

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

GARY M. YEWDALL, : CIVIL ACTION
 : NO. 97-2303
Plaintiff, :
 :
v. :
 :
BOROUGH OF SPRING CITY, :
et al. :
 :
Defendants. :

ORDER-MEMORANDUM

AND NOW, this **30th** day of **July 1998**, upon consideration of the defendants' motion for summary judgment (doc. no. 16) and plaintiff's response thereto (doc. no. 24), it is **ORDERED** that the motion is **DENIED IN PART AND GRANTED IN PART** as follows:

1. As to Count I, the motion is **DENIED**;
2. As to Count II, the motion is **GRANTED**;
3. As to Count III, the motion is **GRANTED** with respect to the defamation claim, and **DENIED** with respect to § 1983 deprivation of due process claim;
4. As to Count IV, the motion is **GRANTED**.

The Court's decision is based on the following reasoning:

The plaintiff was employed by the Borough of Spring City (the "Borough") as a part-time police officer from May of 1991 until his alleged termination in March of 1996. After the

Borough stopped scheduling plaintiff as a part-time police officer, the plaintiff filed a four-count complaint¹ against the Borough, Police Chief Clarence Collopy, and Mayor Timothy Hoyle ("defendants"). Count I alleges that the defendants discriminated against the plaintiff on the basis of his age in violation of the Age Discrimination in Employment Act ("ADEA") and the Pennsylvania Human Relations Act ("PHRA"). Count II asserts a state law claim for wrongful discharge. Count III asserts both that the defendants deprived plaintiff of a property interest without due process of law in violation of 42 U.S.C. § 1983, and that the defendants defamed the plaintiff. Finally, Count IV alleges that defendants conspired to violate plaintiff's civil rights. The defendants requests that the Court grant summary judgment in its favor on all counts of the complaint.

Summary judgment is appropriate if the moving party can "show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). When ruling on a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-movant. Matsushita Elec. Indus. Co. v.

1. The plaintiff filed his original complaint on April 2, 1997. After considering the defendants' motion to dismiss, the Court granted the motion to dismiss in part, and afforded the plaintiff an opportunity to amend the complaint. On July 2, 1997, the plaintiff filed an amended complaint. References in this Order to the plaintiff's complaint refer to the amended complaint rather than the original complaint.

Zenith Radio Corp., 475 U.S. 574, 587 (1986). The Court must accept the non-movant's version of the facts as true, and resolve conflicts in the non-movant's favor. Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358, 1363 (3d Cir. 1992), cert. denied, 507 U.S. 912 (1993).

The moving party bears the initial burden of demonstrating the absence of genuine issues of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Once the movant has done so, however, the non-moving party cannot rest on its pleadings. See Fed. R. Civ. P. 56(e). Rather, the non-movant must then "make a showing sufficient to establish the existence of every element essential to his case, based on the affidavits or by depositions and admissions on file." Harter v. GAF Corp., 967 F.2d 846, 852 (3d Cir. 1992); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). This standard will be applied to defendants' motion for summary judgment.

First, the Court will address defendants' claim that Count I of the complaint should be dismissed because there is no evidence that age was a determining factor in the Borough's decision to discontinue scheduling the plaintiff for part-time police shifts. The Court will apply the burden shifting analysis of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and its progeny to the plaintiff's claims of age discrimination under the ADEA and PHRA to determine if summary judgment is appropriate.

See, e.g., Brewer v. Quaker State Oil Refining Corp., 72 F.3d 326, 330 (3d Cir. 1995); Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994). See also Kelly v. Drexel University, 94 F.3d 102, 105 (3d Cir. 1996) (applying same standards to PHRA claims and ADEA claims). Because the defendant does not argue that the plaintiff has failed to demonstrate a prima facie case, the Court will focus on whether the defendant has "presented sufficient evidence to allow an inference that at least one of the legitimate non-discriminatory reasons articulated by defendant for discontinuing its practice of scheduling plaintiff for part-time police shifts is in fact a pretext for age discrimination. See Fuentes v. Perskie, 32 F.3d 759, 763-65 (3d Cir. 1994).

The defendants claim that they stopped scheduling plaintiff for part-time shifts because the plaintiff lacked good judgment in the performance of his duties. (Def.'s Mem. at 15.) Specifically, defendants claim as legitimate, non-discriminatory reasons that: (1) plaintiff was reprimanded for failing to fully investigate a domestic violence disturbance which resulted in visible injuries to the victim; (2) plaintiff was reprimanded for failing to report injuries sustained while on duty; (3) Jane Alberts and Pamela Straface complained about plaintiff's overly aggressive behavior during separate DUI arrests and Straface threatened to file a civil rights law suit against plaintiff and the Borough; (4) Mayor Hoyle heard from other Borough councilmen

that officers at East Vincent Township had complained that plaintiff may be a "loose cannon;" (5) a fellow female officer had complained about plaintiff's failure to provide her with timely back-up assistance in a potentially dangerous fight involving multiple subjects outside a bar, and (6) Mayor Hoyle heard that the plaintiff believed he could smell cocaine, a claim which he believed could not be true because to the best of his knowledge, cocaine is odorless. (Def.'s Mem. at 15-16.)

