

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

GREGORY M. SPECK, et al. : CIVIL ACTION
 : NO. 06-4976
v. :
 :
CITY OF PHILADELPHIA, et al. :
 :
O'NEILL, J. : JULY , 2007

MEMORANDUM

Plaintiffs¹ filed a complaint against defendants City of Philadelphia, Sylvester Johnson, Thomas Nestell, Anthony Wong, Charlotte Council, Jeffrey Miller, John M. Gallaher, E. Beverly Young, Charles G. Crow and three unnamed individual defendants. The complaint alleges that defendants violated plaintiffs' rights under 42 U.S.C. § 1983 and the rights of a subset of plaintiffs² pursuant to the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. §§ 4301-4319 ("USERRA"). Before me now are defendants' motion to dismiss plaintiffs' § 1983 Due Process and USERRA claims or in the alternative for a more definite statement concerning plaintiffs' § 1983 Due Process,

¹ The complaint identifies plaintiffs in four separate locations. However, the lists of plaintiffs are inconsistent. Some of the lists include names that do not appear elsewhere in the complaint and include duplicates as well. An exhaustive list compiled from the entire complaint includes Gregory M. Speck, Neil Aitken, Joseph M. Barrios, Sharon M. Brambrinck, Gilbert Brook, Shawn L. Coleman, Brian Copeland, Leo Costello, Michael Curran, Joe Disaldo, Joseph Dispaldo, Omar Giggins, James J. Green, Diane Haines, Christa Hayburn, Tracey Jenkins, William J. Kline, Lawrence Leissener, Ernestine Lloyd, Matthew Matt, John J. McCafferty, Jerome Moore, James J. Morace, Jr., Linwood H. Norman, Terrence O'Hanlon, Renaldo Peluzo, Albert A. Price, Rabsaan Price, Barbara Rausher, Pabb Rivera, Jr., Marcellus Robinson, Chris Salver, Kenneth Taylor, John Thompson, Thomas M. Tustim, Gary Williams, and Steve Williams. I am assuming that James J. Green is the same individual as James Green.

² Plaintiffs who assert additional injury under §§ 4301-4319 include Gregory M. Speck, Joseph Barrios, Michael Curran, Joe Disaldo, Joseph Dispaldo, James J. Green, William Kline, Lawrence Leissener, Jerome Moore, Terrence O'Hanlon, Renaldo Peluzzo, and Chris Salver.

First Amendment retaliation, and USERRA claims, plaintiffs' response, and defendants' reply thereto.³

BACKGROUND

Plaintiffs are residents of Philadelphia County. They assert that each completed the requirements set forth by the Commonwealth of Pennsylvania and the City of Philadelphia for certification and employment as municipal police officers and that each was subsequently employed by the City for at least five years. At some point prior to the occurrence of the events at issue in this action plaintiffs claim that they were involved in an employment dispute with defendants pursuant to a Collective Bargaining Agreement. Additionally, plaintiffs Gregory M. Speck, Joseph Barrios, Michael Curran, Joe Disaldo, Joseph Dispaldo, James J. Green, William Kline, Lawrence Leissener, Jerome Moore, Terrence O'Hanlon, Renaldo Peluzzo and Chris Salver were members of the U.S. uniformed services who had reported for active duty and deployment while working as police officers for the City of Philadelphia. This group of plaintiffs alleges that they returned to work following the end of their service obligations but were fired within a year of reemployment with the City.

To work as a municipal police officer an individual must obtain certification from the Municipal Police Officer Education and Training Commission ("MPOETC") by meeting certain qualifications and completing training. See 37 Pa. Code § 203.11(a)(1)-(11) (requiring that the candidate be eighteen years of age, a citizen of the U.S., and successfully complete basic training at a certified school). Certification for employment lasts for two years and will expire unless the police officer obtains mandatory in-service

³ Plaintiffs also allege Equal Protection and Contract Clause violations under § 1983. Because defendants do not seek dismissal or a more definite statement with respect to these claims, I will not address them here.

training while employed and notifies the Commission of its successful completion. See id. § 203.13(b)(1); id. § 203.13(c)(1); id. § 203.52. Police officers and their employing departments may seek an extension to complete the renewal requirements if they file a request with the MPOETC within two years from the date of the certification's expiration. See id. §§ 203.14(c), 203.52(c)(10).

Plaintiffs assert that Commonwealth defendants decertified plaintiffs and City defendants terminated their employment with the police department even though plaintiffs had satisfied all in-service requirements for certification renewal. They allege that defendants' actions were motivated by the earlier employment dispute with plaintiffs.⁴ Plaintiff Tracey Jenkins further alleges that defendants were also motivated by race-based animus in removing her from employment. Finally, plaintiffs claim that defendants required them to submit to evaluations as well as divulge confidential information in order to be recertified. According to plaintiffs, these new requirements were not imposed on other officers.

