

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

EVELYN W. MORRISON	:	CIVIL ACTION
	:	
v.	:	NO. 02-7788
	:	
THE CITY OF READING, et al	:	

MEMORANDUM OPINION

Savage, J.

March 9, 2007

I. Background

In this action alleging employment discrimination brought under 42 U.S.C. § 1983 and retaliation for exercising her First Amendment right to free speech, the plaintiff, Evelyn Morrison (“Morrison”), claims that she was not hired for a city government position on the basis of her gender and race, and that she was not appointed to an unpaid seat on a city commission in retaliation for having spoken out publicly against the city administration. Morrison, a fifty-one year old African-American female, was not selected for either of the two managerial positions with the City of Reading (“City”) for which she had applied. She alleges that the defendants Jeffrey White (“White”), the City’s Managing Director, and Jesús Peña (“Peña”), the City’s Director of Human Resources, did not hire her because she was an African-American and a female. At the same time, she contends that the City instead hired candidates who were willing to perpetuate the City’s racially discriminatory administration of HUD Community Development Block Grant Funds (“HUD funds”).

With respect to her First Amendment claim, Morrison alleges that Peña, White, and Joseph Eppihimer (“Eppihimer”), the City’s Mayor, violated her First Amendment free speech rights when they did not appoint her to an unpaid position on the Human Relations

Commission (“Commission”) because she had publicly complained about racial discrimination. She also contends that Eppihimer made disparaging remarks about her.

Moving for summary judgment, the defendants contend that Morrison cannot make out a *prima facie* case of employment discrimination because she was not qualified for the positions she sought. They argue that her lack of qualifications is a legitimate nondiscriminatory reason for not hiring her, and that she cannot point to sufficient evidence demonstrating that this legitimate reason is pretextual.

With respect to the First Amendment retaliation claim, the defendants maintain that they are entitled to summary judgment because government efficiency interests outweigh Morrison’s free speech rights under the *Pickering* test.¹ They also argue that the Mayor’s public remarks about her are not actionable under § 1983. The individual defendants also raise qualified immunity. The City contends that Morrison’s allegations are insufficient to meet the *Monell* standard for imposing municipal liability.

The defendants are entitled to summary judgment on the employment discrimination claim because there is no genuine issue of material fact regarding Morrison’s lack of qualifications. Morrison has failed to come forward with sufficient evidence establishing that she was qualified for the job. Thus, she cannot make out a *prima facie* case, obviating the need to reach the defendants’ proffered reason for not hiring her.

Morrison’s claim based upon the defendants’ failure to appoint her to the Human Relations Commission cannot survive summary judgment because the government’s interest in efficient administration outweighs her free speech rights in the context of this

¹*Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

case. Finally, the First Amendment claim arising out of retaliatory remarks allegedly made by Eppihimer is not actionable under federal law. Therefore, summary judgment will be entered in favor of the defendants and against the plaintiff.

II. Summary Judgment Standard

Summary judgment is appropriate if “there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). In examining the motion, we must view the facts in the light most favorable to the nonmovant and draw all reasonable inferences in her favor. *InterVest, Inc. v. Bloomberg, L.P.*, 340 F.3d 144, 159-60 (3d Cir. 2003).

The party moving for summary judgment bears the initial burden of demonstrating that there are no genuine issues of material fact. Fed. R. Civ. P. 56(c). Once the movant has done so, the opposing party cannot rest on the pleadings. To defeat summary judgment, she must come forward with probative evidence establishing the *prima facie* elements of her claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). The nonmovant must show more than the “mere existence of a scintilla of evidence” for elements on which she bears the burden of production. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). An inference based upon speculation or conjecture does not create a material fact. *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 382 n.12 (3d Cir. 1990). Thus, “[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no ‘genuine issue for trial.’” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted).

