IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

JOHN MILLER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civ. No. 03-876-SLR
	)	
TOWN OF MILTON,	)	
	)	
Defendant.	)	

Jeffrey K. Martin, Esquire and Timothy J. Wilson, Esquire of Margolis Edelstein, Wilmington, Delaware. Counsel for Plaintiff.

Norman H. Brooks, Jr., Esquire and Joseph M. Leager, Jr., Esquire of Marks, O'Neill, O'Brien & Courtney, Wilmington, Delaware. Counsel for Defendant.

MEMORANDUM OPINION

Dated: March 8, 2005
Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

On September 11, 2003, plaintiff John Miller filed this suit against defendant the Town of Milton ("defendant" or "the Town") alleging racial discrimination and retaliation in violation of 42 U.S.C. § 1981 ("§ 1981"), Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) et seq. as amended by the Civil Rights Act of 1991, 42 U.S.C. § 704(a) ("Title VII"), and the Milton town charter ("the Charter").

On July 12, 2001, plaintiff filed a complaint with the Delaware Department of Labor ("DDOL") challenging defendant's failure to promote him to the position of Chief of Police. (D.I. 39 at 9) The DDOL concluded that plaintiff had been discriminated against based on his race, finding that there was "credible evidence . . . that some Council Members worked to keep [plaintiff] from the position . . . ." (Id. at 12-13) The EEOC found that "the evidence obtained during the [DDOL] investigation establishes a violation of Title VII." (Id. at 7) In light of the EEOC's findings, and lack of settlement during the conciliation period, the EEOC issued a right to sue letter. (Id. at 8)

The court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343(a)(3) and 1343(a)(4). Currently before the court are the parties' cross motions for summary judgment. (D.I. 37, 40) For the reasons stated, plaintiff's motion for summary

judgment is denied and defendant's motion for summary judgment is granted in part and denied in part.

II. BACKGROUND[1]

In September of 1988, the Town hired plaintiff as a part-time police officer. (D.I. 41 at 5) In 1990 he was a given a full-time position as a Patrolman First Class. (Id.) In 1992, plaintiff was promoted to Sergeant. (Id.) Three years later, in 1995, plaintiff was promoted to Assistant Chief of Police, a position that was second in command to the Chief of Police. (Id.) As the Assistant Chief of Police, plaintiff, inter alia, helped the Chief with the annual budget, a responsibility that was within the Chief of Police's job description. (D.I. 42 at A0062) Plaintiff's job performance was never deemed unsatisfactory. (D.I. 42 at A0039)

In April of 1996, Jack Bushey became the Mayor of Milton. On the same day Mayor Bushey was sworn in, plaintiff was "demoted" from Assistant Chief of Police to Lieutenant, without notice, reason or warning. (D.I. 41 at 5) When plaintiff

---

[1]Throughout his filings in conjunction with the summary judgment motions, plaintiff cites to his complaint as support for his assertions, apparently relying on the argument that, because his requests for admissions went unanswered by defendant, defendant admitted the assertions. (See, e.g., D.I. 41 at 12) This argument is without merit, however, in light of the court's December 10, 2004 order excluding plaintiff's requests for admissions as filed after the close of discovery. (D.I. 53) Therefore, the court treats plaintiff's statements, cited to the complaint, as unsubstantiated assertions and does not restate or rely on them for purposes of these proceedings.

subsequently applied for additional police training, he was denied the opportunity, even when he offered to pay for the training. (D.I. 41 at 6-7)

On April 30, 2001, the Chief of Police retired, creating a vacant position. Section 2-20(g)(1) of the Charter provides that "[a]ny employee of the Town wishing to be considered for a promotion to a vacant position shall request the Personnel Officer to include his file with an application for the position to be considered for eligibility . . . ." (D.I. 42 at A0079) The Charter further requires that "[t]he hiring of the position[] of Police Chief . . . shall be with the majority approval of Mayor and Council." (D.I. 42 at A0079) Section 2-20(c)(5) of the Charter provides that recruiting shall be designated as either "promotional recruiting" or as "open, competitive recruiting." In "open, competitive recruiting", all eligible candidates, including Town employees, are considered. In "promotional recruiting", only employees of the Town are considered. In this regard,

> [a]t the discretion of the Personnel Officer, and with the approval of Council, advertisement may **not** be used for the purposes of recruiting if the following is met: there is at least one (1) person who is already employed by the Town who wishes to be considered for the vacant position and for whom the vacant position represents a logical promotion from the position currently held; or if in the opinion of the Personnel Officer, a condition exists which requires that such employee be hired immediately in order to avoid a serious disruption of the services provided by the Town.

