**IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

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|---|---|---|
| **JULIAN ADAMS,** | ) | **CIVIL ACTION NO.** |
| **Plaintiff** | ) | |
| | ) | **4:07-cv- 01103-JEJ** |
| **v.** | ) | |
| | ) | |
| **CHARLES KELLAR, and the City of Harrisburg,** | ) | |
| | ) | |
| **Defendants** | ) | **JURY TRIAL DEMANDED** |

**BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Respectfully Submitted,

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## I. INTRODUCTION

The Amended Complaint in this matter clearly articulated the claims of the Plaintiff against every one of the Defendants, and, rather than Defendants' Motions for Summary Judgment piercing the pleading and establishing the absence of genuine issues of fact that entitle them to relief, the summary judgment record they put before the Court, standing alone, shows that this is a case for trial on all counts of the Amended Complaint, the arguments made by defendants in briefs notwithstanding. *See Exhibit "P" Deposition of Kellar pgs 36, 45-47* wherein Kellar admits that is the reason they terminated the plaintiff. This is a clearly a First Amendment violation of plaintiff rights.

Plaintiff notes that there were at least a dozen depositions in this matter, yet defendants have supported their motion for summary judgment with only selected portions of some of them, and relied on hearsay testimony of plaintiff and others, and unauthenticated documents to substantiate the basis of their claims on key material facts. Their brief in support of their motion exceeds the page limitations of local rules, and no request for an extension was sought,[1] and there are only two citations to the factual record in their entire brief. It is a completely unfair exercise, and one done purposefully to capitalize on the typically under-resourced plaintiff in civil rights cases, to place a partial record before the court on a motion on which the defendants bear every burden, and to expect a plaintiff to have to come back and defeat a record and arguments that are based upon the mere recitals and arguments of counsel, which all-but blatantly argue for judgment *despite of*, and not in light of, the rigorous summary judgment standard. It is a situation, however, that exists because the courts have allowed it to exist, and

[1] In *Breslin, et al. v. Dickinson Twp., et al.*, No. 09-CV-1396, Judge Kane struck a brief filed by plaintiff's counsel, and even denied a motion to exceed page limitations after a motion to do so was properly filed. In fairness, if these types of orders can be considered fair, defendants should suffer same consequence especially since they did not even seek an a Motion for Leave to File in Excess and they filed all their documents as one document in violation of Local Rules.

plaintiff submits that it is time that defendants in civil rights cases, and all cases for that matter, be held to the appropriate standards in their dispositive motions, and technical compliance with all applicable rules.

Plaintiff's Counterstatement of Material Facts provides an exhaustive analysis of the factual contentions, with proper support, and plaintiff has submitted an abundant record to this Court which, whether or not every reference is specifically made, provides overwhelming support for the conclusion, which could be drawn by a jury, that Chief Kellar has a history of disparate treatment of minority officers and the use of overt racial epithets, and that, in furtherance of his malevolent designs, and specifically his designs to hurt and harm Lydell Muldrow, willingly and gladly victimized plaintiff as well, for his truthful testimony at the Muldrow arbitration proceeding, as well as based upon his race.

Plaintiff never committed perjury or otherwise gave sworn testimony that was knowingly false with the intent to deceive anyone. What happened very simply was that he testified at a preliminary hearing where the defendant was charged with assaulting Muldrow. It was a contentious arrest witnessed by many people, and there were allegations that Muldrow may have hit the suspect in the head with his flashlight and/or his fists. The suspect, Blackwell, did file an excessive force case against the City, as well as Muldrow, plaintiff, and another officer, but none of those issues were at play in the preliminary hearing – that was just a probable cause hearing for the charges against Blackwell. During the hearing, plaintiff was asked whether he saw Muldrow strike Blackwell. Plaintiff was aware of the allegations about the beating in and around the head, and truthfully stated that he did not see Muldrow strike Blackwell in the head. In fact, at one point he said "I didn't see *the* hit" meaning, clearly, the hit apparently being referenced to Blackwell's head. However, Blackwell's wife and other officers testified completely

differently. *See Plaintiff's Exhibit "G" pg 35.* Plaintiff testified truthfully at that proceeding, and other witnesses, including five non-minority officers testified falsely when they said Muldrow struck Blackwell on and around the head. S*ee plaintiff's Exhibit "Q", p. 36,* wherein the Arbitrator found that "[f]ollowing an exhaustive review of the extensive record developed in this matter, I find that the record does not convincingly demonstrate that the Grievant struck Mr. Blackwell in the head while handcuffed".[2]

Thereafter, in furtherance of the Chief's illicit plan to hurt Muldrow, and perhaps for legitimate investigatory reasons as well, a disciplinary investigation was directed into the allegations that Muldrow violated the excessive force policy. The investigation was being conducted by Sergeant Drobynak, and, of course, plaintiff was a material witness to the criminal charges, the disciplinary investigation, and the civil rights suit filed by Blackwell. During a pre-interview, Drobynak informed plaintiff that Muldrow did admit to striking Blackwell, but not in the head. This very naturally refreshed plaintiff's recollection immediately, and caused him to realize the error that he appeared to have made at the preliminary hearing. *See Plaintiff's Exhibit "N" Declaration of Julian Adams.* When plaintiff gave his statement to Drobynak, which was a statement solely in response to questions asked by Drobynak, he truthfully stated that he did recall seeing Muldrow strike Blackwell in the area of his ribs with the back of his hand or fist to control Blackwell after Blackwell head-butted Muldrow and knocked his glasses off. Drobynak counseled plaintiff to be more careful about his testimony at hearings, and that was the last plaintiff heard of it as of early 2004. Five to six officers testified that they saw Muldrow strike

[2] Also see Plaintiff's Exhibit "Q" pgs 36 wherein the Arbitrator states that "What is clear is the fact that the officers' perceptions do not conform with each other nor, most importantly, do they confirm with the testimony of the Blackwell's". Also see pg 21-23.

