IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

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| RANDY HOLLOWAY, | ) | |
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| Plaintiff, | ) | |
| | ) | |
| VS. | ) | No. 01-1174 |
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| CITY OF BROWNSVILLE, ET AL., | ) | |
| | ) | |
| Defendants. | ) | |

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

The plaintiff, Randy Holloway, filed this *pro se* complaint under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq*., and 42 U.S.C. §§ 1981, 1983, 1985, and 1986. The defendants are the City of Brownsville, Mayor Webb Banks, Chief Gill Kendrick, Lieutenant Daniel Zartman, and Patrolman Reginald Scott. The plaintiff, a former patrol officer for the City of Brownsville, alleges that the defendants discriminated against him on account of his race by causing criminal charges to be brought against him, resulting in his termination from his job. Plaintiff also alleges that he was denied procedural due process, and that his termination was the result of a conspiracy. The defendants have filed a motion seeking summary judgment on all of the plaintiff's claims. Plaintiff has not responded to the motion.

Motions for summary judgment are governed by Fed. R. Civ. P. 56. If no genuine

issue of material fact exists and the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. Fed. R. Civ. P. 56(c). The moving party may support the motion for summary judgment with affidavits or other proof or by exposing the lack of evidence on an issue for which the nonmoving party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). The opposing party may not rest upon the pleadings but must go beyond the pleadings and "by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); see also Celotex Corp., 477 U.S. at 323.

"If the defendant . . . moves for summary judgment . . . based on the lack of proof of a material fact, . . . [t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). However, the court's function is not to weigh the evidence, judge credibility, or in any way determine the truth of the matter but only to determine whether there is a genuine issue for trial. Id. at 249. Rather, "[t]he inquiry on a summary judgment motion . . . is . . . 'whether the evidence presents a sufficient disagreement to require submission to a [trier of fact] or whether it is so one-sided that one party must prevail as a matter of law.'" Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479 (6th Cir. 1989) (quoting Anderson, 477 U.S. at 251-52). Doubts as to the existence of a genuine issue for trial are resolved against the moving party. Adickes v. S. H. Kress & Co., 398 U.S. 144, 158-59 (1970).

If a party does not respond to a motion for summary judgment, the Federal Rules of Civil Procedure provide that "summary judgment, if appropriate, shall be entered against him." Fed. R. Civ. P. 56(e). The fact that plaintiff did not respond does not require granting defendants' motion. However, if the allegations of the complaint are contravened by defendants' affidavits and defendants are entitled to judgment as a matter of law on those facts, then summary judgment is appropriate. Smith v. Hudson, 600 F.2d 60, 65 (6th Cir. 1979).

The undisputed affidavits submitted by the defendants establish the following facts. On Sunday, April 30, 2000, Off. Reginald Scott and Lt. Daniel Zartman were on bicycle patrol in Brownsville when they noticed activity behind the home of Ray Anthony Sanders. Scott and Zartman knew Sanders to be a bootlegger, so they set up surveillance of the residence, with Off. William Gammel also near, on standby. Scott and Zartman observed Sanders sell alcohol to individuals in two separate vehicles. Scott went to stop the second vehicle but before he could do so, he saw the plaintiff's vehicle turn into Sanders' driveway, and so returned to the surveillance point. Scott and Zartman observed the plaintiff, who was off-duty at the time, give Sanders cash in exchange for a six-pack of beer, the sale of which is unlawful within the city limits of Brownsville. The sale of alcohol on Sunday is also unlawful within Haywood County, in which Brownsville is located.

When plaintiff left Sanders' house, Scott radioed plaintiff's direction of travel to Gammel, who stopped plaintiff. Scott and Zartman then went to their location and told

plaintiff why he had been stopped. After being questioned, plaintiff told them the beer was in the truck's tool box. Plaintiff stated that he had visited Sanders to talk with him about an air conditioner that plaintiff wanted to sell, and also to try to get Sanders to sell beer to him in order to build a case against Sanders. However, plaintiff had not sought or been given authority by his superiors to conduct an undercover operation. Seven cans of beer were confiscated, and plaintiff was released pending further investigation.

