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

KEVAN HINSHILLWOOD	:	CIVIL ACTION
	:	
v.	:	
	:	
COUNTY OF MONTGOMERY, et al.	:	NO. 00-4283

MEMORANDUM AND ORDER

HUTTON, J. February 20, 2002

Currently before the Court are Defendants' Motion for Summary Judgment (Docket No. 8), Plaintiff's Reply in Opposition to Defendants' Motion for Summary Judgment (Docket No. 9), and Defendants' Reply Brief in Further Support of Their Motion for Summary Judgment (Docket No. 12). For the reasons stated below, Defendant's Motion for Summary Judgment is **GRANTED IN PART; DENIED IN PART**.

I. BACKGROUND

On August 22, 2000, Plaintiff Kevan Hinshillwood ("Plaintiff") filed the instant action against Montgomery County, the Montgomery County Correctional Facility ("MCCF"), Warden Lawrence Roth, and Deputy Warden Julio Algarin (collectively, the "Defendants") for a violation of Plaintiff's rights under the United States Constitution. Plaintiff worked as a correctional officer at the MCCF from 1993 until his termination on April 14, 2000. In 1999, Plaintiff was one of seven or eight correctional officers involved

in pro-unionization activities at the MCCF. According to Plaintiff, he attended a roll call meeting on October 22, 1999 where Defendant Deputy Warden Julio Algarin complained about the unionization effort and referred to those who were involved in the activities as "Judas."

On April 10, 2000, Plaintiff was involved in an incident involving the distribution of food trays to inmates in H Pod at the MCCF. Following the incident, Plaintiff refused to indorse an incident report, which he claims was false because it named the wrong inmates. At a meeting held before Deputy Warden Algarin regarding the incident, Plaintiff was ordered to prepare his own incident report. Discrepancies continued to persist in the reports filed by the correctional officers involved in the incident. Four days after the incident in H Pod, Plaintiff's employment with the MCCF was terminated. Plaintiff appealed his termination to the Prison Board of Inspectors, but in an untimely fashion, and the Prison Board upheld his termination.

Plaintiff then commenced the instant action by filing a five-count complaint alleging that Defendants violated his rights under 42 U.S.C. §§ 1981, 1982, 1983, 1985(1-3), 1986, 1988 and the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution. In addition, Plaintiff claims supplemental violations of various state laws. Defendants now move for summary judgement on all of Plaintiff's claims.

II. LEGAL STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment has the initial burden of showing the basis for its motion. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Once the movant adequately supports its motion pursuant to Rule 56(c), the burden shifts to the nonmoving party to go beyond the mere pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. See id. at 324. A genuine issue is one in which the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

When deciding a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the nonmovant. Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992), cert. denied, 507 U.S. 912, 113 S.Ct. 1262, 122 L.Ed.2d 659 (1993). Moreover, a court may not consider the credibility or weight of the evidence in deciding a motion for

summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent. Id. Nonetheless, a party opposing summary judgment must do more than just rest upon mere allegations, general denials or vague statements. Trap Rock Indus. Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir. 1992).

III. DISCUSSION

In his five-count Complaint, Plaintiff alleges that Defendants violated a myriad of federal and state laws. Neither Plaintiff's Complaint nor his response to the instant motion are models of clarity and specificity. The Court has nevertheless gleaned from the Complaint that Plaintiff intends to set forth a cause of action under 42 U.S.C. §§ 1981, 1982, 1983, 1985(1-3), 1986, 1988 and the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution. Moreover, Plaintiff summarily alleges violations of Pennsylvania law including intentional infliction of emotional distress, negligent infliction of emotional distress, fraudulent misrepresentation, negligent misrepresentation, wrongful interference with contract rights, official oppression, abuse of process and malicious prosecution. The Court will address Defendants' objections to each claim in turn.

A. Plaintiff's Section 1983 Claim

Plaintiff alleges that Defendants decision to terminate his employment with the MCCF was retaliatory, in violation of his First

Amendment rights as protected by 42 U.S.C. § 1983.[1] A public employee's retaliation claim for engaging in a protected activity is evaluated under a three-part test. See Baldassare v. State of N.J., 250 F.3d 188, 194-95 (3d Cir. 2001); Suppan v. Dadonna, 203 F.3d 228, 235 (3d Cir. 2000). First, Plaintiff must establish that he engaged in speech or an activity protected by the First Amendment. See Baldassare, 250 F.3d at 195. In order for speech to be protected, it must relate to a matter of public concern, and Plaintiff's interest in the speech must outweigh the public employer's interest in promoting the efficiency of public service it provides through its employees. See id. Second, Plaintiff must "show the protected activity was a substantial or motivating factor in the alleged retaliatory action." Id. Third, "the public employer can rebut the claim by demonstrating 'it would have reached the same decision ... even in the absence of the protected conduct.'" Id.

