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

JOSEPH F. POLI	:	CIVIL ACTION
	:	
v.	:	
	:	
SEPTA, et al.	:	NO. 97-6766

M E M O R A N D U M

Padova, J. July 2, 1998

Plaintiff, Joseph F. Poli, a former employee of the Southeastern Pennsylvania Transportation Authority ("SEPTA"), brings this law suit against SEPTA and a number of SEPTA employees, claiming that the Defendants terminated his employment on the basis of his race and because he questioned the legality of an order issued by his supervisor. Before the Court is Defendants' Motion to Dismiss the Amended Complaint Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

For the reasons set forth below, the Court will dismiss the following claims for failure to state a claim upon which relief can be given: all claims against all Defendants for alleged violations of Poli's First Amendment rights; all claims against all Defendants for alleged violations of Poli's Fourteenth Amendment due process rights; the claim against SEPTA independently based on 42 U.S.C.A. § 1981 (West 1994); the claims

against the individual Defendants in their official capacities, independently based on section 1981 and brought under section 1981 via 42 U.S.C.A. § 1983 (West 1994); all claims based on the contract clause of section 1981 against all Defendants; all claims under 42 U.S.C.A. § 1985(3)(West 1994) against the individual Defendants in their official capacities; and the punitive damages claims against SEPTA and the individual Defendants in their official capacities.

The following claims will go forward: the equal protection claims brought under section 1983 against SEPTA and the individual Defendants (in Counts II, IV, VI, VIII, and Count X); the section 1981 claims against SEPTA, brought via section 1983, and the section 1981 claims against the individual Defendants in their individual capacities, brought directly under section 1981 and via section 1983 (to the extent that such claims are based on the equal benefit clause and/or like punishment clause of section 1981)(in Counts I, II, IV, VII, VIII, and X); the section 1985(3) claims against the individual Defendants in their individual capacities (in Count IX); the claim against SEPTA brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.A. § 2000e et seq. (West 1994)(in Count XI); the punitive damages claims against the individual Defendants in their individual capacities (in Count XII); and the attorney's fees claims against all Defendants (in Count XIII).

I. BACKGROUND

A. Facts

Plaintiff, Joseph F. Poli, Jr., a white male, was employed as a railroad or street railway police officer for SEPTA from November 7, 1990 to January 31, 1996. (Am. Compl. at ¶¶ 15, 60.) The following events culminated in his termination on January 31, 1996.

On December 31, 1995, Poli was on duty as a SEPTA Police Officer. (Id. at ¶¶ 18-19.) At approximately 1:30 a.m. on January 1, 1996, he received a radio message from his dispatcher to come to Suburban Station in Philadelphia for an assignment. (Id. at ¶ 20.) Sergeant Steven Rocher ("Rocher"), a supervisory SEPTA employee with the rank of Police Sergeant, had directed the dispatcher to have Poli ride a SEPTA train from Philadelphia to Trenton, New Jersey and back again. (Id. at ¶¶ 3, 21.) The train was to leave Suburban Station at 2:05 a.m. without any passengers and arrive in Trenton at approximately 3:15 a.m. to transport travelers from Trenton to Philadelphia. (Id. at ¶ 21.) The request for Poli to ride the SEPTA train into New Jersey had been made by the New Jersey Transit Authority officials, through the SEPTA Regional Rail Division Control Center, to escort New Year's Eve and Mummer's Day celebrators to Philadelphia. (Id. Ex. D.)

Poli refused to ride the train to New Jersey on the grounds that he had no police powers in New Jersey and that he believed that it was illegal for him to go into New Jersey in uniform carrying a gun unless notice had been given to the appropriate authorities in New Jersey. (Id. at ¶¶ 22-33.) The dispatcher informed Poli that Rocher had issued the order for Poli to ride the train to New Jersey. (Id. at ¶ 29.) The dispatcher informed Rocher about Poli's concerns about taking the train into New Jersey; Rocher told the dispatcher to tell Poli to catch the train as directed. (Id. at ¶¶ 34-35.) Poli then telephoned the dispatcher and advised him that he had heard Rocher's order, but that, although he was not refusing to go to New Jersey, he would not follow Rocher's order unless he could be assured that it was not illegal for him to do so. (Id. at ¶¶ 33, 36-40.) In this conversation with the dispatcher, Poli twice asked the dispatcher to wake up SEPTA's Chief of Police, Richard J. Evans, which the dispatcher did not do. (Id. at ¶¶ 36, 39, 43.) The dispatcher urged Poli to follow Rocher's order and grieve it later. (Id. at ¶ 37.) While this conversation was taking place, Poli was on his way to the 18th Street Police Headquarters at Suburban Station. (Id. at ¶ 40.) The dispatcher informed Rocher that Poli refused to follow Rocher's order until he got clarification from Police Chief Evans. (Id. at ¶ 44.) The dispatcher then dispatched another SEPTA police officer to take the assignment that Poli had

ordinally been ordered to carry out. (Id. at ¶ 43.)

Rocher ordered Poli to stand by at the 18th Street Police Headquarters. (Id. at ¶ 45.) When Poli arrived there, Rocher demanded to know why Poli had not carried out the assignment as ordered; Poli responded that the assignment was illegal. (Id. at ¶¶ 47-50.) Rocher then told Poli to set forth in writing the reasons why he refused to carry out the assignment. (Id. at ¶ 51.) Poli took the position that, under the collective bargaining agreement between SEPTA and the Fraternal Order of Transit Police ("FOTP"), he was entitled to Union representative with him when he did so. (Id. Ex. A; at ¶ 52.) Rocher insisted that Poli was entitled to a Union representative only if he was being interviewed, that he was not being interviewed but only was being asked to give a written explanation of his actions, and that, therefore, he was not entitled to Union representation. (Id. at ¶ 53.) Poli wrote the memo although he was not given the opportunity to have a Union representative present with him. (Id. Exs. B and C; at ¶ 56.)

On January 11, 1996, Poli received a Pre-Disciplinary Interview conducted by Rocher and attended by an FOTP representative. (Id. at ¶ 59.) As a result of this interview, Poli's employment was terminated on January 31, 1996. (Id. Ex. D and at ¶ 60.) Poli was terminated for violating the following SEPTA Transit Police Department's Directives:

ARTICLE I CONDUCT UNBECOMING AN OFFICER:

1. Insubordination.
2. Publicly criticizing the Official Actions of a Superior Officer.
3. Any course of conduct indicating that a member has little or no regard for his-her responsibilities as a member of the SEPTA Police Department.
4. Quarreling with members of the SEPTA Police Department.

ARTICLE II NEGLECT OF DUTY:

1. Failure to comply with written or oral orders, directives, rules, or regulations issued by a Superior Officer (You specifically violated a DIRECT ORDER).
2. Unauthorized absence from an assignment.
3. Failure to respond to an assignment.