Section 2-20(c)(4)(emphasis added). (D.I. 42 at A0077-78)

Upon the Chief's retirement, plaintiff was named "Officer-in-Charge" and served in that capacity until the installation of a new Chief. Plaintiff requested the Town Clerk to include his file for the Chief of Police position. Plaintiff was told that he would have to submit a new application and undergo a background check. (D.I. 41 at 8) Initially, plaintiff refused to undergo an additional background check because "none of his white predecessors had been required" to. (D.I. 41 at 8) On advice of counsel, however, plaintiff submitted to the background check so that his application would be considered for the vacant position. (Id.)

The Milton Town Council ("the Council"), through its Personnel Committee, determined to conduct "open, competitive recruiting." (Id.) Councilman Blayney, a member of the Personnel Committee, stated that this decision was based on the growth anticipated by the Town which would make the Chief of Police an important position requiring leadership. (Id. at A31) Before acting, the Council asked the Town Solicitor to determine whether the Charter required them to hire an employee for the position. The Solicitor advised that the Council "had all the backing of the law to seek candidacy outside of the town employment force . . . ." (Id. at A35)

Having decided to conduct open recruiting for the position of Chief of Police, defendant contacted the Town of Georgetown, which had just gone through a similar hiring process. (Id. at A27) The Town of Georgetown recommended that defendant use the services of the Delaware Police Chief's Council ("DPCC") because Georgetown had used the DPCC's selection process in selecting its chief of police. (Id.) Initially, the Council used the DPCC to aid in its hiring decision but, upon learning that the president of the DPCC was an applicant for the position, the Council switched to the Maryland Police Chief's Council ("MPCC"). (Id. at A40-41) The MPCC then performed interviews and an initial screening of the candidates. (Id. at A41) The MPCC recommended three candidates for the Personnel Committee to present to the Council. (Id.) Plaintiff was not one of the final three candidates recommended by the MPCC. (Id.) Out of the six candidates interviewed by the MPCC, plaintiff received the lowest score. (D.I. 39 at A72-115)

In response to the Council's meetings and actions regarding the Chief of Police position, Councilman Hunsicker resigned from the Council after serving only one and half years of his three year term. (D.I. 42 at A0049-A0058) According to Councilman Hunsicker, the title of "Officer-in-Charge" given to plaintiff (rather than "Acting Chief of Police") reflected Mayor Bushey's reluctance to promote plaintiff to the position of Chief of

Police; i.e., that the title "Acting Chief" would infer that a promotion to "Chief" would be "a logical promotion" for plaintiff "from the position currently held," consistent with § 2-20(c)(4) of the Charter. (D.I. 30 at A14-15; D.I. 42 at A0077) Moreover, the Council failed to publicly recognize or record the letters submitted in support of plaintiff's candidacy. (D.I. 42 at A0053-56, A0067-75) Councilman Hunsicker also charged that Mayor Bushey did not want a "black Chief of Police" and was instrumental in convincing the Council to "hire out" the position. (D.I. 39 at A15-16; D.I. 42 at A0057) Consistent with that charge, Mayor Bushey was heard to remark, as part of a conversation regarding whether plaintiff would be the next Chief of Police, "that n----- will never be chief as long as I have anything to do with it." (D.I. 42 at A0037; see also D.I. 41 at 6) Although Mayor Bushey denied making such a statement, he admitted using such derogatory racial slurs because he does not think "n-----" is a "strong word." (Id. at A0040-42) At Council meetings, particularly in private sessions, Mayor Bushey and Councilwoman Betts exchanged disparaging remarks about African American youth "loitering" on city streets. (Id. at A-0048-50)

In December of 2001, William Phillips, a Caucasian male, was hired as the new Chief of Police. On December 3, 2001, plaintiff resigned from his position at the Milton Police Department. (D.I. 38 at 4; D.I. 42 at A0021)