Blackwell, however they were never disciplined for not filing a report regarding the so-called hits in the head. *See Plaintiff's Exhibit "Q" Arbitration Decision pg 7.*

The date of the decision was March 13, 2007, and the Chief and others were aware of the nature of plaintiff's testimony since the end of 2003. It was not, however, until after the Muldrow decision that the Chief personally went to Marty Carlson and Ed Marsico to solicit their letters regarding disclosures under *Brady*. This is absurd under the circumstances as set forth above. Regardless, the defendants only put the two letters, dated April 22, 2007 and May 14, 2007 into the record, with no testimony affidavit or any indication whatsoever as to any possible basis for the conclusions or exactly what facts upon which they relied. They are hearsay letters, and there is nothing additional that makes anything about them a pertinent issue at summary judgment. In fact, the inferences based on the above support plaintiff's conclusion that plaintiff's termination was an orchestrated affair motivated by the Chief and the City's racist practices, and in retaliation for his testimony at the Muldrow arbitration.

## I. STATEMENT OF FACTS

The Plaintiff Julian Adams had been a patrol officer with the Harrisburg Bureau of Police since August 1989, and has a history of exemplary performance and an unremarkable disciplinary history. *See Plaintiffs Exhibit "N", Declaration of Julian Adams.*

In October 2003, plaintiff was on patrol with Harrisburg Police Corporal Muldrow when Muldrow became involved in an arrest-related altercation with a citizen of Harrisburg, namely James Blackwell. Plaintiff charged the citizen with aggravated assault, resisting arrest, and disorderly conduct. *See Plaintiff's Exhibit "L", Declaration of Corporal Muldrow.*

An internal affairs investigation was conducted concerning the incident, and Muldrow ultimately received a 120 day disciplinary suspension, demoted him from the rank of Corporal to the rank of patrol officer. Muldrow grieved the discipline, and on March 13, 2007 the Arbitrator issued an award reinstating Corporal Muldrow to the rank of Corporal, and awarded back pay. The Arbitrator also converted the suspension to thirty days. *See Plaintiff's Exhibit "Q" Amended Proposed Decision and Order of Corporal Muldrow.* The Declaration of Muldrow sets forth the entirety of the circumstances surrounding his discipline in the context of his own retaliation and mistreatment because of his race by the Chief and others, including his own disciplinary proceeding, the one in which plaintiff testified, following a very similar pattern. Defendant Kellar has a vendetta against Corporal Muldrow for the reasons set forth therein which he has transferred to the plaintiff. Kellar's hatred is partly based upon racism. Plaintiff is African American and Muldrow is African American.

Blackwell subsequently filed a federal civil rights complaint against Muldrow and Adams as co-defendant, alleging the excessive use of force and related civil rights violations. That case was settled without the knowledge of Corporal Muldrow and plaintiff Julian Adams. *See Plaintiffs Exhibits "L" and "N" Declarations of Adams and Muldrow.*

Defendants originally believed that plaintiff would provide testimony that was favorable to the interest of the Police Bureau in defense of Muldrow's grievance, and plaintiff met with defendants' and the Bureau's attorney Frank Lavery, Esquire who at the time represented the City in the Arbitration hearing against Muldrow and also was involved in the termination of Julian Adams. *See Plaintiff's Exhibit "N" Declaration of Julian Adams.* Lavery apparently determined that plaintiff's testimony would not have been favorable, and he and Kellar subsequently informed plaintiff that he should not testify at Muldrow's arbitration hearing, and

that plaintiff could face charges if he did testify. They ordered him not to show up at the Muldrow hearing, and assured him that nothing would come of his past testimony as long as he stayed away from the Muldrow arbitration proceeding. Nevertheless, plaintiff was subsequently summoned to testify during the September 2006 arbitration of Corporal Muldrow, at the direction of defendant Kellar, who was instructed to order plaintiff's appearance by the arbitrator. The circumstances were very coercive and confusing, but plaintiff appeared and testified truthfully at the proceeding. *See Plaintiff's Exhibit "N" Declaration of Julian Adams.*

Three years after his original allegedly false testimony, and within weeks of his testimony at the Muldrow proceeding, plaintiff became the subject of a disciplinary investigation concerning the testimony he gave at the arbitration proceeding. Plaintiff's declaration sets forth in detail all the facts and circumstances surrounding that testimony. Plaintiff was stripped of most of his duties, taken off patrol, and assigned to a report-writing function. These actions humiliated and embarrassed the plaintiff and were extremely damaging to his career. *See Plaintiff's Exhibit "N" Declaration of Julian Adams.* During the three years after the alleged false testimony, which was known to the Chief and others, plaintiff was working as a police officer, attending hearing, trials, testifying at Court and arresting defendants.

