BRIAN MORRISON
V.
PHILADELPHIA HOUSING AUTHORITY, PHILADELPHIA HOUSING AUTHORITY POLICE DEPARTMENT AND ANTHONY TAMBURRINO

MEMORANDUM

WALDMAN, Judge.

I. Introduction

Plaintiff was a Philadelphia Housing Authority ("PHA") police officer. He alleges that he was discriminated against because of his religion and retaliated against for being a witness in connection with claims of discrimination by two other Philadelphia Housing Authority Police Department ("PHAPD") police officers against the PHA.

Plaintiff has asserted a Title VII claim against the PHA and PHAPD for confiscating his firearm and later terminating him because he is a Muslim and in retaliation for his giving testimony. He has asserted claims under 42 U.S.C. § 1983 for violation of his First Amendment rights and his Fourteenth Amendment rights to due process and equal protection against PHA, PHAPD and PHAPD Sergeant Anthony Tamburrino. Plaintiff has also asserted a supplemental state law claim for intentional infliction of emotional distress against Sergeant Tamburrino.

Plaintiff's § 1983 claims for alleged violations of the Fourth and Fifth Amendments against all defendants and his claim for punitive damages against the PHA and the PHAPD were dismissed with prejudice pursuant to a stipulation of the parties.

Presently before the court is defendants' Motion for Summary Judgment.

II. Legal Standard

In considering a motion for summary judgment, the court must determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). See also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Arnold Pontiac-GMC, Inc. v. General Motors Corp., 786 F.2d 564, 568 (3d Cir. 1986). Only facts that may affect the outcome of a case are "material."See Anderson, 477 U.S. at 248. All reasonable inferences from the record must be drawn in favor of the non-movant. See id. at 256.

Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which it bears the burden of proof. See J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)), cert. denied, 499 U.S.

921 (1991). A plaintiff cannot avert summary judgment with speculation or conclusory allegations, such as those found in the pleadings, but rather must present evidence from which a jury could reasonably find in his favor. See Anderson, 477 U.S. at 248; Ridgewood Bd. of Educ. v. N.E. for M.E., 172 F.3d 238, 252 (3d Cir. 1999); Williams v. Borough of West Chester, 891 F.2d 458, 460 (3d Cir. 1989); Woods v. Bentsen, 889 F. Supp. 179, 184 (E.D.Pa. 1995).

III. Facts

From the evidence of record, as uncontroverted or otherwise viewed in a light most favorable to plaintiff, the pertinent facts are as follow.

Plaintiff began working as a police officer for the PHAPD on April 1, 1991. His partner during 1994 and early 1995 was Malik Abdullah who introduced plaintiff to the Muslim religion. Plaintiff testified that he became a Muslim during 1995 and began to attend services at a Muslim temple in late 1997. Plaintiff greeted Mr. Abdullah with the Arabic greeting "as salama lakum" in front of other officers and began wearing a kufee, a headpiece worn by Muslims but also by others. Plaintiff prayed before meals but has no recollection of any other officers observing such prayer.

In November 1994, plaintiff and Mr. Abdullah had to report for daily roll call in uniform although they were engaged in plain clothes work. They were asked by Lieutenant Geiger to report their whereabouts by radio each half-hour and to come to headquarters to report off-duty. Other non-Muslim officers were not required to do this. At an unspecified time in 1994, plaintiff and Mr. Abdullah were authorized to organize a community educational program which was "later" reassigned to non-Muslim officers.

At an unspecified time in 1995, Sergeant Tony Miller told plaintiff and Mr. Abdullah that he was "not going to have two Muslims working together" and thereafter the two were not assigned as partners. Plaintiff made a verbal request to sergeant Miller to partner again with Mr. Abdullah but such a reassignment was not made. Plaintiff acknowledged that partner requests were to be made in writing and "we failed to do it the correct way." Between April 1998 and July 1998 Sergeant Tamburrino made several disparaging comments to "plaintiff and/or Alaikum Malik Abdullah" about their Muslim faith and Muslim greeting. Plaintiff complained about these comments to then Chief Hughes who "put a stop to it."

On December 26, 1996, plaintiff injured his knee and was not working. When he asked to return to work, he was told that he could do so only if he was able to work full duty because no light duty was then available. Six non-Muslim female officers were assigned to light duty while pregnant or injured. One non-Muslim male officer was assigned to light duty after an injury for four days in the spring of 1999.

The only such officer one can determine was so assigned at any time in 1996 from the record presented is Kim Day who was assigned to the radio room. Plaintiff was subsequently assigned to light duty for six months when the same knee condition was aggravated.

In March 1998, PHAPD Officer Stanley Bacone filed an EEOC complaint of sexual harassment against the PHA, PHAPD Sergeant Tony Miller and PHAPD Officer Angela Allen. Plaintiff was named in that complaint as a witness to some of the alleged acts of harassment and drafted a handwritten letter dated June 29, 1998 regarding those events. It is not clear from the record to

whom this letter was directed, but it was apparently provided to assist Officer Bacone in the prosecution of his claim. Plaintiff did not provide any testimony in connection with the Bacone case.

By letter of August 4, 1998, Malik Abdullah was terminated by the PHAPD on the ground he was unfit based on his arrest by Philadelphia police on a domestic violence charge. In a letter of August 23, 1998 to the EEOC, Mr. Abdullah complained that he had been terminated because of his religion and named plaintiff as someone who had witnessed discriminatory conduct at the PHAPD. On September 22, 1998, Mr. Abdullah filed a formal charge of religious discrimination with the EEOC in which there is no mention of plaintiff. On May 4, 1999, Mr. Abdullah filed a federal suit against the PHA for religious discrimination under Title VII. Plaintiff was deposed on November 18, 1999 in connection with that suit and appeared as a witness at trial on April 4, 2000.