According to defendants, based on these circumstances, Mayor Hoyle believed it was in the Borough's best interest to stop scheduling plaintiff for part-time shifts so as to avoid potential harm to Borough residents and avoid liability for the Borough. (Def.'s Mem. at 16.)

To demonstrate that the defendants' claim that plaintiff was not scheduled for part-time shifts because of citizen complaints is a pretext for discrimination, the plaintiff points to: (1) Mr. Collopy's testimony that he was not aware of any incidents where a citizen's civil rights had been violated by plaintiff and that an investigation of the one citizen complaint received from Pamela Straface revealed that plaintiff had not acted improperly; (2) evidence that other officers within the Borough, who were the subject of complaints, and even lawsuits, were not terminated or disciplined in any way; (3) evidence that civil suits were filed against Officers Weil and Ferguson and

they were not terminated; (4) and evidence that the filing of meritorious complaints against police officers are a frequent and normal occurrence in police work. (Pl.'s Mem. at 4-5.) In addition, with respect to the defendants' assertion that plaintiff ignored the seriousness of domestic violence situations, plaintiff submits evidence that in his five years as a part-time police officer, he responded to and investigated over 30 domestic violence calls and cited more than ten men for aggravated assault against a female. (Pl.'s Mem. at 5.) With respect to defendants' claims that plaintiff was guilty of misconduct, plaintiff claims that other officers, who were younger than him and who engaged in more serious misconduct, were not terminated by the Borough. (Pl.'s Mem. at 6.) As examples, plaintiff submits evidence that: (1) Officer Weil, age 30, has been suspended for firing a weapon in the police station; and (2) Officer Kohl, age 40, was not subject to any disciplinary action for arresting a woman without a proper investigation and violating her due process rights, and was known to have been involved in a domestic disturbance involving his girlfriend for which no disciplinary action was taken. (Pl.'s Mem. at 5.)

The Court finds that, based on the affidavits and depositions submitted by plaintiff, the plaintiff has raised a genuine issue of material fact as to whether the defendants' articulated reasons for plaintiff's discharge are pretextual. In

other words, the plaintiff has sufficiently pointed to "'weaknesses, implausibilities, inconsistencies, incoherences, or contradictions in the employer's proffered legitimate reason for its action that a reasonable factfinder could rationally find them unworthy of credence, and hence infer that the employer did not act for [the asserted] non-discriminatory reasons.'" Brewer v. Quaker State Oil Refining Corp., 72 F.3d 326, 331 (3d Cir. 1995)(quoting Fuentes, 32 F.3d at 765)(citations and internal quotations omitted). Specifically, plaintiff's evidence that he was treated differently from other, younger officers, who engaged in misconduct and/or were the subject of citizen complaints, and plaintiff's evidence that his record in domestic dispute cases does not reflect a disregard for the seriousness of that crime, demonstrates the kind of inconsistencies and arguable implausibilities which could support an inference that the defendants discriminated against plaintiff based on his age.

Next, the Court addresses plaintiff's § 1983 claim. "In order to succeed on a claim of deprivation of due process under the Fourteenth Amendment with respect to termination of a specific employment position, a plaintiff must first establish a property interest in the employment." Latessa v. New Jersey Racing Commission, 113 F.3d 1313, 1318 (3d Cir. 1997)(quoting Board of Regents of State Colleges v. Roth, 408 U.S. 564, 576 (1972)). A property interest in employment can: (1) be created

expressly by state statute or regulation, see Carter v. City of Philadelphia, 989 F.2d 117, 120 (3d Cir. 1993); (2) arise from government policy, id.; or (3) arise from an implied agreement between an employer and an employee, see Perry v. Sinderman, 408 U.S. 593, 601 (1972). To establish the existence of a policy, the plaintiff may look to official pronouncements of municipal bodies, written guidelines, or actions by individuals with final decision-making authority. Pembaur v. Cincinnati, 475 U.S. 469, 480-81 (1986). With respect to implied agreements, the Supreme Court has held:

[A]bsence of . . . an explicit contractual provision may not always foreclose the possibility that a [plaintiff] has a property interest in reemployment. For example, the law of contracts in most, if not all, jurisdictions long has employed a process by which agreements, though not formalized in writing, may be implied. Explicit contractual provisions may be supplemented by other agreements implied from the promisor's words and conduct in the light of the surrounding circumstances.

