff rarely specifies which allegation pertains to a specific defendant. Plaintiff does make some specific allegations against Defendant Kline and these are noted. It was also difficult to determine the basis for Plaintiff's Section 1981 and 1983 claims. I have construed the allegations in a light most favorable to the Plaintiff.

I. BACKGROUND²

Plaintiff, a female African-American, obtained a bachelor's degree in English from Eastern College University in 1972. She became certified to teach in the Commonwealth of Pennsylvania in 1990. In 1993, School District hired her as a full-time Senior High School English Teacher for 10th through 12th grade. She was the first African-American female full-time teacher in the School District in a decade. The fourteen other English teachers employed by the School District were all Caucasian. Defendant Kline is a Caucasian male and Principal of School District. Defendant Amuso is a Caucasian male and Superintendent of the School District.

In the summer of 2002, Plaintiff designed a Reading Remediation Program to assist students who had not passed the state assessment test. The school designated Plaintiff to handle the program for the upcoming 2002-2003 school year. However, Defendant Kline arbitrarily removed Plaintiff from this position³ and reassigned a Caucasian teacher to the job. In response, Plaintiff sent a written complaint to Defendants in June 2003 stating she believed that this adverse action was racially motivated. Defendant took no remedial action. Although the School cancelled the Remediation program for the 2003-2004 school year, they reinstated it for the 2004-2005 school year and hired a female Caucasian teacher with less education and experience than

²The facts are taken from the complaint and are accepted as true for the purposes of this motion.

³Plaintiff does not indicate the date or time period when she was removed.

the Plaintiff to staff the program. On August 27, 2004, Plaintiff again complained to Defendants that she had been denied the Remediation assignment because of racial discrimination. Defendants did not take remedial actions and retaliated against Plaintiff with adverse employment actions.

Defendants racially harassed Plaintiff by using racial slurs and derogatory references and comments about African-Americans.⁴ On November 16, 1995, Defendant Kline referred to Plaintiff as a “nigger.” Plaintiff complained about Defendant Kline’s use of racial slurs.

On or about September 30, 2005, Defendant Kline accused Plaintiff of using vulgar language in the classroom with her students. Plaintiff denied this charge and told Defendant Kline that she instructed students not to use such language in the classroom. Plaintiff also responded that she only used vulgar language when discussing literature books approved by the School District. She notes for example that John Steinbeck’s Of Mice and Men uses the word “nigger.” Plaintiff was disciplined for using vulgar language that appeared in literature for teaching purpose while Caucasian teachers were not.

On or about October 13, 2004, Plaintiff tried to separate students who were fighting in the hallway during the period in between classes. Plaintiff was injured because of the incident and this caused her to take a disability leave. Defendants had

⁴Plaintiff says this racial harassments occurred “prior to June 2003” and does not say when and if it ended.

previously instructed teachers to be in the hallway between classes to supervise and ensure the safety of students and staff. Yet, Plaintiff was the only teacher in the hallway when the incident happened. Defendants criticized Plaintiff for breaking up the fight instead of returning to her classroom to call the office. Defendants did not discipline Caucasian teachers who were not in the hallway to possibly deter or minimize the incident.

While Plaintiff was on the disability leave,⁵ Defendants subjected her to adverse actions including: suspension, loss of pay and benefits, unsatisfactory performance evaluations, performance improvement plan, undermining her authority with the students, and other disciplinary actions.

More than 180 days prior to the institution of this lawsuit, Plaintiff filed charges against the Defendant with the EEOC and PHRC. After Plaintiff exhausted her administrative remedies, the EEOC issued a right to sue letter on December 14, 2005. See Pl's Am. Compl. Ex. A. Plaintiff filed this action on March 15, 2006 and amended her complaint on June 13, 2006. Plaintiff alleges race discrimination in violation of (1) Title VII of the Civil Rights Act of 1964("Title VII"), (2) § 1981 of the Civil Rights Act ("Section 1981"), (3) and the Pennsylvania Human Relations Act 43 PA. CONS. STAT. § 951 et seq ("PHRA"); (4) retaliation in violation of § 1981 of the Civil Rights Act; and

⁵ Plaintiff does not give specific details about this disability leave, particularly the reason for the leave and the date it began and ended. Plaintiff only states that she "was out of work on the work related injury and disability on November 18, 2004." Am. Compl. ¶ 38.