After a three-day trial, a jury returned a defense verdict. Mr. Abdullah was ultimately acquitted of the criminal charge against him but has not been reinstated.

The PHA has a domestic abuse policy which mandates that upon learning of the entry of a Protection From Abuse Order ("PFA Order") against a PHA police officer, any firearm issued by the PHA to that officer must be confiscated. On October 26, 1998, plaintiff's wife obtained a PFA Order against him. The order was served on plaintiff while he was at work. Sergeant Tamburrino received a copy of the order on November 2, 1998 and took plaintiff's PHA-issued firearm from him. On November 17, 1998, plaintiff's wife requested that the order be vacated. The next day, plaintiff sent a copy of the vacating order with a request for the return of his firearm to Sergeant Tamburrino, Captain Geiger and then PHAPD Chief Hargrave. The firearm was not returned.

Plaintiff was also subject to a PFA Order for a brief period in August 1998 during which time his firearm was not confiscated. The only evidence which plaintiff has presented that anyone at the PHAPD was aware of this order is his own testimony that his wife delivered a copy of the order to an unidentified sergeant. Plaintiff does not claim to have witnessed this and he has submitted no affidavit from his wife or any other competent evidence to show this actually occurred.

There is no evidence that these individuals actually saw such a request and Sergeant Tamburrino has testified that he did not. For purposes of the instant motion, the court credits plaintiff's claim that he sent such a request from which one could infer it was received.

From June 1998 to December 1998, plaintiff was assigned to light duty following aggravation of a knee injury. This duty encompassed answering telephones and doing paperwork at PHAPD headquarters and occasionally doing errands for superiors. While on light duty, an officer cannot work undercover or on patrol.

On the night of December 10, 1998, while returning to work after running a personal errand, plaintiff was mugged. He was hit on the head from behind and knocked to the ground. While lying face down on the ground, plaintiff felt what he thought was the gun in the back of his head and was told not to move as his pockets were searched. Plaintiff's wallet and cell phone were taken. Plaintiff then turned around and with his elbow knocked a gun from one of the attackers and instinctively felt for his gun when he remembered it had been confiscated. Plaintiff then lost consciousness for several minutes. Upon awaking, he walked back to work and reported this

incident. Plaintiff states that as a result of being hit on the head, he has suffered headaches, impaired vision and permanent brain damage. Plaintiff was out from work on sick leave from December 10, 1998 to June 17, 1999.

Plaintiff suggests but does not explain how he would have avoided the debilitating blow to the head from behind if he had been armed.

Plaintiff was arrested on March 31, 1999 by Philadelphia police officers for forgery, theft, theft by deception, receiving stolen property and securing execution of a document by deception. The identified victim was Shonda Leach, a tenant of one of the PHA communities which plaintiff was assigned to patrol.

In January 1998, Ms. Leach received $70,000 from her father's estate. Unsure what to do with the money, she asked plaintiff for advice. Ms. Leach gave plaintiff a check for $10,000 which he told her he would invest in a savings account he would open in her name at Commerce Bank. Plaintiff told Ms. Leach she would receive a $400 interest check monthly. Ms. Leach asked for paperwork from the bank which plaintiff never provided. Ms. Leach then called Commerce Bank and discovered that there was no account in her name.

Ms. Leach asked plaintiff for her money back. He told her that he did not have it all but would pay her back in installments. Plaintiff then paid Ms. Leach $2,500 in cash. On February 19, 1998, plaintiff made an additional payment of $1,000 in cash and $400 by check.

Ms. Leach went to PNC Bank which issued the original $10,000 check and saw that her name had been forged on the back of the check with a handwritten notation "Pay to the order of Brian Morrison for purchase of Mazda 929." Ms. Leach then contacted the South Detectives of the Philadelphia Police Department and was interviewed by Detective Frank Straup.

On June 2, 1998, a search warrant was executed for Commerce Bank records which revealed that the forged $10,000 check was deposited into plaintiff's personal bank account. On June 16, 1998, plaintiff was interviewed by Detective Straup regarding the $10,000 check. Plaintiff said that Ms. Leach lent him the money and he endorsed the back of the check after getting her permission to do so. Plaintiff related to the police that he told Ms. Leach he needed a reason to deposit the check and that he would write on the back that she had purchased a car from him.

After concluding his investigation, Detective Straup obtained a warrant for plaintiff's arrest on March 26, 1999. On March 31, 1999, plaintiff voluntarily turned himself in to South Detectives and was arrested for forgery, theft, theft by deception, receiving stolen property and securing execution of a document by deception.

In a letter dated April 5, 1999 and addressed to "Dear Sir/Madam" at the Criminal Justice Center, Ms. Leach wrote that she and plaintiff "had come to an agreement" and that she "wanted everything dropped" but that Detective Straup had declined to do so because a warrant had been issued. Plaintiff and Ms. Leach executed a document captioned "Repayment Contract" on March 31, 1999. The document provided that plaintiff would repay Ms. Leach in monthly installments to be completed by July 30, 1999 and that "[i]f payment isn't completed by July 30, 1999 [plaintiff] should be arrested."

On March 31, 1999, Commander John O'Brien of the PHAPD learned of plaintiff's arrest and reported it to PHAPD Chief of Police Lester Williams. Patrick Agnew, an investigator with the

PHA Office of the Inspector General, was assigned to investigate and verify the information surrounding plaintiff's arrest. Mr. Agnew reviewed plaintiff's arrest report, the affidavit and arrest warrant, plaintiff's signed interview with Detective Straup and the forged check, and also interviewed Detective Straup.