III. Employment Discrimination

Employment discrimination actions filed under § 1983 are governed by the three step *McDonnell Douglas* burden shifting analysis used in Title VII cases. *Stewart v. Rutgers, The State Univ.*, 120 F.3d 426, 432 (3d Cir. 1997). First, the plaintiff must present enough evidence to make out a *prima facie* case. If she does, at the second step, the defendant must produce evidence of a legitimate nondiscriminatory reason for the adverse employment action. At the third step, the plaintiff must show that the defendant's proffered reason for taking the adverse action was merely a pretext for the real reason behind the adverse action, namely race and sex discrimination. *Stewart*, 120 F.3d at 432-33.

If the plaintiff fails to establish a *prima facie* case, the defendant is entitled to judgment as a matter of law. The determination of whether a *prima facie* case has been established is, under most circumstances, a question of law for the court. *Pivrotto v. Innovative Sys., Inc.*, 191 F.3d 344, 347 n.1 (3d Cir. 1999).

The purpose of the *prima facie* case is to "eliminate the most obvious, lawful reasons for the defendant's action," such as the applicant's lack of qualifications. *Pivrotto*, 191 F.3d at 352. Unless a plaintiff can prove that she was qualified for the position, her discrimination case fails. *Id.*

To make out a *prima facie* case of discrimination in a failure to hire case, the plaintiff must show that: (1) she is a member of a protected class; (2) she was qualified for the job; (3) she was not hired; and, (4) the employer kept the position open and continued to seek applicants from persons having the same qualifications as the plaintiff. *Id.*

There is no dispute that Morrison is an African-American female who unsuccessfully applied for two open positions and the City continued to seek candidates for the jobs,

which were ultimately filled by non-African-American males. Thus, if she was qualified for the positions, she has made out a *prima facie* case.

Defendants argue that Morrison cannot establish a *prima facie* case because she was not qualified for either job. They compare Morrison's résumé to the posted job requirements as undisputed evidence that she did not meet the educational and work experience requirements.

The defendants invite a comparison between the qualifications of those who were hired on the one hand and Morrison's on the other. At the first step of the *McDonnell Douglas* analysis, the *prima facie* case, only Morrison's qualifications are relevant. Whether the persons hired were better qualified, as the defendants argue, goes to the City's proffered legitimate nondiscriminatory reason why Morrison was not hired, the second step of the analysis.

As advertised, candidates for the position of Division Manager for Planning, Zoning and Economic Development were required to have either combination of education and experience: 1) a "Bachelor's Degree in Planning or equivalent with a minimum of ten (10) years related managerial level experience in planning, zoning, historic preservation and economic development planning"; or 2) a "Master's Degree with a minimum of five (5) years related experience with increasing responsibility within an organization." *Notice of Vacancy* at R0231, *Hummel Decl.*, Ex. 4 (*Defs.' Stmt. Undisputed Facts*, Ex. A).

Candidates for the Division Manager for Housing and Neighborhood Improvement position needed either: 1) a "Bachelor's Degree in Business Administration, Planning or equivalent with a minimum of ten (10) years related managerial experience in HUD, HOME and CDBG and other single and multi family housing development programs"; or 2) a

“Master’s Degree with a minimum of five (5) years related experience with increasing responsibility within an organization.” *Notice of Vacancy* at R0496, *Hummel Decl.*, Ex. 4 (*Defs.’ Stmt. of Undisputed Facts* , Ex. A).

Morrison met the educational component of the qualifications of both jobs. She has a Bachelor’s degree in Criminal Justice and a Master’s degree in Business Administration. *Morrison Biography/Resume* at R0225 (*Defs.’ Stmt. of Undisputed Facts*, Ex. C). She did not, however, satisfy the experience requirements. She had worked at a variety of jobs, each lasting two to three years, and none more than three years. *Id.* None of these prior jobs met the minimum eligibility requirements for either of the open positions.

Morrison’s employment history includes numerous jobs: insurance claims adjuster, public assistance caseworker, assistant supervisor of social workers, personal and commercial banker, community policing coordinator, developer and manager of a community loan facility, bank teller, designer of marketing and business education strategies at her alma mater, and a self-employed “multi-cultural consultant.” *Id.* at R0223-R0226. In none of those jobs did she work for more than three years. Thus, she did not possess the minimum years of required work experience.