III. STANDARD OF REVIEW

A court shall grant summary judgment only 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 judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of proving that no genuine issue of material fact exists. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 n.10 (1986). "Facts that could alter the outcome are 'material,' and disputes are 'genuine' if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct." Horowitz v. Fed. Kemper Life Assurance Co., 57 F.3d 300, 302 n.1 (3d Cir. 1995) (internal citations omitted). If the moving party has demonstrated an absence of material fact, the nonmoving party then "must come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e)). The court will "view the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion." Pa. Coal Ass'n v. Babbitt, 63 F.3d 231, 236 (3d Cir. 1995). The mere existence of some evidence in support of the nonmoving party, however, will not be sufficient for denial of a motion for summary judgment; there

must be enough evidence to enable a jury reasonably to find for the nonmoving party on that issue. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). If the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

IV. DISCUSSION

A. Municipality Immunity From Suit Under § 1981

Defendant argues it is immune from liability under § 1981 because, as a municipal actor, it can only be sued under § 1983. In Jett v. Dallas Independent School District, 491 U.S. 701, 711-36 (1989), the Supreme Court held that § 1983 was "the exclusive federal damages remedy for the violation of rights guaranteed by § 1981 when the claim is pressed against a state actor. Thus to prevail on [a] claim for damages . . . [a plaintiff] must show that the violation of his [rights] protected by § 1981 was caused by a custom or policy within the meaning of Monell and subsequent cases." Id. at 736-36. The Court found that the legislative history of § 1983 and § 1981 indicated that Congress did not intend to make municipalities vicariously liable for discrimination. Id. at 725-31.

In 1991, Congress amended § 1981 by adding subsection (c), which increased the scope of the statute to "protect [the rights

listed in the section] against impairment by nongovernmental discrimination and impairment under color of State law." Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. Federal courts are divided on the effect the amendments had on discrimination claims brought against municipalities under § 1981. Compare, Federation of African Am. Contractors v. City of Oakland, 96 F.3d 1204 (9th Cir. 1996) (finding that the 1991 amendments created an implied right of action under § 1981, but that the "custom or policy" requirement of Monell still applied), with Oden v. Oktibbeha County, 246 F.3d 458 (5th Cir. 2001), cert. denied, 534 U.S. 948 (2001) (finding that the 1991 amendments did not create an implied right of action under § 1981 against state actors).[2]

Assuming for purposes of these proceedings that the 1991 amendments created an implied right of action under § 1981, the court concludes that plaintiff is required to prove defendant had a custom or policy of discriminating against African-Americans.[3]

---

[2]Although the effect of the 1991 amendments has not specifically been addressed by the Third Circuit, the circuit recently subjected a plaintiff's § 1981 claims to a Monell analysis, requiring him to prove a custom or policy of discrimination. See Oaks v. City of Philadelphia, No. 02-2772, 2003 WL 1228025 (3d Cir. March 17, 2003).

[3]In amending § 1981, Congress inserted the phrase "under color of State law" into the subsection. This phrase is strikingly similar to the § 1983 language upon which the Supreme Court based on its holding in Monell. See Monell v. Dep't of Social Serv. of City of New York, 436 U.S. 658, 692 (1978) (holding that § 1983 "impose[d] liability on a government that,

Therefore, defendant is not vicariously liable for discrimination by its agents and plaintiff must prove that there was a discriminatory policy implemented by a policy maker or "acquiescence in a longstanding practice or custom which constitutes the 'standard operating procedure' of the local government entity." Oaks, No. 02-2772, 2003 WL 1228025 at *1-*2 (citing St. Louis v. Praprotnik, 485 U.S. 112, 123 (1988) and Pembaur v. City of Cincinnati, 475 U.S. 469, 485 (1986)). Plaintiff has failed to even assert, let alone demonstrate, that a policy maker authorized or acquiesced in a custom or policy of racial discrimination. The events that plaintiff claims were discriminatory are not sufficient for a reasonable jury to infer that defendant had a custom or policy of discriminating against African American employees generally.