Mr. Agnew did not interview plaintiff or Ms. Leach. Mr. Agnew attempted to contact plaintiff on several occasions. He faxed a request to plaintiff's supervisor on May 7, 1999 for plaintiff to appear at Mr. Agnew's office on May 18, 1999 to discuss the charges against him. Mr. Agnew received a copy of the notice bearing plaintiff's signature but plaintiff never appeared for an interview. Mr. Agnew sent a registered letter to plaintiff's house to which he also never received a response. Mr. Agnew attempted to contact Ms. Leach by telephone and an unregistered letter but did not receive a response.

In a report of June 18, 1999 to then Inspector General Joseph Daley, Mr. Agnew concluded that the case against plaintiff was "founded." On June 21, 1999, PHAPD Commander Lester Williams wrote a memorandum to then PHAPD Chief of Police Richard Zeppile requesting that plaintiff be disciplined for violating Sections 5.01, 1.50 and 1.11 of the PHAPD Disciplinary Code.Commander Williams recommended that plaintiff be suspended for ten days with intent to terminate his employment.

Section 5.01 prohibits "Soliciting money or valuables for personal gain." Section 1.50 addresses "Conduct including arrest by any other outside law enforcement agency, indicating a member has little, or no regard for his responsibility as a member of the [PHAPD]." Section 1.11 addresses "Failure to Cooperate in a Departmental Investigation."

In August 1999, Chief Zeppile asked Nancy Hartsough, newly employed by the PHAPD as Integrity Officer, to review plaintiff's file and implement whatever discipline she determined to be appropriate. Ms. Hartsough concluded that plaintiff had engaged in conduct "unbecoming an officer" and "demonstrated little or no regard for [his] position as a member of the [PHAPD]" in violation of Section 1.50 of the PHAPD Disciplinary Code. Ms. Hartsough so informed plaintiff by letter of September 10, 1999 in which she also notified plaintiff he was suspended for ten days with intent to dismiss, and that his employment with the PHAPD was terminated effective September 24, 1999.

Plaintiff then initiated the grievance procedure authorized under his union's collective bargaining agreement. On December 28, 1999, during step two of the three-step grievance procedure, Ms. Hartsough assigned PHA Investigator Richard Contrabasso to re-investigate the facts surrounding plaintiff's arrest.

As part of his investigation Mr. Contrabasso obtained copies of the forged check and the repayment contract executed by Ms. Leach and plaintiff. On December 29, 1999, Mr. Contrabasso interviewed Ms. Leach who stated that plaintiff had breached the contract and she wanted the balance of her money returned even if that meant plaintiff would have to be charged criminally.

On January 10, 2000, Mr. Contrabasso twice attempted to contact plaintiff and eventually left a message with plaintiff's wife. On January 27, 2000, Mr. Contrabasso spoke with plaintiff who stated he would get back to Mr. Contrabasso in a couple of hours but never did.

Mr. Contrabasso learned that plaintiff's criminal trial had been scheduled for September 30, 1999 and because Ms. Leach was late, the case was dismissed by the court for lack of prosecution.

After reading Mr. Contrabasso's report of his investigation, Ms. Hartsough was certain she "had done the right thing" in terminating plaintiff.

After the three-step grievance procedure was complete, plaintiff was informed by letter of January 11, 2000 that PHA had decided to uphold his termination. The PHA found that there was "no dispute that [plaintiff] was arrested on March 31, 1999 by the Philadelphia Police Department and charged with forgery, theft and related charges." PHA concluded that plaintiff had engaged in "conduct unbecoming an officer."

One non-Muslim officer who had been arrested was ultimately not terminated by the PHA. One non-Muslim officer who had been cited for conduct "unbecoming an officer" was not terminated.

Tonya Morrison was arrested on September 13, 1997 for violating a PFA Order to avoid contact with a former boyfriend. Ms. Morrison was terminated effective October 4, 1997, but then reinstated on a last chance basis without back pay on May 6, 1998 pursuant to an agreement brokered by the union. Officer Michael Duross was cited in August 1992 for "conduct unbecoming an officer" for misrepresenting that he was acting as a PHAPD officer when making an arrest while he was actually off-duty working as a private security guard. On August 20, 1994, the PHA suspended Mr. Duross for twenty-five days which it allowed him to serve over a period of three months. He was expressly advised that he would be terminated for any improper conduct on his part within the following two years.

Two non-Muslim officers, Greg Carter and Mark Townsend, were terminated on April 19, 1995 and November 4, 1997 respectively for conduct unbecoming an officer after each was arrested. Mr. Townsend was arrested for possession of drugs. Mr. Carter was arrested for attempting fraudulently to obtain merchandise worth $300 from a retail store by unauthorized use of another person's credit card.

Plaintiff correctly identified one non-Muslim PHAPD officer whose firearm was not confiscated when a PFA Order was entered against him. He is David Padova. Officer Padova, however, had voluntarily turned in his firearm upon the issuance of the PFA Order. Officer Padova requested the return of the firearm about ten days later. About two weeks thereafter his firearm was returned. Since the adoption of the domestic abuse policy, the PHA has confiscated the firearms of at least nine other non-Muslim officers while they were subject to PFA Orders. They are Michael Anderson, Roy Steigerwalt, Carlos Perez, Fred Boyle, Tonya Morrison, Ron Smith, Geraldine Coleman, Steven Blaker and Mark Townsend.

It is not clear from the record whether this was related to Officer Padova's assigned duties, but it does appear he was on active duty at the time.