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[1] Section 1983 provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

1. Public Concern

In order for speech to be protected, it must address a matter of public concern. Azzaro v. County of Allegheny, 110 F.3d 968, 975 (3d Cir. 1997). Speech addresses a matter of public concern when it can fairly be considered to relate "to any matter of political, social, or other concern to the community." Watters v. City of Phila., 55 F.3d 886, 892 (3d Cir. 1995). In this Circuit, the primary consideration is whether Plaintiff's speech enhances the process of self-governance. Azzaro, 110 F.3d at 977. Whether Plaintiff's conduct was protected is a question of law properly decided by the Court. Id. at 975.

In the instant case, Defendants contend that Plaintiff was not engaged in a matter of public concern when he distributed union authorization cards in the parking lot of the MCCF. See Defs.' Mot. for Summ. J. at 11. Because Plaintiff did not bring any union materials into the Facility and did not discuss the union campaign with the Facility's management, Defendants argue that his "First Amendment interests are so slight as to be undeserving of protection." Id. The Court disagrees.

Plaintiff's First Amendment claim is a "hybrid" that focuses on a public employee's right to free association in order to organize a labor union, as well as the speech used to achieve that end. In Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983), the United States Supreme Court found that a public

employee's speech involves a matter of public concern if it can "be fairly considered as relating to any matter of political, social or other concern to the community." 461 U.S. at 146. While courts unanimously apply Connick's "public concern" test to matters involving speech, the Circuit Courts are split as to whether Connick requires public employees to demonstrate that their associational activity also relates to a matter of public concern.[2] As the Second Circuit recently explained:

> it is anything but clear whether the public concern requirement applies to associational claims made by government employees. Since the Supreme Court's decision in Connick . . ., a public concern has been a prerequisite to First Amendment protection of public employee speech. Some courts have read Connick to say that a public concern must also be raised for government employees to state a First Amendment associational claim, while others have refused to apply the public concern requirement beyond the category of speech.

Clue v. Johnson, 179 F.3d 57, 60 n.2 (2d Cir. 1999).

In Sanguigni v. Pittsburgh Board of Public Education, 968 F.2d 393 (3d Cir. 1992), the Third Circuit, while recognizing the conflict, failed to take a position. See 968 F.2d at 400 ("[W]e do not find it necessary to confront the issue whether Connick generally applies to claims involving the freedom of association."). Rather, the court held that Connick's public

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[2] See Griffin v. Thomas, 929 F.2d 1210, 1212-14 (7th Cir. 1991) (holding that Connick test applies to both free speech and free association claims); Boals v. Gray, 775 F.2d 686 (6th Cir. 1985) (same); Coughlin v. Lee, 946 F.2d 1152, 1158 (5th Cir. 1991) (limiting Connick to free speech claims and thus not requiring public employees to demonstrate that their associational activity relates to a matter of public concern); Hatcher v. Board of Pub. Educ. & Orphanage, 809 F.2d 1546, 1558 (11th Cir. 1987) (same).

concern requirement governed a public school teacher's freedom of association claim because, like the plaintiff in Connick, "Sanguigni's freedom of association claim . . . is based on speech that does not implicate associational rights to any significantly greater degree than the employee speech in Connick." Id. "The employee in Connick circulated a questionnaire to her colleagues in an apparent effort to elicit their support for her position with respect to the office's transfer policy, its handling of grievances, and other matters." Id. Similarly, Sanguigni made statements in a school newsletter with the intention of gathering opposition to the school administration. See id.

In declining to waive Connick's public concern requirement in Sanguigni, the Third Circuit specifically distinguished its earlier decision in Labov v. Lalley, 809 F.2d 220 (3d Cir. 1987), in which the court "never mentioned Connick either with respect to the associational claim or the free speech claim and, in fact, did not address the free speech claim at all." Sanguigni, 968 F.2d at 400. In Labov, a public employer was accused of retaliating against a deputy sheriff who attempted to organize a collective bargaining unit. See Labov, 809 F.2d at 222. The Third Circuit asserted that "efforts of public employees to associate together for the purpose of collective bargaining involve associational interests which the First Amendment protects from hostile state action." 809 F.2d at 222-23.