The next day, May 1, 2000, the plaintiff was placed on administrative leave by Lt. Johnny Blackburn; he refused to sign the Employee Warning Notice. Blackburn also notified the Attorney General regarding probable cause for possible criminal charges. On May 2, criminal charges were filed against plaintiff under Tenn. Code Ann. § 39-11-402, alleging that he was criminally responsible for the sale of unlawful alcohol.[1]

On May 9, 2000, Chief Kendrick met with plaintiff about the incident, but plaintiff walked out when Kendrick began questioning his version of the events. Kendrick advised plaintiff that, effective May 19, 2000, he would be discharged for conduct unbecoming a police officer. Plaintiff appealed that decision to the Board of Mayor and Aldermen, which

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[1] Tennessee Code Annotated § 39-11-402 provides that an individual is criminally responsible for the conduct of another under certain circumstances:

> A person is criminally responsible for an offense committed by the conduct of another if:
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> (1) Acting with the culpability required for the offense, the person causes or aids an innocent or irresponsible person to engage in conduct prohibited by the definition of the offense;
>
> (2) Acting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids, or attempts to aid another person to commit the offense; or
>
> (3) Having a duty imposed by law or voluntarily undertaken to prevent commission of the offense and acting with intent to benefit in the proceeds or results of the offense, or to promote or assist its commission, the person fails to make a reasonable effort to prevent commission of the offense.

conducted a hearing on May 17, 2000. The Board heard testimony, and plaintiff was allowed to cross-examine each witness. At the conclusion of the hearing, the Board determined that plaintiff would remain suspended without pay pending the disposition of the criminal charges. Plaintiff was convicted on September 25, 2000, following a bench trial, and fined $50.00. He was subsequently discharged from his employment.

The City of Brownsville contends that plaintiff's allegations fail to state a claim against it under § 1983. A municipal defendant cannot be held liable under § 1983 on the basis of *respondeat superior*. There must be a showing that the constitutional violation stems from the enforcement of a governmental policy or custom. Monell v. Department of Soc. Serv., 436 U.S. 658, 691 & 694 (1978). Thus, a local governmental entity, such as a city or a county, "is not vicariously liable under § 1983 for the unconstitutional conduct of its agents: It is only liable when it can be fairly said that the city itself is the wrongdoer." Collins v. City of Harker Heights, Tex., 503 U.S. 115, 122 (1992). This requires a showing that "through its *deliberate* conduct, the municipality was the 'moving force' behind the injury alleged." Board of County Comm'rs v. Brown, 520 U.S. 397, 404 (1997).

To the extent plaintiff alleges that the ultimate decision to terminate him violated § 1983, the City maintains that it cannot be held liable because it was not the ultimate policymaker in this instance. See Pembaur v. City of Cincinnati, 475 U.S. 469, 483 n.12 (1986); Hull v. Cuyahoga Valley Joint Voc. Sch. Dist. Bd. of Educ., 926 F.2d 505, 515-16 (6th Cir. 1991). Pursuant to Tenn. Code Ann. § 38-8-106(4), as part of the minimum

standards for the qualification of police officers, any person employed as a police officer shall "[n]ot have been convicted of or pleaded guilty to or entered a plea of nolo contendere to . . . any violation of any federal or state laws or city ordinances relating to force, violence, theft, dishonesty, gambling, liquor or controlled substances." The minimum standards are "mandatory and binding upon any municipality, county or political subdivision of this state." Tenn. Code Ann. § 38-9-105(a). As the policy in accordance with which plaintiff was discharged was enacted by the Tennessee General Assembly, not by the City of Brownsville or any of the defendants, plaintiff may not recover against the City on that basis.

In any event, even if the City were the policymaker, plaintiff does not actually appear to be challenging the official policy requiring discharge of those police officers convicted of certain crimes. He apparently alleges only that, in his case, the policy was wrongfully applied on account of his race and in retaliation for past complaints. In other words, plaintiff is alleging that he was arrested and charged, and ultimately discharged, even though he was innocent of any crime.

Any claim that plaintiff was arrested without probable cause and wrongfully convicted is not cognizable under § 1983. In Heck v. Humphrey, 512 U.S. 477 (1994), the Supreme Court stated:

> We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's

> issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under § 1983.