(Id.)

The FOTP filed a grievance on Poli's behalf. (Id. at ¶ 61.) Poli requested that the first level grievance hearing be waived. (Id. at ¶ 62.) As requested, a second level grievance hearing was held on February 14, 1996; Lieutenant Ronald Coates served as the Hearing Examiner. (Id. at ¶ 63.) Coates upheld Poli's termination. (Id. Ex. E; at ¶ 64.) A third level grievance hearing was held on March 12, 1996; C. Collier Hall, SEPTA's Manager of Labor Relations, served as the Hearing Examiner. (Id. at ¶ 65.) Hall upheld Poli's termination. (Id. Ex. F; at ¶ 66.)

The FOTP appealed Poli's termination to the American Arbitration Association ("AAA"). (Id. at ¶ 67.) On February 13, 1997, a hearing was held before the AAA arbitrator, who had been jointly selected by the parties. The arbitrator denied the grievance. (Id. Ex. G; at ¶ 71.) The FOTP filed a Petition to Vacate Arbitration Award on Poli's behalf in the Court of Common

Pleas for the County of Philadelphia. On July 10, 1997, the Court of Common Pleas denied the Petition and confirmed the opinion and award of the arbitrator.[1] (Defs.' Mot. Ex B).

B. Causes of Action

Poli names the following as Defendants: SEPTA; Sergeant Rocher, Poli's supervisor, who issued the order for Poli to ride the SEPTA train into New Jersey; Lieutenant Ronald Coates of the SEPTA Police, who served as the hearing examiner at Poli's second level grievance hearing; C. Collier Hall, SEPTA's Manager of Labor Relations, who served as the hearing officer at Poli's third level grievance hearing; Richard J. Evans, SEPTA's Chief of Police; Gerald LeClaire, SEPTA's Chief Labor Relations Officer; Patricia A. Day, SEPTA's Deputy Chief Labor Relations Officer;

[1]According to Defendants, the Court of Common Pleas order was not appealed. Although not pled in the Amended Complaint, Defendants attach a copy of the Court of Common Pleas order to their Motion, ask the Court to consider this document, and note that if matters outside the pleadings are presented and not excluded by the Court, the Rule 12(b)(6) motion shall be treated as one for summary judgment. (Defs.' Mot. at 7-8 n. 3.) Contrary to Defendants' suggestion, the Court's consideration of this document will not result in the conversion of the Motion to Dismiss into a summary judgment motion. Poli does not dispute the authenticity of this document. In addition, the state court order is a matter of public record and properly subject to judicial notice, pursuant to Rule 201 of the Federal Rules of Evidence. As such, the Court can consider the state court order in deciding Defendants' Motion to Dismiss. Pension Benefit Guaranty Corp. v. White Consolidated Industries, Inc., 998 F.2d 1192, 1196-97 (3d Cir. 1993)(in deciding a Rule 12(b)(6) motion, a court may rely upon the allegations in the complaint, exhibits attached to the complaint, and matters of public record).

and Amy M. Foran, SEPTA's Director of Labor Relations. The individual Defendants are sued both in their individual and official capacities. (Am. Compl. at ¶¶ 3-9.)

Poli's Amended Complaint contains thirteen counts. Count I is brought under 42 U.S.C. §§ 1981 and 1983 against Defendant Rocher for Rocher's alleged refusal to allow Poli to postpone writing a memo of explanation concerning Rocher's order, which allegedly was motivated by Rocher's racial bias against Poli and thus violated Poli's contract rights under the collective bargaining agreement and his due process rights.

Count II is brought under 42 U.S.C. §§ 1981 and 1983 against Defendant Rocher for Rocher's termination of Poli on January 31, 1996, which allegedly was motivated by Rocher's bias against Poli because of his race.

Count III is brought under 42 U.S.C. § 1983 against Defendant Rocher for Rocher's termination of Poli on January 31, 1996 in violation of Poli's First Amendment rights.

Count IV is brought under 42 U.S.C. §§ 1981 and 1983 against Defendant Coates for Coates's alleged failure to address the issue of the legality of Rocher's order that Poli ride a SEPTA train to New Jersey.[2]

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[2]Although the Amended Complaint does not clearly set forth the alleged constitutional violation at issue in Count IV, it appears that Count IV is based on Coates's alleged discrimination against Poli on the basis of his race and denial of Poli's due process rights because "Coates upheld Poli's termination, rubber-

Count V is brought under 42 U.S.C. § 1983 against Defendant Coates for Coates's alleged acquiescence in Rocher's wrongful termination of Poli, in violation of Poli's First Amendment rights.

Count VI is brought under 42 U.S.C. § 1983 against Defendant Hall for Hall's alleged misstatement of the law concerning the legality of Rocher's order in order to cover-up Rocher's and Coates's wrongful termination of Poli and to hurt Poli because of his race, in violation of Poli's due process rights.[3]

Count VII is brought under 42 U.S.C. §§ 1981 and 1983 against Defendant Hall for Hall's alleged misstatement of the law concerning the legality of Rocher's order and cover-up of Rocher's and Coates's wrongful termination of Poli because of Poli's race, in violation of Poli's contract and due process

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stamping Rocher's action without addressing the issue of the legality of Rocher's order, thereby depriving Poli of a meaningful second-level hearing as provided for in the Union contract. Coates knew that Rocher terminated Poli because of Poli's race and he acquiesced in Rocher's wrongful termination of Poli because it was easier to acquiesce in Poli's wrongful termination than to overturn Rocher's decision and have to defend himself at the next hearing level." (Am. Compl. at ¶¶ 110-111.)

[3]Poli only identifies a due process violation under the Fourteenth Amendment in Count VI against Hall. (Am. Compl. at ¶ 127.) However, the allegations also suggest the existence of a race-based, equal protection claim. For the purposes of Defendants' Motion, the Court will assume that Poli is also attempting to plead an equal protection claim against Hall.

rights.[4]

Count VIII is brought under 42 U.S.C. §§ 1981 and 1983 against Defendants Evans, LeClaire, Day, and Foran for upholding the racially discriminatory termination of Poli and for violating his contract, First Amendment, and due process rights.

Count IX is brought under 42 U.S.C. § 1985 against Defendants Rocher, Coates, Hall, Evans, LeClaire, Day, and Foran for conspiring to deprive Poli of his rights under the Union contract and the First and Fourteenth Amendments.

Count X is brought under 42 U.S.C. §§ 1981 and 1983 against SEPTA based on its alleged custom, pattern, and practice of discriminating against white police officers, including Poli.

Count XI is brought under 42 U.S.C. § 2000e against SEPTA for its racially discriminatory policies against white police officers, including Poli.

