

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

SCOT SMITH : CIVIL ACTION
 :
 v. :
 :
 BOROUGH OF POTTSTOWN, CHIEF :
 CHRISTOPHER CARLILE, and SGT. :
 MARK FLANDERS : NO. 96-1941

MEMORANDUM AND ORDER

HUTTON, J.

June 30, 1997

Presently before this Court is the Defendants' Motion for Summary Judgment (Docket No. 6) and the Plaintiff's Response thereto.

BACKGROUND

Between November, 1990 until April, 1994, the Borough of Pottstown employed the plaintiff, Scot A. Smith, as a police officer. During his employment, the plaintiff's supervisors reprimanded him on several occasions for citizen complaints and damage to police vehicles. (Pl.'s Dep. at 152-54.) In fact, on one occasion, the plaintiff received a three day suspension for his involvement in a domestic violence incident. (Id. at 59.) Additionally, in 1993, the plaintiff was repeatedly polygraphed and questioned by defendant Chief Christopher Carlile about whether he was involved with the theft of drug buy money from an evidence locker. (Id. 30-34.) The plaintiff denied involvement, and during questioning, allegedly told investigators that several

officers, including defendant Sergeant Mark Flanders had openly complained about their financial situation.\¹ (Id. at 8.)

On March 11, 1994, while off-duty, the plaintiff was arrested and charged with assaulting and harassing Danielle Smith, then his wife.\² On April 11, 1994, following his arrest, the Borough Council ("Council") voted to discharge the plaintiff. At the plaintiff's request, a civil service hearing was held on May 12, 1994, June 12, 1994, and August 12, 1994, during which the plaintiff, represented by counsel, presented evidence and cross-examined the Borough's witnesses. Following the hearings, the three member Civil Service Commission ("Commission") determined that the plaintiff had engaged in conduct unbecoming a police officer and upheld the Borough's decision to terminate the plaintiff's employment. (Mem. & Order of Borough of Pottstown Civil Service Commission of Sept. 23, 1994.) The plaintiff challenged the Commission's findings and conclusions by filing a petition for appeal with the Court of Common Pleas of Montgomery County, Pennsylvania ("Common Pleas Court"). The Common Pleas Court, however, denied his petition.\³ Smith v. Civil Serv.

¹/ The results of the plaintiff's polygraphs were inconclusive, and thus he was never again approached about the theft. (Defs.' Mem. at 4.)

²/ The criminal charges against the plaintiff were dropped because his ex-wife, Danielle Smith, refused to testify at the preliminary hearing, despite defendant Sergeant Mark Flanders' attempts to convince Mrs. Smith to do otherwise. (Smith Dep. at 143.) Moreover, Mrs. Smith has recently admitted that she lied to the police about the incident, and that her husband did not physically abuse her on the occasion of his arrest. (See Danielle Smith Aff. at 1-2.)

³/ The Court of Common Pleas also denied his motion for reconsideration. Smith v. Civil Serv. Comm'n, No. CIV.A.94-2027 (C.P. Montgomery Aug. 15, 1995)

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Comm'n, No. CIV.A.94-2027 (C.P. Montgomery June 28, 1995) (order). The plaintiff, then for lack of funds, chose not to appeal the court's decision. (Pl.'s Dep. at 124.)

The plaintiff also filed for unemployment compensation benefits. After two hearings before a referee, the Unemployment Compensation Board of Review ("Board") denied the plaintiff benefits, finding that he had engaged in willful misconduct. The plaintiff appealed the findings, but the Commonwealth Court upheld the Board's decision. Smith v. Unemployment Compensation Bd. of Review, No. CIV.A.2788-1994 (Pa. Commw. Ct. Apr. 6, 1995). On March 11, 1996, the plaintiff initiated the instant action with this Court.

DISCUSSION

A. Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment has the initial burden of showing the basis for its motion. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the movant adequately supports its motion pursuant to Rule 56(c), the burden shifts to

(...continued)
(order).

the nonmoving party to go beyond the mere pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. Id. at 324. A genuine issue is one in which the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

When deciding a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the nonmovant. Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992), cert. denied, 507 U.S. 912 (1993). Moreover, a court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent. Id. Nonetheless, a party opposing summary judgment must do more than rest upon mere allegations, general denials, or vague statements. Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir. 1992).

B. Analysis of Defendants' Federal Law Claims

1. Section 1981 and 1982 Civil Rights Claims

Following the ratification of the Thirteenth Amendment of the United States Constitution, Congress enacted the Civil Rights Act of 1866 ("1866 Act"). The purpose of this legislation was "to wipe out the 'burdens and disabilities' of slavery by securing 'to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are

the essence of civil freedom, namely, the same right to make and enforce contracts . . . and to inherit, purchase, lease, sell, and convey property, as is enjoyed by white citizens.'" Grier v. Specialized Skills, Inc., 326 F. Supp. 856, 861 (W.D.N.C.1971) (quoting Civil Rights Cases, 109 U.S. 3, 22 (1883)). To accomplish this goal, Section 1 of the 1866 Act provided that:

[A]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27. In 1870, following the passage of the Fourteenth Amendment, Section 1 of the 1866 Act was reenacted and recodified. Id. Ultimately, Section 1 was divided and codified into two adjacent sections: 42 U.S.C. §§ 1981 and 1982. Id.

Section 1981, most recently modified by the Civil Rights Act of 1991, provides in relevant part that:

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, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981(a) (1994). Section 1982, on the other hand, provides that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982 (1994). Although both Sections 1981 and 1982 have proven effective in battling discrimination, their scope is limited to cases of race discrimination. Saint Francis C. v. Al-Khazraji, 481 U.S. 604, 613 (1987). Thus, these sections may only be invoked when discrimination is alleged against "identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics." Id.

In the instant case, the defendants argue that the plaintiff's allegations are vague and fail to state a statutory claim. (Def.'s Mem. at 16.) Furthermore, they argue that neither the plaintiff's deposition, nor the deposition of his wife establish a federal claim. (Id.) The plaintiff, on the other hand, attempts to respond by reciting the allegations in his complaint, and offering as support, the deposition of Danielle Scott, the plaintiff's ex-wife. He does not detail,

however, how her deposition supports his Section 1981 and 1982 claims.

A review of the record indicates that there is no evidence that the defendants discriminated against the plaintiff because of his ancestry or ethnicity. In fact, the record is devoid of any reference to the ancestry or ethnic origin of any of the parties. Therefore, this Court concludes that there is no genuine issue of material fact that the defendants discriminated against the plaintiff because of his ancestry or ethnicity. Accordingly, this Court grants summary judgment in favor of the defendants and against the plaintiff with respect to the Section 1981 and 1982 claims.

