IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

FREDERICK PAOLINO,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 98-404-JJF
	:	
JAMES H. SILLS ET AL.,	:	
	:	
Defendants.	:	

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Attorneys for Defendants CITY OF WILMINGTON, MARY DEES, ARTHUR BOSWELL and WILLIAM JONES.

MEMORANDUM OPINION

October 29, 2002
Wilmington, Delaware.

FARNAN, District Judge.

The Motion for Summary Judgment filed by Defendants Damalier Molina, James H. Sills and Mary Starkey (D.I. 233) and the Motion for Summary Judgement filed by Defendants City of Wilmington, Mary Dees, Arthur Boswell and William Jones (D.I. 241), were granted by an Order of the Court (D.I. 258) dated September 30, 2002, for the reasons discussed below.

INTRODUCTION

From June 1988, Plaintiff Frederick Paolino was employed as a Code Enforcement Officer for the City of Wilmington's Department of Licenses and Inspections ("L&I"). (D.I. 238 at 2). On May 29, 1998, Mr. Paolino resigned, claiming he was constructively discharged due to a hostile working environment and racially discriminatory policies. (D.I. 244 at 10). In January 1993, during Mr. Paolino's tenure with L&I, James H. Sills became Wilmington's Mayor. In forming his administration, Mayor Sills appointed Defendant Arthur Boswell as his Administrative Assistant, Defendant Damalier Molina as Commissioner for L&I, and Defendant Mary Starkey as Deputy Commissioner for L&I. In 1994, Defendant William Jones was hired by the City's Personnel Department, and, in May 1996, Defendant Mary Dees was appointed Director of Personnel.

Mr. Paolino was one of five Plaintiffs who filed a class action complaint alleging violations of: 1) 42 U.S.C. § 1983 and

§ 1985(3); 2) Title VII; 3) procedural and substantive due process; and 4) wrongful discharge under state law. (D.I. 1). The Court denied the application of original Plaintiffs for class certification.

As of this writing, Mr. Paolino is the only Plaintiff remaining in the case. Two of the briefs filed in connection with the pending summary judgment motions set out the causes of action and Defendants who remain in this lawsuit. (D.I. 246 at 3; D.I. 248 at 2-3).

The Court's understanding from the two briefs is that Mr. Paolino no longer asserts any claims against three individual Defendants, specifically, Defendants Boswell, Jones, and Dees. Mr. Paolino also concedes that his Title VII causes of action are no longer viable. In sum, the remaining Defendants are Sills, Molina, Starkey, and the City of Wilmington.

APPLICABLE LEGAL STANDARDS

Rule 56(c) of the Federal Rules of Civil Procedure provides that a party is entitled to summary judgment if a court determines from its examination of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In determining whether there is a triable dispute of material fact, a court must

review all of the evidence and construe all inferences in the light most favorable to the non-moving party. Goodman v. Mead Johnson & Co., 534 F.2d 566, 573 (3d Cir. 1976). However, a court should not make credibility determinations or weigh the evidence. Reeves v. Sanderson Plumbing Prods., Inc., 120 S. Ct. 2097, 2110 (2000). Thus, to properly consider all of the evidence, the "court should give credence to the evidence favoring the [non-movant] as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that evidence comes from disinterested witnesses." Id.

To defeat a motion for summary judgment, Rule 56(c) requires the non-moving party to show that there is more than:

> some metaphysical doubt as to the material facts.... In the language of the Rule, the non-moving party must come forward with "specific facts showing that there is a genuine issue for trial".... Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is "no genuine issue for trial."

Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). Accordingly, a mere scintilla of evidence in support of the non-moving party is insufficient for a court to deny summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).

DISCUSSION

I. Relevant Facts

Mr. Paolino worked for ten years as a Code Enforcement Officer in the City of Wilmington. Mr. Paolino described the position in his deposition as the "greatest job in the world" until everything started to change in January 1998. Before January of 1998, Mr. Paolino contends that he received numerous positive reports about his job performance during the ten years he worked as a Code Enforcement Officer. However, Defendants recount twenty-two instances between 1992 and 1996 when Mr. Paolino was an employee about whom complaints were received or against whom some disciplinary action was required.

Because Mr. Paolino claims that his resignation from City employment was the result of a constructive discharge based on his race and due to a hostile work environment that was created by Defendants in January 1998, the Court will review the facts surrounding two incidents that Mr. Paolino says demonstrate the intolerable conditions of his employment.

The first incident concerns work Mr. Paolino did for a friend at a property located at 1302 Walnut Street in the City of Wilmington. Mr. Paolino says he agreed to do some electrical work for which he got permission and approved time off from his superiors.