(5) deprivation of constitutional rights in violation of 42 U.S.C. § 1983 ("Section 1983"). Defendant School District filed a motion to dismiss on June 30, 2006. Defendants Kline and D'Amuso filed a motion to dismiss on July 24, 2006.

II. STANDARD OF REVIEW⁶

The purpose of a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure is to test the legal sufficiency of a complaint. Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987). The court may grant a motion to dismiss only where "it appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." Carino v. Stefan, 376 F.3d 156, 159 (3d Cir. 2004) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). In deciding a motion to dismiss, the court must construe the complaint liberally, accept all factual allegations in the complaint as true, and draw all reasonable inferences in favor of the plaintiff. Id. See also D.P. Enters. v. Bucks County Cmty. Coll., 725 F.2d 943, 944 (3d Cir. 1984). A plaintiff, however, must plead specific factual allegations. Neither "bald assertions" nor "vague and conclusory allegations" are accepted as true. See Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997); Sterling v. Southeastern Pa. Transp. Auth.,

⁶ Plaintiff asserts that Defendants rely on extraneous factual allegations outside of the Amended Complaint and therefore, the Court must disregard these allegations or treat Defendants' motions under Rule 56 and give Plaintiff additional time for discovery. FED. R. CIV. P. 12(b) states that if a party making a Rule 12(b)(6) motion presents "matters outside the pleading" and these pleadings are "not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." The court will analyze this motion under Rule 12(b)(6) and exclusively rely on facts in the amended complaint and Plaintiff's responsive motions. The court will exclude any extraneous factual allegations presented by the Defendants.

897 F. Supp. 893 (E.D. Pa. 1995).

III. DISCUSSION

A. Plaintiff's Claims⁷ for Race Discrimination under Title VII,⁸ the PHRA,⁹ and Section 1981¹⁰

Courts in the Third Circuit apply the burden-shifting framework first established by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–04 (1973), to claims of disparate treatment in violation of Title VII. Jones v. Sch. Dist. of Philadelphia, 198 F.3d 403, 409 (3d Cir. 1999). In the McDonnell Douglas analysis, the plaintiff bears the initial burden of establishing a *prima facie* case of employment discrimination by a preponderance of the evidence. Storey v. Burns Int'l Sec. Servs., 390 F.3d 760 (3d Cir. 2004)(citing Tex. Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-

⁷ Although unclear from Plaintiff's Amended Complaint, Plaintiff clarifies that her claims against individual defendants Kline and Amuso are under Section 1981 and Section 1983. Pl. Opp'n Br. Defs' Kline and Amuso Mot. Dismiss p. 11 n.1. Therefore, Plaintiff's Title VII and PHRA claims are exclusively against School District while the Section 1981 Claim is against School District and Defendants Kline and Amuso.

⁸ Title VII provides that "[i]t shall be an unlawful employment practice for an employer...to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin...". 42 U.S.C. § 2000e-2.

⁹ The PHRA provides "[t]he opportunity for an individual to obtain employment for which he is qualified... without discrimination because of race, color, familial status, religious creed, ancestry, handicap or disability, age, sex, national origin...". Courts interpret the PHRA consistently with Title VII. Weston v. Pennsylvania, 251 F.3d 420, 426 n.3 (3d Cir. 2001)("The proper analysis under Title VII and the Pennsylvania Human Relations Act is identical, as Pennsylvania courts have construed the protections of the two acts interchangeably.").

¹⁰ Section 1981 states, in relevant part, "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." A Section 1981 analysis is identical to a Title VII analysis. Schurr v. Resorts International Hotel Inc., 196 F.3d 486, 499 (3d Cir. 1999) (holding that the elements of employment discrimination under Title VII are identical to the elements of discrimination under § 1981). See also Section E *infra* for a discussion of the Section 1981 claim.

53 (1981). A *prima facie* case requires a showing that: “(1) she is a member of a protected class; (2) she satisfactorily performed the duties required by her position; (3) she suffered an adverse employment action; and (4) either similarly-situated non-members of the protected class were treated more favorably or the adverse job action occurred under circumstances that give rise to an inference of discrimination.” Langley v. Merck & Co., No. 05-3205, 2006 U.S. App. LEXIS 14958, at * 4 (3d Cir. June 15, 2006)(citing Sarullo v. U.S. Postal Serv., 352 F.3d 789, 797 (3d Cir. 2003)).