2. Sections 1985 & 1986 Civil Rights Claims

The plaintiff also seeks to proceed against the defendants under 42 U.S.C. §§ 1985 and 1986, two provisions of the 1871 Act. These provisions establish:

[A] cause of action against any person who enters into a private conspiracy for the purpose of depriving the claimant of the equal protection of the laws . . . [and] against any person who, knowing that a violation of § 1985 is about to be committed and possessing power to prevent its occurrence, fails to take action to frustrate its execution.

Rogin v. Bensalem Township, 616 F.2d 680, 696 (3d Cir. 1980), cert. denied sub nom., Mark-Garner Assoc., Inc. v. Bensalem Township, 450 U.S. 1029 (1981).

To make out a valid cause of action under Section 1985,⁴ a plaintiff must allege each of the following:

(1) a conspiracy; (2) motivated by a racial or class based discriminatory animus designed to deprive, directly or indirectly, any person or class or persons to the equal protection of the laws; (3) an act in furtherance of the conspiracy; and (4) an injury to person or property or the deprivation of any right or privilege of a citizen of the United States.

Lake v. Arnold, 112 F.3d 682 (3d Cir. 1997) (citing United Bhd. of Carpenters & Joiners of Am., Local 610, AFL-CIO v. Scott, 463 U.S. 825, 828-29; Griffen v. Breckenridge, 403 U.S. 88, 102-103

^{4/} The plaintiff in this case may only proceed against the defendant under § 1985(3), because "§ 1985(1) concerns itself only with interference with officials of the Federal Government [and] § 1985(2) is concerned only with conspiracies to prevent parties, witnesses, or jurors from attending or testifying in courts of the United States." Meza v. Lee, 669 F. Supp. 325, 327 (D. Nev. 1987). Section 1985(3) provides as follows:

If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(3) (1994).

(1971)). Once a plaintiff satisfies these requirements, he may also maintain a Section 1986 action, if he can prove that the defendants had knowledge of the Section 1985 violations and neglected to prevent their occurrence.\⁵ 42 U.S.C. § 1986 (1994). If, however, a plaintiff cannot set forth a cause of action under Section 1985, he cannot set forth a claim under Section 1986. Rogin, 616 F.2d at 696.

In the instant case, the defendants allege that the plaintiff's allegations are vague and fail to state a statutory claim. (Def.'s Mem. at 16.) Furthermore, they argue that neither the plaintiff's deposition, nor the deposition of his ex-wife establish a federal claim. (Id.) The plaintiff, on the other hand, attempts to respond by reciting the allegations in his complaint, and again offering as support, the deposition of

⁵/ Section 1986 provides that:

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commissions of the same, neglects or refuses so to do, if such wrongful act which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding five thousand dollars damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

42 U.S.C. § 1986 (1994).

his ex-wife.\⁶ He argues that 1986 is appropriate because the record shows the defendants had knowledge of the "conspiracy." He does not detail, however, how her deposition supports the Section 1985(3) and 1986 claims.

A review of the record indicates that there is no evidence that the defendants discriminated or conspired against the plaintiff because of a racial or other class-based animus, as required by Section 1985(3). Therefore, this Court concludes that there is no genuine issue of material fact. Accordingly, this Court grants summary judgment for the defendants with respect to the Section 1985(3) claim. Furthermore, because the Section 1986 claim requires 1985 violation, the Court also grants summary judgment for the defendants with respect to the Section 1986 claim.

3. Section 1983 Civil Rights Claims

42 U.S.C. § 1983 was originally enacted as part of the Civil Rights Act of 1871 ("1871 Act"). Wilson v. Garcia, 471 U.S. 261, 276 (1985). The statute was passed as a response to "the campaign of violence and deception in the South, fomented by the Ku Klux Klan, which was denying decent citizens their civil and political rights." Id. In addition to halting the persecution of decent citizens by the Ku Klux Klan,

[i]t is abundantly clear that one reason the legislation was passed was to afford a

⁶/ The plaintiff alleges that the defendants conspired and retaliated against him for bringing to light their long pattern and practice of violating constitutional rights. (Compl. at 1.)

federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance, or otherwise, state laws might not be enforced and claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by state agencies.

Monroe v. Pape, 365 U.S. 167, 180 (1961), overruled by, Monell v. Department of Soc. Servs., 436 U.S. 658, (1978). As such, a plaintiff may bring a Section 1983 action if he alleges that a person acting under color of state law deprived him of rights, privileges, or immunities secured by the Constitution or laws of the United States.⁷ 42 U.S.C. § 1983 (1994); West v. Atkins, 487 U.S. 42, 48-49 (1988); Groman v. Township of Manalpan, 47 F.3d 628, 633 (3d Cir. 1995). "§ 1983 'is not a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'" Graham v. Connor, 490 U.S. 386, 394 (1989) (quoting Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979)).

In the instant case, the plaintiff seeks to recover under Section 1983 for violations of his First, Fourth, Fifth,

⁷/ Section 1983 provides as follows:

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. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (1994).

Sixth, Eighth, and Fourteenth Amendment rights. The plaintiff claims that the defendants conspired to cause his false arrest and wrongfully terminate his employment, because he spoke freely about what he alleged was the defendants unconstitutional actions.⁸ The defendants, however, seek summary judgment with respect to these claim on two grounds. First, they argue that the issues underlying the plaintiff's claim were litigated in state proceedings, and thus, the principle of issue preclusion applies. Second, they argue that the evidence in the record demonstrates that there are no genuine issues of material facts that they falsely arrested and imprisoned the plaintiff, maliciously prosecuted him, violated his due process rights, or retaliated against him for exercising his First Amendment rights.

a. Issue Preclusion

⁸/ The plaintiff asserts that:

The defendants engaged in unlawful conspiracy and scheme to cause the false arrest of Plaintiff, the wrongful and unjustified removal of Plaintiff from position as police officer for Borough of Pottstown and subject him to retaliation, an effort to cover up a long pattern and practice of harassment and intimidation, and violation of constitutional rights, retaliating against Plaintiff for his blowing the whistle about an unwritten policy and custom of harassment and intimidation of persons who testify and/or protest about their superiors' mistreatment, illegal policies and procedures, favoritism, surveillance, intimidation, subjective disciplinary criteria, being targeted for removal from the police department, and the systematic removal of those who complained about the above.

(Compl. at ¶ 1.) Furthermore, he claims that he is "being targeted for removal by the defendants to retaliate against the Plaintiff for his exercising his First Amendment rights, cover up of the conspiracy and obstruction of justice by the defendants and those acting with them." (Id. at ¶ 2.)