Id. at 486-87 (footnote omitted). There is no evidence that plaintiff's conviction has been reversed, expunged or declared invalid either by a state court or federal court. In light of Tenn. Code Ann. §§ 38-8-106(4) and -105(a), a determination by this Court that the City had no basis on which to discharge plaintiff would necessarily imply that his conviction was invalid. Therefore, plaintiff has no § 1983 claim for wrongful termination on that basis.

Plaintiff also alleges that he was denied procedural due process in connection with his termination, and that his race was the reason for that lack of due process. (Compl. ¶ 18.) It is unclear whether he intends to assert these claims only against the City itself, or also against Chief Kendrick and Mayor Banks individually. However, regardless of whether the claims are asserted against some or all of the defendants, plaintiff's allegations are flatly contradicted by the undisputed evidence in the record.

Plaintiff alleges that he was discharged on May 2, 2000, without any opportunity for a hearing. However, the affidavits submitted by the defendants establish that plaintiff was placed on administrative leave on May 1, 2000. After meeting with Kendrick on May 9, plaintiff was informed that same day that he would be discharged effective May 19, 2000. He appealed, and on May 17, before his discharge became effective, he was afforded a hearing before the Board of Mayor and Aldermen, at which he was allowed to cross-examine the witnesses against him. The Board modified Kendrick's decision, allowing

plaintiff to remain suspended without pay pending the disposition of the criminal charges. He was discharged only after his conviction on September 25, 2000.

As the evidence is undisputed that plaintiff was, in fact, afforded procedural due process, the defendants are entitled to judgment as a matter of law on that claim.

The Court also finds that the individual defendants are entitled to qualified immunity from liability on any remaining § 1983 claims. While acting within the scope of their discretionary authority, government officials "generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. 635, 640 (1987) (citations omitted).

When ruling upon a defense of qualified immunity from suit, the Court must resolve two questions in the proper sequence. Saucier v. Katz, 121 S. Ct. 2151, 2156 (2001). First, the Court must determine whether the facts, taken in the light most favorable to the plaintiff, show that the defendants' conduct violated a constitutional right. If not, the inquiry ends in the defendants' favor. However, an affirmative answer requires the Court to address the second issue, which is whether the right was clearly established. Id.

In this case, the facts are undisputed, as plaintiff has failed to respond to the motion for summary judgment. Defendants Scott and Zartman were faced with a situation in which they observed plaintiff, while off-duty, facilitating the commission of a crime by purchasing beer within the City limits. When he was stopped and questioned, he admitted buying the beer. Plaintiff claimed that he was engaged in an undercover operation, but admitted that he had not obtained prior authority from his superiors for such an operation. This evidence simply does not demonstrate that Scott and Zartman violated plaintiff's constitutional rights.

Upon learning of plaintiff's conduct, Chief Kendrick met with him and heard his version of the incident. When Kendrick began questioning plaintiff, plaintiff walked out of the meeting. Kendrick then advised plaintiff that he would be discharged for conduct unbecoming an officer. That decision was appealed, and was modified after the hearing conducted by Mayor Banks and the City Aldermen. Again, this evidence does not demonstrate that either Kendrick or Banks violated plaintiff's constitutional rights.

As the facts, taken in the light most favorable to the plaintiff, show that the defendants did not violate plaintiff's constitutional rights, the individual defendants are entitled to qualified immunity on plaintiff's § 1983 claims.

Plaintiff also asserts a claim of conspiracy under 42 U.S.C. § 1985, as well as a claim against Mayor Banks under § 1986. In order to establish a claim under § 1985(3), a plaintiff must show: 1) a conspiracy between at least two persons; 2) that the object of the conspiracy was to deprive the plaintiff of equal protection of the law or of privileges and immunities

under the law; 3) an act in furtherance of the objective; and 4) injury to the plaintiff as a result of the conspiracy. See Griffin v. Breckenridge, 403 U.S. 88, 102-03 (1971); Smith v. Thornburg, 136 F.3d 1070, 1078 (6th Cir. 1998); Raimondo v. Village of Armada, 197 F. Supp. 2d 833, 844 (E.D. Mich. 2002).