Count XII is brought against all Defendants for punitive damages.

Count XIII is brought against all Defendants for attorney's fees.

II. STANDARD

A claim may be dismissed under Rule 12(b)(6) of the Federal

[4]Once again, because of the allegations underlying Count VIII, the Court will assume that Poli is also attempting to plead an equal protection claim against Coates.

Rules of Civil Procedure only if the plaintiff can prove no set of facts in support of the claim that would entitle her to relief. ALA, Inc. v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994). The reviewing court must consider only those facts alleged in the complaint and accept all of the allegations as true. Id.; see also Rocks v. Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989)(holding that in deciding a motion to dismiss for failure to state a claim, the court must "accept as true all allegations in the complaint and all reasonable inferences that can be drawn therefrom, and view them in the light most favorable to the nonmoving party").

III. DISCUSSION

A. Title VII

In Count XI, Poli brings a Title VII disparate treatment claim against SEPTA based on SEPTA's alleged intentional acquiescence in or reckless disregard of discriminatory acts allegedly taken against Poli, which culminated in his discharge. (Am. Compl. at ¶ 162.) The parties agree that to state a claim of discriminatory discharge under Title VII, Poli must allege that (1) he is a member of a class of persons protected by Title VII, (2) he was qualified for the job and was performing the job satisfactorily, (3) he suffered some adverse employment action, and (4) similarly situated employees outside of the protected

class were treated more favorably than he was. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824 (1979); Sheridan v. E.I. Dupont de Nemours & Co., 100 F.3d 1061, 1066 n. 5 (3d Cir. 1996). Poli must also allege that the discriminatory acts were intentional. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253, 101 S. Ct. 1089, 1093 (1981); St. Mary's Honor Center v. Hicks, 509 U.S. 502, 511, 113 S. Ct. 2742, 2749 (1993). Finally, because Poli, a white male, brings a reverse racial discrimination suit, he must allege the existence of "background circumstances that support an inference that the defendant is one of those unusual employers who discriminates against the majority."[5]

Defendants argue that Poli's Title VII claim is insufficient in three ways. First, they argue that Poli has failed to allege

[5]The United States Court of Appeals for the Third Circuit has not ruled on the issue of whether the traditional McDonnell Douglas test is modified in reverse discrimination cases. The majority of courts in this district have applied the modified McDonnell Douglas test in reverse discrimination cases. E.g., Ludovico v. U.S. Healthcare, Inc., Civ.A.No. 96-61, 1997 WL 288592, at * 5 (E.D. Pa. May 21, 1997)(Broderick, J.); Cassera v. The Scientist, Inc., Civ.A.No. 95-6467, 1996 WL 728759, at *2 (E.D. Pa. Dec. 18, 1996)(R. F. Kelly, J.); Davis v. Sheraton Society Hill Hotel, 907 F. Supp. 896 (E.D. Pa. 1995)(Joyner, J.); Daly v. Unicare Corp.--Township Manor Nursing Center, Civ.A.No. 94-6838, 1995 WL 251385, at *4-6 (E.D. Pa. Apr. 26, 1995)(Dalzell, J.); Reikow v. City of Philadelphia, Civ.A.No. 92-6937, 1994 WL 22721, at *1 (E.D. Pa. Jan. 27, 1994)(Hutton, J.). Moreover, Poli does not dispute the application of this additional requirement. (Pl.'s Resp. at 11.) Therefore, the Court finds that this additional requirement must be pled in order for Poli to state a claim under Title VII for reverse discrimination.

that he was performing his duties as a SEPTA police officer in a satisfactory manner. (Defs.' Mot. at 9.) Poli alleges that he "was a competent law enforcement officer when he was hired by SEPTA and there has never been any question of his competence to do his job. Indeed, he has received commendations to do his work." (Am. Compl. at ¶ 15.) The Court finds that Poli has adequately pled that his performance was satisfactory.

Next, Defendants argue that Poli has failed to allege that similarly situated members of minority groups were treated more favorably by SEPTA than he was treated. (Defs.' Mot. at 9.) Poli alleges that he was charged with conduct unbecoming an officer and neglect of duty and was terminated. (Am. Compl. at ¶ 60.) In contrast, Poli alleges that a number of African-American SEPTA police officers, also charged with conduct unbecoming an officer and neglect of duty, were subjected to less severe discipline than he was. (Id. at ¶ 80.) The Court finds that Poli has adequately pled that similarly situated employees outside of the protected class were treated more favorably than he was.

Finally, Defendants argue that Poli has not alleged facts that support the conclusion that SEPTA is one of those unusual employers who discriminates against a majority. (Defs.' Mot. at 11.) Poli alleges that Rocher, an African-American, displayed racial animus against white officers generally and against Poli

specifically. (Am. Compl. at ¶¶ 76-77.) Poli also alleges that for "at least the last five years and perhaps longer, the Fraternal Order of Transit Police has raised the issue of racial discrimination against Caucasian officers at the annual Labor/Management Conferences at Sugarloaf" attended by SEPTA's labor relations managers. (Id. at ¶ 85.) The Court finds that Poli has adequately pled that SEPTA is an atypical employer that discriminates against a majority.

Accordingly, the Court will deny Defendants' Motion to Dismiss Poli's Title VII claim against SEPTA (Count XI).

B. Section 1983

To state a claim under section 1983, Poli must allege a deprivation of a right secured by the Constitution or laws of the United States and that the acts which allegedly constituted such deprivation occurred under color of state law. Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 931, 102 S. Ct. 2744, 2750-51 (1982). Defendants argue that all of Poli's section 1983 claims fail because he has not adequately alleged that he was deprived of any constitutional rights. The Court will address each of Poli's section 1983 claims in turn.

1. Retaliation for Exercise of First Amendment Rights

Defendants seek the dismissal of the First Amendment

retaliation claims in Counts III, V, VIII, and X. In Count III against Defendant Rocher, Poli alleges that his termination for reasonably questioning the legality of an order from a superior officer violated his First Amendment right to ask a reasonable question. (Am. Compl. at ¶¶ 103-04.) In Count V against Defendant Coates, Poli alleges that the position taken by Coates at the second level grievance hearing that Poli could not question an order, and the acquiescence by Coates in Rocher's wrongful termination, violated Poli's First Amendment rights. In Count VIII against Defendants Evans, LeClaire, Day, and Foran, Poli alleges that the acquiescence of Defendants to Poli's termination violated his First Amendment rights. (Id. at ¶¶ 143-44.) In Count X against SEPTA, Poli alleges that SEPTA knew of and acquiesced in the discriminatory acts by the individual Defendants and thereby violated Poli's First Amendment rights. (Id. at ¶ 157.)