Morrison has no experience in zoning, historic preservation or city planning. Consequently, she needed experience in economic development or housing development programs. With a generous reading of Morrison’s résumé, two of the jobs, developer and manager of a community loan facility, and personal and commercial banker, arguably appear to have been in the economic development field. However, she worked at those jobs at National Bank of Boyertown, now National Penn Bank, for only three years. It is unclear whether these were two separate positions held at different times or whether the

titles included activities of both at the same time. In any event, she did not have the minimum years at those jobs. Her résumé states that she is a certified Housing and Urban Development Housing Counselor. There is no evidence that she ever worked as a housing counselor.

Reviewing Morrison's résumé in her favor still demonstrates that she did not have the requisite work experience for either position. The Division Manager of Housing and Neighborhood Development position required five years of relevant experience. Morrison did not have it. Nor did she have the requisite experience for the Division Manager of Planning, Zoning and Economic Development position because none of her prior jobs relate to historic preservation, city planning, zoning or economic development. Again, even assuming her prior positions were relevant or "related," none of them lasted the minimum five years required.

Morrison, as the nonmovant, must come forward with evidence to support the essential elements of her claim on which she bears the burden of proof at trial. *In re TMI*, 89 F.3d 1106, at 1116 (3d Cir. 1996). Meeting this burden requires more than pointing to the pleadings. *Id.* The evidence is limited to what would be admissible at trial. *Blackburn v. United Parcel Serv., Inc.*, 179 F.3d 81, 95 (3d Cir. 1999); *see also Alexander v. Riga*, 208 F.3d 419, 435 (3d Cir. 2000). If the plaintiff cannot produce admissible evidence demonstrating that she was qualified, she fails to meet an element of her *prima facie* case. Hence, because Morrison undisputedly did not possess the minimum prior work experience, there is no genuine issue of material fact as to her lack of qualifications for the positions.

To overcome her undisputed lack of the advertised qualifications, Morrison argues

that the qualifications set forth in the public postings should not control the inquiry of whether she was in fact qualified because the postings did not actually govern selection for the job. *Resp. to Mot. Summ. J.* at 5; *Pl.'s Stmt. of Disputed Facts* ¶ 6. She contends that the advertised qualifications for the Housing and Neighborhood Development job were a “sham” because the City had already selected a person for the position before it advertised the job. *Transcript of Oral Argument* (Jan. 20, 2004), at 19 (“*Tr.*”). To show that the hiring process was a “sham,” Morrison presents her own unsupported affidavit, stating that “Galosi was awarded the job of Assistant Director before the City advertised a vacancy for the position.” *Morrison Decl.* ¶ 3 (*Pl.'s Stmt. of Disputed Facts* Ex. A). She argues, again without citation to any evidence, that the City wanted to hire someone for the Housing and Neighborhood Development job who would continue the improper administration of HUD funds. *Pl.'s Stmt. of Disputed Facts* ¶ 7.

Morrison also claims that the person hired for the Planning, Zoning and Economic Development position was unqualified. Without any evidence to support her supposition, she asserts that the head of a private community development corporation having a City contract advised him of the opening and informed him that he needed only interview with Eppihimer to get the job. Morrison claims, without pointing to anything in the record, that the defendants “are lying about how Mr. Mukerji was selected to be the Division Manager of Planning, Zoning and Economic Development for Reading.” *Pl.'s Stmt. of Disputed Facts* ¶ 27. She relies upon her own perceived and unproven failure of Mukerji, after his selection, to correct the discriminatory administration of HUD funds as proof that he had been hired, not for his qualifications, but to continue improperly using HUD funds. *Resp. to Mot. for Summ. J.* at 5; *Pl.'s Stmt. of Disputed Facts* ¶ 27.

Morrison's contention that Mukerji and Galosi were hired instead of her because they could be counted on to perpetuate the City's improper administration of HUD funds is fatal to her *prima facie* case. This reason, assuming it was true, is not based on race or gender. Rather, the reason she actually claims she was not hired is because she would not have gone along with the administration's inappropriate agenda. Hence, by her own statement, the City did not refuse to hire her because she was African-American and/or a female.