Plaintiffs contend that defendants' actions violated their rights secured under 42 U.S.C. § 1983. Plaintiffs are using § 1983 as a vehicle to vindicate several claims: (1) compliance with the new requirements violated plaintiffs' contractual rights; (2) plaintiff Tracey Jenkins was denied equal protection of the laws; (3) defendants retaliated against plaintiffs for engaging in conduct protected by the First Amendment; and (4) defendants did not provide plaintiffs with adequate due process in depriving them of their certification and employment. With respect to plaintiffs' USERRA claim, a subset of plaintiffs assert that they were fired within one year of reemployment following their

⁴ Plaintiffs' do not assert that their attempts to resolve the dispute through their Collective Bargaining Agreement has any relation to the present claims other than supplying a motive for defendants' alleged retaliation.

deployment. Plaintiffs request relief from both Commonwealth and City defendants in the form of damages and injunctive relief.

The complaint identifies several defendants who for purposes of identification and later analysis are best discussed as two separate groups.⁵ The first group is comprised of the City of Philadelphia and four of its employees (collectively “City defendants”). The four individuals are Sylvester Johnson, the Commissioner of Philadelphia’s Police Department, and Thomas Nestell, Anthony Wong, and Charlotte Council, Philadelphia Police Department employees. According to plaintiffs, as Commissioner and employees of the Philadelphia Police Department, defendants authorized, implemented and supervised the training, employment, and subsequent termination of plaintiffs as police officers.

The second group consists of four Commonwealth employees (collectively “Commonwealth defendants”). Jeffrey Miller is the Pennsylvania State Police Commissioner and chairman of the MPOETC. The other three defendants, John M. Gallaher, E. Beverly Young, and Charles G. Crow, are employees at the MPOETC who serve as its Executive Director, Administrative Officer, and Director of Training, respectively. The MPOETC is charged with establishing and implementing standards for the issuance, renewal and revocation of municipal police officer certifications. See 53 Pa. Cons. Stat. § 2164. Plaintiffs allege that Commonwealth defendants were directly involved in and intentionally revoked their certification in retaliation for plaintiffs’ involvement in the employment dispute and as a result of race-based animus towards plaintiff Tracey Jenkins.

⁵ The complaint also names three unnamed individuals as defendants but does not allege any causes of action against them directly or provide any explanation of their relationship to the claims brought against City and Commonwealth defendants.

Defendants move to dismiss the complaint on multiple grounds. First, both sets of defendants argue that the claim brought under § 1983 should be dismissed as a matter of law since defendants have not violated any of plaintiffs' due process rights in their certification to work as police officers. Commonwealth defendants also assert that plaintiffs have failed to plead adequately that they were personally involved in any violation of rights protected under § 1983. Second, both sets of defendants argue that they are entitled to qualified immunity against any damage claims brought under either § 1983 or §§ 4301-4319. Additionally, Commonwealth defendants contend that the Eleventh Amendment bars any damage claims brought under either statute against the state or its agents. Lastly, regarding §§ 4301-4319, Commonwealth defendants assert two additional requiring dismissal. First, they argue that this Court lacks subject matter jurisdiction to hear claims brought under §§ 4301-4319. Second, they claim that they are not plaintiffs' employer. Since the statute grants a cause of action only against an employer defendants argue that they cannot be subject to liability under the statute. Alternatively, all defendants move for a more definite statement in the event that I deny their motion to dismiss.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) permits a court to dismiss all or part of an action for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). In ruling on a 12(b)(6) motion, I must accept as true all well-pleaded allegations of fact, and any reasonable inferences that may be drawn therefrom, in plaintiffs' complaint and must determine whether "under any reasonable reading of the pleadings, plaintiffs may be entitled to relief." Nami v. Fauver, 82 F.3d 63, 65 (3d Cir.

1996) (citations omitted). Nevertheless, in evaluating plaintiffs' pleadings I will not credit any "bald assertions." In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1429 (3d Cir. 1997). Nor will I accept as true legal conclusions or unwarranted factual inferences. Bell Atl. Corp. v. Twombly, 2007 U.S. LEXIS 5901, at *21 (U.S. May 21, 2007). When considering a Rule 12(b)(6) motion, I do not "inquire whether the plaintiffs will ultimately prevail, only whether they are entitled to offer evidence to support their claims." Nami, 82 F.3d at 65, citing Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). "It is black-letter law that [a] motion to dismiss for failure to state a claim . . . is to be evaluated only on the pleadings." Mele v. Fed. Reserve Bank of N.Y., 359 F.3d 251, 257 (3d Cir. 2004), citing A.D. Bedell Wholesale Co. v. Philip Morris, Inc., 263 F.3d 239, 266 (3d Cir. 2001).