A plaintiff's properly pleaded *prima facie* case "eliminates the most common nondiscriminatory reasons" for an employer's actions. Burdine, 450 U.S. at 253. While the *prima facie* case only "raises an inference of discrimination," the Supreme Court has stated that, once the *prima facie* case is established, it will presume that the employer's action is "more likely than not based on the consideration of impermissible factors." Id. at 254. Should the plaintiff establish her *prima facie* case, the burden of production (but not the burden of persuasion) shifts to the defendant to articulate some legitimate and nondiscriminatory reason for the employer's action. Sarullo, 352 F.3d at 797. If the defendant meets this burden, the presumption of a discriminatory action raised by the *prima facie* case is rebutted. Id. The plaintiff must then demonstrate by a preponderance of the evidence that the employer's articulated reason was merely a pretext for discrimination, and not the actual motivation behind its decision. Id.

The McDonnell Douglas framework was not intended to be “rigid, mechanized, or

ritualistic” but a sensible way to ascertain whether the employer is treating some people less favorably on the basis of a protected characteristic. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978). See also E.E.O.C. v. Metal Serv. Co., 892 F.2d 341, 348 (3d Cir. 1990)(“Thus, since ‘the importance of McDonnell Douglas lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act...courts need not, and should not, stubbornly analyze all Title VII factual scenarios through the McDonnell Douglas formula....a Title VII plaintiff has established a *prima facie* case when sufficient evidence is offered such that the court can infer that if the employer’s actions remain unexplained, it is more likely than not that such actions were based on impermissible reasons.”)(citations omitted). With this caveat in mind, I will review the two elements of the McDonnell Douglas *prima facie* case that Defendants find insufficient: the presence of an adverse employment action and preferential treatment of similarly situated individuals outside of Plaintiff’s protected class.¹¹

(1) Adverse employment action.

¹¹Plaintiff meets the first element of the *prima facie* case on the basis of her race (African-American). Am. Compl. ¶ 7. Plaintiff is qualified for the position because she has been certified to teach in the Commonwealth of Pennsylvania since 1990. Am. Compl. ¶ 12. Moreover, Defendants do not argue that Plaintiff is not qualified for her position. Therefore, Plaintiff satisfies the second element of the *prima facie* case as well.

The Third Circuit test for an adverse employment action closely tracks the language of Title VII. An adverse employment action is an action by the employer that is “serious and tangible enough to alter an employee’s compensation, terms, conditions, or privileges of employment” such as hiring, firing, failing to promote or reassignment. Storey, 390 F.3d at 764. While an employee does not need to allege tangible or economic consequences from the discrimination, it is equally clear that not every racial epithet, slight, or unpleasantness gives rise to a claim. Robinson v. City of Pittsburgh, 120 F.3d 1286, 1296-1297 (3d Cir. 1997).

Defendants argue that Plaintiff does not sufficiently allege an adverse employment action. Plaintiff describes a course of conduct showing differential treatment and adverse employment actions on the basis of race. Plaintiff alleges that Caucasian teachers received more favorable support and resources and were not disciplined for similar behavior for which the School District disciplined her. Am. Compl. ¶ 15, 36. Plaintiff also makes more specific allegations that Defendant Kline “referred to Plaintiff as a ‘nigger’ subliminally” (Am. Compl. ¶ 24); Defendant Kline removed her from teaching a Reading Remediation Program she had designed and replaced her with a Caucasian teacher (Am. Compl. ¶ 18, 20); and that Defendants subjected her to adverse actions such as suspension, loss of pay and benefits, unsatisfactory performance evaluations and other false allegations when she was on disability leave (Am. Compl. ¶ 25, 26, 38). While Plaintiff does not allege that Defendants fired or failed to promote her because of race,

Plaintiff does allege a discriminatory motive behind her reassignment from the Remediation Program, along with many allegations of dissimilar and less favorable treatment on the basis of race. Given the procedural posture of this case, Plaintiff's allegations support an inference of disparate treatment affecting the "compensation, terms, conditions, or privileges of employment" on the basis of race.