Perry, 408 U.S. at 601-02.

In this case, the plaintiff argues that a property interest in his employment as a part-time police officer arose from both Borough policy and practices and an implied agreement between the plaintiff and the Borough. The plaintiff points to the same evidence to support both theories. First, plaintiff points to language in the Police Manual of the Borough of Spring City which provides that a police officer may be suspended or dismissed for three reasons, none of which is applicable to this

case. (Pl.'s Mem. at 8.) This language is said to apply to "all police officers," without either explicit inclusion or exclusion of part-time officers. (Pl.'s Mem. at Ex. 8.) The plaintiff argues that the cited language in the manual demonstrates a policy, practice, or custom of terminating part-time and full-time officers only for cause. The plaintiff also points to the deposition testimony of Chief Collopy who testified that full-time and part-time police officers are treated alike with respect to discipline and termination.² (Pl.'s Mem. at 8, Ex. 2.)

With respect to whether plaintiff has a property interest in his employment which arises from the Borough's policy or practice of discharging full-time and part-time police officers only for cause, it is appropriate to look to written guidelines or actions by individuals with final decision-making authority to establish the existence of a policy. Pembaur v. Cincinnati, 475 U.S. 469, 480-81 (1986). Because the plaintiff has pointed to both written guidelines contained in the police manual and testimony describing actions of individuals with final decision-making authority, the Court finds that the evidence cited is sufficient to create a material issue of fact as to

2. Aside from the police manual, full-time police officers enjoy protections under the Borough Code. See 53 P.S. §§ 46190, 46195. Chief Collopy's statement can be interpreted to mean that, in addition to applying the provisions of the manual equally to both part-time and full-time police officers, the protections enjoyed by full-time policemen under the Borough Code were applied to part-time police officers as well.

whether the Borough had a policy or custom of only discharging part-time officers for cause. Id.; see also Horton v. Flenory, 889 F.2d 454 (3d Cir. 1988)(policy created by police department manual).

With regard to whether there was an implied agreement between the Borough and the plaintiff, the Court looks to McDonald v. McCarthy, 1990 WL 131393 (E.D.Pa. Sept. 7, 1990). In McDonald, the Court found that a police manual was properly admitted into evidence to show a property interest in employment because the police manual evidenced an "implicit agreement between the [Borough of Kennett Square and the plaintiff, a part-time police officer] that plaintiff would be removed only for specified reasons, enumerated in the police manual and the Borough Code." See McDonald v. McCarthy, 1990 WL 131393 *3. In addition, viewing the deposition testimony of Mr. Collopy in the light most favorable to plaintiff, Mr. Collopy's testimony refers to past conduct from which an implied agreement could be inferred in light of the surrounding circumstances. Perry, 408 U.S. at 602. Therefore, the Court concludes that a genuine issue of material fact exists as to whether plaintiff has a property interest in his employment arising from an implied agreement between plaintiff and the Borough.³

3. Defendants argue that the manual cannot serve as the basis of an implied agreement between the defendants and the plaintiff
(continued...)

Finally, with respect to plaintiff's wrongful discharge claim contained in Count II, plaintiff's conspiracy claim contained in Count IV and plaintiff's defamation claim contained in Count III, the Court agrees that judgment should be entered in favor of defendants. Defendants have satisfied their initial burden of demonstrating the absence of genuine issues of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Plaintiff in turn has failed to respond in any manner. Because, plaintiff has failed to "make a showing sufficient to establish the existence of every element essential to his case, based on the affidavits or by depositions and admissions on file," see Harter v. GAF Corp., 967 F.2d 846, 852 (3d Cir. 1992); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986), judgment is entered in favor of the defendants on Counts II and IV, and to the extent that Count III of the complaint seeks to advance a

3. (...continued)

because the plaintiff never read the manual or relied upon it. The McDonald opinion addressed the same argument and found that plaintiff's failure to read the police manual was insignificant because "[e]ven though [plaintiff] had not seen the police manual before this litigation, he knew of its existence, the rules police officers were required to obey, and the discipline imposed for violations." McDonald, 1990 WL 131393 at *3. However, even if the plaintiff in this case was unaware of the manual, Mr. Collopy's testimony is sufficient to raise material issues of fact as to whether the Borough's conduct and the circumstances surrounding plaintiff's employment gave rise to an implied agreement. Therefore, summary judgment cannot be awarded based on plaintiff's failure to read the manual.

claim for defamation, judgment in favor of the defendants is entered on that claim as well.

The case, therefore, shall proceed to trial on the age discriminations claims contained in Count I, and the § 1983 claim for deprivation of a property interest without due process of law contained in Count III.

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.