Plaintiff was never informed of the allegations against him, or the results of any investigation into his conduct, but, in April 2007, was told by defendants that he was going to be disciplined for conduct unbecoming a police officer, and that, if he did not accept a two year suspension after which he would be forced to retire, he would be terminated. In connection with this he was presented with an agreement, which upon his execution thereof, would have accomplished the above wishes of the defendants. *See Plaintiff's Exhibit "N" Declaration of Julian Adams.* Plaintiff was being forced into the agreement and contended in his original

lawsuit he did nothing wrong, and that defendants were attempting to bring pressure to bear upon him and his family in order to give plaintiff no reasonable alternative but to accept the two year suspension, which, under the circumstances, would have constituted a constructive discharge of his employment with the Harrisburg Bureau of Police. Nonetheless he was considering the agreement. The original two-page proposal was set to expire if plaintiff did not agree to it by June 15, 2010, and he had not done so. On June 21, 2007, plaintiff filed this civil rights lawsuit, and a new proposal was drafted on June 22, 2007 for plaintiff's separation, which included an agreement not to sue. There was no proposal on the table at the time plaintiff filed this civil rights lawsuit, and he was terminated 8 days after he filed it. Kellar told him he was being terminated immediately because he filed the lawsuit. *See Plaintiff's Exhibit "P" Deposition of Kellar pgs 43-45.*

Discovery in this case has revealed a wealth of information about the known racist, bigoted, retaliatory, and abusive practices of Chief Kellar, as evidenced in substantial records revealed through the PHRC, despite tremendous resistance of the defendants and the PHRC in producing the information, and abusive discovery practices by the defendants, which ultimately were ratified and condoned by the Court, which have deprived plaintiff of the full scope of the evidence to support his equal protection claims. Nevertheless, the record is replete with documented instances of the Chief openly using racial epithets in reference to his minority police officers, and minorities in general, and direct evidence of differential treatment in the administration of police personnel matters. While defendants focus exclusively on the treatment between plaintiff and Officer Neal, and while those differences themselves create an issue for trial, that is not all of the evidence upon which plaintiff relies. Plaintiff relies directly on the testimony of the five non-minority officers who testified at the Muldrow arbitration that they saw

Muldrow strike Blackwell on or around the head, which the arbitrator himself found not to be credible, and which is otherwise belied by all known facts. None of these officers were disciplined or even investigated, while plaintiff was investigated and disciplined, very harshly. The defendants' arguments in this regard are nothing short of arguments as to how this Court should resolve the factual differences that are clearly set forth on the record. It is clear from the record that other non-minority Harrisburg Bureau of Police officers have committed infractions far more serious than any alleged infractions committed by plaintiff, even if any credence is given to their conclusory statements about the nature of his infractions, which plaintiff contends

Even with specific respect to the isolated falsehoods in Neal's affidavits of probable cause, it is clear that the nature of his representations are not as stated by defendants in conclusory fashion in their brief. The deposition of Levell Jenkins, who was a witness to the circumstances surrounding both of Neal's instances of false swearing, not to mention his false testimony in the Muldrow arbitration, casts doubt on defendants' conclusory statements and bare recitals, and creates an issue as to those statements being known falsehoods made by Neal with the intent to deceive, which is something never even suggested as to plaintiff. At most, plaintiff is guilty of being tripped up by a crafty attorney who was trying to conceal evidence and intimidate plaintiff all in effort to serve the unlawful and repugnant ends of a racist and bigoted Chief in a system where his abuses were protected and even fostered, with the knowledge acquiescence of the Mayor himself.

As a direct and proximate result of the defendant's conduct, plaintiff has been deprived of the full benefit of his employment as a police officer, and carries a stigma which has impaired or impeded his ability to become and remain gainfully employed as a police officer in Harrisburg or any other jurisdiction, and has caused him considerable humiliation, aggravation, inconvenience,

embarrassment and emotional suffering. *See Amended Complaint paragraph 23.* Plaintiff's Counterstatement of Material Facts provides an exhaustive analysis of the factual contentions, with proper support, and plaintiff has submitted an abundant record to this Court., all of which clearly defeat defendant's assertion that they are entitled to summary judgment.

## II. ISSUES

1. Whether Plaintiff has established the existence of material factual disputes relative to his First Amendment retaliation claim.
2. Whether Plaintiff has established the existence of material factual disputes relative to his Fourteenth Amendment Equal Protection claim.
3. Whether Plaintiff has established the existence of material factual disputes relative to his municipal liability claims.
4. Whether Plaintiff can prove claims for which Kellar has no qualified immunity.

Suggested Answer Yes as to all !

## III. ARGUMENT

### A. Standard of Review

Under the Federal Rules of Civil Procedure a party is entitled to seek summary judgment in its favor on "all or any part" of the claims that have been made. Fed. R. Civ. P. 56(b). The courts are instructed that summary judgment:

> shall be rendered forthwith 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).

In Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548 (1986), the Court articulated the familiar standard that:

> the party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.

477 U.S. at 323, 106 S. Ct. at 2553. A court may grant summary judgment as long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in rule 56, is satisfied. Id..

Summary judgment has been characterized as a drastic remedy, because it cuts off a party's rights to a jury trial; that is why courts must resolve any doubts as to the existence of a genuine issue of material fact against the moving party. Ness v. Marshall, 660 F.2d 517, 519 (3d Cir. 1981). The drastic nature of summary judgment supports the limitation of the court's function to determining whether issues of fact exist and not resolving issues of fact, even if a preponderance of the evidence supports the moving party's contentions concerning the factually unsupported claims or defenses that it wishes to "isolate and dispose of". Celotex, 477 U.S. at 323-24, 106 S. Ct. at 2553.

The papers of the movant are to be carefully scrutinized while those of the non-movant should be indulgently received. Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074 (1976). The Court must disregard all evidence favorable to the moving party that a jury is not required to believe and should give credence to the evidence favoring the nonmovant and the unimpeached or uncontradicted evidence from disinterested witnesses supporting the moving party. Reeves v. Sanderson Plumbing, 530 U.S. 133, 150-51, 120 S. Ct. 2097, 2110 (2000). As a further protection of the nonmoving party's right to trial, the courts must draw all inferences in favor of that party and are not to resolve any genuine credibility issues. Ness, 660 F.2d at 519.