B. Retaliation in Violation of Title VII

A plaintiff claiming retaliation must first establish a prima facie case under Title VII.[4] In order to do so, he must

---

under color of some official policy, 'causes' an employee to violate another's constitutional rights"). In light of the similarities, this court concludes that, even if Congress intended to imply a private right of action under § 1981, it incorporated into § 1981 all of the restrictions on § 1983 actions against municipalities. See Federation of African Am. Contractors, 96 F.3d at 1215.

[4]The anti-retaliation section of Title VII provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has

demonstrate by a preponderance of the evidence that: (1) he engaged in a protected activity;[5] (2) the defendant took adverse employment action against him; and (3) a causal link exists between the protected activity and the adverse action. See Kachmar v. Sungard Data Sys., Inc., 109 F.3d 173, 177 (3d Cir. 1999). Once a plaintiff has established a prima facie case, the defendant gets the opportunity to set forth, through the introduction of admissible evidence, reasons for its actions that, if believed by the trier of fact, would support a finding that unlawful discrimination was not the motivating force behind the adverse employment action. See Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254-55 (1981). If the defendant successfully rebuts the plaintiff's prima facie showing, the presumption of discrimination drops from the case, and plaintiff

---

> opposed any practice made an unlawful employment practice by this subchapter, or because he had made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3a.

[5]Title VII defines a "protected activity" as an instance when an employee has

> opposed any practice made an unlawful employment practice by this subchapter, or . . . has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a).

must present sufficient evidence for a reasonable factfinder to conclude "that the proffered reason was not the true reason for the employment decision." Id. at 256; see also Bray v. Marriott Hotels, 110 F.3d 986, 990 (3d Cir. 1997).

1. Protected Activity

Plaintiff argues that he engaged in protected activities when he complained that: (1) his title was changed from "Assistant Chief of Police" to "Lieutenant;" (2) he was denied training opportunities; and (3) he was asked to submit to a background check as part of his application. Protected activities include charges of discrimination or complaints about discriminatory employment practices. See Abramson v. William Paterson Coll. of N.J., 260 F.3d 265, 287-88 (3d Cir. 2001).

In this case, plaintiff has not met his burden of establishing protected activity with respect to his complaints about the change in his job title and about being denied training. There is no evidence of record identifying the individuals to whom plaintiff complained, or what he said, or even if he complained at all. Based on the lack of evidence, a reasonable jury could not find that plaintiff opposed an unlawful employment practice under 42 U.S.C. § 2000e-3(a).

A reasonable jury could infer, however, that plaintiff's refusal to undergo a background check was a protected activity. His refusal stemmed from his belief that his predecessors, all

Caucasian, did not have to undergo additional background checks. In other words, he was forced to submit to a background check because he was African American. A reasonable jury could conclude that he was complaining about racial discrimination.

2. Adverse Employment Action

Plaintiff argues that he was denied the promotion to Chief of Police in retaliation for his complaints. The Third Circuit requires that an employment decision be a "materially adverse" employment decision before it will be considered retaliation. See Lex K. Larson, Employment Discrimination §34.04 (2004) (citing Robinson v. City of Pittsburgh, 120 F.3d 1286, 1302 (3d Cir. 1997)). The court finds that the denial of a promotion is a materially adverse employment action.

3. Causal Link

Plaintiff argues there is a causal link between his complaint about the second background check and being denied the promotion because he was denied the promotion after he complained. (D.I. 41 at 16) An inference of a causal link should be based on the evidence as a whole. Kacmar v. Sungard Data Systems, Inc., 109 F.3d 173, 177 (3d Cir. 1997). "[T]he mere fact that [an] adverse employment action occurs after a complaint will ordinarily be insufficient to satisfy plaintiff's burden of demonstrating a causal link between the two events." Robinson, 120 F.3d at 1302. However, temporal proximity is some

evidence of a causal link between two events. See, e.g., Kacmar, 109 F.3d at 177.