Defendants contend that the Walnut Street repairs involved electrical work and some sheetrock installation during a work day. Defendants contend that Plaintiff had not followed proper procedures and this was brought to their attention by a state legislator, a member of the House of Representatives. It is undisputed that Plaintiff was initially disciplined for his conduct related to the Walnut Street repairs, but, on appeal, the discipline initially imposed was overruled in favor of a lesser degree of discipline, a written warning.

The second post-January 1998 incident involved a pre-rental inspection of a property located at 307 East Twenty-Third Street in the City. In this instance, sometime in January 1998, Plaintiff issued a temporary permit for tenants to occupy the subject property despite the existence of code violations. Plaintiff alleges he exercised his discretion because of the circumstances the family renting the property was in. On February 3, 1998, Plaintiff was advised by his superiors that he was being disciplined for authorizing the occupancy of the rental unit because it was not in compliance with the City Code. The discipline was a suspension from duties, but, after proceeding through the City's employee grievance procedures, the discipline was reversed. Interestingly, both incidents involved properties owned by an acknowledged friend of Plaintiff, Arlene Harrison.

The above facts are undisputed and are the facts of the two incidents relied upon by Plaintiff to demonstrate a post-January 1998 hostile work environment which led to Plaintiff's resignation. There is also no dispute that both incidents were initiated by a state legislator and not Defendants. The Defendants did inquire into the incidents, but only in response to the complaints of the state representative, not on their own initiative.

Plaintiff's claims rest on his assertion that Defendants' actions were based on his race. However, Plaintiff has not adduced any credible evidence to support the race discrimination allegation, and the allegation is undermined by a 1998 decision in a separate case filed in this Court. In Blackshear v. City of Wilmington, 15 F. Supp.2d 417 (D. Del. 1998), evidence was presented and accepted by the Court that Mr. Paolino, a white employee, had received more favorable treatment in disciplinary matters than Mr. Blackshear, a black employee.

Lastly, the evidence establishes that at the time Mr. Paolino resigned his position with the City in May 1998 and in response to Mr. Paolino's complaints to appointed and elected officials about the two incidents, Defendants Boswell and James Baker, the President of the City Council, offered to investigate the matter for Mr. Paolino. Mr. Boswell offered Plaintiff a

thirty-day paid leave of absence while the investigation into Mr. Paolino's claims were conducted. Mr. Paolino chose to resign.

II. The Motion of Defendants Molina, Sills, and Starkey

The remaining individual Defendants contend that there was no racially motivated constructive discharge under § 1983, because Mr. Paolino has not adduced evidence that the conduct complained of would have the foreseeable result of creating working conditions that were so unpleasant that a reasonable person would resign. (D.I. 236 at 7). The individual Defendants contend there was no racially discriminatory behavior that created a hostile environment. (D.I. 236 at 8). The Defendants also contend that there was no conspiracy under § 1985(3) because Mr. Paolino has not adduced any evidence of specific dates, meetings or communications to establish a conspiracy existed. (D.I. 248 at 17).

In response, Mr. Paolino argues that a reasonable jury could conclude that Mr. Paolino's employment was constructively terminated because there were prior threats of discharge. (D.I. 244 at 11). Also Mr. Paolino argues that he was constructively terminated in furtherance of Defendants' discriminatory policies and relies on the two disciplinary actions as evidence that a hostile environment existed for him post-January 1998. (D.I. 244 at 14, 18). Additionally, Mr. Paolino contends that a reasonable

jury could conclude that there was a conspiracy to terminate him based on his race. (D.I. 244 at 18).

To establish a prima facie case that his resignation from employment resulted from a constructive discharge Mr. Paolino must show that the conduct complained of would have the foreseeable result of creating working conditions that were so unpleasant or difficult that a reasonable person in the employee's position would resign. See Schafer v. Board of Public Education, 903 F.2d 243, 249 (3d Cir. 1990). The Third Circuit, in Clowes v. Alleghaney Hospital, 991 F.2d 1159 (3d Cir. 1993), provided factors a court may take into account when analyzing whether constructive discharge occurred. These factors include: reduction of pay or benefits, demotion, suggestions to retire or resign, threats of discharge, involuntary transfer to a less desirable position, altered job responsibilities, and unsatisfactory job evaluations. See Clowes, 991 F.2d at 1161. Mr. Paolino asserts that there were threats of discharge, specifically, Mr. Paolino testified that at an informal meeting with a supervisor he was told that he should "take one for the city." This single alleged suggestion was purportedly made in the context of the disciplinary action Mr. Paolino was subjected to post-January 1998.