Rule 56 clearly places the initial burden on the moving party to show initially how the evidentiary matter in support of the motion establishes the absence of a genuine issue concerning any material fact. Fed. R. Civ. P. 56, Advisory Committee Notes to 56(c). If the moving party does not meet the initial burden of establishing the absence of a genuine issue of material fact, summary judgment must be denied before the non-moving party's response even needs to be considered. Id..

If the moving party meets its initial burden of showing the evidentiary basis that establishes the absence of a genuine issue, the nonmoving party is required to go beyond the contrary allegations of their complaint and must come forward with evidence disputing the materials relied upon by the moving party to avoid conceding the fact at issue for purposes of summary judgment. Adickes v. Kress & Co., 398 U.S. 144, 160-61, 90 S. Ct. 1598, 1610 (1970).

When, as in the present case, intent is an issue, the court must be cautious about granting summary judgment. Goosby v. Johnson & Johnson Medical, Inc., 228 F.3d 313, 321 (3d. Cir. 2000). Moreover, because issues of pretext often turn on credibility, summary judgment should not be granted when such issues arise because credibility determinations are for a jury. See e.g. Jackson, 826 F.2d at 236.

In ruling on a Motion for Summary Judgment, this Court must review the evidence in a light most favorable to Plaintiff, to give Plaintiff the benefit of all reasonable inferences, and to resolve all doubts in favor of Plaintiff. See, Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 1356 (1986). The Third Circuit has held that this standard must be applied with added rigor in employment discrimination cases, where intent and credibility are crucial issues. Stewart v. Rutgers, 120 F.3d 426, 431 (3d Cir. 1997).

Because this is a discrimination case, this Court should have been mindful of the admonition that:

> in today's climate of public opinion, blatant acts of discrimination the true smoking guns can easily be identified, quickly condemned and often rectified in the particular settings where they occur. Much of the discrimination that remains resists legal attack exactly because it is so difficult to prove. Discrimination victims often come to the legal process without witnesses and with little direct evidence indicating the precise nature of the wrongs they have suffered. That is one of the reasons why our legal system permits discrimination plaintiffs to prove their cases by direct or circumstantial evidence.

Jackson v. University of Pittsburgh, 826 F.2d 230, 236 (3d Cir. 1987) (citations omitted). In Aman v. Kort Furniture Rental Corp., 85 F.3d 1074, the Third Circuit noted that:

> Anti-discrimination laws and lawsuits have educated would-be violators such that extreme manifestations of discrimination are thankfully rare. Though they still happen, the instances in which employers and employees openly use derogatory epithets to refer to fellow employees appear to be declining. Regrettable, however, this in no way suggests that discrimination based upon an individual's race, gender, or age is near an end. Discrimination continues to pollute the social and economic mainstream of American life, and is often simply masked in more subtle forms. It has become easier to coat various forms of discrimination with the appearance of propriety, or to ascribe some other less odious intention to what is in reality discriminatory behavior.

85 F.3d at 1081-82. Moreover, circumstantial proof typically includes unflattering testimony about the employer's history and practices, and discrimination may, at times, be capable of proof through evidence of the atmosphere and context in which the decisions were made. Antol v. Perry, 142 F.3d 639, 644 (3d Cir. 1998).

To survive summary judgment when the employer has articulated a legitimate nondiscriminatory reason for its action, there must be some direct or circumstantial evidence from which a finder of fact could reasonably disbelieve the employer's articulated reasons or believe that a discriminatory reason was more likely than not a motivating or determinative cause. Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994). If Plaintiff points to evidence that

calls into question the true motivation behind Plaintiff's separation, the inference of an improper motive may be drawn, and it is for a jury to determine whether Defendant's improper motive was unlawful as well. See St. Mary's Honor Center v. Hicks, 509 U.S. 502, 511, 113 S. Ct. 2742 (1993).

The character and quality of the evidence for which the plaintiff can show pretext varies under circumstances of the case. To defeat summary judgment, a plaintiff may not need to point to evidence other than that which establishes the prima facie case. Simpson v. Kay Jewelers, Inc., 142 F.3d 639, 644 (3d Cir. 1998). Of course, a plaintiff may also point to weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons to create a reasonable inference of discrimination. Fuentes, 32 F.3d at 764. Courts have also considered noncompliance with internal policies, statements by supervisory-level employees, past treatment of the plaintiff and others, and the past opportunities provided to a complaining plaintiff relevant in pretext cases. See e.g., Colgan v. Fisher Scientific Co., 935 F.2d 1407 (3d Cir. 1991) (en banc) (adherence to employer rules); Wilson v. Susquehanna Township Police Dept., 55 F.3d 126 (3d Cir. 1995) (discriminatory statement of decision maker's supervisor); Fuentes, 32 F.3d 759 (past discrimination and less favorable treatment); and Ezold v. Wolf, Block, Schorr and Solis-Cohen, 98 F.3d 309 (3d Cir. 1993) (opportunities given employee).

**A. FIRST AMENDMENT RETATLIATION**

Defendants correctly observe that plaintiff has made a two-fold claim for violation of his First Amendment rights: first, that plaintiff had a protected First Amendment right to testify truthfully in the Muldrow arbitration proceeding, notwithstanding the so-called bogus order by the Chief that he appear to do so, and second, that he was actually terminated directly for filing

the present lawsuit. Plaintiff submits that under the well-established standards governing First Amendment liability in employment cases, that he must be permitted to proceed to trial on both claims.