Plaintiff testified that other non-Muslim officers who were subject to PFA Orders did not have their firearms confiscated but has presented no evidence of first hand knowledge or other competent evidence to substantiate this assertion. The two officers so identified by plaintiff, Rodney Little and Antonio Fuller, testified that they were never subject to a PFA Order.

On January 11, 2000, plaintiff filed a charge of religious discrimination and retaliation with the EEOC. On June 6, 2000, plaintiff filed the instant action. On September 8, 2000, he obtained a signed statement from Ms. Leach that she had now been repaid in full.

Plaintiff appealed from the grievance procedure to an arbitrator. Hearings were held on November 13 and December 4, 2000. On March 6, 2001, the arbitrator ordered that plaintiff be reinstated with back pay. The PHA then invited plaintiff in writing to return to work, but he has continuously been on worker's compensation leave and has not been cleared by his physician to return to work.

IV. Discussion

Plaintiff's Title VII Claims Statute of Limitations

Defendants assert that insofar as the Title VII claim is based on confiscation of plaintiff's firearm prior to March 18, 1999, it is time barred. Plaintiff filed his EEOC claim on January 11, 2000. Defendants are correct that discriminatory conduct more than 300 days prior to the filing of an EEOC complaint is generally not actionable. See 42 U.S.C. § 2000e-5(e); Colgan v. Fisher Scientific, Inc., 935 F.2d 1407, 1414 (3d Cir.), cert. denied, 502 U.S. 941 (1991); Harris v. SmithKline Beecham, 27 F. Supp.2d 569, 576 (E.D.Pa. 1998).

Plaintiff contends that his firearm was confiscated and he was terminated because he is a Muslim and in retaliation for being a witness and "[a]ccordingly the two acts are linked and therefore create a continuing violation."

Defendants have not argued that confiscation of plaintiff's firearm did not constitute an "adverse employment action" and the court will assume it did for purposes of the instant motion although he was already assigned to light duty at the time for other reasons.

Under the continuing violation theory, a plaintiff may pursue a claim for "conduct that began prior to the filing period if he can demonstrate that the act is part of an ongoing practice or pattern of discrimination." Rush v. Scott Specialty Gases, Inc., 113 F.3d 476, 481 (3d Cir. 1997). A determination of whether alleged incidents were isolated or part of a continuing pattern requires an examination of the nature or subject matter, the frequency and the permanence of the occurrences. See Green v. Los Angeles County Superintendent of Schools, 883 F.2d 1472, 1480-81 (9th Cir. 1989). To obtain relief for a time-barred act, a plaintiff must link that act to at least one discriminatory act which occurred within 300 days of his EEOC charge.See Mroczek v. Bethlehem Steel Corp., 126 F. Supp.2d 379, 386 (E.D.Pa. 2001).

The firearm was confiscated pursuant to a mandatory domestic abuse policy. Different individuals were involved in the taking of plaintiff's firearm and his termination. The events occurred more than ten months apart. See, e.g., Sicalides v. Pathmark Stores, Inc., 2000 WL 760439, *6 (E.D.Pa. June 12, 2000) (frequency requirement not met where there were three months between alleged discriminatory incidents). Even assuming each act was discriminatory or retaliatory, one cannot reasonably find a "link" between the confiscation of plaintiff's firearm and his termination which is the only timely pled act.

2. Title VII Religious Discrimination Claim

A plaintiff has the initial burden of establishing a prima facie case of employment discrimination. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Pamintuan v. Nanticoke Mem'l Hosp., 192 F.3d 378, 385 (3d Cir. 1999). To establish a prima facie case of discriminatory discharge a Title VII plaintiff must show that he is a member of a protected class, he was qualified for the position he held, he was discharged and was replaced by someone not in the protected class, or otherwise present evidence sufficient to support an inference of unlawful discrimination. See Pivirotto v. Innovative Systems, Inc., 191 F.3d 344 (3d Cir. 1999). See also Jones v. School of Philadelphia, 198 F.3d 403, 410-11 (3d Cir. 1999); Sheridan v. E.I. DuPont de Nemours and Co., 100 F.3d 1061, 1066 n. 5 (3d Cir. 1996); Waldron v. SL Industries, 56 F.3d 491, 494 (3d Cir. 1995). The burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment decision. See McDonnell Douglas, 411 U.S. at 802; Hampton v. Borough of Tinton Falls Police Dep't, 98 F.3d 107, 112 (3d Cir. 1996). The plaintiff may then discredit the defendant's articulated reason and show that it was pretextual from which a factfinder may infer that the real reason was discriminatory or otherwise present evidence from which one reasonably could find that unlawful discrimination was more likely than not a determinative cause of the adverse employment action. Id. at 112-13.

To discredit a legitimate reason proffered by the employer, a plaintiff must present evidence demonstrating "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" in that reason that one could reasonably conclude it is incredible and unworthy of credence, and ultimately infer that the employer did not act for the asserted non-discriminatory reasons. See Fuentes v. Perskie, 32 F.3d 759, 765 (3d Cir. 1994). A plaintiff does not discredit the employer's proffered reason merely by showing that the adverse employment decision was mistaken, wrong, imprudent, unfair or incompetent. Id. The ultimate burden of proving that a defendant engaged in intentional discrimination remains at all times on the plaintiff. See St. Mary's Honors Center v. Hicks, 509 U.S. 502, 508 (1993).

There is evidence to show that plaintiff is a member of a protected class and was terminated from a position for which he had the basic objective qualifications. See Goosby v. Johnson Johnson Medical, Inc., 228 F.3d 313, 320-21 (3d Cir. 2000) (noting distinction between objective qualifications and performance issues generally more appropriately considered at pretext stage). There is no evidence that prior to the order of reinstatement, plaintiff was replaced by anyone. Plaintiff suggests that discrimination may be inferred from the more favorable treatment accorded non-Muslim officers, particularly Tonya Morrison and Michael Duross.