(2) Preferential treatment of similarly situated teachers outside Plaintiff's protected class

Again, while the McDonnell Douglas framework is a useful benchmark, Plaintiff's Complaint will survive a motion to dismiss as long as it supports an inference that people outside of plaintiff's protected class were treated differently. Metal Serv. Co., 892 F.2d at 348. Defendant argues that Plaintiff fails to allege this prong of the McDonnell Douglas test because Plaintiff does not identify any specific employees.

Plaintiff's Complaint makes sufficient allegations that she was treated less favorably on the basis of race. As her comparator group, Plaintiff indicates that she was the only African-American English teacher and approximately fourteen other English teachers were Caucasian. Am. Compl. ¶ 17. Plaintiff also alleges that Defendants twice reassigned a Caucasian teacher with less education and experience to staff the Remediation Reading Program. Am. Compl. ¶ 18, 20. Finally, Plaintiff asserts that Caucasian teachers who used vulgar language during their teaching were not reprimanded or disciplined as Plaintiff was. Am. Compl. ¶ 31. These allegations satisfy the fourth-

part of Plaintiff's *prima facie* case.

Plaintiff has adequately pleaded these race discrimination claims and Defendants' motions to dismiss on these counts will be denied.

B. Plaintiff's Exhaustion of Administrative Remedies for the Retaliation Claim¹²

It is an unlawful employment practice for an employer to retaliate against an employee who has opposed an unlawful practice under Title VII or because she made a charge or otherwise participated in an investigation. 42 U.S.C. § 2000e-3(a). As with any alleged violation of Title VII, filing charges with the EEOC and receiving a right to sue letter are prerequisites to suit. Ostapowicz v. Johnson Bronze Co., 541 F.2d 394, 399 (3d Cir. 1976). These administrative procedures evince a preference for settling matters through administrative conciliation instead of formal court proceedings and should not be strictly interpreted. Id. The test in the Third Circuit for exhaustion of administrative remedies is "whether the acts alleged in the subsequent Title VII suit are fairly within the scope of the prior E.E.O.C. complaint, or the investigation arising therefrom." Antol v. Perry, 82 F.3d 1291, 1295 (3d Cir. 1996)(citing Walters v. Parsons, 729 F.2d 233, 237 (3d Cir. 1984)); see also Ostapowicz, 541 F.2d at 399 ("...courts allow plaintiffs to sue for

¹²Defendants do not challenge the substance of Plaintiff's retaliation claim at this stage in the proceedings. Count 4 of Plaintiff's Complaint is labeled as a Section 1981 Retaliation Claim. The Third Circuit recognizes Section 1981 claims for retaliation independent of Title VII. Cardenas v. Massey, 269 F.3d 251, 263 (3d Cir. 2001); Khair v. Campbell Soup Co., 893 F.Supp. 316, 335 (D. N.J. 1995). Unlike Title VII, Section 1981 does not require exhaustion of administrative remedies. However, the briefings of both parties presume that the retaliation claim also proceeds under Title VII. Therefore, the court will analyze whether the plaintiff has completed the administrative prerequisites to bring a retaliation claim under Section 1981.

any Title VII violations “which can reasonably be expected to grow out of the charge of discrimination.”)

Plaintiff presents evidence that retaliation was within the scope of her original EEOC complaint and investigation. Plaintiff filed charges with the EEOC and the PHRC and received a right to sue letter on December 14, 2005. Amend. Compl. ¶ 6. In her Charge Information Questionnaire, she lists retaliation as the basis for her complaint, in addition to race, color, gender, and disability. Pl.’s Br. Opp’n. Def. School District Mot. Dismiss Ex. B. Plaintiff alleges that she continued to press her claim of retaliation after signing the charge form in March 2005. See Id. at p. 21, Ex. F. At this point in the proceedings, we do not have the benefit of reviewing EEOC records to know what the agency actually investigated. However, Plaintiff has sufficiently alleged that the complaint she lodged with the EEOC included a retaliation claim. Therefore, her claim will not be dismissed for failure to exhaust administrative remedies.