First Amendment Retaliation is established when a plaintiff shows he engaged in protected activity, and the government retaliated, where the protected activity was the cause, Anderson v. Davilla, 125 F.3d 148, 162-63 (3d Cir. 1977), and "… the protected activity was a substantial or motivating factor in the alleged retaliatory action." McGreevy v. Stroup, 413 F.3d 359, 364 (3d Cir. 2005). To state a prima facie claim for First Amendment retaliation, a plaintiff has the burden to show: "(1) that the activity in question is protected by the First Amendment, and (2) that the protected activity was a substantial factor in the alleged retaliatory action." *Hill v. Borough v. Kutztown*, 455 F.3d 225, 241 (3d Cir.2006). The first element is an issue of law, whereas the second element is an issue of fact. *Curinga v. City of Clairton*, 357 F.3d 305, 310 (3d Cir.2004).

There is no reasonable dispute, even under defendants' argument, that the filing of the present lawsuit is protected First Amendment petitioning activity. See San Filippo v. Bongiovanni, 30 F.3d 424 (3d Cir. 1994). This establishes the first prong of the First Amendment analysis, which is the only mater that is a question of law for the court. The remainder of defendants' argument is directly arguing for the Court to resolve factual disputes presented on the record before it as to the second and third steps of the First Amendment analysis, i.e., whether the protected activity was a substantial or motivating factor in the adverse action and whether the same adverse action would have been taken without the protected activity. These issues relate to matters in the First Amendment analysis that are typically for the jury. *See* Johnson v. Lincoln Univ., 776 F.2d 443, 454 (3d Cir. 1985) ("[the] second and third

questions [in the First Amendment analysis] . . . should be submitted to the jury"); *see also* Zamboni v. Stamler, 847 F.2d 73, 79 n.6 (3d Cir.) (holding that the issues of whether the protected activity was a substantial or motivating factor and whether the same actions would have been taken are for the jury), *cert. denied*, 488 U.S. 899, 109 S. Ct. 245 (1988). Nevertheless, it is unequivocally clear that plaintiff has established an issue for trial on this issue.

Though defendants motion does not dispel the existence of material factual disputes concerning the termination of plaintiff for filing this lawsuit, but instead argues for the resolution of these clearly disputed facts, plaintiff can point to direct evidence that the decision to terminate him was conclusively made after and in direct response to the filing this lawsuit. The evidence is clear that because he plaintiff chose to file this lawsuit he was terminated from his position. Chief Kellar testified to this specific effect and, for municipal liability purposes, directly linked this to a decision of the City, and further tying the City in to every aspect of his termination on all claims. *See Plaintiff's Exhibit "P" pgs 45-46.* Defendant Kellar's own statement confirms that plaintiff was terminated for filing this suit because plaintiff moved forward with his right to file a civil rights lawsuit. Kellar along with the other defendants terminated plaintiff's from his position. *See Plaintiff's Exhibit "P" Deposition of Charles Kellar excerpts pgs 41-43.*

> Q: That he had filed the lawsuit.
> A: Yeah, he didn't fulfill, it was against the deal that they had worked out. Well I would have notified the Fraternal Order of Police. I mean I have to and that would have been either Link Brinker. I think the principals at that point were Brinker, Detective Brinker, Detective Lau, and Sean Welby. Yeah, I guess that would have been about it.
> Q: What did you say to them, Chief?
> A: That we were terminating Julian. I didn't say anything to the administration. They said it to me.

*Also see Plaintiffs Exhibit "P" Deposition of Kellar excerpts pages 45-47.*

> Q: That the deal was off.

> A: Well, yeah, he violated the conditions of the offer by filing a federal lawsuit.

It is important to recall that there was no deal whatsoever on the table so-to-speak at the time plaintiff filed his lawsuit, as the original offer communicated to plaintiff by and through Lavery's partner, Jim Young, had expired by its own terms on June 15, 2007, plaintiff filed his lawsuit on June 21, 2007, and there was no new proposal until the one plaintiff received on June 25, 2007, that was drafted on June 22, 2007, the day after his lawsuit was filed.

Despite defendants' argument that they had grounds to terminate plaintiff and had made a determination to do so, plaintiff suggests that the fact that they did not do so proves that they did not have valid and proper cause to do so, and were orchestrating the further coercive concealment of the violations of his rights through the so-called negotiation process. Moving Defendant's self-serving rendition of the facts falls far short of the standard set forth in Celotex, supra, that "The evidence must be viewed in the light most favorable to the non-moving party, and the Court must draw all justifiable inferences in the non-movant's favor." Id. 322-24. If defendants wish to argue that they were being kind and compassionate to plaintiff they can do so, but these are clearly issues that are uniquely suited to juries, not judges imposing value judgments on these matters based on a cold, hard record. Defendants blatantly argue that this Court upset the summary judgment standard, and plaintiff has unequivocally set forth a triable issue of fact under the appropriate standard, upon which it is incumbent that this court abide.