Defendants challenge Poli's First Amendment claims on the following grounds: (1) Poli's refusal to carry out a direct order from a superior is conduct, not speech protected by the First Amendment; (2) Poli's exchanges with the dispatcher did not involve a matter of public concern but rather involved a personal grievance related only to his employment at SEPTA; and (3) even if Poli's conduct and/or speech was protected, SEPTA's interests in effectively and efficiently fulfilling its responsibilities to

the public outweigh Poli's interest in his speech. (Defs.' Mot. at 13-17.)

In Mt. Healthy City School District Board of Educ. v. Doyle, 429 U.S. 274, 97 S. Ct. 568 (1977), the Supreme Court held that an individual has a viable claim against the government when he or she is able to prove that the government took action against him or her in retaliation for his or her exercise of First Amendment rights. As explained by the United States Court of Appeals for the Third Circuit ("Third Circuit") in Anderson v. Davila, 125 F.3d 148, 161 (3d Cir. 1997),

> Under Mt. Healthy and its progeny, an otherwise legitimate and constitutional government act can become unconstitutional when an individual demonstrates that it was undertaken in retaliation for his exercise of First Amendment speech. This doctrine demonstrates that, at least where the First Amendment is concerned, the motives of government officials are indeed relevant, if not dispositive, when an individual's exercise of speech precedes government action affecting that individual.[6]

To state a claim based on retaliation for having engaged in free speech or conduct protected by the First Amendment, Poli must allege that (1) his speech or conduct constituted protected activity; (2) Defendants responded with retaliation; and (3) his

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[6]Mt. Healthy falls within a larger category of Supreme Court cases known as the "unconstitutional conditions" doctrine, whereby "government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected freedom of speech' even if he has no entitlement to that benefit." Board of County Commissioners v. Umbehr, 518 U.S. 668, 674, 116 S. Ct. 2342, 2347 (1996)(quoting Perry v. Sindermann, 408 U.S. 593, 597, 92 S. Ct. 2694, 2697 (1972)).

protected activity was the cause of Defendants' retaliation. Id. Poli' speech or conduct is protected under the First Amendment if (1) his speech involves a matter of public concern and (2) his interests in the speech outweigh SEPTA's interests, as a public employer, in promoting the efficiency of the public services it performs through its employees. Waters v. Churchill, 511 U.S. 661, 668, 114 S. Ct. 1878, 1884 (1994)(citing Connick v. Myers, 461 U.S. 138, 103 S. Ct. 1684 (1983); Green v. Philadelphia Housing Authority, 105 F.3d 882, 885 (3d Cir. 1997). Whether speech or conduct is protected by the First Amendment is an issue of law for the Court to decide. Connick, 461 U.S. at 148 n.7 and 150 n.10, 103 S. Ct. at 1690 n.7 and 1692 n.10.

The legal determination of whether a public employee's speech deals with an issue of public concern is made with reference to "the content, form, and context" of the speech as revealed by the whole record. Connick, 461 U.S. at 147, 103 S. Ct. at 1690. Although there is no precisely delineated test, the Supreme Court in Connick explained that speech that can be "fairly considered as relating to any matter of political, social, or other concern to the community" can be characterized as speech on a matter of public concern. Id.

Even if it has been determined that the speech or conduct at issue is a matter of public concern, this Court must then balance "the interests of the [public employee] as a citizen, in

commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering v. Board of Education, 391 U.S. 563, 568, 88 S. Ct. 1731, 1734-35 (1967).

Defendants first argue that Poli was terminated for unprotected conduct, not protected speech, and so his first Amendment claims should be dismissed. "[W]hether a given activity constitutes speech represents a threshold question in every First Amendment case." Pro v. Donatucci, 81 F.3d 1283, 1293 (3d Cir. 1996). In some instances, this issue may be sidestepped. Id. The Court finds that this is such a case. Poli alleges that he was terminated for activity that could be characterized as conduct (e.g., failure to comply with an order issued by a superior officer and failure to respond to an assignment). (Am. Compl. at ¶ 60.) But he was also terminated for activity that is speech (e.g., publicly criticizing the official actions of a superior officer and quarreling with members of the SEPTA Police Department). Id. Because he was terminated, in part, for speech, the Court does not need to decide whether Poli's conduct constitutes expressive conduct that is protected under the First Amendment. See Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 89 S. Ct. 733 (1969).

Because speech was implicated in Poli's termination, the

Court proceeds to the next step in the inquiry -- whether Poli's speech implicated a matter of public concern. Poli argues that his speech concerned the lawful behavior of police officers and as such constitutes a matter of public concern. (Pl.'s Resp. at 14.) The focus of the Court's inquiry, however, is not how Poli characterizes his speech for the purposes of this law suit. Rather, the Court must examine the content, form, and context of Poli's speech as alleged to determine whether his speech was a matter of public concern. According to the Amended Complaint, the content of Poli's speech involved his concern that Rocher's order was illegal and that if he followed the order and entered New Jersey in uniform and armed, without having proper permission, he faced the possibility that he would be arrested or fined by New Jersey authorities. (Am. Compl. at ¶ 30.) The form and context of the speech involved Poli's telephone conversation with the dispatcher about Rocher's order.

The Court finds that, as a matter of law, Poli's speech did not relate to a matter of public concern but amounted to nothing more than a personal grievance. As such, it is not protected under the First Amendment. As the Supreme Court explained, "when a public employee speaks . . . upon matters only of personal interest, . . . a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior."

Connick, 461 U.S. at 147, 103 S. Ct. at 1690.

In interpreting the Connick test, the Third Circuit has held that "speech disclosing public officials' misfeasance is protected while speech intended to air personal grievances is not." Swineford v. Snyder County Pennsylvania, 15 F.3d 1258, 1271 (3d Cir. 1994). Here, Poli was not attempting to disclose official misfeasance. Instead, he refused to follow Rocher's order because of the consequences that he believed he would suffer personally. His speech was motivated by his own personal interests and related to his own conditions of employment, not with an issue of public concern.[7] Gaj v. United States Postal

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[7]The law in other Circuits is in accord with the Third Circuit. In Ayoub v. Texas A & M Univ., 927 F.2d 834, 837 (5th Cir. 1991), the Court of Appeals for the Fifth Circuit held that there was no First Amendment protection where an employee spoke only on matters concerning his own employment conditions.

> It is clear to us that Ayoub's speech did not involve a matter of public concern. Ayoub's complaints focused on his own individual compensation. Only when his attorney filed the EEOC charge did Ayoub characterize his complaint in terms of a 'two-tier' system perpetuated by the University, whereby foreign-born professors were paid less than white, native-born professors. There is no evidence that Ayoub ever uttered such a protest at any time before the alleged retaliatory acts by the defendants. To the extent, however, that Ayoub may now couch his complaint in terms of a disparate "two-tier" pay system, the record is absolutely clear that he only complained about its application to him.