C. Liability of Individual Defendants Kline and Amuso for Plaintiff’s Section 1981 and 1983 Claims

In her Amended Complaint, it was not clear if Plaintiff’s claims against the individual defendants were in their official or individual capacities. Plaintiff now clarifies that her Section 1981 and 1983 claims against Defendants Kline and Amuso are

in their individual capacities.¹³ Pl. Opp'n Br. Defs' Kline and Amuso Mot. Dismiss p. 11. To hold Defendants liable in their personal capacity, Plaintiff must allege that each Defendant personally participated in violating her rights, or directed another person to do so, or had knowledge and acquiesced in the subordinates' violation. Robinson v. City of Pittsburgh, 120 F.3d 1286, 1293 (3d Cir. 1997). Even if a defendant is potentially personally liable, he may be entitled to qualified immunity under an objective legal reasonableness test if "reasonable officials in the defendants' position at the relevant time could have believed, in light of what was in the decided case law, that their conduct would be lawful." Good v. Dauphin County Soc. Servs. for Children & Youth, 891 F.2d 1087, 1092 (3d Cir. 1989).

(1) Defendant Amuso is dismissed from the suit.

Plaintiff does not make any specific allegations about personal acts or omissions of Defendant Amuso, the Superintendent of the School District. Plaintiff also does not allege that Defendant Amuso had knowledge of or acquiesced to a violation of Plaintiff's rights. Therefore, Plaintiff's Complaint does not provide a sufficient basis for asserting that she is suing Defendant Amuso in his individual capacity. Defendant Amuso is dismissed from this suit.

¹³Defendants cannot be sued in their official capacity because claims against individual defendants in their official capacity are equivalent to claims against the government entity itself and as such are redundant and must be dismissed. McMillian v. Monroe County, 520 U.S. 781, 785 n.2 (1997); Burton v. City of Philadelphia, 121 F.Supp.2d 810, 812 (E.D. Pa. 2000). Moreover, Defendants can not be held personally liable under Title VII. Sheridan v. E.I. Dupon de Nemours & Co., 100 F.3d 1061, 1078 (3d Cir. 1996).

(2) Defendant Kline is not entitled to qualified immunity.

Plaintiff does make specific allegations that Defendant Kline, the principal of the school, personally violated her rights. See Am. Compl. ¶ 18, 24, 28. Defendant argues that Defendant Kline is not personally liable because he only acted in his official capacity: by making staffing decisions or disciplining staff. However, if Defendant Kline performed these official job duties in a discriminatory way and violated Plaintiff's constitutional rights, he is not entitled to immunity. Defendants' also conveniently leave off one of Plaintiff's allegations: that "Defendant Kline referred to Plaintiff as a 'nigger' subliminally." Am. Compl. ¶ 24. This act is surely not within the scope of his job duties and supports an allegation that Defendant Kline personally discriminated against Plaintiff.

Moreover, Defendant Kline is not entitled to qualified immunity under the objective legal reasonableness test. Taking Plaintiff's allegations as true, Defendant Kline personally and individually discriminated and retaliated against Plaintiff on the basis of race. Racial discrimination is clearly prohibited by state and federal law. Therefore, Defendant's actions cannot be legally reasonable in light of the established law. Plaintiff's Section 1981 and 1983 claims against Defendant Kline survive the motion to dismiss.

D. Plaintiff's Section 1983 Claim

In relevant part, Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to

be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress... 42 U.S.C. §1983.

While not a source of substantive rights, Section 1983 provides a remedy for violations of constitutional rights by state officials.¹⁴ Samerik v. City of Phila., 142 F.3d 582, 590 (3d Cir. 1998). To prevail on a section 1983 claim, a plaintiff generally must show: (1) that the defendant acted under color of state law and (2) that the defendant deprived the plaintiff of a right protected by federal law. Id.

(1) The claim against the School District must be dismissed because Plaintiff has not pleaded a policy or custom under Monell.

Defendants argue that they are not liable under Section 1983 because of the limitation established by Monell v. Dept. of Soc. Servs., 436 U.S. 658 (1978).¹⁵ In Monell, the Supreme Court held that municipalities may not be found liable on a theory of *respondeat superior* under Section 1983. 436 U.S. at 691. See also Colburn v. Upper Darby Township, 946 F.2d 1017, 1027 (3d Cir. 1991). Section 1983 liability is only proper when a municipal employee or official deprives the plaintiff of his or her federally

¹⁴Plaintiff's complaint does not identify the constitutional basis for the Section 1983. As her underlying suit is for race discrimination, the Court will presume the Section 1983 claim is to enforce Plaintiff's rights under the equal protection clause of the Fourteenth Amendment. See Bradley v. Pittsburgh Bd. of Educ., 913 F.2d 1064, 1079 (3d Cir. 1990)(noting that although the plaintiff "does not explicitly identify in the complaint or briefs the substantive basis for his race discrimination claim under section 1983, that claim must be grounded on the equal protection clause of the Fourteenth Amendment.").