Federal Rule of Civil Procedure 8(a) requires that a complaint include "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). Rule 8(a) requires plaintiffs, via the complaint, "to give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Bell Atl. Corp., 2007 U.S. LEXIS 5901, at *20-21, citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957). "A complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations." Id. at *21. It must, however, allege sufficient facts to adequately "put defendant on notice of the essential elements of plaintiff[s'] cause of action," Nami, 82 F.3d at 65, and "raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true," Bell Atlantic Corp., 2007 U.S. LEXIS 5901, at *21.

If the complaint is “so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading,” the court may grant a moving party’s request for a more definite statement. Fed. R. Civ. P. 12(e) (2007). “Motions for a more definite statement are generally disfavored, and should [be granted only] if a pleading is unintelligible, making it virtually impossible for the opposing party to craft a responsive pleading.” Sabugo-Reyes v. Travelers Indem. Co. of Ill., No. 99-5755, 2000 U.S. Dist. LEXIS 504, at *7-8 (E.D. Pa. Jan. 12, 2000), citing Frazier v. SEPTA, 868 F. Supp. 757, 763 (E.D. Pa. 1994).

DISCUSSION

I. Count One: 42 U.S.C. § 1983

Federal civil rights statute 42 U.S.C. § 1983 provides an avenue for individuals to adjudicate violations of rights secured under federal constitutional or statutory law. Elmore v. Cleary, 399 F.3d 279, 281 (3d Cir. 2005), quoting Baker v. McCollan, 443 U.S. 137, 145 n.3 (1979) (“[Section 1983] is not itself a source of substantive rights, but [rather] a method for vindicating federal rights elsewhere conferred.”) (second bracketed word in the original). A valid claim brought under 42 U.S.C. § 1983 must plead three elements: (1) defendant acted under color of law; (2) defendant violated plaintiff’s federal constitutional or statutory rights; and (3) that violation caused injury to plaintiff. Elmore, 399 F.3d at 281, citing Sameric Corp. of Del. v. City of Philadelphia, 142 F.3d 582, 590 (3d Cir. 1998). Defendants dispute that plaintiffs have pleaded any violation of their federal constitutional or statutory rights as required by the second element.

A. First Amendment Retaliation

Plaintiffs allege that defendants violated their First Amendment rights by retaliating against them for engaging in protected activities. A proper retaliation claim must plead three elements: “(1) constitutionally protected conduct, (2) retaliatory action sufficient to deter a person of ordinary firmness from exercising his constitutional rights, and (3) a causal link between the constitutionally protected conduct and the retaliatory action.”⁶ Thomas v. Independence Twp., 463 F.3d 285, 296 (3d Cir. 2006), citing Mitchell v. Horn, 318 F.3d 523, 530 (3d Cir. 2003). A determination with respect to the first element is a matter of law for the court. Baldassare v. New Jersey, 250 F.3d 188, 195 (3d Cir. 2001).

Plaintiffs’ complaint does not adequately or clearly specify any constitutionally protected conduct. “When an adverse employment action is taken against a public employee . . . the threshold question is whether the employee’s speech can be fairly considered as relating to any matter of political, social, or other concern to the community.” Swartzwelder v. McNeilly, 297 F.3d 228, 235 (3d Cir. 2002), quoting Connick v. Myers, 461 U.S. 138, 146 (1983). The speech or conduct will not be protected if the “public employee speaks not as a citizen on matters of public concern, but instead as an employee on matters of personal interest, absent unusual circumstances.” Swartzwelder, 297 F.3d at 235, quoting Connick, 461 U.S. at 147; see

⁶ The Court of Appeals has described the second element as requiring that plaintiff show “his interest in the speech outweighs the state’s countervailing interest as an employer in promoting the efficiency of the public services it provides through its employees.” Baldassare, 250 F.3d at 195, citing Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968). The Court of Appeals also has recognized a fourth element, or more accurately a defense, whereby defendant can show that the “same action would have been taken in the absence of the protected activity.” Baldassare, 250 F.3d at 195; see also Schlichter v. Limerick Twp., 2006 U.S. Dist. LEXIS 57399, No. 04-4229, at *20 (E.D. Pa. Aug. 15, 2006). Since it is not clear that plaintiffs have shown that they engaged in protected activity, I do not consider the remaining elements.

also Hill v. Borough of Kutztown, 455 F.3d 225, 241-42 (3d Cir. 2006). To distinguish between the two I must focus on “the nature of the information, not its audience.”

Baldassare, 250 F.3d at 198.