Insofar as plaintiff points to the roll call and reporting requirements, he was not then a Muslim and had yet to be a witness for Mr. Bacone or Mr. Abdullah. As to the denial of plaintiff's request for light duty in 1996, there is no competent evidence of record to show that whoever told plaintiff no such duty assignments were available at that particular time was untruthful or incorrect.

Officer Morrison was arrested for violating a PFA Order to avoid contact with a former boyfriend and was initially terminated. She was reinstated seven months later without back pay. This was substantial discipline which shows the low tolerance of the PHA for any conduct resulting in an arrest. Officer Morrison's conduct on its face was less serious and less inimical to the perception of the PHA than the defrauding of a public housing resident by a PHAPD officer sworn to serve and protect her. Moreover, even assuming Ms. Morrison was treated more favorably, one cannot infer discrimination from such treatment accorded to a single individual in

view of the termination of other non-Muslims who were arrested on criminal charges. See Simpson v. Kay Jewelers, Div. of Sterling, Inc., 142 F.3d 639, 646 (3d Cir. 1998).

Officer Duross was not arrested. He was found to have engaged in inappropriate conduct when he misrepresented that he was acting as a PHAPD officer while making an off-duty arrest as a security guard. He was not charged with criminally defrauding a PHA resident. That both actions are fairly characterized as "conduct unbecoming an officer" does not make them comparable.

The Duross incident occurred seven years before plaintiff's termination and there is no evidence that anyone involved in that decision was involved in imposing discipline in the Duross or Tonya Morrison case. Officers Carter and Townsend, both non-Muslims, were terminated by the PHA for conduct unbecoming an officer after being arrested.

Plaintiff has not presented competent evidence sufficient to give rise to an inference of a religiously motivated termination. Plaintiff has not discredited defendants' legitimate reason that he was terminated for an arrest by an outside law enforcement agency indicating he had little or no regard for his responsibility as a member of the PHAPD, or otherwise presented competent evidence from which one could reasonably find that his religion was more likely than not a determinative factor in plaintiff's termination.

It is undisputed that plaintiff was arrested on a warrant for forgery, theft and other related offenses and that the named victim was a member of the community plaintiff was hired to police. Section 1.50 addresses arrests by other agencies and not convictions. Moreover, contrary to his suggestion, plaintiff was not exonerated. The court dismissed the charges against him because of the failure of a witness timely to appear at trial.

Plaintiff's suggestion that the PHAPD investigation was a "sham" also does not demonstrate pretext. The PHAPD reasonably could have acted on the results of the Philadelphia Police Department investigation, but conducted its own multi-tier review. Indeed, Ms. Hartsough showed a willingness to reconsider her own conclusion and directed a further investigation by Mr. Contrabasso who obtained a copy of the repayment agreement executed by plaintiff. Plaintiff's agreement to make restitution to Ms. Leach subject to being "arrested" is effectively an admission that he unlawfully obtained the $10,000 in a manner for which he could be criminally charged and the PHAPD could very reasonably so view it.

Moreover, there is no competent evidence of record that any individual involved in the decision to terminate plaintiff knew of his religion. Mr. Agnew testified that he was never aware of plaintiff's religion before the time of his deposition in this action. There is no competent evidence that Mr. Contrabasso or Ms. Hartsough, the recently employed final decisionmaker, had any previous contact with plaintiff or were aware of his religion.

There also is no evidence that Sergeant Miller or Sergeant Tamburrino, who made disparaging comments about plaintiff's religion fourteen months earlier, were involved in any way in his termination. See, e.g., Hodgkins v. Kontes Chemistry Life Sciences Product, 2000 WL 246422, *14 (D.N.J. March 6, 2000) (precluding evidence of past harassment to show employer's discriminatory motivation in absence of evidence that those who were culpable were involved in current alleged discriminatory decision). See also Gomez v. Allegheny Health Serv., Inc., 71 F.3d 1079, 1085 (3d Cir. 1995) (discriminatory statements by non-decisionmaker insufficient to support inference of discrimination by employer), cert. denied, 518 U.S. 1005 (1996); Armbruster v. Unisys Corp., 32 F.3d 768, 779 (3d Cir. 1994) (discriminatory

statement by non-decisionmaker several months before challenged transfer insufficient); Armbruster v. Unisys Corp., 914 F. Supp. 1153, 1156-57 (E.D.Pa. 1996) (discriminatory statement must be connected to motive of decisionmaker).