¹⁵Defendants do not disagree that they acted under color of state law or that Plaintiff has a federally protected right.

protected rights pursuant to a municipal policy or custom. 436 U.S. at 691. In order to recover from a municipality under Section 1983, a plaintiff must: (1) identify a policy or custom that deprived him or her of a federally protected right, (2) demonstrate that the municipality, by its deliberate conduct, acted as the "moving force" behind the alleged deprivation, and (3) establish a direct causal link between the policy or custom and the plaintiff's injury. Bd. of the County Comm'rs v. Brown, 520 U.S. 397, 404 (1997).

A municipal policy, for purposes of section 1983, is a "statement, ordinance, regulation, or decision officially adopted and promulgated by [a government] body's officers." Monell, 436 U.S. at 690; see also Berg v. County of Allegheny, 219 F.3d 261,275 (3d Cir. 2000)("Policy is made when a 'decisionmaker possessing final authority to establish municipal policy with respect to the action' issues an official proclamation, policy, or edict.")(citation omitted). Such a policy "generally implies a course of action consciously chosen from among various alternatives." Oklahoma City v. Tuttle, 471 U.S. 808, 823 (1985). Limiting liability to identifiable policies ensures that municipalities are only liable for "deprivations resulting from the decisions of its duly constituted legislative body or of those officials whose acts may fairly be said to be those of the municipality." Brown, 520 U.S. at 403-04.

Plaintiff asserts that she is not proceeding under a theory of *respondeat superior* and that she has sufficiently pled that "Defendant has a policy, custom, or usage of discriminating against African-Americans, and retaliating against her for complaining of

race discrimination or violation of her Constitutional rights.” Pl.’s Br. Opp’n Def. School District Mot. Dismiss, p. 16. Yet even a liberal reading of Plaintiff’s Complaint, with all reasonable inferences in her favor, finds that it does not allege that school officials acted pursuant to an officially adopted or enacted policy, as defined by Monell.

Plaintiff can also base Section 1983 liability by showing the school officials acted under a municipal custom. A custom, while not formally adopted by the municipality, may lead to liability if the “relevant practice is so widespread as to have the force of law.” Brown, 520 U.S. at 404. This requirement should not be construed so broadly as to circumvent Monell: “[p]roof of a single incident of unconstitutional activity is not sufficient to impose liability under Monell, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy...”. Oklahoma City v. Tuttle, 471 U.S. 808, 823-824 (1985). Plaintiff’s allegations do not support a finding that the School District’s acted pursuant to a custom as defined by Monell. Plaintiff’s complaint focuses on the conduct of individuals, not the School District.¹⁶ Plaintiff fails to make any factual allegations that the School District acted pursuant to an official policy or custom and deprived her of her constitutional rights.

For the same reasons that Plaintiff fails to allege a municipal policy or custom under Monell, I find that Plaintiff’s complaint does not support the two additional

¹⁶In fact, the only specific factual allegations in her complaint focus on an individual defendant. Plaintiff alleges that Defendant Kline removed Plaintiff from a teaching program (Am. Compl. ¶ 18); referred to her as a nigger (Am. Compl. ¶ 24), and accused her of using vulgar language in the classroom (Am. Compl. ¶ 27).

elements necessary to survive a motion. Plaintiff must demonstrate that the municipality, by its deliberate conduct, acted as the "moving force" behind the alleged deprivation. Bd. of the County Comm'rs v. Brown, 520 U.S. 397, 404 (1997). This requires proof that an authorized decision maker intentionally deprived plaintiff of a federally protected right. Id. at 405. Plaintiff must also establish a direct causal link between the policy or custom and the plaintiff's injury. Id. at 404. Plaintiff fails to allege these elements and accordingly, her Section 1983 claim against the School District is dismissed.

(2) The Sea Clammers Doctrine does not bar Plaintiff's Section 1983 claim against Defendant Kline.