Unlike Sanguigni, Plaintiff's speech in the instant case implicates one of the most recognized associational rights protected by the First Amendment – the right to unionize. The First Amendment's protection of the right to freedom of speech extends to union activities. See Thomas v. Collins, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430 (1945); Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940); Hotel & Rest. Employees & Bartenders Int'l Union Local 54 v. Read, 832 F.2d 263, 265 (3d Cir. 1987); Conn. State Fed'n of Teachers v. Bd. of Ed. Members, 538 F.2d 471, 478 (2d Cir. 1976); Hanover Township Fed'n of Teachers v. Hanover Cmty. Sch. Corp., 457 F.2d 456 (7th Cir. 1972). Moreover, "[s]peech arising in the context of union organization efforts has long been held to be a matter of public concern." Terry v. Vill. of Glendale Heights, Civ. A. No. 86-4468, 1989 WL 106623, at *6 (N.D. Ill. Sept. 13, 1989) (citing McGill v. Bd. of Educ., 602 F.2d 774 (7th Cir. 1979)). The instant case is most similar to Labov, and therefore, the Court will not halt the inquiry into Plaintiff's section 1983 claim on this point.

2. Public Employer's Interest

The Court must now decide whether the Plaintiff's interest in the protected activity is outweighed by any injury the speech may cause to the MCCF. See Pickering v. Bd. of Ed., 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968); see also Watters v. City of Phila., 55 F.3d 886, 895 (3d Cir. 1995). On one side of the

balance is Plaintiff's First Amendment right, on the other is Montgomery County's interest "in promoting the efficiency of the public services it performs through its employees." Pickering, 391 U.S. at 568. In weighing the respective rights and interests of the parties, the Court considers whether Plaintiff's actions "impair[ed] discipline by superiors or harmony among co-workers, ha[d] a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impede[ed] the performance of the speaker's duties or interfere[d] with the regular operation of the enterprise." Rankin v. McPherson, 483 U.S. 378, 388, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987). The public employer's side of the scale focuses mostly on the interference or potential interference with the effective functioning of the facility. See id., 483 U.S. at 389. Courts should also consider "the manner, time, and place of the employee's expression" as well as "the context in which the dispute arose." See id. at 388.

In the instant case, Defendants assert that Plaintiff's protected activity presented a significant potential for disruption at the MCCF. In support of their assertion, Defendants rely primarily on the Third Circuit's decision in Green v. Philadelphia Housing Authority, 105 F.3d 882, 887 (3d Cir. 1997). See Defs.' Mot. for Summ. J. at 15-16. Green, however, is inapposite to the case at bar. In Green, the plaintiff was a member of the Housing Authority Police Department's Drug Elimination Task Force ("DETF")

who attended a bail hearing to testify as a character witness on behalf of a friend's son. See id. at 884. After word of his attendance at the hearing reached his superiors, the plaintiff was transferred out of the DETF. See id. The Court found that the risk of disruptiveness outweighed the plaintiff's interest in testifying since other officers no longer wished to work with the plaintiff because they believed he had ties to organized crime. See id. Moreover, the Court found that, "because of the nature of DETF work, any perceived breach of trust and security could reasonably constitute a threat to the DETF, its officers and its relationships with other police drug units and the community it serves." Id. at 888-89.

The Court finds that Green provides little guidance as to Defendants' interest in the instant case because neither the Plaintiff's position nor the reasons for his actions implicate the same fundamental issues associated with sensitive drug enforcement officials potentially being involved with people associated with organized crime. The Court does not dispute that Defendants have a significant interest in effective and safe maintenance of the MCCF. Nevertheless, Defendants conclusory statements that Plaintiff's "activities could reasonably constitute a threat to the [MCCF's] mission, and could endanger the safety of other . . . employees" are unsupported by the evidence. Rather, the facts of the instant case, viewed in the light most favorable to Plaintiff,

demonstrate that the potential for disruption at the Facility as a result of Plaintiff's activities was minimal at best.

Plaintiff did not distribute the union authorization cards within the Facility itself, but in the parking lot. Moreover, his unionization activities did not interfere with his job performance since he advocated for a union after working hours. Plaintiff was not a policymaker at the MCCF, and his job did not necessitate any special personal loyalty or confidence. Nor did Plaintiff's activities "impugn the integrity" of his supervisors. Watters v. City of Phila., 55 F.3d 886, 898 (3d Cir. 1995). Defendants' motion is devoid of any examples as to how Plaintiff's activities could have or did impair discipline or harmony among co-workers, impede the performance of the Plaintiff's duties or interfere with the regular operation of the MCCF. See Rankin, 483 U.S. at 388. The Court finds that Plaintiff's interest in his protected activity is not outweighed by any injury the activity could potentially cause to Defendants. Therefore, the Plaintiff's speech is considered a protected activity.

3. Substantial and Motivating Factor

Once it is established that the Plaintiff's activity is protected, the Plaintiff must show that it was a substantial or motivating factor in the alleged retaliatory action. See Suppan v. Dadonna, 203 F.3d 228, 235 (3d Cir. 2000). If Plaintiff carries this burden, the Defendants must then show by a preponderance of

the evidence that they would have terminated Plaintiff even in the absence of the protected conduct. Nicholas v. Pa. State Univ., 227 F.3d 133, 144 (3d Cir. 2000). Defendants argue that Plaintiff has failed to provide any evidence which would link his protected activity with the MCCF's decision to terminate his employment. The Court disagrees.