Id.; see also Ferrara v. Mills, 781 F.2d 1508, 1516 (11th Cir. 1986)(a public employee cannot transform a personal grievance into a matter of public concern solely by invoking a general public interest in the manner in which the public institution was run).

Service, 800 F.2d 64 (3d Cir. 1986)(although in some instances complaints about noise level and conveyor belt maintenance might comprise criticisms of the employer's safety policies and therefore rise to the level of public concern, plaintiff postal employee was "merely expressing himself as an employee dissatisfied with his own conditions of employment"); Versage v. Township of Clinton New Jersey, 984 F.2d 1359, 1364-65 (3d Cir. 1993)(the speaker's motivation is relevant to the extent that it indicates whether the speaker is speaking as a citizen upon matters of public concern or as a volunteer upon matters only of personal interest).

Because Poli's speech is not on a matter of public concern, the Court does not need to reach the Pickering balancing test. The Court will grant Defendants' Motion to Dismiss the First Amendment retaliation claims set forth in Counts III, V, VIII, and X.

2. Due Process

Poli asserts Fourteenth Amendment due process claims under section 1983 against all of the Defendants. In Count I, Poli alleges that Rocher's refusal to allow Poli to postpone writing the memo of explanation until Poli could consult with a union representative violated Poli's contract rights and his right to due process. (Am. Compl. at ¶ 92.) In Count IV, Poli alleges

that Coates wrongfully upheld Poli's termination and denied Poli a meaningful second level grievance hearing. (Id. at ¶ 110.) In Count VI, Poli alleges that Hall wrongfully upheld Poli's termination, thereby violating Poli's due process rights under the Fourteenth Amendment. (Id. at ¶¶ 122-27.) In Count VII, Poli alleges that Hall denied Poli a meaningful third level grievance hearing, in violation of his contract rights and right to due process under the Fourteenth Amendment. (Id. at ¶ 131.) In Count VIII, Poli alleges that Evans, LeClaire, Day, and Foran knew about Hall's decision upholding the termination of Poli, acquiesced in her decision, and thereby disregarded Poli's rights under the Union contract and the Fourteenth Amendment. (Id. at ¶ 144.) In Count X, Poli alleges that SEPTA knew about the illegal discriminatory acts of the individual Defendants and thereby violated Poli's rights under the Fourteenth Amendment.

Although not clearly stated, Poli's Fourteenth Amendment claim appears to be based on the deprivation of a property interest in his job without due process of law when Defendants failed to provide him meaningful grievance procedures with respect to his discharge. In order to state a section 1983 claim based on the Fourteenth Amendment, Poli must allege that he was deprived of a property interest under color of law without due process. Dykes v. SEPTA, 68 F.3d 1564, 1570 (3d Cir. 1995); Sample v. Diecks, 885 F.2d 1099, 1113 (3d Cir. 1989). Defendants

do not challenge the sufficiency of the facts alleged to establish that Poli had a contractual employment relationship with SEPTA and that the relationship created a property interest subject to Fourteenth Amendment protection. Instead, Defendants argue that, as a matter of law, Poli received all of the process to which he was entitled under the collective bargaining agreement and therefore his rights to due process were not violated. Poli had available to him a three step grievance process which could be followed by an AAA arbitration. (Am. Compl. Ex. A at 19-25.) Poli admits that he received a pre-disciplinary interview, that he waived a first level grievance hearing, that he received second and third level grievance hearings, and that he received an AAA arbitration before a neutral arbitrator. (Id. at ¶¶ 59-71.)

The Third Circuit has held that "[w]here a due process claim is raised against a public employer, and grievance and arbitration procedures are in place, . . . those procedures satisfy due process requirements 'even if the hearing conducted by the Employer . . . [was] inherently biased.'" Dykes, 68 F.3d at 1571 (quoting Jackson v. Temple Univ., 721 F.2d 931 (3d Cir. 1983)).

Here, grievance and arbitration procedures were in place and Poli took advantage of them. Poli does not allege that the grievance procedures outlined in the collective bargaining

agreement violated due process. Dykes, 68 F.3d at 1572 n. 6 (grievance procedures outlined in collective bargaining agreements can satisfy due process requirements). Moreover, Poli has not alleged that the arbitrator or the arbitration proceedings were biased in any way. Jackson, 721 F.2d at 933 ("[t]he right to proceed to arbitration provided . . . an adequate due process safeguard even if the hearing conducted by the Employer had been inherently biased."). Under these circumstances, Poli fails to allege a cognizable violation of his due process rights. Accordingly, the Court will grant Defendants' Motion to Dismiss the due process claims set forth in Counts I, IV, VI, VII, VIII, and X.[8]

3. Equal Protection

Although Poli does not identify the substantive basis for his race discrimination claims under section 1983, Defendants posit, and Poli does not dispute, that the claims are grounded in the Equal Protection Clause of the Fourteenth Amendment. In order to state a claim under section 1983 based on the Equal Protection Clause, Plaintiff must allege that he "was a member of a protected class, was similarly situated to members of an

[8]The Court notes that Poli does not respond to Defendants' challenge to his due process claims. Therefore, the Court also grants this aspect of Defendants' Motion as uncontested, pursuant to Local Rule 7.1(c), as an alternate basis for dismissal.

unprotected class, and was treated differently from the unprotected class." Wood v. Rendell, Civ.A.No. 94-1489, 1995 WL 676418, at *4 (E.D. Pa. Nov. 3, 1995)(citation omitted). In its most general sense, the Equal Protection Clause directs that "all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439, 105 S. Ct. 3249, 3254 (1985). To maintain an action under the Equal Protection Clause, a plaintiff "must show intentional discrimination against him because of his membership in a particular class, not merely that he was treated unfairly as an individual." Huebschen v. Dept. of Health & Social Service, 716 F.2d 1167, 1171 (7th Cir. 1983); see also Murray v. Pittsburgh Board of Public Education, 919 F. Supp. 838, 847 (W.D. Pa. 1996).

Defendants once again argue that Poli has failed to allege that similarly situated employees outside of the protected class were treated more favorably than he was. As set forth in Section III.A above, the Court finds that Poli has adequately pled this element of his equal protection claims. The Court will deny Defendants' Motion to Dismiss the equal protection claims set forth in Counts II, IV, VI, VIII, and X.

C. Section 1981

Poli alleges section 1981 claims in Counts I, II, IV, VII, VIII, and X. Section 1981(a) provides as follows:

> 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.