Plaintiffs allege that they engaged in protected conduct by filing a civil rights action against the City and for challenging their removal under a Collective Bargaining Agreement. Nowhere does plaintiffs’ complaint or response specify what civil rights action plaintiffs have filed against the City other than the one that is before me now. Plaintiffs also do not provide any allegations or facts surrounding their dispute under the Collective Bargaining Agreement. Without more, I am unable to determine if the challenge involved nothing more than employees pursuing personal interests, namely an employment dispute, or if the dispute was a matter of public concern involving “actual or potential wrongdoing or breach of public trust on the part of government officials.” Baldassare, 250 F.3d at 195, citing Holder v. City of Allentown, 987 F.2d 188, 195 (3d Cir. 1993). Accordingly, I will grant defendants’ alternative motion for a more definite statement of plaintiffs’ First Amendment retaliation claim.

B. Procedural Due Process

Plaintiffs allege that defendants violated the Fourteenth Amendment by failing to provide them with adequate procedural process when depriving plaintiffs of their asserted property interest in employment and certification. To assess the validity of plaintiffs’ claim, I must make a two-part inquiry: (1) plaintiffs’ interests must fall within the Fourteenth Amendment’s protection of life, liberty, or property; and (2) whether adequate procedural due process was accorded when plaintiff was deprived of that

protected interest. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985); Alvin v. Suzuki, 227 F.3d 107, 116 (3d Cir. 2000).

1. Property Interest

Employment and certification may fall within the scope of the amendment's protection of property only if plaintiffs have a legitimate entitlement to continued employment and certification and not just a unilateral expectation of them. Bd. of Regents of Cal. v. Roth, 408 U.S. 564, 577 (1972) (holding that employment for a fixed term that had no renewal clause was not a property interest); see also Lockhart v. Matthew, No. 02-2914, 2003 U.S. App. LEXIS 26238, at *5-6 (3d Cir. Dec. 23, 2003) (finding that professional licenses that expire after a fixed term are not property interests in contrast to licenses that renew automatically). That determination can be made only by reference to the state law creating the asserted property interest. Roth, 408 U.S. at 577 (“[Property interests] are created and their dimensions are defined by existing rules . . . that stem from . . . state law . . .”).

Public employees do not have a legitimate entitlement to continued employment when it is terminable at will. See Thomas v. Town of Hammonton, 351 F.3d 108, 113 (3d Cir. 2003) (“The fact that [a city employee] was an at-will employee is fatal to this [due process] claim, however.”), quoting Bishop v. Wood, 426 U.S. 341, 346 n.8. (1976) (noting that if the terms of employment are at will that “necessarily establishes that he had [n]o property interest”). Municipal police officers in Pennsylvania, however, are not terminable at will but may only be severed for “just cause” upon written notice and an opportunity to receive a hearing if requested. 53 Pa. Cons. Stat. § 12638; Keys v. City of Philadelphia, No. 04-0766, 2005 U.S. Dist. LEXIS 30137, at *20 n.5 (E.D. Pa. Nov. 29,

2005). See generally Dowling v. Commonwealth Liquor Control Bd., No. 88-7568, 1992 U.S. Dist. LEXIS 17438, at *8-9 (E.D. Pa. Oct. 26, 1992) (finding that Pennsylvania law grants plaintiffs a property interest in employment that cannot be deprived without due process), citing 53 Pa. Cons. Stat. § 12638. Unlike at-will employees Pennsylvania municipal police officers have a legitimate entitlement to continued employment absent “cause” for removal. See Keys, 2005 U.S. Dist. LEXIS 30137, at *20 n.5; see also Richardson v. Felix, 856 F.2d 505, 509 (3d Cir. 1990) (“The hallmark of a constitutionally protected property interest is an individual entitlement that cannot be removed except for cause.”), quoting Logan v. Zimmerman Brush Co., 455 U.S. 422, 430 (1982).

Defendants contend that plaintiffs’ claim should fail because they do not have a property interest in their certification to work as municipal police officers. To the extent that plaintiffs are seeking relief for violation of an asserted property interest in their certifications separate from employment plaintiffs’ claim must fail. Municipal police officer certifications are initially “valid for 2 years from the date of issuance . . . [which] shall contain the dates of issuance and expiration” See 37 Pa. Code § 203.13(b)(1). Furthermore, police officers must complete on-going training during the course of employment to renew their certification or, alternatively, they must request a waiver or extension to complete those requirements. See id. §§ 203.13(c)(1), 203.14(c). Taken together, these rules imply that plaintiffs do not have a property interest in certification since they expire after a fixed term and the individual maintains responsibility for renewing before expiration. See Lockhart, 2003 U.S. App. LEXIS 26238, at *5-6; cf. Herz v. Dregnan, 648 F.2d 201, 208 (3d Cir. 1981) (determining that plaintiff had a

property interest in a professional license that renewed automatically and could only be revoked on grounds specified by statute).