The doctrine of issue preclusion "derives from the simple principle that 'later courts should honor the first actual decision of a matter that has been actually litigated.'
Burlington N.R.R. Co. v. Hyundai Merchant Marine Co., 63 F.3d 1227, 1231 (3d Cir. 1995) (quoting 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4416 (1981)); see Edmundson v. Borough of Kennett Square, 4 F.3d 186, 189 (3d Cir. 1993) ("Issue preclusion otherwise known as collateral estoppel, bars re-litigation of an issue identical to that in a prior action."). This doctrine ensures that "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." Montana v. United States, 440 U.S. 147, 153 (1979). Furthermore,

[w]hen a prior case has been adjudicated in a state court, federal courts are required by 28 U.S.C. § 1738⁹ to give full faith and

⁹/ Congress has provided that:

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United

(continued...)

credit to the state judgment and, in section 1983 cases, apply the same preclusion rules as would the courts of that state. Decisions of state administrative agencies that have been reviewed by state courts are also given preclusive effect in federal courts.

Edmundson, 4 F.3d at 189 (citations omitted) (footnote added).

Therefore, when considering whether to apply collateral estoppel, Pennsylvania law requires a party to prove that:

- (1) the issue decided in the prior case is identical to one presented in the later case;
- (2) there was a final judgment on the merits;
- (3) the party against whom the plea is asserted was a party or in privity with a party in the prior case;
- (4) the party or person privy to the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding[;] and
- (5) the determination in the prior proceeding was essential to the judgment.

City of Pittsburgh v. Zoning Bd. of Adjustment of City of Pittsburgh, 559 A.2d 896, 901 (Pa. 1989) (citing Schubach, Philadelphia Marine Trade Assoc. v. International Longshoreman's Assoc., 308 A.2d 98 (Pa. 1973)).

The analysis, however, is slightly varied when a state agency's findings are unreviewed by a state court.¹⁰ In that situation, "when a state agency 'acting in a judicial capacity

(...continued)

States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C. § 1738 (1994).

^{10/} Different analyses are required because "[s]ection 1738 applies only to rulings of a state court. It does not apply to judicially unreviewed, administrative factfinding of a state agency. Federal common law rules govern the preclusive effect of unreviewed agency findings." Seitzer v. City of Williamsport, 920 F. Supp. 73, 76 n.4 (M.D. Pa. 1996) (citation omitted).

. . . resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate," federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts." University of Tenn. v. Elliott, 478 U.S. 788, 799 (1986) (citation and footnote omitted); accord Edmundson, 4 F.3d at 189 (citing Elliott, 478 U.S. at 799 ("[I]n section 1983 cases, only state administrative factfinding is entitled to preclusive effect in the federal courts when the agency ruling remains unreviewed by state courts.")). In this situation, the Court must apply federal collateral estoppel law, which requires that a party satisfy four requirements: (1) issue decided in the prior case must have been identical with the issue presented in the later matter; (2) the issue was actually litigated; (3) there was a final and valid judgment; and (4) the issue was essential to the prior judgment. Burlington Northern, 63 F.3d at 1231-32. Nonetheless, despite its preclusive effect, the United States Court of Appeals for the Third Circuit has been reluctant to allow district court's to preclude a plaintiff from litigating constitutional issues, based on the unreviewed findings of a state administrative agency. See Edmundson, 4 F.3d at 193 ("[W]e do not think that an administrative agency consisting of lay persons has the expertise to issue binding pronouncements in the area of federal constitutional law.").

In this case, the defendants argue that the plaintiff should be precluded from relitigating issues previously

adjudicated by the Pennsylvania administrative agencies and courts. (Defs.' Mem at 13-15.) Specifically, the defendants argue that the plaintiff has already litigated the issues surrounding his termination in various state court and administrative agency proceedings. (Id. at 14.) Furthermore, they maintain that these agencies' decisions were reviewed and affirmed by the Pennsylvania state courts. (Id.) Therefore, the defendants argue that the plaintiff should be precluded from relitigating issues already decided in the state system. (Id. at 15.) The plaintiff, however, asserts that the Common Pleas Court was not asked nor could it address the issues in this action. (Pl.'s Mem. at 14.) Therefore, he urges the Court to reject the defendants' argument and examine the merits of his claims. (Id. at 14-15.)

To resolve this issue, the Court must examine the two state court proceedings which the defendants assert preclude relitigation of the issues in this case. The first litigation is the three day hearing before the Commission. This Court finds that the Commission acted in a judicial capacity, allowed the plaintiff to fairly litigate the issues surrounding his termination, and resolved disputed issues of fact. Nonetheless, its factual findings and conclusions were never reviewed by a state court, because the Common Pleas Court refused to grant the plaintiff's petition for appeal. Therefore, this Court will not preclude the Section 1983 claims with the factual findings of the Commission.

Similarly, the Court will not apply the findings of the Board, which were reviewed by the Commonwealth Court to preclude the plaintiff from relitigating the issues underlying his Section 1983 claim. The United States Court of Appeals for the Third Circuit has stated that the findings of the Board will not preclude the relitigation of issues underlying a Section 1983 claim. Swineford v. Snyder County, 15 F.3d 1258, 1269 (3d Cir. 1994).

b. Analysis of Constitutional Claims

In this complaint, the plaintiff alleges that the defendants violated his First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment rights. (Compl. at ¶ 1.) The basis of all of these claims stem from his March 11, 1994 arrest and his subsequent termination one month later. The defendant claims that the defendants conspired to cause his false arrest and wrongfully terminate his employment because he spoke freely about what he alleged was their unconstitutional actions. Therefore, to determine whether the defendants violated the plaintiff's intertwined constitutional rights under Section 1983, the Court must determine whether the plaintiff was terminated for exercising his right to free speech, whether the March 11th arrest was valid, whether his termination and the events surrounding it violated due process of law, and whether the defendant violated the prohibitions of the Eighth Amendment.

(1) First Amendment Allegations

The United States Court of Appeals has stated that, "public employers cannot condition public employment on a basis that infringes an employee's constitutionally protected interest in free expression." Swineford, 15 F.3d at 1269 (citations omitted). To determine whether a public employee was fired because of his protected speech, the Court must employ a three-step analysis. Green v. Philadelphia Housing Auth., 105 F.3d 882, 885 (3d Cir. 1997), petition for cert. filed, -- USLW ---- (June 3, 1997); Swineford, 15 F.3d at 1270. First, the Court must determine whether the employee was engaged in a protected activity. Green, 105 F.3d at 885; Swineford, 15 F.3d at 1270. Second, the Court must determine whether the plaintiff demonstrates that the protected activity was a substantial or motivating factor in his discharge. Green, 105 F.3d at 885; Swineford, 15 F.3d at 1270. Third, the Court must ascertain whether the defendants have had an opportunity to defeat the employees claim by demonstrating that they would have taken the same action absent the protected conduct. Green, 105 F.3d at 885; Swineford, 15 F.3d at 1270.

In this case, the defendants allege that the plaintiff's allegations are vague and fail to state a statutory claim. (Def.'s Mem. at 16.) They further argue that the plaintiff was terminated because he engaged in wilful misconduct, and note that the record indicates no other reason. (Id. at 16-18.) The plaintiff, however, maintains that he was fired because he reported what he believed were corrupt department practices,

and because he identified defendant Flanders as a potential suspect in the theft investigation. (Pl.'s Mem. at 2-3.)