Even if Morrison could demonstrate that the public postings were shams, and that the successful applicants were pre-selected to fill the Division Manager openings, she would still be unable to demonstrate any intent to discriminate against her based on her race or sex. If the defendants had pre-selected the persons who filled the positions because they could be counted on to carry on the City's discriminatory practices rather than because they were non-African-American males, they would have been "discriminating" against Morrison and all other candidates for reasons other than race or gender.

Morrison's assertions, absent supporting evidence, fail to establish that she was qualified for the positions. Significantly, her claim that the persons actually hired were selected because they would carry on existing practices contradicts her allegations of race and gender discrimination. Because the City has demonstrated the absence of any genuine issue of material fact as to Morrison's lack of qualifications, and Morrison has failed to point to specific facts to support an essential element of her *prima facie* case, we must grant summary judgment for the defendants on the employment discrimination claim.

IV. First Amendment Retaliation

Morrison contends that Mayor Eppihimer, Peña and White did not appoint her to the unpaid position on the City's Human Relations Commission ("Commission") in retaliation for her criticizing various City officials and policies. She also claims that public remarks made by Eppihimer were retaliatory and defamatory.

Unless they had personal involvement in the alleged wrongs, individuals can not be sued in a § 1983 action. *Sutton v. Rasheed*, 323 F.3d 236, 249-50 (3d Cir. 2003); *Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3d Cir. 1998). Morrison has not pled that Peña and White had any control or even involvement in the selection of appointees to the Human Relations Commission. Nor has she presented any evidence that they did. Although White, as the City's Managing Director, had supervisory responsibility for the Commission, he had no power or involvement with appointing or selecting members. Bill No. 6-2002, *Ordinance Amending and Re-enacting the Ordinance Which Provides for the Establishment of the City of Reading Human Relations Commission*, § 1-524(1) (enacted Mar. 13, 2002) (*Defs.' Stmt. of Undisputed Facts*, Ex. I). Only the Mayor could appoint members. *Id.* § 1-524(2). Hence, Peña and White are entitled to judgment as a matter of law on Morrison's First Amendment claim.

Morrison sought appointment to one of nine seats on the Commission, and the City Council had recommended her appointment. Eppihimer, who had the discretionary authority to appoint her, declined to do so. Morrison claims that his refusal to appoint her was in retaliation for her filing an EEOC complaint based on the City's failure to hire her for the two division manager positions and for publicly criticizing his administration. *Morrison Decl.* ¶ 8 (*Pl.'s Stmt. of Disputed Facts*, Ex. A). She had spoken at a City Council meeting

about racial discrimination, had made public complaints about the misapplication of HUD funds, and had challenged Galosi during a television broadcast. *Morrison Decl.* ¶¶ 5, 8, 9 (*Pl.'s Stmt. of Disputed Facts*, Ex. A).

Public employers may not retaliate against employees for speaking out merely because they disapprove or dislike the content of their speech. The employer can, however, restrain speech when it interferes with the efficiency of governmental operations because the employer has an interest in providing government services efficiently to the public. *Curinga v. City of Clairton*, 357 F.3d 305, 309 (3d Cir. 2004). In other words, public employees do not enjoy the same free speech rights that private citizens do. However, the government employer's ability to regulate its employee's speech is not without limitation.

Prospective government employees and applicants for volunteer positions as well as persons already employed in government positions enjoy First Amendment protection. "[T]he opportunity to serve as [a volunteer] constitutes the type of governmental benefit or privilege the deprivation of which can trigger First Amendment scrutiny." *Hyland v. Wonder*, 972 F.2d 1129, 1135 (9th Cir. 1992). Even though one does not have a right to serve as a volunteer in an unpaid government position, the public employer may not deny the opportunity to a person because she engaged in constitutionally protected speech. *Id.* (citing *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)). Where a public employer acts against an employee for speaking out, two interests - the employee's right to protected speech and the employer's right to exercise control over the work force - intersect. Which competing interest prevails depends upon the outcome of the *Pickering* balancing test that weighs the government's interest in regulating employee speech to promote efficiency in carrying out its public service mission against the employee's interest in informing the

public of matters of public concern. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