That conclusion does not end the inquiry, however, since plaintiffs also claim a property interest in their employment. In Wilson v. MVM, Inc., 475 F.3d 166 (3d Cir. 2007) the Court of Appeals faced a set of circumstances that is instructive here. A federal agency had determined that several plaintiffs were medically unfit to work as security personnel and instructed their private employer to remove them from employment in that capacity. Id. at 171. In addressing plaintiffs due process claim against the agency, the Court adopted reasoning from the Second Circuit and held that if a state's decertification provided a private employer with the "just cause" for termination the employee had a valid property interest against the state. Id. at 177-78, quoting Stein v. Bd. of N.Y., Bureau of Pupil Trans., 792 F.2d 13, 16 (2d Cir. 1986) ("Where the independent source of a property interest is a private contract, the state cannot transgress on the claim of entitlement to continued employment without due process of law."); see also Stein 792 F.2d at 17 (declining to reach the "question whether [plaintiff's] certification . . . was *itself* a property interest Although certification . . . might bear some comparison to licensing of professions by the state our holding in this case rests on the narrower ground that [plaintiff] had a protected property interest in his continued employment") (citations omitted) (emphasis added).

Under that holding, defendants miss the mark by focusing solely on negating plaintiffs' property interest in certification and not addressing whether there is a property interest in employment. Whether an individual has a separate property interest in certification does not defeat an interest he or she might have in employment that is

contingent on certification. Stein, 792 F.2d at 17. For that reason, the Court’s holding in Wilson more closely applies to the present case than those dealing solely with an interest in certification. See, e.g., Lockhart, 2003 U.S. App. LEXIS 26238; Herz, 648 F.2d 201. As discussed above, plaintiffs have a property interest in continued employment with the City of Philadelphia. And, as in Wilson and Stein, by decertifying plaintiffs, Commonwealth defendants provided the cause for which plaintiffs’ employers, here City defendants, reduced or terminated them from employment as municipal police officers. Thus, plaintiffs have asserted a property interest protected by the Fourteenth Amendment.

2. Adequate Procedural Process

The next step in the inquiry is to determine whether adequate procedural due process was provided. “[T]he Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures.” Cleveland Bd. of Educ., 470 U.S. at 541. While there is no “rote formula for sufficient protections under the Due Process Clause . . . [a]t a minimum, due process requires notice and a hearing.” Wilson, 475 F.3d at 178, citing Reichley v. Pa. Dept. of Agric., 427 F.3d 236, 247 (3d Cir. 2005) (finding that although notice and hearing must be given, they need not always be given prior to the deprivation so long as sufficient procedural safeguards are provided afterwards). Moreover, “a plaintiff must have taken advantage of the processes that are available to him or her unless those procedures are unavailable or patently inadequate.” Alvin, 227 F.3d at 116; see also McDaniels v. Flick, 59 F.3d 446, 460 (3d Cir. 1995) (finding no violation of due process where an individual failed to take advantage of post-deprivation hearings

provided by the state). Plaintiffs' claim that neither notice nor an opportunity for hearing before or after decertification and termination was provided by any defendant. Given these allegations, I cannot conclude at this juncture that plaintiffs have been accorded adequate due process or otherwise failed to avail themselves of due process already provided by statute.

3. Alleging Personal Involvement

“A defendant in a civil rights action must have personal involvement in the alleged wrongs; liability cannot be predicated solely on the operation of respondeat superior.” Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir. 1988), citing Parratt v. Taylor, 451 U.S. 527, 537 n.3 (1981). Commonwealth defendants argue that plaintiffs did not plead that they were personally involved in plaintiffs' decertification and subsequent termination. A complaint will have pleaded a civil rights claim adequately where it states “the conduct, time, place, and persons responsible.” Evancho v. Fisher, 423 F.3d 347, 353 (3d Cir. 2005), citing Boykins v. Ambridge Area Sch. Dist., 621 F.2d 75, 80 (3d Cir. 1980). Although plaintiffs have not alleged any of these elements with particularity they have specified which defendants they believe are responsible, the conduct for which plaintiffs seek to hold them liable, and a general time frame for when the alleged conduct occurred. Cf. Boykins, 621 F.2d at 80. Additionally, plaintiffs allege that defendants intentionally and knowingly decertified plaintiffs. See Independence Twp., 463 F.3d at 296-97 (noting that a complaint which sets for basic facts and asserts that individual defendants used excessive force satisfied the notice pleading standard); Covey v. City of Philadelphia, No. 06-3649, 2007 U.S. Dist. LEXIS 17734, at *17 (E.D. Pa. Mar. 13, 2007) (“Plaintiff sufficiently alleges personal involvement by stating that the

individual Defendants participated in the alleged violations when disciplining and, ultimately, terminating [plaintiff].”). Consequently, I will not dismiss plaintiffs’ claim on the grounds that they have not given Commonwealth defendants fair notice of their claims and the grounds upon which they rest. The discovery process will provide ample opportunity for Commonwealth defendants to demonstrate whether or not they were personally involved.