After reviewing the record, this Court finds that the three elements of the free speech test are satisfied. The first element is satisfied because the plaintiff's comments about departmental policy and potential suspects in the theft investigation are a protected activity. See, e.g., Connick v. Myers, 461 U.S. 138, 146-48 (noting that in public employment context, speech relating to matters of public concern and not merely personal interest or grievance are protected speech); Zamboni v. Stamler, 847 F.2d 73, 77 (3d Cir.) (public employees' speech on matters of public concern are protected under First Amendment), cert. denied, 488 U.S. 899 (1988); Vearling v. Bensalem Township Sch. Dist., No. CIV.A.94-7711, 1997 WL 128096, at *10 (E.D. Pa. Mar. 18, 1997) ("Speech disclosing wrongdoings of public officers or criticizing their official actions and decisions is protected."). This Court also finds that there is a genuine issue of material fact with regard to the second element, because the plaintiff maintained at his deposition that his comments were the real reason he lost his job as a police officer. (See Pl.'s Dep. at 7-21.) Finally, this Court finds that the defendants have not sufficiently demonstrated that they would have terminated the plaintiff, absent his comments about departmental conduct and the theft investigation. Therefore, this Court concludes that the plaintiff may maintain a Section

1983 action based upon allegations that the defendants violated his First Amendment rights.

(2) Fourth and Sixth Amendment Allegations

The Fourth Amendment of the United States Constitution provides that:

The right of the people to secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons of things to be seized.

U.S. Const. amend. IV. Therefore, "[t]he central issue in determining liability in a § 1983 action based on a claim of false arrest is 'whether the arresting officers had probable cause to believe the person arrested committed the offense.'" Kis v. County of Schuylkill, 866 F. Supp. 1462, 1469 (E.D. Pa. 1994) (quoting Dowling v. City of Philadelphia, 855 F.2d 136, 141 (3d Cir. 1988)). "It is well established that probable cause for a warrantless arrest exists when, at the time of arrest, the facts and circumstances within the officer's knowledge are 'sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense.'" United States v. Glasser, 750 F.2d 1197, 1205 (3d Cir. 1984) (emphasis added), cert. denied sub nom., Erdlen v. United States, 471 U.S. 1018 and Gaza v. United States, 471 U.S. 1068 (1985). Moreover, "[t]he ultimate finding of guilt or innocence, or dismissal of charges arising out of an arrest and detention has no bearing on

whether the arrest was valid." Valenti v. Sheeler, 765 F. Supp. 227, 230 (E.D. Pa. 1991).

Along with a Section 1983 claim based upon false arrest, a plaintiff may also assert a Fourth Amendment claim of false imprisonment, and Sixth Amendment¹¹ claims of malicious prosecution, and malicious abuse of process. To prove false arrest, false imprisonment, or malicious prosecution, the plaintiff must prove that the defendants lacked probable cause to arrest and prosecute him. See Gilbert v. Feld, 842 F. Supp. 803, 821 (E.D. Pa. 1993) ("An unlawful arrest--that is, an arrest without probable cause--gives rise to a cause of action for false imprisonment as well as false arrest."); Payson v. Ryan, No. CIV.A.90-1873, 1992 WL 111341, at *12 (E.D. Pa. May 14) (citations omitted) ("When a § 1983 action for damages is based on a claim of malicious prosecution, . . . and lack of probable cause is an element of a malicious prosecution claim under state law, a plaintiff must show lack of probable cause in order to succeed on a § 1983 claim."), aff'd 983 F.2d 1051 (3d Cir. 1992) (table); Gutherman v. Northeast Women's Ctr., Inc., No. CIV.A.87-

¹¹/ The Sixth Amendment of the United States Constitution provides as follows:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

8150, 1989 WL 66423, at *2 (E.D. Pa. June 16, 1989) (citations omitted) ("The property inquiry in a section 1983 claim based on false arrest is 'whether the arresting officer had probable cause to believe the person committed the offense.' If probable cause existed, plaintiff[] cannot state an actionable claim for false arrest or under § 1983."). A plaintiff, however, need not prove lack of probable cause to prove malicious abuse of process.

Gilbert, 842 F. Supp. at 820; contra Meiksin v. Howard Hanna Co., 590 A.2d 1303, 1304 (Pa. Super. Ct.) ("In order to prevail on a claim of wrongful use of civil proceedings [abuse of process], the plaintiff must show that the defendant maliciously instituted proceedings against the plaintiff, that the defendant lacked probable cause to institute the proceedings, and that the proceedings terminated in favor of the plaintiff."), appeal denied, 600 A.2d 196 (Pa. 1991). Instead he must establish "'an ulterior motive and a use of the process for a purpose other than that for which it was designed.'" Id. (citing Harvey v. Pincus, 549 F. Supp. 332, 340 (E.D. Pa. 1982), aff'd, 716 F.2d 890, cert. denied, 464 U.S. 918 (1983)). Therefore,

"A cause of action for abuse of process requires [s]ome definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process . . . [;] there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even the with bad intentions."

Id. (citations omitted) (emphasis added); accord Cameron v. Graphic Management Assoc., Inc., 817 F. Supp. 19, 21 (E.D. Pa.

1992) (citations omitted) ("[T]here is no cause of action for abuse of process if the claimant, even with bad intentions, merely carries out the process to its authorized conclusion.").

In this case, the defendants argue that there are no facts to suggest that they did not have probable cause to arrest the plaintiff. They note that on the evening of March 11, 1994, Mrs. Smith came to the Pottstown Police Department and alleged that her former husband, the plaintiff, had assaulted her. (Defs.' Mem. at 20.; Danielle Smith Dep. at 36.) After she spoke with several police officers, including defendant Sergeant Mark Flanders, they allege that Mrs. Smith detailed her allegations in a written statement.¹² (Defs.' Mem. at 20.; Danielle Smith Dep. at 41.) The defendants argue that they interviewed witness Holly Walsh and the plaintiff, and then determined that they had probable cause to arrest the plaintiff. (Defs.' Mem. at 20; Pl.'s Dep. at 28.) In fact, to justify their actions, they offer the plaintiff's deposition, in which he details from his own experience, how a police officer has a duty to arrest an alleged aggressor if the officer concludes that an assault occurred. (Defs.' Mem. at 19-20; Pl.'s Dep. at 83-84.) Following the arrest, the plaintiff was arraigned before Magistrate Judge Catharine Hummel, who also concluded that there was probable cause to issue a criminal complaint. (Defs.' Mem. at 8; Defs.' Reply at 11.) Furthermore, the defendants argue that the fact

^{12/} The defendants also note that defendant Carlile was not present the evening of the plaintiff's arrest. (Defs.' Reply at 7.) This is confirmed by the deposition of Mrs. Smith. (Danielle Smith Dep. at 42-43.)

that Mrs. Smith refused to press charges, or that she later admitted that she lied, is irrelevant to the determination that they had probable cause to arrest the plaintiff. (Defs.' Mem. at 20-21; Defs.' Reply at 9.)