Plaintiff has presented evidence from which a reasonable jury could infer that he was terminated because of his unionization activities. Plaintiff sets forth "statements by decisionmakers reflecting hostility to plaintiff['s] union activities . . ." Suppan, 203 F.3d at 237. According to Plaintiff, at roll call meeting on October 22, 1999, Defendant Algarin told a group of MCCF employees, "'There's no way we will ever have a union here. . . . I've done a lot of favors for all you guys here. Why would you guys do this to me?'" Dep. of Kevan Hinshillwood, Apr. 5, 2001, at 142. Algarin proceeded to refer to certain employees as "Judas.'" Id. Only twenty minutes before this meeting, Plaintiff contends that he had a conversation with Captain Ottinger about the county sheriffs who were unionizing. See id. at 132-33, 138. Plaintiff told the Captain that "we should get what they're getting." Id. at 133. Moreover, according to Plaintiff's deposition testimony, he was distributing union cards and literature up until January or February of 2000. See id. at 134. Plaintiff further testified that it was well known at the MCCF that if you wanted information

on the union, “talk to [Hinshillwood].” Id. at 139. This evidence, if credited, is sufficient to prove that Plaintiff’s protected conduct was a substantial factor in his termination.

Defendants claim that Plaintiff has failed to prove his termination was motivated by his unionizing campaign because Plaintiff would have been terminated regardless of his protected activity. The Court finds that this issue is a factual dispute which should go to the jury. A plaintiff "need not prove at th[e summary judgment] stage that the employer’s purported reason for its actions was false, but the plaintiff must criticize it effectively enough so as to raise a doubt as to whether it was the true reason for the action." Solt v. Alpo Pet Foods, Inc., 837 F.Supp. 681, 684 (E.D. Pa. 1993) (citing Naas v. Westinghouse Elec. Corp., 818 F.Supp. 874, 877 (W.D. Pa. 1993)). As previously discussed, Plaintiff’s termination could reasonably raise an inference that the Plaintiff was being disciplined for his unionization efforts. Therefore, the Court finds that a reasonable jury could find that the Plaintiff's unionizing activity was a motivating factor in his termination from the MCCF. .

B. Section 1983 – Policy or Custom

A municipality cannot be held directly liable under section 1983 for the unconstitutional actions of their employees pursuant to a theory of respondeat superior in the absence of an official

governmental policy or custom. See Monell v. Dept. of Social Serv. of City of New York, 436 U.S. 658, 690-91, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Defendants contend that Plaintiff's section 1983 claim should be dismissed against Montgomery County, the MCCF and the individual defendants in their official capacities because Plaintiff is unable "to establish any policy or custom of 'deliberate indifference' by the Prison Board (or any policy maker) that was the 'moving force' behind any alleged constitutional violation . . ." Defs.' Reply Brief at 16.

In order to hold Montgomery County liable under this theory, Plaintiff must show that there was an action by a relevant policy maker and that it was taken with "deliberate indifference." See Bryan Co., Oklahoma v. Brown, 520 U.S. 397, 418, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997). Here, Plaintiff has a relevant policy maker in Warden Roth and Deputy Warden Algarin. In addition, as previously discussed, a reasonable jury could conclude that Plaintiff's termination for his involvement the food tray incident in H Pod was a pretext to retaliate against Plaintiff for his unionization campaign. Therefore, a jury, if they choose to credit Plaintiff's testimony, could find that Defendants Roth and Algarin acted with deliberate indifference towards Plaintiff's rights and municipal liability could be imposed.

With regards to individual defendants sued in their official capacities, the United States Supreme Court, in the wake of Monell,

found "[t]here is no longer a need to bring official-capacity actions against local government officials, for under Monell, local government units can be sued directly for damages and injunctive or declaratory relief." Kentucky v. Graham, 473 U.S. 159, 169 n.14, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985); see also Satterfield v. Borough of Schuylkill Haven, 12 F.Supp.2d 423, 432 (E.D. Pa. 1998). By naming Warden Roth and Deputy Warden Algarin as defendants to this suit in their official capacities, Plaintiff has in essence named the County as a defendant three times. See Satterfield, 12 F.Supp.2d at 432. The Court grants Defendants motion for summary judgment as to Defendants Roth and Algarin in their official capacities only. The Court notes that the suit against Montgomery County is premised upon the misconduct of its employees, and that the County is responsible for the misconduct of its employees in their official capacities. Defendants Roth and Algarin remain as parties to the suit in their individual capacities.