Defendant's failure to promote plaintiff was the result of two decisions: 1) The decision to conduct open, competitive recruiting for the position of Chief of Police; and 2) MPCC's decision not to recommend plaintiff for the position. Plaintiff has failed to carry his burden of establishing a causal connection between his refusal to undergo a background check and either of these decisions. There is no evidence of record from which a jury could infer that the MPCC decision had anything to do with plaintiff's refusal. Furthermore, based on the evidence of record, the court cannot determine which event occurred first, the Council's decision to conduct open recruiting or plaintiff's refusal to submit to a background check. Without knowing which came first, a reasonable jury could not conclude that plaintiff's refusal to submit to a background check caused the Council to retaliate against him. Therefore, defendant's motion for summary judgment is granted with respect to plaintiff's retaliation claims.

C. Racial Discrimination in Violation of Title VII

Claims brought pursuant to Title VII are analyzed under a burden-shifting framework. Under this framework, plaintiff must first establish a prima facie case of race discrimination under Title VII. In order to state a case based on discrimination,

plaintiff must prove that: (1) he is a member of a protected class; (2) he suffered some form of adverse employment action; and (3) this action occurred under circumstances that give rise to an inference of unlawful discrimination such as might occur when a similarly situated person not of the protected class is treated differently. See Boykins v. Lucent Techs., Inc., 78 F. Supp. 2d 402, 409 (E.D. Pa. 2000) (citing Jones v. Sch. Dist. of Phila., 198 F.3d 403, 410 (3d Cir. 1999)). The Third Circuit recognizes, however, that the elements of a prima facie case may vary depending on the facts and context of the particular situation. See Pivirotto v. Innovative Sys. Inc., 191 F.3d 344, 352 (3d Cir. 1999).

If plaintiff makes a prima facie showing of discrimination, the burden shifts to defendant to establish a legitimate, nondiscriminatory reason for its actions. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). If defendant carries this burden, the presumption of discrimination drops from the case, and plaintiff must "cast sufficient doubt" upon defendant's proffered reasons to permit a reasonable factfinder to conclude that the reasons are fabricated. See Sheridan v. E.I. DuPont de Nemours & Co., 100 F.3d 1061, 1072 (3d Cir. 1996) (en banc).

In this case, it is undisputed that plaintiff is a member of a protected class, as he is African American. Plaintiff claims that he suffered some form of adverse employment action when: (1)

he was "demoted" from Assistant Chief of Police to Lieutenant; (2) he was denied training; (3) he was assigned extra duties as the "Officer-in-Charge;" (4) he was forced to submit to a background check as part of his application for Chief of Police; (5) as the "Officer-in-Charge" he was required to report to both the Mayor and Town Clerk, whereas, his predecessors only had to report to the Mayor; and (6) he was denied a promotion.[6] (D.I. 41 at 17-18) Finally, plaintiff refers to evidence in the record that gives rise to an inference of racial discrimination. A Caucasian who was not a Town employee was given the position of Chief of Police. The Mayor of Milton used racially derogatory language with respect to African Americans and specifically with respect to plaintiff becoming Chief of Police. Certain Council members expressed animus towards African Americans. Councilman Hunsicker opined that the failure to promote plaintiff was discriminatory.

Defendant argues in response that it relied on the MPCC to recommend someone to fill the Chief of Police position and that the decision to hire out the position was based on the importance of the position in light of the future growth of Milton.

---

[6]Plaintiff also alleges he was subject to adverse employment action because "he was followed around town by the Mayor." (D.I. 41 at 18) Taking all of the facts in the light most favorable to plaintiff, there is no evidence of record that he was followed by the Mayor; therefore, no reasonable jury could conclude this was an adverse employment action.

Defendant further asserts that its decision to hire out the position was not discriminatory as evidenced by the fact that plaintiff and another African American were able to compete in the recruitment process. (D.I. 38 at 25)

Although there is no evidence of record that the MPCC discriminated against plaintiff, it is not clear whether the Council's initial choice to conduct open recruiting for the position was motivated by plaintiff's race. There were numerous letters sent to the Council in support of plaintiff's promotion to Chief of Police and there were Council members who thought he was qualified for the position; even Mayor Bushey thought his service as a police officer was "satisfactory." (D.I. 42 at A0039) Judging from the evidence presented in the motions for summary judgment, it is not possible to determine what the motivating factor was behind the Council's decision to hire out; therefore, the motions for summary judgment are denied with respect to plaintiff's Title VII claims of racial discrimination.