A number of different rights are enumerated in section 1981. The contract clause of section 1981 entitles all persons to the right "to make and enforce contracts." 42 U.S.C.A. § 1981(a). The equal benefit clause entitles all persons to "the full and equal benefit of all laws and proceedings for the security of persons and property enjoyed by white citizens." Id. The like punishment clause entitles all persons to "like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." Id. The equal benefit and like punishment clauses give section 1981 applicability beyond the mere right to contract. Goodman v. Lukens Steel Co., 777 F.2d 113, 132-134 (3d Cir. 1985); Mahone v. Waddle, 564 F.2d 1018, 1027-29 (3d Cir. 1977).

Defendants seek the dismissal of Poli's section 1981 claims on the following grounds: (1) section 1981 does not provide Poli with an independent cause of action since section 1983 is the exclusive means by which a plaintiff can pursue a damages remedy against a state actor for a violation of rights guaranteed by section 1981; (2) section 1981 prohibits discrimination in the making and enforcement of contracts, the only contract at issue

here is the collective bargaining agreement, and Poli admits that Defendants complied with the grievance and arbitration provisions of the agreement; and (3) Poli has failed to allege that he was similarly situated to employees outside of the protected class.

1. Claims Brought Independently Under Section 1981

Defendants seek the dismissal of all of Poli's independent section 1981 claims against all Defendants on the grounds that Poli has failed to state an independent cause of action under section 1981. Defendants rely on Jett v. Dallas Indep. School Dist., 491 U.S. 701, 731, 109 S. Ct. 2702, 2721 (1989), in which the Supreme Court held that (1) the remedial provisions of section 1983 constitute the exclusive federal remedy for violations of rights enumerated in section 1981 by municipal entities and (2) a municipality cannot be held liable for its employees' violations of section 1981 under a respondeat superior theory. After Jett was decided, Congress passed the Civil Rights Act of 1991, which, inter alia, amended section 1981 by adding subsection (c), which provides that "[t]he rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law."

Although Defendants acknowledge the 1991 Amendments, they fail to adequately address the impact of the Amendments on the holdings of Jett. The critical question underlying this aspect

of Defendants' Motion is whether subsection (c) creates an independent cause of action, thereby abrogating the holding in Jett that section 1983 provides the exclusive remedy for violations of section 1981 by state actors. The case relied on by Defendants, Johnakin v. City of Philadelphia, Civ.A.No. 95-1588, 1996 WL 18821 (E.D. Pa. Jan. 18, 1996), discusses but does not decide this issue. Johnakin held that the requirements for municipal liability set forth in Monell v. Dept. of Social Services, 436 U.S. 658, 98 S. Ct. 2018 (1978), continue to apply to section 1981 actions, even assuming that subsection (c) creates an independent basis for section 1981 actions against state actors.[9] Id. at *4. Johnakin, therefore, sidesteps the very issue that Defendants raise in their Motion.

Moreover, the Third Circuit has not addressed the effect of the 1991 Amendments on Jett, and there is a split in the Circuits on this issue.[10] The Court of Appeals for the Ninth Circuit

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[9]Other courts in this District, including this one, have held that the Monell requirements for municipal liability continue to apply to claims against state actors under section 1981, notwithstanding the 1991 Amendments. E.g., Brady v. Cheltenham Township, Civ.A.No. 97-4655, 1998 WL 164994, at *6 (E.D. Pa. Apr. 9, 1998); Conway v. City of Philadelphia, Civ.A.No. 96-8112, 1997 WL 129024, at *4 (E.D. Pa. Mar. 20, 1997); Wood v. Rendell, Civ.A.No. 94-1489, 1997 WL 109654, at *6 (E.D. Pa. Mar. 4, 1997); Whichard v. Cheltenham Township, Civ.A.No. 95-3969, 1996 WL 502281, at *8 (E.D. Pa. Aug. 29, 1996). None of these cases, however, addresses the issue raised by Defendants' Motion.

[10]The only district court case in the Third Circuit on this issue that this Court located is Lewis v. Delaware Dept. of

("Ninth Circuit") has held that the Civil Rights Act of 1991 creates an implied cause of action against state actors under section 1981, and thus statutorily overrules Jett's holding that section 1983 provides the exclusive federal remedy against municipalities for violation of the civil rights guaranteed by section 1981. Federation of African American Contractors v. City of Oakland, 96 F.3d 1204, 1214 (9th Cir. 1996).[11] In contrast, the Courts of Appeals for the Fourth and Eleventh Circuits have held that section 1983 continues as the exclusive federal remedy for rights guaranteed in section 1981 by state actors. Dennis v. County of Fairfax, 55 F.3d 151, 156 (4th Cir. 1995); Johnson v. City of Fort Lauderdale, 903 F. Supp. 1520 (S.D. Fla. 1995), aff'd 114 F.3d 1089 (11th Cir. 1997).

In keeping with the reasoning of Dennis and Johnson, the Court finds that the 1991 Amendments do not abrogate the holdings of Jett, that section 1983 is the exclusive remedy for section 1981 claims against municipal entities, and that direct claims under section 1981 cannot be brought against municipal entities. Consequently, Poli can only bring a section 1981 claim against

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Public Instruction, 948 F. Supp. 352, 365 (D. Del. 1996), which holds that a plaintiff cannot state a claim for damages against a state actor directly under section 1981 on the basis of Jett, but does not mention the 1991 Amendments.

[11]The Ninth Circuit nevertheless held that the policy and custom requirements of Monell apply to section 1981 claims against municipalities. Federation, 96 F.3d at 1214-15.

SEPTA via section 1983. The Court will dismiss that portion of Count X against SEPTA that is based independently on section 1981. In addition, because a claim against an employee of a municipality in his or her official capacity is essentially a suit against the municipal employer, Johnakin, 1996 WL 18821, at *3 n. 2, the Court will also dismiss the direct section 1981 claims against the individual Defendants in their official capacities.[12]

The result is different with respect to Poli's direct section 1981 claims against the individual Defendants in their individual capacities. The holdings of Jett are inapplicable to alleged discriminatory acts by private parties. Johnson, 903 F. Supp. at 1523 (direct section 1981 claim against city dismissed under the authority of Jett but direct section 1981 claims against city employees, sued in their individual capacities, not subject to dismissal under Jett). As a result, Defendants' Motion to Dismiss on the basis of Jett does not reach Poli's direct section 1981 claims against the individual Defendants in their individual capacities. Therefore, these claims survive this aspect of Defendants' Motion.

[12]Because of the duplicate nature of claims brought against SEPTA and against the individual Defendants in their official capacities, the Court will also dismiss the section 1981 claims brought via section 1983 against the individual Defendants in their official capacities.