The defendants in this case are all employees of the City of Brownsville. A corporation or entity cannot conspire with its own agents or employees. Johnson v. Hills & Dales Gen. Hosp., 40 F.3d 837, 839-40 (6th Cir. 1994). Thus, "if all of the defendants are members of the same collective entity, there are not two separate 'people' to form a conspiracy." Hull, *supra*, 926 F.2d at 510. An exception to this rule is that a conspiracy may be formed under § 1985(3) if employees or agents of the same entity are acting outside the scope of their employment or agency. Johnson, 40 F.3d at 840-41. In this case, there is no evidence that the defendants were acting outside the scope of their employment.[2] Therefore, plaintiff's claim under § 1985(3) fails.

Plaintiff's dependent cause of action under § 1986 must also fail. "Section 1986 is designed to punish those who aid and abet violations of § 1985." Browder v. Tipton, 630 F.2d 1149, 1155 (6th Cir.1980). Thus, when there is no violation of § 1985, there can be no violation of § 1986. Haverstick Enterprises, Inc. v. Financial Fed. Credit, Inc., 32 F.3d 989, 994 (6th Cir. 1994). Accordingly, the defendants are entitled to judgment as a matter

[2] To the extent plaintiff is claiming that the defendants conspired to retaliate against him because he engaged in activity protected under Title VII, such a claim may not be brought under § 1985(3). Section 1985(3) may not be used to remedy violations of Title VII. Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366 (1979).

of law on plaintiff's claims under § 1985(3) and § 1986.

The analysis for a race discrimination claim under 42 U.S.C. § 1981 is the same as the analysis under Title VII. Mitchell v. Toledo Hosp., 964 F.2d 577, 581-82 (6th Cir. 1992). Therefore, the Court will analyze the plaintiff's § 1981 and Title VII claims together.

A plaintiff alleging discrimination on account of race can withstand a motion for summary judgment either by presenting direct evidence of discrimination, or by using the framework set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973), to present a *prima facie* case of circumstantial evidence from which a jury may infer a discriminatory motive. See Kline v. Tennessee Valley Auth., 128 F.3d 337, 348 (6th Cir. 1997); Talley v. Bravo Pitino Restaurant, Ltd., 61 F.3d 1241, 1248-49 (6th Cir. 1995). If plaintiff succeeds in proving a *prima facie* case, the burden of production shifts to the employer "to articulate some legitimate, nondiscriminatory reason" for the employment decision. McDonnell Douglas, 411 U.S. at 802; Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981). The plaintiff must then prove the ultimate issue, *i.e.*, that the defendants' proffered reasons are pretextual, and that race discrimination is the true reason for the decision. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510-11 (1993).

There is no direct evidence of discrimination in this case; therefore, the issue is whether plaintiff can establish a *prima facie* case under the McDonnell Douglas framework. In order to do so, plaintiff must show that: 1) he is a member of a protected class; 2) he suffered an adverse employment action; 3) he was qualified for the position; and 4) he was

replaced by a person outside the protected class, or that similarly situated non-protected persons were treated more favorably. Burdine, 450 U.S. at 252-53; McDonnell Douglas, 411 U.S. at 802; Talley, 61 F.3d at 1246; Mitchell, 964 F.2d at 582-83. The defendants do not dispute that the plaintiff satisfies the first three elements, but maintain that he cannot satisfy the fourth element.

In his complaint, plaintiff alleges, in a conclusory fashion, that he was subjected to disparate treatment because he was not treated fairly, as white officers have been in similar situations. In his EEOC charge, which is attached to the complaint, plaintiff alleged that two white officers were involved in a hit-and-run accident, but that no action was taken against them. The EEOC charge also alleges that incidents involving white officers are kept "in-house" while incidents involving black officers are made public.[3]

Under Title VII, employees must be treated similarly if they are similarly situated in all relevant respects. Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344, 353 (6th Cir.1998) (citing Mitchell, 964 F.2d at 583). While an exact correlation is not required,