D. Violations of the Charter

Plaintiff claims that defendant violated the Charter when it: (1) discriminated against him based on his race, in violation of § 2-20(b) of the Charter;[7] (2) conducted open and competitive recruiting instead of promotional recruiting, in

[7]Section 2-20(b) of the Charter provides that "[t]here shall be no discrimination, against any person seeking employment or employed, because of . . . race . . . ." (D.I. 42 at A0078)

violation of § 2-20(c)(4) of the Charter; (3) required him to submit to a background check, in violation of § 2-20(g)(1) of the Charter;[8] (4) denied him the training he requested, in violation of §2-24 of the Charter;[9] and (5) "demoted" him from Assistant Chief of Police to Lieutenant, in violation of § 2-25(1) of the

---

[8]Section 2-20(g)(1) provides that "[a]ny employee of the Town wishing to be considered for promotion to a vacant position shall request the Personnel Officer to include his file with an application for the position to be considered for eligibility . . . ." (D.I. 42 at A0079) Section 2-21(b) of the Charter also provides that an application for employment "shall require of a candidate only that information necessary to establish name, address, telephone number, person to contact in emergency, references and qualification criteria as established for the position. The application shall not require information that does not meet the test of job relatedness nor any information of a discriminatory nature." (Id.)
(Id., Sec. 2-21(b))

[9]With respect to training, § 2-24 provides:

> (a) The Personnel Officer may encourage the improving of service by providing employees with appropriate training programs . . . .
> (b) Training programs may be made available in order to . . .
>
> (1) Provide an employee with skill and knowledge required to achieve optimum performance in his current position.
> (2) Acquiant an employee with rules, regulations, ordinances, policies, practices, and standards of Town service.
> (3) Provide an employee with appropriate training to develop potential skills and knowledge required for a position to which he may desire to advance.

(D.I. 42 at A0080)

Charter.[10] Defendant claims that the acts plaintiff challenges were discretionary under the Charter and, therefore, defendant is immune from suit.

Delaware law provides immunity to "all governmental entities" for damage resulting from "[t]he performance or failure to exercise or perform a discretionary function or duty, whether or not the discretion be abused and whether or not the statute, charter, ordinance, order, resolution, regulation or resolve under which the discretionary function or duty is performed is valid or invalid." 10 Del. C. § 4011(a), (b)(3) (2004). As interpreted by the Delaware Supreme Court, the statute does not grant immunity in "every circumstance in which some element of choice is involved." Sussex County v. Morris, 610 A.2d 1354, 1358-59 (Del. 1992). Acts that are "ministerial," "'involv[ing] less in the way of personal decision or judgment or the matter for which judgment is required has little bearing of importance

---

[10]Section 2-25(1) of the charter allows a permanent employee to be demoted "to a position of a lower grade or rank for the following reasons:"

> (a) When an employee would otherwise be laid off because of lack of funding or his/her position is being abolished; his/her position is being reclassified to a lower pay grade; lack of work; or because of the return to work from authorized leave of absence of another employee to such a position.
> (b) When an employee voluntarily requests such demotion.
> (c) As a disciplinary action.

(D.I. 42 at A0081)

upon the validity of the act,'" are not granted immunity by § 4011(b)(3). Id. (citing Restatement 2d of Torts § 895D cmt. H (1979)).

With respect to plaintiff's argument that defendant violated the Charter by discriminating against him, the court finds that this provision is not discretionary; therefore, the municipality is not immune for violations of § 2-20(b). Likewise, defendant is not immune from liability for violations of § 2-25(1), because that section does not give anyone discretion to determine when an employee can be demoted. According to § 2-25(1), permanent employees can only be demoted under three circumstances, none of which requires a discretionary determination.