II. Count Two: 38 U.S.C. §§ 4301-4319

The Uniformed Services Employment and Reemployment Rights Act provides employment security to members of the uniformed services. Rights guaranteed to members include protection from discrimination against uniformed members in hiring choices, ensuring reemployment following their service, and prohibiting termination following reemployment for a fixed period of time. 38 U.S.C. §§ 4311-4312, 4316.

A. Commonwealth Defendants

The Act defines employer to include “any person, institution, organization or entity that pays salary or wages for work performed or that has control over employment opportunities” 38 U.S.C. § 4303(4)(A). Plaintiffs agree in their reply that Commonwealth defendants are not employers within the meaning of the statute and furthermore that the USERRA claim is brought solely against City defendants. Since Commonwealth defendants are not parties to the claim brought by plaintiffs under 38 U.S.C. §§ 4301-4319 I will not address their remaining arguments for dismissing or otherwise limiting any potential liability under this claim.⁷

⁷ Commonwealth defendants contend that I do not have subject matter jurisdiction over claims brought against them. See Velasquez v. Frapwell, 165 F.3d 593, 593-94 (7th Cir. 1999), citing 38 U.S.C. § 4323(b)(2) (“In the case of an action against a State (as an employer) by a person, the action may be brought in a State court”). Regardless of the accuracy of Commonwealth defendants’ interpretation of § 4323(b)(2) with respect to

III. Qualified Immunity

The doctrine of qualified immunity shields defendants from liability for civil damages if “their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” Behrens v. Pelletier, 516 U.S. 299, 305 (1996), quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Independence Twp., 463 F.3d at 292. The “relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable [individual in defendant’s position] that his conduct was unlawful in the situation he confronted.” Independence Twp., 463 F.3d at 300, quoting Saucier v. Katz, 533 U.S. 194, 200-01 (2001). Moreover, the inquiry must be made “in light of the specific context of the case, not as a broad general proposition” Saucier, 533 U.S. 201. “The defense will “be upheld on a 12(b)(6) motion only when immunity is established on the face of the complaint.” Id. at 292, quoting Leveto v. Lapina, 258 F.3d 156, 161 (3d Cir. 2001). If established, qualified immunity functions as “an entitlement not to stand trial or face the other burdens of litigation [t]he privilege is an *immunity from suit* rather than a mere defense to liability” Saucier, 533 U.S. at 200-01 (emphasis in the original) (internal quotations omitted), quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

A. Commonwealth Defendants

As both the parties have agreed, Commonwealth defendants’ relationship with plaintiffs is through certification and not as their employer. Although individuals may have a separate property interest in certifications which do not terminate as a matter of course, as discussed above municipal police officer certifications do not fall within that

them, that argument does not extend to claims brought against City defendants. 38 U.S.C. § 4323(b)(3) (“In the case of an action against a private employer by a person, the district courts of the United States shall have jurisdiction of the action.”).

classification. In that respect, a reasonable person in Commonwealth defendants' positions would not have understood decertification itself to be an infringement on a property interest.

Nor was the law clearly established at the time the allegations occurred that Commonwealth defendants' actions violated plaintiffs' property interest in employment with Philadelphia City. The Court of Appeals only this year held that a state may interfere with a property interest in employment through decertification if it supplies the cause for termination. See Wilson 475 F.3d at 177-78 (finding that the Third Circuit had not spoken on this specific question but adopting reasoning from the Second and Ninth Circuits on the particular issue), citing Stein 792 F.2d at 17; see also Merritt v. Mackey, 827 F.2d 1368 (9th Cir. 1987). Commonwealth defendants' actions at issue here occurred prior to the Wilson decision. Moreover, other Circuits have yet to be confronted with factual settings similar to Wilson. See, e.g., Bernard v. United Twp. High Sch., 5 F.3d 1090, 1092 (7th Cir. 1993) (recognizing that individuals may have a protected property interest in a particular private job but ruling that an artist's oral agreement to sell drawings did not amount to one); Cowan v. Corley, 814 F.2d 223, (5th Cir. 1987) (finding that state interference with an individual's ability to choose an occupation may violate both liberty and property interests but remanding to address whether a property interest was asserted). For those reasons it cannot be said that "there [was] sufficient precedent at the time of action, factually similar to the plaintiff's allegations, to put defendant[s] on notice that their conduct [was] constitutionally prohibited." McLaughlin v. Watson, 271 F.3d 566, 572 (3d Cir. 2001). As such, I find

that Commonwealth defendants are entitled to qualified immunity from suit for civil damages.