Moreover, defendants' post hoc justifications do nothing to dispel the basis for the action taken against plaintiff. As plaintiff's CMF makes clear, the evidence of the letters from Marty Carlson and Ed Marsico are hearsay that answer none of the many appropriate questions that would need to be asked before they could be found reliable, and defendants simply attached the letters with no further evidentiary support for the information they were provided or, indeed, to

explain why the letters were written in April 2007, after Kellar's nemesis Lydell Muldrow again defeated his effort to hurt and harm him, and three and a half years after the alleged perjurious statements that were required to be disclosed. Martin Carlson and District Attorney Marsico also prepared a letter regarding the issues related to plaintiff's ability to testify in Court proceedings, *See Defendants SMF paragraphs 35-36* over four years after the alleged perjury took place. During this entire time plaintiff was still acting as a police officer, with no objections from any defendants. Plaintiff was prosecuting cases, testifying in court and performing as a police officer in all aspects. *See Plaintiff's Exhibit "N" Declaration of Julian Adams, paragraph 26.* Moreover, plaintiff now works as a Dauphin County Probation Officer wherein he was approved by Chief Judge Cherry, Dauphin County Court of Common Pleas after plaintiff advised his supervisors, who advised Judge Cherry, of his previous employment with the City of Harrisburg, and the alleged allegations of perjury that were made against him. Judge Cherry was completely supportive of plaintiff and ultimately hired him for the position. Plaintiff currently testifies in Court (Dauphin County Court), that plaintiff currently has some arrest powers, carries a police firearm etc. *See Exhibit "N" Adams Declaration, paragraph 28-29.* This clearly indicates the bias that not only the defendants had against plaintiff, but the use of the U.S. Attorneys Office and Marsico producing letters over four years old to justify their termination of the plaintiff in clear violation of his First Amendment right.

In addition to the filing of the lawsuit being a basis for the retaliation against plaintiff, he was, despite defendants' arguments, additionally fired for giving truthful testimony in a proceeding he was compelled to attend. The defendants attempt to argue that the circumstances in this case are such as to bring plaintiff's testimony within the holding of the United States Supreme Court in Garcetti v. Ceballos, 126 S.Ct. 1951 (U.S. 2006) which defined the scope of

protected activity for public employees, such as the Plaintiff, under the First Amendment. After Garcetti, a public employee's statement receives First Amendment protection where (1) the statement was made as a citizen; (2) it involves a matter of public concern; and (3) the government employer did not have "an adequate justification for treating the employee differently from any other member of the general public" as a result of the statement made. Hill v. Borough of Kutztown, 455 F.3d at 241-42 (citing Garcetti, 126 S.Ct. at 1958).

Defendants cite Foraker v. Chaffinch, 501 F.3d 231 (3d Cir. 2007), as support for the proposition that the plaintiff's appearance and truthful testimony at an arbitration proceeding of another police officer was an official job duty and not protected under Garcetti. Frankly, that finding under the circumstances would make a mockery of the Supreme Court and First Amendment and the well-settled protection of a public employee to appear and give truthful testimony under process in the courts of the United States. See Pro v. Donatucci, 81 F.3d 1283 (3d Cir. 1996). In that case, the Third Circuit cited favorably to Johnston v. Harris County Flood Control Dist., 869 F.2d 1565 (5th Cir. 1989) for the proposition that:

> When an employee testifies before an official government adjudicatory or fact-finding body he speaks in a context that is inherently of public concern.... If employers were free to retaliate against employees who provide truthful, but damaging, testimony about their employers, they would force the employees to make a difficult choice. Employees either could testify truthfully and lose their jobs or could lie to the tribunal and protect their job security. Those able to risk job security would suffer state-sponsored retaliation for speaking the truth before a body entrusted with the task of discovering the truth. Those unwilling or unable to risk unemployment would scuttle our efforts to arrive at the truth.

869 F.2d at 1578. That admonition is brought to bear with tremendous clarity in this case, and the instruction by the Chief to attend cannot be read to deprive plaintiff of the well-settled protection for his right to testify truthfully, in fact, the order to attend, with its coercive implications, itself violates plaintiff's First Amendment rights. The holdings

of the Supreme Court cannot be bastardized by attempting to cloak actions of public employees that are inherently protected with labels such as official job duties on an arbitrary basis. In this case, the original "order" from the Chief was to not attend the hearing. That "order" cannot be later construed to make his testimony an official duty for arbitrary reasons related to the punitive, racist, and retaliatory interests of the Chief. To do so would turn Supreme Court precedent into an instrumentality of abuse.

Plaintiff's appearance and testimony in an adjudicative proceeding is inherently a matter of public concern, and plaintiff has established that he has been retaliated against for the exercise of that right. Defendants' motion for summary judgment must be denied.

**B. EQUAL PROTECTION CLAIM**

Defendants' argument relative to plaintiff's Equal Protection claim is a sham, and is nothing short of blatant argument for this Court to completely disregard the function of summary judgments and the role of juries in our system. The legal standard governing Plaintiff's Equal Protection claim is very simple, as defendants recognize, n requires only that plaintiff show membership in a protected class and different treatment from members outside protected. See Andrews v. City of Philadelphia, 895 F.2d 1469 (3d Cir. 1990); Terrell v. City of Harrisburg, 549 F. Supp.2d 671 (M.D. Pa. 2008). In this case, defendants cannot dispute that plaintiff is in the protected class of being African-American. The dispute centers around the difference in treatment with similarly-situated employees. In this regard, defendants go through an argument that may be fine for a jury, but asks for the resolution of clearly disputed facts at this point.

Defendants attempt to have this Court adopt their rendition of the facts, disregarding the clearly reasonable inferences favoring plaintiff, and to find that Officer Neal, a white male police officer, and plaintiff, a black male police officer are not similarly-situated because of some

arguments concerning the factual differences between their treatment. That is absurd. The relevant protected class distinctions are race and employment-status – identical for both in this case for all relevant purposes. See Nordlinger v. Hahn, 505 U.S. 1 (1992). Defendants attempt to argue that they are not similarly-situated because of asserted differences in the quality or character of the conduct for which they were disciplined or not disciplined, as the case may be. Not only is this an inappropriate argument on summary judgment, it is not factually sustainable in any case.