In evaluating First Amendment retaliation claims, the *Pickering* test makes the following inquiries: (1) was the employee's speech on a matter of public concern; and, if so, did her interest in the speech outweigh the governmental interest in providing efficient and effective service; (2) was the speech a substantial or motivating factor in the alleged retaliatory action; and, (3) would the employer have taken the adverse action anyway had the employee not spoken out publicly. *Curinga*, 357 F.3d at 310. Only if the employee establishes the first step as a matter of law can her case proceed to the second and third steps, which present questions of fact. *Pro v. Donatucci*, 81 F.3d 1283, 1288 (3d Cir. 1996).

The court must first determine whether the speech involves a matter of public concern and whether the employee's interest in the speech outweighs the government's interest in efficient administration. If the first issue is resolved in favor of the employee, the causation issues in the second and third steps are for the factfinder. The jury must answer whether the protected activity was a substantial or motivating factor in the alleged retaliatory action, and whether, even in the absence of the protected conduct, the government would have taken the same adverse action. *Curinga*, 357 F.3d at 310.

Determining whether the employee engaged in constitutionally protected activity is a matter of law for the court. It provokes two inquiries. First, was the speech on a matter of public concern? Second, do the employee's free speech rights outweigh the government's interest in efficient administration? If the answer is yes to both questions, the employee's activity is constitutionally protected. *Brennan v. Norton*, 350 F.3d 399, 413 (3d Cir. 2003); *Baldassare v. New Jersey*, 250 F.3d 188, 195 (3d Cir. 2001).

The threshold question in a public employee free speech retaliation suit is whether the speech addresses a matter of public concern. If it does not, the *Pickering* analysis ends and protection is unavailable. Hence, a court must examine the content, form, and context of the activity in question in conducting the public concern inquiry to determine whether the analysis should proceed. *Connick v. Myers*, 461 U.S. 138, 147-48 (1983).

If the speech relates to “any matter of political, social or other concern to the community,” it constitutes speech on a matter of public concern. *Brennan*, 350 F.3d at 412 (quoting *Baldassare*, 250 F.3d at 195). It is the value of the speech to the public and not to the speaker that governs whether speech addresses a matter of “public concern.” *Baldassare*, 250 F.3d at 197.

Information about the proper functioning of a governmental department is of “considerable public importance.” *Czurlanis v. Albanese*, 721 F.2d 98, 104 (3d Cir. 1983). Likewise, statements alleging improper spending of taxpayer money, fraud or illegality on the part of public officials qualify as matters of public concern. See *Feldman v. Phila. Hous. Auth.*, 43 F.3d 823, 829 (3d Cir. 1995); *Sanguigni v. Pittsburgh Bd. of Pub. Educ.*, 968 F.2d 393, 398-99 (3d Cir. 1992). So, too, do complaints about racial discrimination. *Sanguigni*, 968 F.2d at 397. Speaking in a public forum before a group of elected officials is a “classic form” of protesting government abuses. *Czurlanis*, 721 F.2d at 104.

At a public meeting, Morrison accused government officials of improperly administering HUD funds in a racially discriminatory fashion. She questioned the propriety of the administration’s use of government funds and charged public officials with racial discrimination. On its face, her speech qualifies as a matter of public concern.

Though Morrison may have had private motives in speaking out publicly, her

motivation alone does not disqualify her speech as a matter of public concern. Although the speaker's motive may be relevant to the public concern analysis, it is not controlling or dispositive. *Brennan*, 350 F.3d at 413. Speech which may have been motivated in part by an employee's private concerns can still qualify as being on a matter of public concern. The focus of the public concern inquiry is not on the speaker's reason for making it, but on its value to the public. *Baldassare*, 250 F.3d at 197. Therefore, regardless of any personal interest or animus toward City officials that Morrison may have had, her comments qualify as speech on matters of public concern.