2. The Contract Clause of Section 1981

Defendants next challenge the sufficiency of Poli's section 1981 claims that are brought via section 1983. In this regard, Defendants argue that the only contract at issue in this case is the collective bargaining agreement, that Poli admits that the grievance and arbitration provisions mandated by the collective bargaining agreement were complied with, and that, therefore, Poli's section 1981 claims brought via section 1983 should be dismissed. (Defs.' Mot. at 23.) The Court agrees that the only contract referenced in the Amended Complaint is the collective bargaining agreement, attached as Exhibit A to the Amended Complaint. Poli admits that he received the grievance hearings and arbitration mandated by the agreement and does not allege racial discrimination in connection with the agreement. The Court finds that Poli does not state a claim for a violation of the contract clause of section 1981.[13] Accordingly, the Court will dismiss Poli's section 1981 claims against SEPTA, brought via section 1983, and against the individual Defendants in their

[13]The Court is aware that subsection (b) of section 1981 provides for an expansion of the definition of the contract clause. Subsection (b) states as follows: "For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." This expanded definition of the contract clause does not save Poli's contract-based section 1981 claims. Poli does not allege racial discrimination in connection with any aspect of contractual relationship based on the collective bargaining agreement.

individual capacities, brought directly under section 1981 and via section 1983, to the extent that the claims are based on the contract clause.[14]

The Court notes that the dismissal of claims based on the contract clause of section 1981 does not dispose of the section 1981 claims in their entirety. As discussed above, in addition to the right to make and enforce contracts, the rights enumerated in section 1981 include the right to equal benefit of the laws and the right to like punishment. Arguably, Poli's section 1981 claims may be based on the equal benefit clause and/or the like punishment clause. Defendants' Motion does not challenge the sufficiency of the allegations with respect to these clauses, however, and thus this issue is not currently before the Court. Therefore, at this stage of the proceedings, Poli's section 1981 claims against SEPTA, brought via section 1983, and against the individual Defendants in their individual capacities, brought directly under section 1981 and via section 1983, will go

forward, to the extent that they are based on the equal benefit clause and/or the like punishment clause.

[14]The Court notes that Poli does not respond to this challenge to his section 1981 claims. Therefore, the Court also grants this aspect of Defendants' Motion as uncontested, pursuant to Local Rule 7.1(c), as an alternate basis for dismissal.

3. Similarly Situated Requirement

In moving to dismiss Poli's section 1981 claims, Defendants once again argue that Poli has failed to allege that he was similarly situated to those whom he alleges received more favorable treatment. (Defs.' Mot. at 21 n. 7.) For the reasons set forth in Section III.A above, the Court will deny Defendants' Motion on this ground.

4. Summary

In conclusion, the Court will dismiss the following claims: the direct section 1981 claim against SEPTA; the section 1981 claims against the individual Defendants in their official capacities, brought directly under section 1981 and via section 1983; the section 1981 claim against SEPTA, based on the contract clause and brought via section 1983; and the section 1981 claims against the individual Defendants in their individual capacities, based on the contract clause and brought directly under section 1981 and via section 1983.

D. Section 1985

Defendants argue that the "intracorporate conspiracy" doctrine requires the dismissal of Count IX, which alleges a

violation of 42 U.S.C.A. § 1985(3).[15] According to Defendants, Poli has not alleged the existence of a conspiracy because "[a] corporation cannot conspire with itself nor can officers or agents of the corporation, exercising their collective judgment, conspire with each other or with the corporation as an entity." (Defs.' Mot. at 25.)

Defendants are correct that under section 1985(3), a corporation cannot conspire with its own officers while the officers are acting in their official capacities. Robinson v. Canterbury Village, Inc., 848 F.2d 424, 431 (3d Cir. 1988). However, a section 1985(3) conspiracy can be maintained between a corporation and one of its officers if the officer is acting in a personal capacity, or if independent third parties allegedly have joined the conspiracy. Id.

Defendants inaccurately characterize the allegations of Poli's section 1985 claim. Poli alleges that all of the individual Defendants "intentionally conspired to deprive [him] of his rights under the Union contract and the First and Fourteenth Amendments in violation of 42 U.S.C. § 1985." (Am.

[15]Poli's Amended Complaint does not set forth the subsection of section 1985 upon which Count IX is based. Defendants assume, and Poli does not deny, that Count IX is based on section 1985(3), which provides a remedy for persons injured by conspiracies to deprive them of their rights to equal protection under the laws. de Botton v. Marple Township, 689 F. Supp. 477, 482 (E.D. Pa. 1988). Therefore, the Court will treat Count IX as a section 1985(3) claim, as the parties have done.

Compl. at ¶¶ 144, 149.) SEPTA is not named as a Defendant in this Count, and Poli does not allege that the individual Defendants conspired with SEPTA. Therefore, Defendants' argument that this claim should be dismissed because SEPTA employees cannot conspire with SEPTA is without merit.

The individual Defendants, all employees of SEPTA, can conspire with one another in their individual capacities for purposes of section 1985(3). Novotny v. Great American Federal Sav. & Loan Assoc., 584 F.2d 1235, 1238 (3d Cir. 1978), vacated on other grounds, 442 U.S. 366, 99 S. Ct. 2345 (1979); Bedford v. SEPTA, 867 F. Supp. 288, 295 (E.D. Pa. 1994). A claim under section 1985(3) is subject to dismissal "only to the extent that liability is asserted against governmental employees acting in their official capacities." Scott v. Township of Bristol, Civ.A.No. 90-1412, 1990 WL 178556, at *7 (Nov. 14, 1990); Whichard v. Cheltenham Township, Civ.A.No. 95-3969, 1995 WL 734106, at *1-2 (E.D. Pa. Dec. 6, 1995)(claims against police officers in their official capacities are, in effect, suits against the governmental entity).

Poli brings all of his claims against the individual Defendants in both their individual and their official capacities. The Court will dismiss the conspiracy claim against the individual Defendants in their official capacities. The conspiracy claim against the individual Defendants in their

individual capacities, however, is not subject to dismissal.

Therefore, the Court will grant in part and deny in part Defendants' Motion to Dismiss Count IX.

E. Punitive Damages

1. Against SEPTA

Poli names SEPTA as a defendant in Count X, brought under sections 1981 and 1983, and in Count XI, brought under Title VII. In addition, he seeks punitive damages against SEPTA in Count XII. Punitive damages cannot be recovered against SEPTA under section 1981, section 1983, or Title VII.

SEPTA is considered an agency of the Commonwealth of Pennsylvania. Feingold v. SEPTA, 517 A.2d 1270, 1277 (Pa. 1986). As such, punitive damages are not available in a Title VII action against SEPTA. The 1991 Amendments to Title VII expressly exempt governments, governmental agencies, and political subdivisions from liability for punitive damages under Title VII.