The plaintiff maintains that he was falsely arrested, and offers his ex-wife's deposition and 1996 affidavit to rebut the defendants' arguments. (Pl.'s Mem. at 1-3.) He argues that because she admits that she made up the assault story and lied to the police, he was falsely arrested. (Id.) He also alleges that defendant Flanders coached his ex-wife in making a statement, and threatened to file charges against her if she withdrew her statement. (Id. at 3.)

After reviewing the record, this Court finds that the defendant officers had probable cause to arrest the plaintiff. Mrs. Smith arrived at the police station in tears and made a statement against her husband. (Danielle Smith Dep. at 36-41.) The police officers then investigated the allegations by interviewing Ms. Walsh and the plaintiff. (Pl.'s Dep. at 66-81.) After completing the interviews and reviewing Mrs. Smith's statement, the officers determined that an altercation between the plaintiff and his wife had taken place and arrested the plaintiff. This Court finds that given the evidence in the record, the police officers had probable cause to believe that the plaintiff assaulted his former wife, and arrest him. Moreover, a magistrate reviewed the evidence, and determined that there was probable cause to issue a criminal complaint.

Furthermore, the fact that Mrs. Smith later recanted her story and admitted to lying to the police is irrelevant for this determination. The arresting officers did not know that two years later, Mrs. Smith would change her story. There is no evidence that defendant Flanders coached or threatened Mrs. Smith. The record, indicates the opposite:

QUESTION: Did he threaten you?

ANSWER: Who?

QUESTION: Did Sergeant Flanders threaten you?

ANSWER: At the statement?

QUESTION: Yes.

ANSWER: No.

QUESTION: Did he give you the answers to put on the report?

ANSWER: Who?

QUESTION: Sergeant Flanders?

ANSWER: On my statement?

QUESTION: Yes.

ANSWER: No.

* * *

QUESTION: [Did] Sergeant Flanders threaten you that you had to testify?

ANSWER: He called me the next day on the phone just to make sure I was okay and to make sure that, you know, I had told him that everything had gotten blown way out of proportion, and that I didn't want anything to happen. I don't want to go through with this anymore. And he told me that I had to testify and that I

should definitely testify, that I needed to testify, and I needed to go through with all of this.

QUESTION: Those were his exact words?

ANSWER: It was three years ago. It's as much as I can remember.

QUESTION: Did he say anything else? Did he threaten you with anything else if you didn't testify?

ANSWER: No. He just said that, you know, if I didn't testify, and they -- filed you know, not filed reports, but filed charges against me, that it could look bad in my custody, it would be a mark against me.

QUESTION: So the threat was that if you didn't testify, that the police department would file reports that would --

ANSWER: They could file reports against me or charges.

* * *

QUESTION: And you didn't testify, correct?

ANSWER: No, I did not.

QUESTION: And did the police department file any charges against you?

ANSWER: No, they did not.

(Danielle Smith Dep. at 39-42.) This testimony does not establish that defendant Flanders threatened the plaintiff's ex-wife. Therefore, this Court concludes that the plaintiff's arrest was based on probable cause.

Consequently, because this Court finds that the police officers had probable cause to arrest the plaintiff, this Court finds that the plaintiff cannot maintain a Section 1983 claim based upon Fourth Amendment claims of false arrest or false imprisonment. See City of Los Angeles v. Heller, 475 U.S. 796, 799 (1985) (municipality cannot be held liable for constitutional violation unless plaintiff establishes that police officers violated plaintiff's civil rights), cert. denied, 476 U.S. 1154 (1986). Moreover, the plaintiff may not maintain a Section 1983 claim based upon Sixth Amendment claims of malicious prosecution or malicious abuse of process, because the record indicates that the criminal charges filed against the plaintiff were based on probable cause, and that defendants did nothing more than carry out the criminal and civil processes to their authorized conclusions.

(3) Fifth and Fourteenth Amendment Allegations

The Fifth and Fourteenth Amendments of the United States Constitution provide that no person shall be deprived of "life, liberty, or property without due process of law."¹³ U.S. Const. amends. V & XIV, § 1. While both amendments guarantee due process of law, the Fifth Amendments' prohibitions are limited to acts of the federal government, while the Fourteenth Amendments' prohibitions apply only to acts of state and local governments.¹⁴ Shoemaker v. City of Lock Haven, 906 F. Supp. 230, 238 (M.D. Pa. 1995).

A plaintiff may bring a due process challenge under the Fourteenth Amendment by either alleging that the state or local

^{13/} The Fifth Amendment of the United States Constitution provides that:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment, or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V. The Fourteenth Amendment provides in relevant part that:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV.

^{14/} In this case, the plaintiff asserts his due process claim against a local government and its employees. Therefore, this Court will analyze the plaintiff's claim under the Fourteenth Amendment.

government violated his protection afforded to him under substantive procedural due process.

"Because the line dividing 'procedural due process' from 'substantive due process' is not always bright, it may be difficult in some cases to determine which is the proper characterization of the plaintiff's claim." A procedural due process claim consists of an allegation that plaintiff has suffered a deprivation of a constitutionally protected liberty or property interest, and that the deprivation took place without the benefit of constitutionally-mandated procedures. In some circumstances, procedural safeguards must be afforded in advance of the deprivation; in others, remedial procedures after the fact are constitutionally adequate. But in all procedural due process claims, the conclusion that the plaintiff's constitutional rights have been violated requires an examination of a procedural nature. By contrast, a substantive due process claim is predicated on an assertion that the deprivation suffered by the plaintiff is of constitutional dimension regardless of the adequacy of the procedures available to the plaintiff for its prevention and redress.

Metzger v. Osbeck, No. CIV.A.85-0415, 1987 WL 13320, at *3 (E.D. Pa. June 29, 1987) (citations and quotations omitted), aff'd in part and rev'd in part sub nom., Metzger By and Through Metzger v. Osbeck, 841 F.2d 518 (3d Cir. 1988).

In the instant case, the defendants argue that the plaintiff's pleadings with respect to this claim vague and fail to state a statutory claim. (Def.'s Mem. at 16.) They assert that the record demonstrates that the termination was just and that they complied with the law. (Id. at 10-12.) Furthermore, they argue that neither the plaintiff's deposition nor the

deposition of his ex-wife establish that he may maintain a claim under Section 1983 for violations of due process. (Id. at 16.) The plaintiff, on the other hand, attempts to respond by reciting the allegations in his complaint, and again offering as support, the deposition of his ex-wife. He insists that the record viewed in the light most favorably to him, is sufficient for him to defeat summary judgment.

It is unclear from the pleadings whether the plaintiff's allegations are based on substantive or procedural due process. Therefore, this Court will examine both aspects of due process, to determine whether the plaintiff may maintain a Section 1983 claim under the Fourteenth Amendment.