After a review of the evidentiary record, the Court concludes that the remaining individual Defendants are entitled

to summary judgment on Plaintiff's § 1983 and § 1985(3) claims. With regard to the § 1983 claim the Plaintiff has not adduced evidence that could lead a reasonable jury to conclude that his resignation from City employment resulted from a hostile environment created by Defendants.

In the Court's view the evidence of record established without dispute that: 1) prior to January 1998 and despite a record of adverse disciplinary actions, Plaintiff liked his job; 2) the two post-January 1998 incidents were not initiated by the Defendants, but a state legislator who observed the Plaintiff's alleged misconduct-the Defendants merely reacted to the legislator's complaint and no evidence exists that Plaintiff's race was a factor; 3) the district court found in the Blackshear case that Plaintiff had been treated better than a black employee with regard to discipline matters; 4) Plaintiff "successfully" grieved the initial disciplinary actions and received less stringent discipline which is evidence that Plaintiff's work environment was not hostile; 5) when Plaintiff resigned in May 1998 all disciplinary matters had been resolved, but city officials, in response to complaints by Plaintiff about the actions, offered to investigate Plaintiff's complaints and provide him with paid leave. (Paolino Deposition at 90-93). In sum, in the record presented, the Court concludes that Plaintiff

has failed to present evidence to establish his constructive discharge claim.

A conspiracy claim based on § 1985(3) requires a clear showing of invidious, purposeful and intentional discrimination. See Robinson v. McCorkle, 462 F.2d 111, 113 (3d Cir. 1972). In this case Mr. Paolino produced no evidence as to specific times, dates, communications or meetings in aid of a conspiracy. Because of this lack of evidence, the Court concludes that there is no factual support for a claim of conspiracy and that no reasonable jury could find that there was a conspiracy.

II. The Motion of the City of Wilmington

Plaintiff relies upon his responses to the Molina, Sills and Starkey Summary Judgment Motion concerning Plaintiff's constructive discharge claim under § 1983 and his conspiracy claim under § 1985(3). (D.I. 246 at 11). Defendant, City of Wilmington, relies on the Molina, Sills and Starkey contentions in support of its motion for summary judgment on Plaintiff's § 1983 and § 1985(3) claims.

For the reasons discussed in the Court's discussion on the Molina, Sills and Starkey motion, the Court will grant the City's Motion for Summary Judgment on Plaintiff's constructive discharge claims.[1]

[1] The Court notes that it agrees with the Defendant City that Plaintiff has failed to adduce evidence of any municipal policy or person with final policymaking authority that could establish

The Court understands that Plaintiff continues to maintain an equal protection claim against the Defendants, including the City of Wilmington. However, in the case of, Nicholas v. Pennsylvania State University, 227 F.3d 133, 142 (3d Cir. 2000), the Third Circuit denied protection to public employment property interests. Therefore, the Court concludes that Plaintiff is unable as a matter of law to maintain such a claim.

With regard to any procedural due process claim, because Mr. Paolino resigned, and no actions were pending, the Defendant City had no evidence to present or charges for Plaintiff to respond to in the context of procedural due process. Further, to the extent it may be relevant the Court notes that union grievance procedures were in effect when Plaintiff resigned. Moreover, Plaintiff was offered an opportunity for an investigation which he declined. So, in the circumstances of this case, Plaintiff's procedural due process rights were satisfied because union grievance procedures were in effect. See Dykes v. Septa, 68 F.3d 1564, 1572 (3d Cir. 1995). Thus, the Court concludes no due process violations have been established.

Finally, with regard to Plaintiff's wrongful discharge claim and the exceptions to the Delaware at-will employment doctrine, courts have construed the limited exceptions narrowly and this Court has held that a wrongful discharge claim based on

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a harm suffered by Plaintiff.

discrimination does not fall within any of the exceptions. See Fini v. Remington Arms Co., Inc., C.A. No. 97-12-SLR, 1998 U.S. Dist. LEXIS 8261, at *36 (D. Del. May 27, 1998). Because Plaintiff's wrongful discharge claim is based on allegations of racial discrimination the Court concludes that the claim does not fall within an exception to the at-will employment doctrine. Accordingly, the Court concludes that the City of Wilmington's Motion for Summary Judgment on the state law wrongful discharge grounds should be granted.

CONCLUSION

For the reasons discussed, the Motion for Summary Judgment filed by Defendants Damalier Molina, James H. Sills and Mary Starkey (D.I. 233) and the Motion for Summary Judgement filed by Defendants City of Wilmington, Mary Dees, Arthur Boswell and William Jones (D.I. 241) were **GRANTED** by an Order (D.I. 258) dated September 30, 2002.