C. The Individual Defendants and Qualified Immunity

Defendants argue that Warden Roth and Deputy Warden Algarin should not be held personally liable for any violation of Plaintiff's constitutional rights because they are protected by qualified immunity. See Defs.' Reply Brief at 15. Public officials performing discretionary functions are shielded from personal liability under the doctrine of qualified immunity so long as their conduct does not violate clearly established

constitutional rights known to a reasonable person. See Wilson v. Layne, 526 U.S. 603, 615, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999). "'Clearly established' for the purposes of qualified immunity means that '[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" Id., 526 U.S. 616 (citations omitted).

As previously discussed, Plaintiff has presented enough evidence from which a reasonable fact finder could conclude that his termination was in retaliation for his engaging in an activity protected by the First Amendment. The right to advocate for a labor union is clearly established by the First Amendment's guarantee of freedom of association. Moreover, a reasonable MCCF warden or deputy warden would understand that disciplining and terminating Plaintiff for distributing union material violated Plaintiff's right. Therefore, Plaintiff has set forth sufficient evidence which, if credited, could lead a reasonable jury to conclude that Roth and Algarin are not shielded from personal liability under the doctrine of qualified immunity because their conduct violated Plaintiff's clearly established constitutional right, and a reasonable warden and deputy warden would have been aware that Plaintiff's activity was protected. Accordingly, the Court will not grant summary judgment as to the individual defendants on this ground.

D. Plaintiff's Section 1981 Claim

To sustain a section 1981 discrimination claim, Plaintiff must show that Defendants intentionally discriminated against him "because of race in the making, performance, enforcement or termination of a contract or for such reason denied [him] the enjoyment of the benefits, terms or conditions of the contractual relationship." McBride v. Hosp. of the Univ. of Pa., Civ. A. No. 99-6501, 2001 WL 1132404, at *3 (E.D. Pa. Sept. 21, 2001); see also Brown v. Philip Morris, Inc., 250 F.3d 789, 797 (3d Cir. 2001). Race discrimination claims brought under section 1981 are analyzed under the familiar framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See Schurr v. Resorts Int'l Hotel, Inc., 196 F.3d 486, 499 (3d Cir. 1999). Under the traditional McDonnell Douglas framework, the plaintiff bears the initial burden of establishing a prima facie case of employment discrimination by showing that he (1) was a member of a protected group, (2) was qualified for his position, (3) suffered an adverse employment action, and (4) that similarly situated employees, who are not members of the protected group, were treated more favorably. See Ezold v. Wolf, Block, Schorr and Solis Cohen, 983 F.2d 509, 522 (3d Cir. 1993).

In the instant case, Plaintiff is not a member of a racial minority. The Third Circuit Court of Appeals has recognized that suits by white plaintiffs asserting "'reverse discrimination' are viable even though the plaintiff is not a member of a racial

minority." Kondrat v. Ashcroft, 167 F.Supp.2d 831, 835 (E.D. Pa. 2001). However, in order to make such a claim, Plaintiff must set forth sufficient "evidence to allow a fact finder to conclude that the employer is treating some people less favorably than others based upon . . . race . . ." Id. at 835-36 (citing Iadimarco v. Runyon, 190 F.3d 151, 161 (3d Cir. 1999)). Plaintiff is unable to meet this burden.

The facts of the instant case, when viewed in the light most favorable to Plaintiff, fail to support an inference that Plaintiff endured disparate treatment because of his race. In his deposition, Plaintiff testified that "there's favoritism [in the MCCF] like you wouldn't believe. What we call the boys, they got all the good posts." See Dep. of Kevan Hinshillwood, Apr. 5, 2001, at 49. Plaintiff explained that these "boys" who were appointed to the "favorite posts" "hung out with the captains and lieutenants, and they were all boys." Id. at 50. When asked whether the alleged favoritism was race-based, Plaintiff candidly admitted that some of the "boys" who would get "good posts" were black, and some were Plaintiff's race, white. See id. at 51-52. Again during his deposition, Plaintiff admitted that some favoritism was bestowed upon white officers. See id. at 61. This evidence is insufficient to present a prima facie case of reverse race discrimination under section 1981.

In cases of reverse race discrimination, the Third Circuit has

clearly stated that "plaintiff [must] present sufficient evidence to allow a fact finder to conclude that the employer is treating some people less favorably than others based upon . . . [race]." Iadimarco v. Runyon, 190 F.3d 151, 161 (3d Cir. 1999). There is no evidence that Plaintiff was treated differently from other similarly situated employees because of his race. As such, there is no factual basis from which a reasonable fact finder could infer a causal link between Plaintiff's race and his termination. Accordingly, the Court grants Defendants summary judgment on Plaintiff's section 1981 claim.