Title VII Retaliation Claim

Title VII prohibits an employer from discriminating against an employee because he has opposed any employment practice unlawful under Title VII or made a charge, testified, assisted or participated in an investigation, proceeding or hearing under Title VII. See 42 U.S.C. § 2000e-3(a). To establish a prima facie case of retaliation, a plaintiff must show that he engaged in protected activity, that he was subsequently or contemporaneously subject to an adverse employment action and that there was a causal link between the protected activity and the adverse action. See Weston v. Pennsylvania , 251 F.3d 420, 430 (3d Cir. 2001); Krouse v. American Sterilizer Co . , 126 F.3d 494, 500 (3d Cir. 1997); Woodson v. Scott Paper, Co . , 109 F.3d 913, 920 (3d Cir. 1997); Barber v. CSX Distribution Servs . , 68 F.3d 694, 701 (3d Cir. 1995); Nelson v. Upsala College , 51 F.3d 383, 386 (3d Cir. 1995); Jalil v. Avdel Corp . , 873 F.2d 701, 708 (3d Cir. 1989), cert. denied , 493 U.S. 1023 (1990). The burden then shifts to the defendant to offer a legitimate non-retaliatory reason for the adverse action. See Woodson , 109 F.3d at 920; Jalil , 763 F.2d at 708. The plaintiff must then discredit any such reason from which it may be inferred that the real reason was retaliatory, or otherwise show that retaliation was more likely than not a determinative cause of the adverse action. See Lawrence v. National Westminster Bank of New Jersey , 93 F.3d 61, 66 (3d Cir. 1996); Charlton v. Paramus Board of Education , 25 F.3d 194, 201 (3d Cir.), cert. denied , 513 U.S. 1022 (1994); Geary v. Visitation of the Blessed Virgin Mary Parish School , 7 F.3d 324, 329 (3d Cir. 1993). As noted, to discredit a legitimate reason proffered by the employer, a plaintiff must present evidence demonstrating such weaknesses, implausibilities, inconsistencies, contradictions or incoherence in that reason that one could reasonably conclude it is incredible and unworthy of belief. Fuentes , 32 F.3d at 764-65; Ezold v. Wolf, Block, Schorr Solis-Cohen , 983 F.2d 509, 531 (3d Cir. 1992), cert. denied , 510 U.S. 826 (1993). "To discredit the employer's proffered reason, the plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent or competent." Fuentes , 32 F.3d at 765 . See also Holder v. City of Raleigh , 867 F.2d 823, 829 (4th Cir. 1989) ("A reason honestly described but poorly founded is not a pretext") (citation and internal quotations omitted); Hicks v. Arthur , 878 F. Supp. 737, 739 (E.D.Pa.) (that a decision is ill-informed or ill-considered does not make it pretextual), aff'd , 72 F.3d 122 (3d Cir. 1995). Plaintiff's letter of June 28, 1998 on behalf of Officer Bacone in connection with his sexual harassment claim is protected activity. SeeAbramson v. William Patterson College , 260 F.3d 265, 288 (3d Cir. 2001); Aman v. Cort Furniture Rental Corp . , 85 F.3d 1074, 1085 (3d Cir. 1996); Beeck v. Federal Express Corp . , 81 F. Supp.2d 48, 55 (D.D.C. 2000). Whether being named as a potential witness by Mr. Abdullah in his letter of August 23, 1998 is protected activity is another matter. The plain language of Title VII prohibits retaliation against someone because "he" has engaged in protected activity. See 42 U.S.C. § 2000e-3(a) . See also Fogelman v. Mercy Hospital, Inc . , 283 F.3d 561, 2002 WL 415833 (3d Cir. Mar. 18, 2002) (noting similar language in ADEA, ADA and PHRA "clearly prohibits only retaliation against the actual person who engaged in protected activity"). As plaintiff was close to Mr. Abdullah and did later testify for

him, however, one can infer that plaintiff may have agreed to assist Mr. Abdullah in the pursuit of his claim at the time he was named in the letter, which would be protected activity.

Plaintiff's deposition and trial testimony in the Abdullah case is clearly protected activity. Plaintiff's termination, however, had already occurred and thus was not contemporaneous with or subsequent to such protected activity.

Plaintiff has not presented competent evidence from which one could reasonably find a causal link between either letter and his termination, or that the stated reason for his termination is incredible and unworthy of credence. There is no temporal proximity, let alone timing which is unusually suggestive. See Krouse , 126 F.3d at 503. The Abdullah letter and plaintiff's letter for Mr. Bacone were written more than a year before his termination. There is no competent evidence of record that anyone involved in the decision to terminate plaintiff had prior knowledge of either letter without which his claim cannot be sustained. See Weston , 251 F.3d at 433; Jones v. School Dist. of Philadelphia , 198 F.3d 403, 415 (3d Cir. 1999); Krouse , 126 F.3d at 505; Manoharan v.Columbia Univ. College of Physicians , 842 F.2d 590, 593 (2d Cir. 1988); Bedford v. SEPTA , 867 F. Supp. 288, 293 (E.D.Pa. 1994).

Plaintiff's § 1983 Claims First Amendment Claim

Plaintiff contends that his firearm was confiscated and he was terminated in retaliation for complaining about Sergeant Tamburrino's offensive comments and for his letter on behalf of Officer Bacone in violation of his First Amendment rights.

Plaintiff has not relied on his participation in the Abdullah case in support of this claim.

Governmental action against an individual in retaliation for his exercise of First Amendment rights is actionable under § 1983. See Allah v. Seiverling, 229 F.3d 220, 225 (3d Cir. 2000); Anderson v. Davila, 125 F.3d 148, 160 (3d Cir. 1997); Estate of Smith v. Maroseo, 2002 WL 54507, *26 (E.D.Pa. Jan. 11, 2002); Zapach v. Dismuke, 134 F. Supp.2d 682, 687 (E.D.Pa. 2001).

To sustain a claim of retaliation for engaging in a protected speech, a plaintiff must show that the speech in question was protected and that it was a substantial or motivating factor in the alleged retaliatory action. A defendant may still defeat such a claim by showing that the same action would have been taken even in the absence of the protected activity. See Watters v. City of Philadelphia, 55 F.3d 886, 892 (3d Cir. 1995).

Plaintiff has the burden of establishing that the protected activity in which he was engaged was a substantial factor in some retaliatory action. See Holder v. City of Allentown, 987 F.2d 188, 196 (3d Cir. 1993); Czurlanis v. Albanese, 721 F.2d 98, 103 (3d Cir. 1983). Whether a public employee's speech involves a matter of public concern and is thus protected is a question of law for the court. See Connick v. Myers, 461 U.S. 138, 148 n. 7 (1983); Versarge v. Township of Clinton, N.J., 984 F.2d 1359, 1364 (3d Cir. 1993).