According to the deposition of Neal as well as Levell Jenkins, it is clear that Neal knowingly made a false sworn statement in an affidavit that was used as a basis to encroach upon the civil rights of American citizens. *See Plaintiffs Exhibit "O" Deposition of Neal pgs 9-11, 60-63, 79-80; Deposition of Levell Jenkins, Plaintiff's Exhibit "O" pp. 11-14.* Plaintiff gave some inartful testimony at an administrative proceeding under very hostile and threatening circumstances where he was not afforded representation. Defendants go to great lengths to minimize Neal's deception, which itself lends credence to plaintiff's disparate treatment claim. Neal also lied at the Muldrow arbitration, along with four other non-minority officers, and nothing was done to them, even when their lack of credibility was specifically pointed to by the arbitrator. *See Plaintiff's Exhibit "Q" pgs 35-36.* It is also noteworthy that Brenda Holmes, the supervisor upon whom they rely for the characterizations of Neal's false swearing also lied in the arbitration proceeding, allegedly under the advise and guidance of Kellar. These circumstances, and their reasonable inferences, create all the evidence necessary to defeat defendants' motion for summary judgment on the equal protection claims.

In addition, if plaintiff was disciplined for giving false testimony about what he observed, then Muldrow too should have been disciplined because he too denied using force and that he

struck Blackwell in the head. Clearly the Arbitrator agreed with the testimony of Muldrow and Adams regarding what really took place during the arrest of Mr. Blackwell. *See Plaintiff's Exhibit "Q" pgs 32, 33, 34, 35-36.* Plaintiff also refers to the records of the PHRC which is attached hereto as *Plaintiff's Exhibit "M" pgs 1-75* which clearly demonstrates the disparate treatment towards minority officers. Defendants again go to great lengths to distinguish circumstances and things of that nature, but those are jury functions, and plaintiff has shown that there is abundant evidence placing disputed issues of fact before the Court.

Finally, plaintiff points specifically to an additional difference in treatment between he and Mike Yanick, a City official who threatened to kill the Chief for having an ongoing sexual affair with Yanick's wife and ruining his marriage. Plaintiff was subjected to a fitness for duty evaluation for making some completely misrepresented and misconstrued assertions about his frustration over being victimized by the Chief while Yanick's direct death threats went unaddressed. This is an additional basis upon which defendants' motion must be denied. Plaintiff is clearly entitled to a trial on his Equal Protection claims.

**C. QUALIFIED IMMUNITY AS TO CHIEF KELLAR**

"A public official is entitled to qualified immunity from monetary liability unless a 'reasonable public official (in the position of defendant Kellar) would know that his or her specific conduct violated clearly established rights." *Johnson v. Horn*, 150 F.3d 276, 286 (3d Cir.1998), citing *Grant v. City of Pittsburgh*, 98 F.3d at 121 (3d Cir.1996).

It is clear a reasonable public official in the position of defendant Kellar acting as defendant did, would without question, know that his or her conduct violated clearly established rights of plaintiff. Plaintiff never had a deal that he would not file a civil suit. That was not even addressed in any agreement with the City. They simply retaliated against him for filing the

lawsuit. *See Plaintiff's Exhibit "N" Declaration of Julian Adams.* The First Amendment rights at issue are clearly established under well-settled precedent such as Pro v. Donatucci and San Filippo v. Bongiovanni, as set forth above as to the plaintiff's First Amendment claims, and no reasonable attorney could credibly argue that the protection against racial discrimination is not clearly established. Defendants did not even argue the latter point, but again made some specious assertions based upon the resolution of clearly disputed facts to support their position.

Not only did the actions of defendant Kellar violate clearly established rights, but the actions of defendant Kellar may constitute criminal behavior. Title 18 Pa. C.S.A. §5301, Official Oppression, provides that "[a] person acting or purporting to act in an official capacity or taking advantage of such actual or purported capacity commits a misdemeanor of the second degree if, knowing that his conduct is illegal, he: (1) subjects another to arrest, detention, search, seizure, mistreatment, dispossession, assessment, lien or other infringement or personal or property rights; or (2) denies or impedes another in the exercise or enjoyment of any right, privilege, power or immunity." Defendant Kellar was fully aware that he was acting in a non-judicial capacity and in the absence of all jurisdiction when he subjected plaintiff to mistreatment and denied him the exercise or enjoyment of the rights and privileges to which plaintiff was entitled. Clearly because plaintiff did not sign the release which he did not sign, but sought legal advice and while still employed by defendants' he was terminated from his position as a Harrisburg Police Officer. A reasonable person with his background and legal expertise that was available to him would know this is clearly a violation of plaintiff First Amendment right.

The actions that defendant Kellar took regarding plaintiff Adams were clearly retaliatory and the evidence shows that he did this intentionally in violations of his rights. Plaintiff clearly was being punished because of his testimony supporting Muldrow and the decision that came down

on March 13, 2007 reversing their discipline of Muldrow. Kellar was going to punish the person (Julian Adams) who clearly testified in support of Muldrow. A reasonable jury would conclude that a reasonable official, like defendant Kellar, in his particular position as Chief of Police would know his conduct to be unlawful. Based upon these circumstances, defendant Kellar is not entitled to qualified immunity.

The purported reliance on the opinions of Mr. Carlson and Mr. Marsico is clearly misplaced as has also been abundantly set forth herein, and is rife itself with implications and inferences favorable to the plaintiff. For qualified immunity purposes, however, it is clear that the First and Fourteenth Amendment rights at issue are clearly-established, and that there is ample evidence that the actions of Chief Kellar would clearly be known by a reasonable official to violate those rights.