Defendant Kline argues that the Sea Clammers doctrine bars Plaintiff's Section 1983 claim against him. In Sea Clammers, the Supreme Court held that "when a 'state official is alleged to have violated a federal statute which provides its own comprehensive enforcement scheme, the requirements of that enforcement procedure may not be bypassed by bringing suit directly under § 1983.'" Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 20 (1981). However, the Third Circuit follows the majority view that Title VII's comprehensive enforcement scheme does not preempt claims under Section 1983 "and that discrimination claims may be brought under either statute, or both." Bradley v. Pittsburgh Bd. of Educ., 913 F.2d 1064, 1079 (3d Cir. 1990); see also Knoll v. Springfield Township Sch. Dist., 699 F.2d 137, 145 (3d Cir. 1983) (noting that "because a cause of action for race discrimination under § 1983 is distinct and independent, and has different procedural, jurisdictional, and remedial characteristics

from a Title VII action, [a party] has the right to proceed under both statutes."), vacated on other grounds, Springfield Tp. Sch. Dist. v. Knoll, 471 U.S. 288, 289, (1985).

Therefore, Plaintiff's Section 1983 claim against Defendants Kline is not barred by the Sea Clammers doctrine because the Third Circuit permits a party to proceed under both statutes.

(3) Plaintiff's Section 1983 claim against Defendant Kline is not barred by the statute of limitations under the continuing violation doctrine.

Defendants assert that Plaintiff is barred from bringing a Section 1983 claim for actions occurring more than two years prior to Plaintiff filing her amended complaint on June 13, 2006.

Section 1983 does not contain a statute of limitations. Therefore, the Supreme Court directs federal courts to find and apply an analogous state statute of limitations. Gooman v. Lukens Steel Co., 482 U.S. 656, 660 (1987). Section 1983 claims are analogous to tort claims and are therefore subject to the two-year statute of limitation under 42 PA. CONS. STAT. § 5524 (2006). DiBartolo v. City of Philadelphia, No. 99-1734, 2000 U.S. Dist. LEXIS 1776 at *13-14 (E.D. Pa. Feb. 15, 2000). Therefore, Section 1983 actions must be filed within two years of the date on which the claim accrues. 42 PA. CONS. STAT. § 5524 (2006)

The statute of limitation period, however, can be modified by the continuing violation doctrine. DiBartolo, 2000 U.S. Dist. LEXIS 1776 at *13-14. If a defendant engages in a continuing course of prohibited conduct and the plaintiff files a timely suit as

to any action that is part of that course of conduct, plaintiff will be able to litigate all acts that are part of the same course of conduct, whether timely or untimely. *Id.* To determine whether the alleged discrimination is properly understood as a single continuing violation or as a series of discrete acts, the Third Circuit requires that the plaintiff show more than sporadic acts of discrimination and establish by a preponderance of the evidence that intentional discrimination against the plaintiff's class was "standard operating procedure." Evans v. Port. Auth. Trans Hudson, No. 04-4062, 2006 U.S. App. LEXIS 4349 (3d Cir. Feb. 23, 2006)(citing Jewett v. Int'l Tel. & Tel. Corp., 653 F.2d 89, 91-92 (3d Cir. 1981)).

It would be premature to dismiss Plaintiff's Section 1983 claim as time barred without giving Plaintiff an opportunity to show that the alleged discrimination was part of continuing violation and not a series of separate and discrete acts. Therefore, Plaintiff's Section 1983 claim will not be dismissed on this basis.

E. Plaintiff's Section 1981 Claims for Race Discrimination and Retaliation

Defendants argue that Plaintiff's Section 1981 claims are barred by Jett v. Dallas Independent School Dist., 491 U.S. 701 (1989). In Jett, the plaintiff brought Section 1981 and 1983 claims against his employer school district and the school's principal for race discrimination. *Id.* at 705-10. The plaintiff did not bring a Title VII claim. The Court held that

...the express "action at law" provided by § 1983 for the "deprivation of any rights,

privileges, or immunities secured by the Constitution and laws," provides the exclusive federal damages remedy for the violation of the rights guaranteed by § 1981 when the claim is pressed against a state actor. Thus to prevail on his claim for damages against the school district, petitioner must show that the violation of his "right to make contracts" protected by § 1981 was caused by a custom or policy within the meaning of Monell and subsequent cases." Id. at 736.

After Jett, Congress amended Section 1981 to add the following language: "The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law." 42 U.S.C. 1981(c) (2006).