E. Plaintiff's Section 1982 Claim

Section 1982 provides that:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U.S.C. § 1982. The Defendants argue that Plaintiff's claim under section 1982 must fail because Plaintiff has not been deprived of any real or personal property. Plaintiff admits that he was an employee at will. See Dep. of Kevan Hinshillwood, Apr. 5, 2001, at 66. Courts in this District have consistently held that employment claims do not fall under the protection of section 1982 because the interest implicated in such cases is neither real nor personal property. See Ocasio v. Lehigh Valley Family Health Cntr., Civ. A. No. 99-4091, 2000 WL 1660153, at *2 (E.D. Pa. Nov. 6, 2000); Altieri v. Pa. State Police, No. 98-5495, 2000 U.S. Dist.

LEXIS 5041, at *44-45 (E.D. Pa. Apr. 19, 2000). Based upon the pleadings, depositions and admissions on file, the Court finds that no genuine issue of material fact exists as to whether Plaintiff was deprived of real or personal property. Therefore, Defendants' Motion for Summary Judgment is granted as to Plaintiff's section 1982 claim.

F. Intentional Infliction of Emotional Distress

To establish a claim of intentional infliction of emotional distress, Plaintiff must show that Defendants' conduct was: (1) extreme and outrageous; (2) intentional or reckless; and (3) caused severe emotional distress. Wisniewski v. Johns Manville Corp., 812 F.2d 81, 85 (3d Cir. 1987). Under Pennsylvania law, a plaintiff may recover for intentional infliction of emotional distress only "where a reasonable person normally constituted would be unable to adequately cope with the mental stress engendered by the circumstances of the event." Mastromatteo v. Simock, 866 F.Supp. 853, 859 (E.D. Pa. 1994)(quoting Kazatsky v. King David Mem'l Park, 527 A.2d 988, 993 (Pa. 1987)). It is the Court's responsibility to determine if the conduct alleged in the instant case reaches the requisite level of outrageousness. Cox v. Keystone Carbon, 861 F.2d 390, 395 (3d Cir. 1988).

Defendants argue that Plaintiff's claim for intentional infliction of emotional distress should be dismissed because Plaintiff has not established sufficiently outrageous conduct or

offered any medical evidence of extreme emotional distress. See Defs.' Reply Brief at 19. According to Plaintiff, he has set forth a cause of action for intentional infliction of emotional distress because "Plaintiff has alleged a pattern of racial harassment and has alleged that defendants retaliated against her [sic] for complaining about sexual harassment." Pl.'s Resp. to Def. Mot. for Summ. J. at 16. As previously discussed, Plaintiff failed to make out a prima facie case of race discrimination, and Plaintiff alleges no claim whatsoever based upon sexual harassment.

Generally, it is insufficient "that the defendant has acted with intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by malice, or a degree of aggravation that would have entitled a plaintiff to punitive damages for another tort." Hoy v. Angelone, 720 A.2d 745, 754 (Pa. 1998)(citing Rest. (2d) Torts § 46, cmt. d). Liability has been found only when the conduct "is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society." Id. (citations omitted).

This Court finds that Defendants are entitled to summary judgment on Plaintiff's claim for intentional infliction of emotional distress for two reasons. First, Plaintiff is unable to prove that he actually suffered any severe distress. The

Pennsylvania Supreme Court has held that a claim of intentional infliction of emotional distress requires "expert medical confirmation that the plaintiff actually suffered the claimed emotional distress." Kazatsky, 527 A.2d at 995. Plaintiff has advanced absolutely no medical evidence to sustain his claim. The only evidence that Plaintiff submits is his own testimony, which is not sufficient to sustain his evidentiary burden. Second, the conduct alleged by Plaintiff does not rise to a sufficient level of egregious conduct where courts have allowed claims for intentional infliction of emotional distress to proceed. See, e.g., Pryor v. Mercy Cath. Med. Ctr, Civ. A. No. 99-0988, 1999 WL 956376, at *3 (E.D. Pa. Oct. 19, 1999); Hides v. CertainTeed Corp., Civ. A. No. 94-7352, 1995 WL 458786, at *4 (E.D. Pa. July 26, 1995). Therefore, summary judgment is granted on Plaintiff's claim of intentional infliction of emotional distress since he is unable to sustain his evidentiary burden with expert medical proof that he actually suffered severe distress, and since the conduct alleged does not rise to the level of outrageous conduct required in order to sustain such a claim.

G. Plaintiff's Claim for Punitive Damages

Finally, Defendants seek summary judgment to the extent Plaintiff sets forth a claim for punitive damages. In the context of section 1983 claims, punitive damages are not recoverable against municipalities. Newport v. Fact Concerns, Inc., 453 U.S.