(a) Procedural Due Process

When analyzing allegations of procedural due process, the Court must apply a two-prong analysis. Robb v. City of Phila., 733 F.2d 286, 292 (3d Cir. 1984). First, the Court must determine "whether the asserted individual interests are encompassed within the fourteenth amendment's protection of 'life, liberty, or property'" Id. Second, "if the protected interests are implicated, [the Court] must then decide what procedures constitute 'due process of law.'" Id. (citing Board of Regents v. Roth, 408 U.S. 564, 569-72 (1972)). "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a

legitimate claim of entitlement to it" Roth, 408 U.S. at 577. Furthermore, protected property interests are created and defined by state law. Id.; Kelly v. Borough of Sayreville, 107 F.3d 1073, 1077 (3d Cir. 1997) (citing Clark v. Township of Falls, 890 F.2d 611, 617 (3d Cir. 1989)).

In Pennsylvania, a public employee generally has at-will status, and thus does not have a property interest in his employment, unless there is express legislative language to the contrary. Cooley v. Pennsylvania Hous. Fin. Agency, 830 F.2d 469, 471 (3d Cir. 1987); Lynch v. Borough of Ambler, No. CIV.A.94-6401, 1996 WL 283643, at *10 (E.D. Pa. May 29, 1996). The Borough Code of Pennsylvania supplies this express language and provides that a borough police officer may only be terminated from his employment for specific reasons.¹⁵ 53 Pa. Cons. Stat.

¹⁵/ The Borough Code of Pennsylvania provides in relevant part that:

No person employed in any police or fire force of any borough shall be suspended, removed or reduced in rank except for the following reasons:

(1) Physical or mental disability affecting his ability to continue in service, in which cases the person shall receive an honorable discharge from service.

(2) Neglect or violation of any official duty.

(3) Violation of any law which provided that such violation constitutes a misdemeanor or felony.

(4) Inefficiency, neglect, intemperance, immorality, disobedience of orders, or conduct unbecoming an officer.

(5) Intoxication while on duty.

(6) Engaging or participating in conducting of any political or election campaign otherwise than to exercise his own right of suffrage.

(continued...)

Ann. § 46190 (1966 & Supp. 1997). Thus, for purposes of due process, a borough police officer has a property interest in his employment. See Olson v. Murphy, 428 F. Supp. 1057, 1058 (W.D. Pa. 1977), aff'd 568 F.2d 769 (3d Cir. 1978) (table).

In addition to having a property interest protected by due process, a public employee may also have a liberty interest, if he alleges that his "'good name, reputation, honor, or integrity is at stake because of what the government is doing to him" Roth, 408 U.S. at 573 (quotations omitted). This does not mean, however, that every allegation of defamation is sufficient to state a due process claim. See Siegert v. Gilley, 500 U.S. 226, 233 (1991) ("Defamation, by itself, is a tort action under the laws of most States, but not a constitutional deprivation."). Instead, a plaintiff "must allege not only that a state actor defamed him, but also that the actor did so while depriving him of another constitutionally protected interest."¹⁶ Watson v. Borough of Darby, No. CIV.A.96-7182, 1997 WL 135701, at *4 (E.D. Pa. Mar. 17, 1997) (emphasis added). For example "'when the government terminates a public employee and makes false or substantially inaccurate public charges or statements that

(...continued)

A person so employed shall not be removed for religious, racial or political reasons

53 Pa. Cons. Stat. Ann. § 46190 (1966 & Supp. 1997).

^{16/} Because a plaintiff must prove more than defamation in and of itself, various courts have termed this requirement "stigma plus," "reputation plus," or "defamation plus." Ersek v. Township of Springfield, 102 F.3d 79, 83 n.5 (3d Cir. 1997); Nicole K. v. Upper Perkiomen Sch. Dist., No. CIV.A.97-1112, 1997 WL 282644, at *5 (E.D. Pa. May 22, 1997); Watson v. Borough of Darby, No. CIV.A.96-7182, 1997 WL 135701, at *4 (E.D. Pa. Mar. 17, 1997).

stigmatize the employee, that employee's liberty interest is implicated.'" Lynch v. Borough of Ambler, No. CIV.A.94-6401, 1996 WL 283643, at *12 (E.D. Pa. May 29, 1996) (quoting McMath v. City of Gary, 976 F.2d 1026 (7th Cir. 1992)). In that situation, a plaintiff may state a procedural due process claim based on a liberty interest, if he can prove that "the state, in terminating his employment, charged him with conduct that seriously impairs his ability to avail himself of other employment opportunities." Bloch v. Temple Univ., No. CIV.A.94-2378, 1995 WL 263541, at *2 (E.D. Pa. May 1, 1995); see Habe v. Fort Cherry Sch. Dist., 786 F. Supp. 1216, 1218-19 (W.D. Pa. 1992) (quoting Huntley v. Community Sch. Bd. of Brooklyn, 543 F.2d 979 (2d Cir. 1976)) ("'A claim for deprivation of liberty without due process exists when 'the state, in terminating an individual's employment, makes charges against him that will seriously impair his ability to take advantage of other employment opportunities.'"), cert. denied, 430 U.S. 929 (1977).

The Court finds that plaintiff in this case satisfies the first prong of the due process analysis because he alleges deprivation of property and liberty without due process of law. Specifically, he claims that because he was a borough police officer he has a property interest in his employment. He also maintains that because of materials in his personnel file, and the statements of the defendants to others, he was defamed and thus is unemployable.

Having concluded that the first prong of the due process analysis is satisfied, this Court turns to the second prong. Pennsylvania law, requires that a borough follow specific procedural requirements when it terminates a police officer's employment. 53 Pa. Cons. Stat. Ann. §§ 46190, 46191 (1966 & Supp. 1997). First, the borough must provide the police officer with notice that he may be terminated, by providing him with a written statement of the charges against him. 53 Pa. Cons. Stat. Ann. § 46190. Next, the Borough Code of Pennsylvania requires that the terminated officer may demand a hearing by the Commission. 53 Pa. Cons. Stat. Ann. § 41691. Following that hearing, "[a]ll parties concerned shall have immediate right of appeal to the court of common pleas of the county, and the case shall there be determined as the court deems proper." Id. Furthermore, Pennsylvania law guarantees that both "[t]he [borough] council and the person sought to be suspended, removed or demoted shall at all times have the right to employ counsel before the commission and upon appeal to the court of common pleas." Id.