Federal courts disagree over the whether this amendment abrogates Jett and creates an independent cause of action under Section 1981. Cardenas v. Massey, 269 F 3d 251, 268 (3d Cir. 2001).

The emerging view among courts of the Eastern District, following the Third Circuit opinion of Oaks v. City of Philadelphia, 59 Fed. Appx. 502 (3d Cir. 2003), is that the amendments to Section 1981 do not supercede Jett and create an independent cause of action.¹⁷ Therefore, to prevail in a claim for damages against a state actor under Section 1981, a claimant, "must show that the violation of his right to make contracts protected by §1981 was caused by a custom or policy within the meaning of Monell and subsequent cases." Id. at 503. In other words, Section 1981 claims merge with Section 1983 because a plaintiff must allege the same facts to prove both claims. Russ-Tobias v. Pa. Bd. of Prob. and Parole, No. 04-0270, 2006 U.S. Dist. LEXIS 8062 (E.D. Pa. Mar. 2, 2006);

¹⁷ One contrary authority, Watkins v. Pa. Bd. of Prob. and Parole, No. 02-2881, 2002 U.S. Dist. LEXIS 23504 (E.D. Pa. Nov. 25, 2002), held that there was an independent cause of action under Section 1981. This holding predates the Third Circuit's decision in Oaks and has not been followed by another court.

Roadcloud v. Pa. Bd. of Prob. and Parole, No. 05-3787, 2006 U.S. Dist. LEXIS 925 (E.D. Pa. Jan. 6, 2006); Foxworth v. Pa. State Police, No. 03-6795, 2005 U.S. Dist LEXIS 6169 (E.D. Pa. Apr. 12, 2005); Miller v. Town of Milton, No. 03-876-SLR, U.S. Dist. LEXIS 3471 (D. Del. Mar. 8, 2005); Jacobs v. City of Philadelphia, No. 03-0950, 2004 U.S. Dist. LEXIS 24908 (E.D. Pa. Dec. 10, 2004); Carlton v. City of Philadelphia, No. 03-1620, 2004 U.S. Dist. LEXIS 5569 (E.D. Pa. Mar. 30, 2004); Valentin v. Philadelphia Gas Works, No. 03-3833, 2004 U.S. Dist. LEXIS 5262 (E.D. Pa. Mar. 29, 2004).

Therefore, Plaintiff's Section 1981 claim against the School District and Defendant Kline will be subjected to the same analysis as her Section 1983 claim.¹⁸ As analyzed *supra* in Section D, Plaintiff has not satisfied the requirement of Monell by pleading a pattern or practice. Accordingly, Plaintiff's Section 1981 claim against the School District suffers from the same deficiency as the Section 1983 claim and will be dismissed. Plaintiff's Section 1981 claim against Defendant Kline may proceed.

IV. CONCLUSION

For the reasons described above, I will grant Defendants' motion with respect to the claims against the Defendant Amuso and the Section 1981 and Section 1983 claims against the School District. I will deny Defendants' motion with respect to the remaining claims. An appropriate Order follows.

¹⁸ Plaintiff may even intend for the Section 1981 and Section 1983 claims to be evaluated together as a merged Section 1983 claim. Plaintiff notes in her response to Defendant's motion that the trend in the Third Circuit is to require Section 1981 claims against state actors to be accompanied by Section 1983 claims. Pl. Opp'n Br. Defs' Kline and Amuso Mot. Dismiss. p. 20. Plaintiff states that she has used Section 1983 as "the vehicle" to assert her Section 1981 claim. Id.

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

BRENDA JOYCE FORTES,	:	CIVIL ACTION
Plaintiff,	:	NO. 06-0878
	:	
v.	:	
	:	
BOYERTOWN AREA SCHOOL	:	
DISTRICT, et. al.,	:	
Defendants.	:	

ORDER

AND NOW, this 20th day of October, 2006, upon consideration of Defendant School District Motion to Dismiss (Document No. 14), Defendants Kline and Amusos' Motion to Dismiss (Document No. 20) and Plaintiff's responses thereto, it is hereby **ORDERED** that the motions are **GRANTED** with respect to the claims against the Defendant Amuso and the Section 1981 and Section 1983 claims against the School District. The Motion is otherwise **DENIED**.

BY THE COURT:

/s/ Lawrence F. Stengel
LAWRENCE F. STENGEL, J.