**D. MONELL CLAIM AGAINST THE CITY OF HARRISBURG**

As to the municipal liability claim, and the race claim, this court has completely deprived plaintiff in a very unfair way of conducting discovery into the issues. Plaintiff's counsel is at a loss as to the mechanism by which this decision was reached under the circumstances, because there clearly is abundant direct evidence of not only the fact that the actual decision to terminate was a decision of the City, and not just the Chief, but that then-mayor Steven reed was directly involved in the decision-making, as well as directly implicated in widespread racial discrimination and abuse in the Harrisburg Bureau of Police. These issues have been abundantly briefed and argued by plaintiff's counsel, and, of course, will be pursued vigorously on appeal, if necessary, but suffice it to say that there is no reason that plaintiff should not have been permitted to depose Mayor Reed, and otherwise have discovery into these matters.

Nevertheless, there is abundant evidence that many police officers went to the PHRC to make complaints about Chief Kellar being racist and equally abundant information that the Mayor, Stephen Reed, was aware of those practices and did nothing about it. *See inter alia Plaintiff's Exhibit "M" pgs 1-13.* Plaintiff believes that the Mayor used his political connections to take what should have been a class complaint of discrimination, or at least a series of individual complaints, and got the PHRC to treat them as administrative reviews, as to which there was less publicity and openness in the process. See *Plaintiffs Exhibit "M"* pgs 1-13 selective statements from the PHRC and *pg 16* wherein the evidence is clear of the complaints made against the City. Nevertheless, there is abundant evidence of all of this in the PHRC record and this Court completely and improperly cut-off plaintiff's ability to develop the record in these regards by the arbitrary and capricious denial of a motion to compel.

This applies generally to the race discrimination claims, and specifically to plaintiff's retaliatory termination claim based upon the filing of the present civil rights suit. Chief Kellar clearly testified that this was a decision made by the City, and communicated to him through its business manager. Plaintiff cannot understand why under all the circumstances that he was not permitted to depose the City's chief executive who is also the head of the Police Bureau (plaintiff incorporates his Motion to compel herein by reference pursuant to the provisions of Fed. R. Civ. P. 56(f). In any case, there is evidence of a municipal policy practice and custom of retaliatory and racist treatment in the City.

A municipality is liable under 42 U.S.C. § 1983 if the individual municipal officers violated his constitutional rights. See, *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986). The Defendants claim that the record contains no evidence sufficient to demonstrate any constitutional violation by any of the individual defendants and that therefore the municipality

cannot be liable to Plaintiff under Section §1983. Defendant Kellar admits in his own testimony that the reason for the termination of Julian Adams was because he filed the civil lawsuit in violation of his agreement, there was no such agreement wherein he could not file a civil suit. See Plaintiff's Exhibit "P" pgs 46-50; CMF 39-43.

For liability to attach to a municipality under 42 U.S.C. §1983, a Plaintiff must show that the municipality itself caused a constitutional violation. *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978). A municipality is liable when through its deliberate conduct, the municipality was the 'moving force' behind the injury alleged." *Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 405 (1997). A municipality is not liable for the constitutional violations committed by its employees under the theories of respondent superior or vicarious liability. *Jett v. Dallas Indep. Sch. Dist.,* 491 U.S. 701, 736 (1989).

A Plaintiff asserting a *Monell* claim must demonstrate that the violation of his or her rights was caused by either a policy or a custom of the municipality. See, *Beck v. City of Pittsburgh*, 89 F.3d 966, 971 (3d Cir. 1996). Policy is made when a decision-maker possessing final authority to establish municipal policy with respect to the action issues an official proclamation, policy or edict. *Kneipp v. Tedder*, 95 F.3d 1199, 1212 (3d Cir.1996) (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481, 89 L.Ed.2d 452, 106 S.Ct. 1292 (1986). Customs are practices of state officials so permanent and well settled as to virtually constitute law. *Id*.

It is clear from the facts that the Defendants engaged in a custom and practice of attempting to mistreatment and discipline minority officers differently than white officers, and that there was direct involvement of the City and its decision-makers in plaintiff's termination. The PHRC documents in Plaintiffs Exhibit "M" clearly indicates the evidence that the

defendants are withholding from the public. Further it is clear that the Plaintiff suffered retaliatory treatment as a result of his testimony in the Muldrow case and the admitted fact that Kellar stated in his own deposition that the reason for terminating plaintiff was because of his civil suit.

Plaintiff has clearly set forth abundant facts, notwithstanding his inability to conduct full discovery on the issues, to support his contentions that the City of Harrisburg should be held liable under Monell for the violations of the Plaintiff's constitutional rights. Defendants' motion for summary judgment must be denied.

## III. CONCLUSION

For the foregoing reasons, Defendants' Motion for Summary Judgment must be denied, and this matter should be permitted to proceed to trial.

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**CERTIFICATION PURSUANT TO LOCAL RULE 7.8 (B) (2)**

I, Don Bailey do hereby certify that pursuant to L.R. 7.8(b) (2), the total word count of the foregoing brief is 8726 which was determined by using the word count feature of the Microsoft Word program.

By: /s/Don Bailey, Esquire

**CERTIFICATE OF SERVICE**

I, Don Bailey do hereby certify that on ***21st of June 2010*** I served a true and correct copy of ***Plaintiff's Brief in Opposition to Defendants Motion for Summary Judgment*** upon the Defendants to the attorney listed below via Electronic Filing:

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