Plaintiffs also request that I grant them injunctive relief under their § 1983 Due Process claim from Commonwealth defendants.⁸ In conflict with that request, however, plaintiffs are explicit in stating that they are suing defendants in their individual, not their official, capacities. The problem presented here is that plaintiffs' suit against Commonwealth defendants in their individual capacity precludes an award of injunctive relief. "In order to maintain a cause of action for injunctive relief, there must be a real threat of a future violation of one's legal rights, or a contemporary violation of a nature likely to continue to recur." Sease v. Sch. Dist. of Phil., 811 F. Supp. 183, 193 (E.D. Pa. 1992), citing United States v. Or. State Med. Soc'y, 343 U.S. 326, 333 (1952).

Moreover, "[t]he sole function of an action for injunction is to forestall future violations." Or. State Med. Soc'y, 343 U.S. at 333. Granting injunctive relief to Commonwealth defendants in their individual capacities would not prevent future violations of plaintiffs' property interest since those violations would occur as a result of actions by Commonwealth defendants in their official capacities. See generally Spicer v. Hilton, 618 F.2d 232, 241 (3d Cir. 1980) (permitting appellant's alternative request for remand so that "plaintiff may sue the proper responsible state official in his/her representative

⁸ Plaintiffs assert that such relief is not barred under the holding in Ex parte Young, 209 U.S. 123, 155-56 (1908) ("[I]ndividuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings . . . violating the Federal Constitution, may be enjoined by a Federal court of equity from such action."). This argument is inapposite since the exception permitted under Ex parte Young pertains to suing state officials in their official capacity, not in their individual capacities. Laskaris v. Thornburgh, 661 F.2d 23, 26 (3d Cir. 1981) ("[D]amages or back pay against a state official acting in his official capacity [are] barred because such retrospective relief necessarily depletes the state treasury but the amendment does not bar a suit seeking declaratory or injunctive relief against the same officials.") (citations omitted), citing Ex parte Young, 209 U.S. 123.

capacity in order to achieve the requested injunctive relief”). Consequently, I will dismiss plaintiffs’ request for injunctive relief from Commonwealth defendants’ in their individual capacities.

B. City Defendants

Before turning to City defendants’ argument for qualified immunity from civil damages I must address plaintiffs’ request for punitive damages from defendant City of Philadelphia. The Supreme Court held in City of Newport v. Fact Concerts, Inc. that “a municipality is immune from punitive damages under 42 U.S.C. § 1983.” 453 U.S. 247, 271 (1981). To the extent that plaintiffs are seeking punitive damages from the City of Philadelphia under their § 1983 claim that relief is barred. See also Satterfield v. Borough of Schuylkill Haven, 12 F. Supp. 2d 423, 444 (E.D. Pa. 1998). Municipalities are not, however, immune from punitive damages sought under a 38 U.S.C. §§ 4301-4319 claim. Satterfield, 12 F. Supp. 2d at 444-45 (finding that the statutory language permits the recovery of punitive damages from a municipality and allowing plaintiffs to bring those demands before a jury), citing 38 U.S.C. § 4323(c)(1)(A)(iii). The only outstanding question is whether City defendants are entitled to qualified immunity with respect to the remainder of plaintiffs’ claims.

1. Immunity from § 1983

City defendants, excluding the City of Philadelphia,⁹ possess the kind of employment relationship with plaintiffs that was not present between Commonwealth defendants and plaintiffs. As noted above, Philadelphia police officers have an established Fourteenth Amendment property interest in their employment with the City

⁹ Municipalities like defendant City of Philadelphia are not entitled to immunity from § 1983 claims. Brandon v. Holt, 469 U.S. 464, 472-73 (1985), citing Owen v. City of Independence, 445 U.S. 622, 638 (1980).

of Philadelphia. 53 Pa. Cons. Stat. § 12638; Keys, 2005 U.S. Dist. LEXIS 30137, at *20. See generally Dowling, 1992 U.S. Dist. LEXIS 17438, at *8-9. A reasonable person in City defendants' position would be aware of applicable state law permitting dismissal of its police officers only for cause as well as litigation that occurred only a year prior in which City defendants were a party to a similar dispute. Assuming plaintiffs' allegations are true, City defendants failed to accord them the due process to which they were entitled. On that basis, I find that City defendants are not entitled to qualified immunity from plaintiffs' § 1983 Due Process claim.