247, 260 (1981). They are, nevertheless, available against state officials sued in their individual capacity. Combs v. School Dist. of Phila., Civ. A. No. 99- 3812, 1999 WL 1077082, at *2 (E.D. Pa. Nov. 29, 1999); see also Coleman v. Kaye, 87 F.3d 1491, 1497 (3d Cir. 1996), cert. denied, 519 U.S. 1084 (1997). Plaintiff purports to sue Defendants Roth and Algarin in their individual capacities. See Pl.'s Compl. at ¶¶ 10-11. Therefore, punitive damages could be awardable against those Defendants under section 1983. Accordingly, summary judgment is granted only as to Plaintiff's claims for punitive damages against Montgomery County.

H. Uncontested Claims

With regards to Plaintiff's federal causes of action, Plaintiff failed to contest Defendants' Motion for Summary Judgment on his claims under sections 1985(1-3), 1986 and 1988[3], and the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution.[4] See Pl.'s Resp. to Defs.' Mot. for Summ. J.

[3] Since Plaintiff may proceed on his section 1983 claim, the Court will not grant summary judgment on Plaintiff's section 1988 claim.

[4] Plaintiff pleads in his complaint that Defendants violated his rights under the First, Fourth, Fifth and Fourteenth Amendments. In his brief, however, he does not make any arguments under the Fourth and Fifth amendments, nor does he present evidence that his right to be free from unreasonable searches and seizures or his right not to incriminate himself or any other right under those amendments was violated. The Court concludes, without the benefit of any argument from the Plaintiff, that only his First Amendment rights, as applied to state and local governments through the Fourteenth Amendment, are at issue in this case, and thus the Court will not address the Fourth and Fifth amendments. To the extent that Plaintiff attempts to allege a violation of due process, the analysis applies only to the due process requirements of the Fourteenth Amendment because Defendants are state actors. The Fifth Amendment applies to the federal government denying a person due process of the law. Local 1498, Am. Fed'n of Gov't Employees v. Am. Fed'n of Gov't Employees, AFL/CIO, 522 F.2d 486, 492 (3d Cir. 1975). No claims have been made against the federal government, and therefore, an action under the Fifth Amendment is completely without merit.

Moreover, with regards to Plaintiff's state law claims, Plaintiff failed to contest Defendants' Motion for Summary Judgment on Plaintiff's claims for negligent infliction of emotional distress, fraudulent misrepresentation, negligent misrepresentation, wrongful interference with contract rights, official oppression, abuse of process and malicious prosecution. Rather, the only claims Plaintiff briefed in his response to the instant motion are Plaintiff's claims under sections 1981, 1982, 1983 and intentional infliction of emotional distress. Given the confusing nature of Plaintiff's complaint and Plaintiff's failure contest the instant motion as to these claims, the Court is disadvantaged in its analysis. In the interest of justice, the Court will examine Plaintiff's claims and Defendants' objections thereto on the merits in order to determine if summary judgment is appropriate.

1. Section 1985(1)-(2)

Section 1985(1) "governs interference with the duties of federal officials only . . . ." Robison v. Canterbury Village, Inc., 848 F.2d 424, 430 n.5 (3d Cir. 1988). Accordingly, to state a claim under section 1985(1), Plaintiff would have to allege he is a federal officer and that Defendants interfered with his official federal duties. See Indus. Design Serv. Co. v. Upper Gwynedd Township, Civ. A. No. 91-7621, 1993 WL 19756, at *4 (E.D. Pa. Jan. 27, 1993) ("Section 1985(1) prohibits interference with federal officials in the performance of their duties. . . . Since

plaintiffs have not alleged any facts involving . . . a federal officer . . . they fail to state a cause of action under [this] provision[]."). Here, plaintiff makes no allegations of that sort and therefore the Court grants Defendants summary judgment on Plaintiff's section 1985(1) claim.

Section 1985(2) targets the obstruction of justice in federal and state courts. See Indus. Design, 1993 WL 19756, at *4. Plaintiff has not alleged any facts involving a federal officer, a federal court, or a state court. Accordingly, he fails to state a cause of action under this provision as well, and the Court grants Defendants summary judgment as to the section 1982 claim.

2. Section 1985(3) and Section 1986

"In general, the conspiracy provision of [section] 1985(3) provides a cause of action under rather limited circumstances against both private and state actors." Brown v. Philip Morris, Inc., 250 F.3d 789, 805 (3d Cir. 2001). For a section 1985(3) claim to survive a motion to dismiss a plaintiff must allege: "(1) a conspiracy; (2) motivated by a racial or class based discriminatory animus designed to deprive, directly or indirectly, any person or class of persons to the equal protection of the laws; (3) an act in furtherance of the conspiracy; and (4) an injury to person or property or the deprivation of any right or privilege of a citizen of the United States." Lake v. Arnold, 112 F.3d 682, 685 (3d Cir. 1997). "There are no precise parameters defining the

boundaries of 'class' within the meaning of section 1985(3)." Id. The United States Supreme Court "strictly construed the requirement of class-based invidious animus . . . finding that commercial and economic animus could not form the basis for a section 1985(3) claim." Id. While the Court has "left open the possibility that section 1985(3) might apply to class-based animus not based upon race," the Court has conclusively held that in order to constitute an "'otherwise class-based invidiously discriminatory animus,'" the plaintiff's "must be 'something more than a group of individuals who share a desire to engage in conduct that the § 1985(3) defendant disfavors.'" Id. (quoting Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 269, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993)).