In this case, the record indicates that the defendants had filed criminal charges against the plaintiff following the March 11, 1994 incident. After these charges were dismissed, the defendants conducted an internal investigation and, as part of that investigation, interviewed the plaintiff. (Pl.'s Dep. at 138.) In addition, to preparing a written statement, the plaintiff met with defendant Carlile on March 29, 1994. (Id. at

137.) Although the record does not indicate that defendant Carlile explicitly told the plaintiff that the defendants were considering terminating his employment, the record indicates that the plaintiff knew that he was subject to discipline for his actions. (Id. at 137-38.) The record also indicates that defendant Carlile advised the plaintiff that he had an opportunity for a hearing before the Council. (Id. at 138.) Although the plaintiff requested a hearing before the Council, his request was denied. (Id. at 138-39.)

This Court finds that the defendant was given sufficient notice of the charges against him. In addition to the meeting with defendant Carlile, the plaintiff received several disciplinary action forms detailing the charges against him. (Id. at 122-23, 139.) Although the plaintiff was terminated before he met with the Council, the defendants informed him that he could appeal the Council's decision to the Commission.¹⁷ (Id. at 139.) The record indicates that the plaintiff appealed his termination to the Commission and the Common Pleas Court, and at all times was represented by counsel. (Id. at 122-23.) Therefore, because the plaintiff had written notice of the

^{17/} The plaintiff may not complain that he was denied due process of law, merely because the Council terminated his employment prior to him meeting with the Council at a hearing. "[T]he applicable state statute gives the dismissed officer a right to demand a hearing before the Civil Service Commission but does not require that the Borough Council hold a hearing." Olson, 428 F. Supp. at 1059 n.4 (citing 53 Pa. Cons. Stat. Ann. § 46191). Furthermore, this procedure corresponds with the United State Supreme Court's recent statement that a public employee is entitled to a very limited hearing prior to his termination, because he is entitled to a more comprehensive hearing following his termination. Gilbert v. Homar, No. 96-651, 1997 WL 303380, at *3 (June 9, 1997) (citing Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985)).

charges against him and had an opportunity to defend himself against these charges, this Court concludes that the plaintiff may not maintain an action for procedural due process based on his property interest.

The Court, however, does find that the plaintiff may maintain a due process claim based on a liberty interest. The plaintiff contends that he has been unable to secure a position with another police force, because of the materials in his personnel file and statements made by the defendants. (Id. at 148-49.) To support these claims, the plaintiff offers his deposition testimony, in which he states that Officer Ed Kropp observed Pottstown police officers, including defendant Flanders, "bad mouth" the plaintiff to officers from the Norristown Police Department. (Pl.'s Dep. at 143-44, 147-49.) He also states that the defendants by their comments and additions to his personnel file have deprived him of at least a dozen jobs with other entities, because in each instance, he failed the background checks. (Id. at 148-49.) The defendants, however, deny that they "bad mouthed" the plaintiff, and offer the affidavit of Officer Kropp to refute the plaintiff's claims. (Kropp Dep. at 4-5.) Nevertheless, this Court finds that a genuine issue of material fact exists with respect to this issue. Therefore, this Court concludes that the plaintiff may maintain a Section 1983 action based upon allegations that the defendants deprived him of a liberty interest without due process of law.

(b) Substantive Due Process

To sustain a claim that his termination and the events surrounding it constitute violations of substantive due process, the plaintiff "must show that he was deliberately and arbitrarily or capriciously deprived of a 'fundamental' right for which substantive due process protection is ordinarily afforded. Government action is arbitrary or capricious for Constitutional purposes only when it is 'egregious' or 'irrational.'" Austin v. Neal, 933 F. Supp. 444, 451 (E. D. Pa. 1996) (citations omitted). The United States Court of Appeals for the Third Circuit has held that "the substantive component of the Due Process Clause can only be violated by governmental employees when their conduct amounts to an abuse of official power that 'shocks the conscience.'" Fagan v. City of Vineland, 22 F.3d 1296, 1303 (3d Cir. 1994) (en banc). Moreover, "[i]t is disputable whether continued public employment implicates substantive due process concerns."¹⁸ Hassel v. Neal, No. CIV.A.96-0813, 1997 WL 269575, at *4 (E.D. Pa. May 16, 1997) (footnote omitted).

In this case, the plaintiff maintains that the defendants' actions were arbitrary and capricious. Specifically,

¹⁸/ The United States Supreme Court has not resolved the split among the Courts of Appeals on this issue. Hassel v. Neal, No. CIV.A.96-0813, 1997 WL 269575, at *4 n.11 (E.D. Pa. May 16, 1997). Moreover, the Third Circuit, has not directly ruled on this issue. Id. Nevertheless, case law suggests that "a tenured public employee may have a sufficient interest in his employment to implicate substantive due process." Austin, 933 F. Supp. at 453 n.9 (citing Bradley v. Pittsburgh Bd. of Educ., 913 F.2d 1064, 1077 (3d Cir. 1990)). But see Homar v. Gilbert, 89 F.3d 1009, 1028 (3d Cir. 1996) (Alito, J., concurring in part, dissenting in part) (questioning whether public employees have substantial due property interest), rev'd 117 S. Ct. 1807 (1997).

he asserts that the defendants punished him for exercising his First Amendment rights. The plaintiff argues that the suppression of his First Amendment rights rises to the level of arbitrary and capricious decision making or an egregious disregard of his rights. Therefore, based on this evidence, and the fact that the Court will allow him to maintain a Section 1983 action based on his First Amendment allegations, this Court concludes that the plaintiff may also maintain a Section 1983 action based on substantive due process.

(4) Eighth Amendment Allegations

The Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. The plaintiff seeks redress under Section 1983 because he claims that the defendants violated his Eighth Amendment rights. (Compl. at ¶ 1.) The defendants maintain that the plaintiff's allegations are vague and unsupported by evidence. (Def.'s Mem. at 16.) The plaintiff does not rebut this assertion, and the Court finds no evidence of an Eighth Amendment violations in the record. Therefore, this Court concludes that the plaintiff may not maintain a Section 1983 action based upon the alleged defendants' violations of the Eighth Amendment.

C. Analysis of Plaintiff's State Law Claims

Pursuant to 28 U.S.C. § 1367, this Court may exercise supplemental jurisdiction over state law claims. However, the Court may decline supplemental jurisdiction if:

- (1) the claim raises a novel or complex issue of State law,
- (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
- (3) the district court has dismissed all claims over which it has original jurisdiction, or
- (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c). The Court may properly decline to exercise supplemental jurisdiction and dismiss the state claims if any one of these applies. See Growth Horizons, Inc. v. Delaware County, 983 F.2d 1277, 1284 (3d Cir. 1993).

The Courts in this district "ordinarily decline to exercise supplemental jurisdiction over state law claims when the federal claims are dismissed." Eberts v. Wert, 1993 WL 304111, *5 (E.D. Pa. Aug. 9, 1993), aff'd, 22 F.3d 301 (3d Cir. 1994) (table). In the instant case, however, this Court has allowed the plaintiff to maintain a claim under Section 1983. Thus, it is appropriate to exercise supplemental jurisdiction over the state law claims.