2. Immunity from §§ 4301-4319

If City defendants are asserting qualified immunity from plaintiffs' §§ 4301-4319 claim, their argument appears to rest on the ground that plaintiffs have failed to demonstrate a necessary element: the presence of a constitutional violation. Contrary to that argument, a violation of federal statutory law may also overcome qualified immunity. See Doe v. Delie, 257 F.3d 309, 319 n.6 (3d Cir. 2001); see also Bates v. Hess, 1994 U.S. Dist. LEXIS 21455, at *27 (E.D. Pa. Aug. 4, 1994) (discussing the application of qualified immunity within the context of violations of 38 U.S.C. §§ 4301-4319). Bates also provides direction on whether qualified immunity from allegations of a USERRA violation should be granted. As the Bates court noted, "the rights secured by the Veterans Act and Cobra Amendments were clearly established at the time and that any legislator or legislative administrator would know of them." Bates, 1994 U.S. Dist. LEXIS 21455, at *27. Consequently, I do not find that City defendants are entitled to qualified immunity on the face of the pleadings and will not grant City defendants' motion on these grounds. Id. at *27, citing Abdul-Akbar v. Watson, 4 F.3d 195, 201 (3d

Cir. 1993) (“Moreover, we note that, as here, the question of qualified immunity often cannot be resolved adequately until the dispositive facts have been presented at trial and reduced to findings.”).

IV. Motion for a More Definite Statement

In addition to granting defendants’ request for a more definite statement concerning plaintiffs’ retaliation claim defendants also request that I grant their motion on three other grounds: (1) plaintiffs have not provided sufficient factual clarity to frame a qualified immunity defense; (2) plaintiffs do not identify which defendants they seek to hold liable for each claim; and (3) plaintiffs fail to identify under which provisions of 38 U.S.C. §§ 4301-4319 they are seeking relief.

None of these arguments provides a compelling basis for finding that the complaint is “so vague or ambiguous that [defendants] cannot reasonably be required to frame a responsive pleading” Fed. R. Civ. P. 12(e). The circumstances presented here are sufficiently clear that in light of applicable case law I am able to make a determination on defendants’ qualified immunity defense, and in some respects a determination favorable to them. Additionally, plaintiffs’ reply clarifies that they are only seeking to hold City defendants liable for violations of 38 U.S.C. §§ 4301-4319, but both Commonwealth and City defendants liable for violations of 42 U.S.C. § 1983. Finally, defendants ask for a litany of factual details surrounding plaintiffs’ 38 U.S.C. §§ 4301-4319 claim, which defendants assert are essential for them to be put on notice concerning which violations under the statute are being alleged. Plaintiffs’ complaint, however, specifically states the provision¹⁰ under which they are alleging a violation.

V. Conclusion

¹⁰ 38 U.S.C. § 4316(c). See page 11 of plaintiffs’ complaint.

For the reasons provided above, I will not dismiss plaintiffs' claims against City defendants for the alleged due process violations under 42 U.S.C. § 1983 and violations under 38 U.S.C. §§ 4301-4319. Plaintiffs may not recover punitive damages from defendant City of Philadelphia under their § 1983 claim. I will dismiss plaintiffs' § 1983 Due Process claim against Commonwealth defendants since I find that they are entitled to qualified immunity from civil suit for damages. I will also deny any injunctive relief sought under plaintiffs' Due Process claim against Commonwealth defendants in their individual capacities. Furthermore, plaintiffs' complaint and response clearly indicate that they are not pursuing any claim under §§ 4301-4319 against Commonwealth defendants. With regards to plaintiffs' First Amendment retaliation claim I will grant defendants' alternative motion for a more definite statement.

An appropriate Order follows.

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

GREGORY M. SPECK, et al.	:	CIVIL ACTION
	:	NO. 06-4976
v.	:	
	:	
CITY OF PHILADELPHIA, et al.	:	

ORDER

AND NOW, this day of July 2007, upon consideration of defendants’ motion to dismiss for failure to state a claim and motion for a more definite statement, plaintiffs’ response, and defendants’ reply thereto, and for the reasons set forth in the accompanying memorandum, it is ORDERED that defendants’ motion to dismiss is GRANTED as to plaintiffs’ § 1983 Due Process claim against Jeffery Miller, John Gallaher, E. Beverley Young, and Charles G. Crow (“Commonwealth defendants”). It is further ordered that defendants’ motion for a more definite statement is GRANTED as to plaintiffs’ First Amendment retaliation claim. Commonwealth and City defendants’ motions to dismiss and motions for a more definite statement are denied as to all other claims.

s/ Thomas N. O’Neill, Jr.
THOMAS N. O’NEILL, JR., J.