> A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

42 U.S.C.A. § 1981a(b)(1)(West 1994).

SEPTA is also immune from punitive damages under section

1983 and section 1981. Bolden v. SEPTA, 953 F.2d 807, 830-31 (3d Cir. 1991)("SEPTA, like a municipality, is immune from punitive damages under § 1983"); Allstate Transportation Co., Inc. v. SEPTA, Civ.A.No. 97-1482, 1998 WL 67550, at *5 (E.D. Pa. Feb. 13, 1998)(demand for punitive damages brought against SEPTA under sections 1981 and 1983 dismissed); see also Heritage Homes v. Seekonk Water Dist., 670 F.2d 1 (1st Cir. 1982)(municipalities are immune from punitive damages under sections 1981 and 1983). Therefore, the Court will dismiss Poli's claim for punitive damages against SEPTA.

2. Against the Individual Defendants

In Count XII of the Amended Complaint, Poli also seeks punitive damages against the individual Defendants. The Court will dismiss the punitive damages claim against the individual Defendants in their official capacities. Johnakin, 1996 WL 18821, at *3 n. 2. Punitive damages, however, are recoverable against the individual Defendants, in their individual capacities, if they acted with a "reckless or callous disregard of, or indifference to, the rights and safety of others." Keenan v. City of Philadelphia, 983 F.2d 459, 470 (3d Cir. 1992) (citation omitted); Murphy v. SEPTA, Civ.A.No. 93-3213, 1993 WL 313133, at *4 (E.D. Pa. Aug. 9, 1993). "The punitive damage remedy must be reserved . . . for cases in which the defendant's

conduct amounts to something more than a bare violation justifying compensatory damages or injunctive relief." Cochetti v. Desmond, 572 F.2d 102, 106 (3d Cir. 1978).

Reading the Amended Complaint as a whole, and with all reasonable inferences drawn in Poli's favor, the Amended Complaint states sufficient facts to support a demand for punitive damages against the individual Defendants. For example, Poli alleges that Rocher "knowingly directed him to break the law for the purpose of setting him up for discipline." (Am. Compl. at ¶ 76.) Therefore, the Court will not dismiss Poli's claim for punitive damages against the individual Defendants in their individual capacities.

F. Attorney's Fees

Defendants seek the dismissal of Count XIII, in which Poli seeks an award of attorney's fees against all of the Defendants. It is within a district court's discretion to award attorney's fees to the prevailing party under section 1988(b)(West 1998) and Title VII. Murphy, 1993 WL 313133, at *5.

Defendants move to dismiss this claim for attorney's fees on the grounds that Poli is not a prevailing party and so is not entitled to attorney's fees. Defendants misconstrue the allegations set forth in Poli's Amended Complaint. Poli does not allege that he is entitled to attorney's fees. Rather, he

alleges that he believes that he will prove that Defendants violated his rights under section 1981, section 1983, and Title VII, and therefore, he believes that he will be the prevailing party and will be entitled to attorney's fees. The allegations in the Amended Complaint are sufficient to state a claim for attorney's fees. Therefore, the Court will deny Defendants' Motion to Dismiss Count XIII.

IV. CONCLUSION

For the foregoing reasons, the Court will dismiss the following claims for failure to state a claim upon which relief can be given: all First Amendment claims against all Defendants (in Counts III, V, VIII, and X); all due process claims against all Defendants (in Counts I, IV, VI, VII, VIII, and X); the claim against SEPTA independently based on section 1981 (in Count X); the claims against the individual Defendants in their official capacities, independently based on section 1981 and brought under section 1981 via section 1983 (in Counts I, II, IV, VII, and VIII); all claims based on the contract clause of section 1981 against all Defendants (in Counts I, II, IV, VII, VIII, and X); all claims under section 1985(3) against the individual Defendants in their official capacities (in Count IX); and the punitive damages claim against SEPTA and the individual Defendants in their official capacities (in Count XII).

The following claims will go forward: the equal protection claims brought under section 1983 against SEPTA and the individual Defendants (in Counts II, IV, VI, VIII, and Count X); the section 1981 claim against SEPTA, brought via section 1983, and the section 1981 claims against the individual Defendants in their individual capacities, brought directly under section 1981 and via section 1983 (to the extent that such claims are based on the equal benefit clause and/or like punishment clause of section 1981)(in Counts I, II, IV, VII, VIII, and X); the section 1985(3) claim against the individual Defendants in their individual capacities (in Count IX); the Title VII claim against SEPTA (in Count XI); the punitive damages claims against the individual Defendants in their individual capacities (in Count XII); and the attorney's fees claims against all Defendants (in Count XIII).

An appropriate Order follows.

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

JOSEPH F. POLI, JR.	:	CIVIL ACTION
	:	
	:	
v.	:	

:

SOUTHEASTERN PENNSYLVANIA :

TRANSPORTATION AUTHORITY, :

ET AL. : NO. 97-6766

O R D E R

AND NOW, this 2nd day of July, 1998, upon consideration of Defendants' Motion to Dismiss Amended Complaint (Doc. No. 8) and Plaintiff's Response thereto (Doc. No. 9), **IT IS HEREBY ORDERED** that

1. Defendants' Motion to Dismiss Amended Complaint is GRANTED IN PART and DENIED IN PART.

2. The following claims are DISMISSED from the Amended Complaint: all First Amendment claims against all Defendants (in Counts III, V, VIII, and X); all due process claims against all Defendants (in Counts I, IV, VI, VII, VIII, and X); the direct claim under Section 1981 against SEPTA (in Counts X); the claims against the individual Defendants in their official capacities, independently based on section 1981 and brought under section 1981 via section 1983 (in Counts I, II, IV, VII, and VIII); all claims based on the contract clause of section 1981 against all Defendants (in Counts I, II, IV, VII, VIII, and X); all claims under Section 1985(3) against all individual Defendants in their official capacities (in Count IX); and the punitive damages claims against SEPTA and all individual Defendants in their official capacities (in Count XII).

3. The following claims will go forward: the equal protection claims brought under section 1983 against SEPTA and the individual Defendants (in Counts II, IV, VI, VIII, and Count X); the section 1981 claim against SEPTA, brought via section 1983, and the section 1981 claims against the individual Defendants in their

individual capacities, brought directly under section 1981 and via section 1983 (to the extent that such claims are based on the equal benefit clause and/or like punishment clause of section 1981)(in Counts I, II, IV, VII, VIII, and X); the section 1985(3) claim against the individual Defendants in their individual capacities (in Count IX); the Title VII claim against SEPTA (in Count XI); the punitive damages claims against the individual Defendants in their individual capacities (in Count XII); and the attorney's fees claims against all Defendants (in Count XIII).

BY THE COURT:

_____
John R. Padova, J.