Because an employee's speech touches on a matter of public concern does not necessarily protect it if the government's efficiency interests outweigh the employee's constitutional rights. *Brennan*, 350 F.3d at 413. The burden is on the public employer to establish that the governmental interests outweigh the employee's interests. *Rankin v. McPherson*, 483 U.S. 378, 388 (1987); *O'Donnell v. Yanchulis*, 875 F.2d 1059, 1062 (3d Cir. 1989).

The purpose of weighing the parties' interests is to balance the right of a citizen to speak out on a matter of public concern and the government employer's interest in providing public services efficiently through its employees. *Pickering*, 391 U.S. at 568. The government has an interest in appointing politically loyal employees to policymaking positions. *Curinga*, 357 F.3d at 310-12.

Typically, the presence of disputed facts places an inquiry in the hands of the fact finder. In First Amendment public employee retaliation cases, however, the court is charged with conducting the difficult *Pickering* balancing inquiry. *Green v. Phila. Hous. Auth.*, 105 F.3d 882, 887-88 (3d Cir. 1997).

Among the factual considerations that enter into the court's balancing calculus are the manner, time and place of the employee's expression; the potential impact of public statements on workplace discipline and harmony; the effect of the speech on an employer's ability to trust the loyalty of the employee; the impact of the speech on the ability of the speaker to perform her job; and, the possibility that the speech will interrupt efficient operation of government. *Rankin*, 483 U.S. at 388; *Pickering*, 391 U.S. at 570-73.

The focus of the state interest element of the test is on the effective functioning of the government employer. *Rankin*, 483 U.S. at 388. "Interference with work, personnel relationships, or the speaker's job performance can detract from the public employer's function; avoiding such interference can be a strong state interest." *Id.* at 388. The government employer need not demonstrate actual interruption of efficient performance of government services. It may present "[r]easonable predictions of disruption" as a consideration. *Waters v. Churchill*, 511 U.S. 661, 673 (1994).

As with any balancing test, the more significant the weight on one side, the greater the weight required on the other. No single factor is dispositive. *Baldassare*, 250 F.3d at 198. The more an employee's speech focuses on a significant rather than a minor area of public concern, the greater the burden on the public employer to demonstrate significant potential or actual disruption sufficient to tip the scales in its favor. *Versarge v. Twp. of Clinton N.J.*, 984 F.2d 1359, 1367 (3d Cir. 1993). The more significant the potential disruption and negative impact on efficient administration, the weightier the government's interest will be. *O'Donnell*, 875 F.2d at 1062-63.

Morrison was an outspoken critic of the City administration. She had previously made public remarks about City government officials and employees at City Council

meetings and on local television, and she wrote letters to HUD about the City's improper administration of HUD funds.

The Commission has the power to investigate discrimination complaints of unlawful employment, housing, lending, and public accommodations. It can issue subpoenas to aid in its investigation. The Commission holds public hearings, issues findings of fact, issues orders for violations of the Ordinance, and imposes civil penalties, ranging from \$10,000 to \$50,000.

Citing the necessity of having people on the Commission with whom he could effectively work, and whose beliefs and methods are in line with his own political agenda, Eppihimer contends that the balancing of the interests weighs in favor of government efficiency. *Defs.' Mem. Supp. Summ. J.* at 17-18. He wanted people he could trust and work with serving him on the Commission.

As Mayor, Eppihimer had the discretionary right not to appoint Morrison to the Commission. The balancing of the interests weighs in favor of Eppihimer, an elected official with a constituency. He had a reasonable belief that if placed on the Commission, Morrison's presence would be disruptive and hinder the efficiency of his administration and the Commission, which requires a good working relationship among its nine members, the mayor and his administration.

City officials and employees cannot stop Morrison from attending public meetings and making public and critical comments about the City, its officials and its employees. They have not done so. Eppihimer can, however, decide that the goals and policies of the Commission can be more effectively achieved without Morrison's direct involvement as a member. Thus, the balancing of the interests favors Eppihimer.