In the public employment context, speech is protected when it appears from an examination of the content, form and context that it relates to a matter of public concern and the speaker's interest in such speech is not outweighed by the government's interest in effective and efficient operation. See Connick, 461 U.S. at 146-48; Swineford v. Snyder County Pa., 15 F.3d 1258,

1271 (3d Cir. 1994). See also Azzaro v. County of Allegheny, 110 F.3d 968, 975 (3d Cir. 1997); Feldman v. Philadelphia Housing Auth., 43 F.3d 823, 829 (3d Cir. 1995).

A complaint about discriminatory employment action is protected activity. See Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 413 (1979); Abramson v. William Patterson Coll., 260 F.3d 265, 288 (3d Cir. 2001); Sumner v. United States Postal Service, 899 F.2d 203, 209 (2d Cir. 1990). Plaintiff's complaints to Sergeant Tamburrino and Chief Hughes, and his statement on behalf of Mr. Bacone, was protected activity. Defendants do not contend that plaintiff's interest in such speech was outweighed by a governmental interest in effective operation and have presented no evidence to show it was.

There is no competent evidence, however, that Sergeant Tamburrino or Chief Hughes were involved in plaintiff's termination. Indeed, Mr. Hughes was no longer the Chief of Police when plaintiff was terminated and there is in any event no rational basis on which to attribute a retaliatory motive to him. He responded affirmatively to plaintiff's complaint and promptly "put a stop" to the offensive comments. There is also no competent evidence of record to show that anyone who was involved in plaintiff's termination knew of his complaints about these comments or his letter for Mr. Bacone. One cannot reasonably find from the competent evidence of record that the complaints or letter were a substantial or motivating factor in plaintiff's termination.

Sergeant Tamburrino was the individual who confiscated plaintiff's firearm. There is no competent evidence that Sergeant Tamburrino knew plaintiff had written a letter on behalf of Mr. Bacone four months earlier. One can reasonably infer that he was aware of plaintiff's complaint to Chief Hughes about the offensive comments.

Sergeant Tamburrino, however, confiscated plaintiff's firearm pursuant to a mandatory domestic abuse policy under which at least nine other non-Muslim officers had their firearms confiscated. While the circumstances are not altogether clear, it appears that Officer Padova's firearm was returned about four weeks after he turned it in. There is no competent evidence that Sergeant Tamburrino was responsible for returning Officer Padova's firearm or was empowered to return plaintiff's. There is no competent evidence that Captain Geiger or Chief Hargrave were aware of plaintiff's protected activity. Two weeks elapsed between Officer Padova's request for his firearm and its release. Within three weeks of the time plaintiff states he requested the return of his firearm, he was out from work on sick leave. By the time of his return, he had been arrested and his termination had been recommended by a commanding officer.

One cannot reasonably conclude that Sergeant Tamburrino, Captain Geiger or Chief Hargrave failed to restore plaintiff's firearm because of his letter and complaints several months earlier.

Fourteenth Amendment Claims

Plaintiff asserts that defendants deprived him of his "property interest in his job and liberty interest in his good name and reputation without due process of law."

As defendants acknowledge, plaintiff had a property interest in his continued employment as he was a public employee subject to a collective bargaining agreement. Plaintiff, however, was not denied due process. Pursuant to the terms of his collective bargaining agreement, he filed a grievance and was afforded the opportunity to appeal his termination.See Dykes v. Southeastern

Pennsylvania Transportation Authority, 68 F.3d 1564, 1571 (3d Cir. 1995) (plaintiff has received due process where adequate grievance or arbitration procedure is in place and followed). See also Loudermill v. Cleveland Board of Education, 470 U.S. 532, 546 (1985)) ("Due process requires that `some form of hearing' be held before an individual is deprived of a property interest"). Plaintiff was afforded a three-level grievance process and ultimately successfully arbitrated his termination.

There is no constitutionally secured liberty or property interest in one's reputation. Unless accompanied by an alteration in legal status or extinction of an otherwise legally protected right, reputational injury inflicted by the State is not actionable under § 1983. This has been characterized as the "stigma plus" test. See Siegert v. Gilley, 500 U.S. 226, 233 (1991); Paul v. Davis, 424 U.S. 693, 712 (1976); Clark v. Township of Falls, 890 F.2d 611, 619 (3d Cir. 1989); DeFeo v. Sill, 810 F. Supp. 648, 656 (E.D.Pa. 1993); Balliet v. Whitmore, 626 F. Supp. 219, 224-25 (M.D.Pa.), aff'd, 800 F.2d 1130 (3d Cir. 1986). Even then, due process requires only that a public employer provide an opportunity for a "name clearing" hearing to the employee. See Codd v. Velger, 429 U.S. 624, 627 (1978); Board of Regents of State Colleges v. Roth, 408 U.S. 564, 573 n. 12 (1972); Brennan v. Hendrigan, 888 F.2d 189, 196 (1st Cir. 1989). A constitutional claim arises not from the stigmatizing conduct but from a denial of a name clearing hearing. See In re Selcraig, 705 F.2d 789, 797 n. 10 (5th Cir. 1983); Austin v. Neal, 933 F. Supp. 444, 456 (E.D.Pa. 1996), aff'd, 116 F.3d 467 (3d Cir. 1997).