> the individuals with whom the plaintiff seeks to compare his/her treatment

[3] Plaintiff also alleged in his EEOC charge, although not in the complaint, that white officers were permitted to use patrol cars to take their children to school, while black officers were not. He also alleged that white officers were permitted to have "paraphernalia" on their cars, whereas black officers were not permitted to do so. Plaintiff has submitted no evidence, however, to support these allegations. Defendant Kendrick states in his affidavit that he is aware of no officers who have used their vehicles, without express authorization, to transport their children to school. Kendrick also states that the only personal items officers are allowed to place on their patrol cars are personal scanners, and only with permission. There is no evidence that plaintiff was denied such authorization while it was granted to similarly-situated white officers. In addition, even if true, these allegations do not constitute the type of adverse employment actions sufficient to support either a discrimination claim or a retaliation claim under Title VII. See Hollins v. Atlantic Co., 188 F.3d 652, 662 (6th Cir. 1999) ("[A] materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities.")

> must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.

Mitchell, 964 F.2d at 583. See also Clayton v. Meijer, Inc., 281 F.3d 605, 611 (6th Cir. 2002); Majewski v. Automated Data Processing, Inc., 274 F.3d 1106, 1116 (6th Cir. 2001); Ercegovich, 154 F.3d at 352-53.

Chief Kendrick states in his affidavit that two white officers were involved in an accident in which they backed into a civilian vehicle. However, the officers were responding to a call at the time, and had to leave the scene. The accident was investigated by the Brownsville Police Department and also documented by the Tennessee Highway Patrol. The civilians involved were advised they could sign a warrant charging the officers with leaving the scene, but declined to do so. The City of Brownsville paid for the repairs to the civilian vehicle.

The officers involved in this accident were not similarly-situated to the plaintiff. These officers were on duty, engaged in responding to an official call, and the civilians involved in the accident declined to sign a warrant charging the officers with leaving the scene. Plaintiff was off duty, allegedly engaged in an unauthorized "undercover" operation, and was formally charged with a crime. There is no evidence that a white officer engaged in the same type of conduct as plaintiff would have been treated any differently, or that a white officer's actions would not have been made public. Therefore, plaintiff has failed to make out a *prima facie* case of race discrimination. Accordingly, the defendants are entitled

to judgment as a matter of law on plaintiff's race discrimination claims under Title VII and § 1981.

Plaintiff has also failed to make out a *prima facie* case of retaliation under Title VII. To establish such a *prima facie* case, the plaintiff must show that (1) he engaged in activity protected under Title VII; (2) the exercise of the protected right was known to the employer; (3) the plaintiff suffered adverse employment action; and (4) there is a causal connection between the protected activity and the adverse employment action. Little v. BP Exploration & Oil Co., 265 F.3d 357, 363 (6th Cir. 2001) (citing Morris v. Oldham County Fiscal Court, 201 F.3d 784, 792 (6th Cir.2000)).

The only allegations concerning retaliation in the complaint are that "prior to the incident the defendant Lt. Zartman was spoken to about his personal habits of unlawful involvement with others [sic] officers spouses by the plaintiff," and that "Plaintiff feels that defendant used opportune time to get back at him for being outspoken about his behavior." (Compl. at 4, ¶¶ 8-9.) These allegations do not state a claim for retaliation, as any previous statements plaintiff may have made about Zartman's behavior with regard to other officers' spouses is not activity that is protected under Title VII.

In his EEOC charge, plaintiff alleged that he was arrested and charged in retaliation for protesting, in January 2000, the discriminatory treatment of black employees. The alleged protest is not described in the charge, and plaintiff has submitted no evidence substantiating that claim. Therefore, plaintiff has not satisfied the first two elements

required for a *prima facie* case of retaliation. In addition, even if it is presumed that plaintiff engaged in protected activity that was known to his employer, there is no evidence of any causal connection between that activity and plaintiff's subsequent arrest and ultimate discharge.

As plaintiff has failed to make out a *prima facie* case of retaliation under Title VII, the defendants also are entitled to judgment as a matter of law on that claim.

For the foregoing reasons, the defendants' motion for summary judgment is GRANTED on all of the plaintiff's claims. The Clerk of Court is directed to prepare a judgment accordingly.

IT IS SO ORDERED.

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JAMES D. TODD
UNITED STATES DISTRICT JUDGE

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DATE