As discussed above, Plaintiff is unable to sustain a prima facie case of reverse race discrimination. The only identifiable class in the instant case are those MCCF employees who wish to engage in the same conduct, forming a union. Plaintiff's allegations of a retaliatory conspiracy clearly fail to meet the section 1985(3) standard. See Sunkett v. Misci, Civ. A. No. 99-5371, 2002 U.S. Dist. LEXIS 987, at *23 (D. N.J. Jan. 24, 2002). Therefore, the Court grants summary judgment on Plaintiff's section 1985(3) and 1986 claims.[5]

[5] In order for a section 1986 claim to be valid, Plaintiff must first establish a preexisting violation of section 1985. Clark v. Clabaugh, 20 F.3d 1290, 1295 (3d Cir. 1994).

3. Plaintiff's Remaining State Law Claims

Plaintiff's remaining state law claims are likewise baseless. Under 42 Pa. Cons. Stat. Ann. § 8542 (the "Tort Claims Act"), local agencies are immune from liability for "any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person." Id. at § 8541. The Act provides eight exceptions for acts of negligence in the areas of (1) vehicle liability; (2) care, custody, or control of personal property; (3) real property; (4) trees, traffic controls and street lighting; (5) utility service facilities; (6) streets; (7) sidewalks; and (8) care, custody or control of animals. Id. at § 8542(b). Plaintiff's claims do not fall into any of the enumerated exceptions to the Tort Claims Act. Moreover, Plaintiff is unable to maintain a cause of action for wrongful interference with contract rights, official oppression, abuse of process and malicious prosecution because, as Plaintiff admits, he was never prosecuted, he was not aware of any misrepresentation and he was an employee at-will without a written contract. See Dep. of Kevan Hinshillwood, Apr. 5, 2001, at 66-67. Accordingly, summary judgement is entered in favor of Defendants on these claims.

IV. CONCLUSION

In Summary, the Court grants Defendants' Motion for Summary Judgment as to Plaintiff's federal claims under sections 1981, 1982, 1985(1-3) and 1986. Summary judgement is denied as to

Plaintiff's claims under section 1983 and 1988. The Court, however, grants Defendants motion for summary judgment as to Defendants Roth and Algarin in their official capacities only. With regards to the supplemental state law claims, the Court grants summary judgment as to Plaintiff's claims for intentional infliction of emotional distress, negligent infliction of emotional distress, fraudulent misrepresentation, negligent misrepresentation, wrongful interference with contract rights, official oppression, abuse of process and malicious prosecution.

An appropriate Order follows.

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

KEVAN HINSHILLWOOD	:	CIVIL ACTION
	:	
v.	:	
	:	
COUNTY OF MONTGOMERY, et al.	:	NO. 00-4283

O R D E R

AND NOW, this 20th day of February, 2002, upon consideration of Defendants' Motion for Summary Judgment (Docket No. 8), Plaintiff's Reply in Opposition to Defendants' Motion for Summary Judgment (Docket No. 9) and Defendants' Reply Brief in Further Support of Their Motion for Summary Judgment (Docket No. 12), IT IS HEREBY ORDERED that Defendants' Motion is **GRANTED IN PART; DENIED IN PART**.

IT IS FURTHER ORDERED THAT

((1) Defendants' Motion for Summary Judgment as to Plaintiff's claims under sections 1983 and 1988 is **DENIED**;

(2) Defendants' Motion for Summary Judgment as to Plaintiff's section 1981 claim is **GRANTED**;

(3) Defendants' Motion for Summary Judgment as to Plaintiff's section 1982 claim is **GRANTED**;

(4) Defendants' Motion for Summary Judgment as to Plaintiff's intentional infliction of emotional distress claim is **GRANTED**;

(5) Defendants' Motion for Summary Judgment as to Plaintiff's claims under section 1985(1-3) and 1986 is **GRANTED**;

(6) Defendants' Motion for Summary Judgment as to Plaintiff's state law claims for intentional infliction of emotional distress, negligent infliction of emotional distress, fraudulent misrepresentation, negligent misrepresentation, wrongful interference with contract rights, official oppression, abuse of process and malicious prosecution is **GRANTED**.

BY THE COURT:

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HERBERT J. HUTTON