The plaintiff alleges that the defendants are liable under various state law actions, including breach of contract, intentional infliction of emotional distress, negligent infliction of emotional distress, intentional fraudulent

misrepresentation, negligent misrepresentation, wrongful interference with contract rights, official oppression, abuse of process, malicious prosecution, false arrest, defamation and invasion of privacy. This Court has already determined that the plaintiff may not maintain claims for false arrest, malicious prosecution, and abuse of process. Furthermore, the defendants have correctly directed the Court to case law which supports their claim that the plaintiff may not maintain an action for official oppression. See Gonzalez v. City of Bethlehem, No. CIV.A.93-1445, 1993 WL 276977, at *5 (E.D. Pa. July 13, 1993) ("Numerous courts have held that official oppression is not a tort under Pennsylvania law."). With respect to the remaining claims, the defendants argue that the Court must grant summary judgment on the claims of intentional fraudulent misrepresentations and negligent misrepresentation, because the plaintiff admits that he cannot recall a misrepresentation. (Defs.' Mem. at 15 n.13 (quoting Pl.'s Dep. at 174).) Further, they argue that the defamation and invasion of privacy claims are not supported by evidence and are refuted by the affidavit of Officer Kropp and the plaintiff's contradictory deposition. (Defs.' Mot. at ¶ 30 n.7; Defs.' Mem. at 21-23.) Finally, they assert that the plaintiff fails to allege facts that support his claims of intentional infliction of emotional distress, negligent

infliction of emotional distress, wrongful interference with contract rights.\¹⁹ (Defs.' Mem. at 15-16 n.13.)

The plaintiff does not offer any evidence of a misrepresentation to support his claims of intentional fraudulent misrepresentations and negligent misrepresentation. Nor does he offer evidence to support his claims of breach of contract, intentional infliction of emotional distress, negligent infliction of emotional distress, wrongful interference with contract rights. Therefore, this Court finds that there are no genuine issues of material fact with respect to these claims. The plaintiff, however, does assert that the evidence in the record is sufficient to maintain his claims of defamation and invasion of privacy.

Under Pennsylvania law, defamation and invasion of privacy\²⁰ are separate and distinct torts. Fogel v. Forbes, Inc., 500 F. Supp. 1081, 1084 (E.D. Pa. 1980). "'[A] statement is defamatory if it tends to harm an individual's reputation so as to lower him in the estimation of the community or deter third persons from associating or dealing with him.'" 12th Street Gym, Inc. v. General Star Indem. Co., 93 F.3d 1158, 1163 (3d Cir.

^{19/} The defendants motion for summary judgment is against all of the plaintiff's federal and state claims. Therefore, the Court will consider the breach of contract claim with the other state law claims which the defendants assert must be dismissed for lack of evidence.

^{20/} The action for invasion of privacy encompasses four distinct torts: (1) appropriation of name or likeness; (2) publicity given to private life; (3) publicity placing a person in a false light; and (4) intrusion upon seclusion. Borse v. Piece Goods Shop, Inc., 963 F.2d 611, 621 n.9 (3d Cir. 1992) (citing Marks v. Bell Tel. Co., 331 A.2d 424, 430 (Pa. 1975)). In the instant case, only the later tort applies.

1996) (quoting Kryeski v. Schott Glass Tech., 626 A.2d 595, 600 (Pa. Super. Ct. 1993), appeal denied, 639 A.2d 29 (Pa. 1994)). On the other hand, tortious intrusion upon seclusion is defined as follows:

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

Borse v. Piece Goods Shop, Inc., 963 F.2d 611, 621 n.9 (3d Cir. 1992) (citing Restatement (Second) of Torts § 625B).

Furthermore, "[a] tortious invasion of privacy must 'cause mental suffering, shame or humiliation to a person of ordinary sensibilities.'" Wolfson v. Lewis, 924 F. Supp. 1413, 1421 (E.D. Pa. 1996) (quotations omitted). "The tort may occur by (1) physical intrusion into a place where the plaintiff has secluded himself or herself; (2) use of the defendant's senses to oversee or overhear the plaintiff's private affairs; or (3) some other form of investigation or examination into the plaintiff's private concerns." Borse, 963 F.2d at 621 (quoting Harris by Harris v. Easton Publ'g Co., 483 A.2d 1377, 1383 (Pa. Super. Ct. 1984)).

A review of the record indicates that a genuine issue of material fact exists with respect to these claims. The plaintiff details in his deposition how the materials in his personnel file and the statements alleged made to investigators prevented him from receiving employment following his termination. (Pl.'s Dep. at 148-49.) In addition, the plaintiff

states that the defendant officers followed him during his Unemployment Compensation hearing, that police officers parked their vehicles on his street and observed him, and that Pottstown police officers visited his home and asked him questions. (Id. at 171-72.) The plaintiff further states that he is embarrassed by the comments that other police officers said about him. (Id. at 175-76.) Therefore, this Court finds that the plaintiff may maintain actions for both defamation and invasion of privacy.

III. CONCLUSION

As set forth above, there are no genuine issues of material fact with respect to the following claims: 42 U.S.C. §§ 1981, 1982, 1985, 1986, 1983 based on the Fourth, Fifth, Sixth, and Eighth Amendments, breach of contract, intentional infliction of emotional distress, negligent infliction of emotional distress, intentional fraudulent misrepresentation, negligent misrepresentation, wrongful interference with contract rights, official oppression, abuse of process, malicious prosecution, and false arrest. There are, however, genuine issues of material fact with respect to the following claims: 42 U.S.C. § 1983 based on the First and Fourteenth Amendments, defamation, and invasion of privacy. Accordingly, the Court grants in part and denies in part the defendants' Motion for Summary Judgment.

An appropriate Order follows.

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

SCOT SMITH : CIVIL ACTION
 :
 v. :
 :
 :
 BOROUGH OF POTTSTOWN, CHIEF :
 CHRISTOPHER CARLILE, and SGT. :
 MARK FLANDERS : NO. 96-1941

O R D E R

AND NOW, this 30th day of June, 1997, upon consideration of the Defendants' Motion for Summary Judgment (Docket No. 6) and the Plaintiff's Response thereto, IT IS HEREBY ORDERED that:

(1) Defendants' Motion is **GRANTED** with respect to the following claims: 42 U.S.C. §§ 1981, 1982, 1985, 1986 and 1983 based on the Fourth, Fifth, Sixth, and Eighth Amendments, breach of contract, intentional infliction of emotional distress, negligent infliction of emotional distress, intentional fraudulent misrepresentation, negligent misrepresentation, wrongful interference with contract rights, official oppression, abuse of process, malicious prosecution and false arrest. **JUDGMENT** is entered in favor of the Defendants and against the Plaintiff for the foregoing claims; and

(2) Defendants' Motion is **DENIED** with respect to the following claims: 42 U.S.C. § 1983 based on the First and Fourteenth Amendments, defamation, and invasion of privacy.

BY THE COURT:

HERBERT J. HUTTON, J.