The court finds that the remaining three violations alleged by plaintiff are based on discretionary provisions of the Charter; thus, defendant is immune from liability for any violations of such. Section 2-20(c)(4) of the Charter provides defendant with the authority to determine whether or not a vacant position could be subject to competitive recruiting. Therefore, the Council had the discretion to "hire out" the Chief of Police position and is immune from suit under state law on this basis.[11]

With respect to defendant requiring plaintiff to undergo a background check, § 2-21(b) of the Charter allows defendant to

---

[11]Although the Council had the discretion to hire out the Chief of Police position, it did not have the discretion to do so for discriminatory purposes.

require candidates to provide information on "qualification criteria." The only limitation in the section relates to information that "does not meet the test of job relatedness nor any information of a discriminatory nature." The provision does not address what types of information are considered "qualification criteria" nor how information is to be judged by "the test of job relatedness." As such, the provision gives defendant discretion to determine what types of information are relevant to an application. In this case, plaintiff has not provided any evidence from which a reasonable jury could infer that a background check was not related to one's qualifications to be the Chief of Police.[12]

Finally, § 2-24 is clearly discretionary because it states that the Personnel Officer "may" encourage training and "may" make training programs available. Nothing in the Charter requires defendant to provide training opportunities to employees.

For the reasons stated, defendant's motion for summary judgement is granted with respect to plaintiff's claims that: (1) the decision to conduct open and competitive recruiting for the

---

[12]The mere assertion that plaintiff, an African-American, was the first applicant for Chief of Police to be required to submit to a background check is insufficient. The plaintiff does not cite any evidence to support his contention, nor does he assert that all of the applicants for Chief of Police were not required to submit to background checks, regardless of their race.

position of Chief of Police violated the Charter; (2) requiring him to submit to a background check violated the Charter; and (3) denying him training opportunities violated the Charter. Defendant's motion for summary judgment is denied with respect to plaintiff's claims that defendant violated the Charter when it discriminated against him based on race and "demoted" him from Assistant Chief of Police to Lieutenant.

E. Damages

1. Future Special Damages

As discussed in the telephone conference with the court conducted on March 4, 2005, plaintiff is precluded from presenting expert testimony as to future special damages because no expert report was submitted by plaintiff prior to the July 30, 2004 close of discovery. However, plaintiff is not precluded from presenting other evidence of future damages to carry his burden of proof. Therefore, defendant's motion for summary judgment is denied with respect to plaintiff's claims for future damages.

2. Punitive Damages

Defendant argues that because it is a municipality, plaintiff cannot seek punitive damages under § 1981. Plaintiff does not contest defendant's claim. Case law supports defendant's analysis of § 1981. See, e.g., City of Newport v. Fact Concepts, Inc., 453 U.S. 247 (1981); Bell v. City of

Milwaukee, 746 F.2d 1205, 1270 (7th Cir. 1984). Therefore, the court grants defendant's motion with respect to punitive damages.

V. CONCLUSION

For the reasons stated, plaintiff's motion for summary judgment is denied. Defendant's motion for summary judgment is denied in part and granted in part. Defendant's motion is granted as to plaintiff's claims of violation of § 1981 and retaliation in violation of Title VII. Defendant's motion is denied as to plaintiff's claims of discrimination in violation of Title VII. Defendant's motion is denied with respect to immunity from state law claims for violating §§ 2-20(b) and 2-25(1) of the Charter, and granted with respect to §§ 2-20(c)(4), 2-21(b) and 2-24. The court further concludes that plaintiff is not precluded from asserting claims for future damages, but is precluded from seeking punitive damages.

An order consistent with this memorandum opinion shall issue.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

JOHN MILLER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civ. No. 03-876-SLR
	)	
TOWN OF MILTON,	)	
	)	
Defendant.	)	

O R D E R

At Wilmington this 8th day of March, 2005, consistent with the memorandum opinion issued this date;

IT IS ORDERED that:

1. Defendant's motion for summary judgement (D.I. 37) is granted as to the following claims:

a. Plaintiff's claims of violation of 42 U.S.C. § 1981;

b. Plaintiff's claims of retaliation in violation of Title VII;

c. Plaintiff's state law claims for violations of the §§ 2-20(c)(4), 2-21(b) and 2-24 of the Charter; and

d. Plaintiff's claims for punitive damages.

2. Defendant's motion for summary judgment (D.I. 37) is denied as to the following claims:

a. Plaintiff's claims of racial discrimination in violation of Title VII;

b. Plaintiff's state law claims for violations of the §§ 2-20(b) and 2-25(1) of the Charter; and

c. Plaintiff's claims for future damages.

3. Plaintiff's motion for summary judgment (D.I. 40) is denied.

United States District Judge