In an additional claim, Morrison alleges that Eppihimer called her a “racist” and urged blacks and Hispanics to lobby against her joining the Human Relations Commission. *Morrison Dep.* at 265 (*Defs.’ Stmt. of Undisputed Facts*, Ex. D). She claims these comments were a form of retaliation for her publicly criticizing the administration.

Disparaging comments alone cannot form the basis for a First Amendment retaliation claim. When coupled with threats, intimidation, or coercion indicating or suggesting that some adverse action will imminently follow, retaliatory comments may be actionable. *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 687 (4th Cir. 2000) (“[W]here a public official's alleged retaliation is in the nature of speech, in the absence of a threat, coercion, or intimidation intimating that punishment, sanction, or adverse regulatory action will imminently follow, such speech does not adversely affect a citizen's First Amendment rights, even if defamatory.”) (collecting cases); *cf. McLaughlin v. Watson*, 271 F.3d 566, 573 (3d Cir. 2001) (stating that “[w]hen a public official is sued for allegedly causing a third party to take some type of adverse action against plaintiff’s speech,” the conduct is not actionable absent threats or coercion of the third party).

Mayor Eppihimer’s speech suggesting how minorities should band together to ensure that Morrison was not selected is not actionable. His audience had no ability to affect her appointment. He was not encouraging, threatening or coercing anyone to make any decision. He had the exclusive power to appoint or not appoint Morrison to the Commission. Bill No. 6-2002, *Ordinance Amending and Re-enacting the Ordinance Which Provides for the Establishment of the City of Reading Human Relations Commission*, § 1-524(2) (enacted Mar. 13, 2002) (*Defs.’ Stmt. of Undisputed Facts*, Ex. I). Thus, his speech, although it may have been distasteful, is not actionable retaliation.

“[S]trongly urging or influencing, but not ‘coercing’ a third party to take adverse action affecting a plaintiff’s speech,” does not violate the plaintiff’s constitutional rights. *McLaughlin*, 271 F.3d at 573 (citing *R.C. Maxwell Co. v. Borough of New Hope*, 735 F.2d 85 (3d Cir. 1984)). Opinions, advocacy and recommendations about whom to hire to fulfill a government function are protected First Amendment political expression. *Vickery v. Jones*, 100 F.3d 1334, 1345-46 (7th Cir. 1996). Eppihimer was exercising his right to freedom of expression.

Morrison also alleges that Eppihimer defamed her when he called her a racist. Defamation is not actionable under § 1983. *Kulwicki v. Dawson*, 969 F.2d 1454, 1468 (3d Cir. 1992). With respect to the purported retaliatory nature of Eppihimer’s statement that Morrison was a racist, even if false and defamatory, does not constitute a violation of her First Amendment rights. Public officials retain their First Amendment rights upon election to public office. *X-Men Sec., Inc. v. Pataki*, 196 F.3d 56, 68-70 (2d Cir. 1999). Insults, absent threats of coercion or violence, are protected under the First Amendment. *Id.* at 67-68.

The fact that Eppihimer called Morrison a racist is not actionable unless it was coupled with a retaliatory action, or a threat of one, that would deprive her of her First Amendment rights. *Suarez*, 202 F.3d at 687 (retaliatory speech coupled with threat, coercion, punishment or sanction may be actionable). Morrison claims that Eppihimer’s decision not to place her on the Commission is the tangible adverse action that should be coupled with his calling her a racist. However, the decision not to place Morrison on the Commission was not actionable because the *Pickering* balancing of the interests favored the defendants. Hence, these comments are not actionable.

Conclusion

On the employment discrimination claim, Morrison has failed to demonstrate that she was qualified for the positions, an element of her *prima facie* case. With respect to the First Amendment retaliation claim, the defendants are entitled to judgment as a matter of law because the balancing of the government's interests against Morrison's rights weighs in favor of the public employer's need for efficient government administration. Furthermore, the defendant Eppihimer's purported disparaging remarks do not give rise to a cognizable § 1983 claim. Thus, the defendants are entitled to summary judgment.²

²There is no need to reach the qualified immunity and the *Monell* issues because the plaintiff has not established her underlying claims.