A termination of public employment does not satisfy the "plus" element of the stigma plus test when the employee is subsequently reinstated with back pay. See Wallin v. Minnesota Dep't of Corrections, 153 F.3d 681, 690 n. 9 (8th Cir. 1998); Dobosz v. Walsh, 892 F.2d 1135, 1140 (2d Cir. 1989). Plaintiff was so reinstated. He also was not denied an opportunity for a name clearing hearing. He was invited by the PHA to give his version during the investigation and had an opportunity to present his version in grievance and arbitration proceedings. See Wallin, 153 F.3d at 690 (opportunity for meeting between plaintiff, his attorney and supervisors "was all the process he was due in connection with [alleged] stigmatizing statements").

To sustain his § 1983 Fourteenth Amendment equal protection claim, plaintiff must prove he was treated differently than similarly situated individuals and that such disparate treatment was the result of purposeful discrimination. See Keenan v. City of Philadelphia, 983 F.2d 459, 465 (3d Cir. 1992); Williams v. Pennsylvania State Police, 108 F. Supp.2d 460, 471 (E.D.Pa. 2000).

It appears from the competent evidence of record that only one officer who was arrested was ultimately not terminated. Through the efforts of the union, Tonya Morrison was successful in converting her termination into a seven-month suspension without pay. Ms. Morrison had been arrested for prohibited contact with a former boyfriend and not an underlying felony.

Officers Townsend and Carter, who like plaintiff were arrested for substantive crimes, were terminated for conduct unbecoming an officer in violation of Section 1.50 of the PHAPD Disciplinary Code. The charge against Mr. Carter involved an attempt fraudulently to obtain merchandise worth $300 from a retail store. The charges against plaintiff involved defrauding a PHA resident of $10,000. Officer Duross, who was suspended but not terminated for conduct unbecoming an officer, had not been arrested or charged with a crime.

One cannot reasonably find from the competent evidence of record that others similarly situated to plaintiff were not terminated. Moreover, one cannot reasonably find that anyone involved in

plaintiff's termination engaged in purposeful discrimination. The only discriminatory motives suggested by plaintiff are his religion and his protected speech in complaining about the offensive comments and writing a letter for Mr. Bacone over a year earlier. There is no competent evidence of record to show that anyone involved in plaintiff's termination was then aware of his religion or protected activity.

One officer who was subject to a PFA Order had his firearm returned. The sergeant who took plaintiff's firearm, and who was one of three persons to whom plaintiff directed a request for its return, was aware of his religion and protected speech. Sergeant Tamburrino was not responsible for the return of Officer Padova's firearm. At least nine non-Muslim officers with no record of having engaged in protected activity had their firearms confiscated after PFA Orders were entered against them. In such circumstances, one cannot infer discrimination from the more favorable treatment apparently accorded to one officer. See Simpson, 142 F.3d at 646.

Plaintiff was assigned to light duty at the time he sent a request for restoration of his firearm. Within three weeks, plaintiff was on sick leave. At the time of his return, he had been arrested and Commander Williams had formally recommended his termination. Neither Officer Padova nor any other officer identified by plaintiff was so situated. One cannot reasonably find from the competent evidence of record that plaintiff's firearm was taken or retained as the result of purposeful discrimination.

Plaintiff's Claim against Defendant Tamburrino for Intentional Infliction of Emotional Distress

Nowhere in his complaint or brief does plaintiff specify the conduct on which this claim is predicated. The only basis apparent from the record presented would be Sergeant Tamburrino's involvement with plaintiff's firearm and his offensive comments in the spring and early summer of 1998.

To sustain a claim for intentional infliction of emotional distress, a plaintiff must show intentional or reckless conduct by a defendant which 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." Hoy v. Avegelone, 720 A.2d 745, 754 (Pa. 1998). See also Rowe v. Marder, 750 F. Supp. 718, 726 (W.D.Pa. 1990) (noting cause of action limited to "diabolical" conduct and acts of extreme "abomination"), aff'd, 935 F.2d 1282 (3d Cir. 1991). The conduct in question does not satisfy this test. See,e.g., Andrews v. City of Philadelphia, 895 F.2d 1469, 1487 (3d Cir. 1990) (sexual harassment insufficient); Clark v. Township of Falls, 890 F.2d 611, 623 (3d Cir. 1989) (setting aside verdict for plaintiff who was defamed and falsely referred for prosecution); Cox v. Keystone Carbon Co., 861 F.2d 390, 395 (3d Cir. 1988) (ill-motivated callous termination of employment insufficient); Sicalides v. Pathmark Stores, Inc., 2000 WL 760439, *11-12 (E.D.Pa. June 12, 2000) (offensive comments and harassment insufficient); Motheral v. Burkhart, 583 a.2d 1180, 1190 (Pa.Super. 1990) (falsely accusing plaintiff of child molestation insufficient).

V. CONCLUSION

Plaintiff was subjected to several offensive religiously intolerant remarks. Such conduct is unacceptable and then Chief Hughes commendably put a stop to it.

One cannot reasonably find from the competent evidence of record, however, that plaintiff's religion was a determinative or motivating factor in his termination more than a year later. He was terminated because of the circumstances of his arrest as were other non-Muslim officers. Plaintiff had executed a document in which he acknowledged that he "should be arrested" if he did not make restitution to Ms. Leach. There is no competent evidence that anyone arrested on comparable criminal charges received more favorable treatment. There is no competent evidence that anyone involved in plaintiff's termination was then aware of his religion.

There is also no evidence that anyone involved in plaintiff's termination was then aware of the Bacone letter, the Abdullah letter or plaintiff's complaint about the offensive remarks. Sergeant Tamburrino was aware of the latter when he confiscated plaintiff's firearm four months later. The firearm was taken, however, pursuant to a policy under which the firearms of at least nine other officers were confiscated. There is no evidence that any of these officers were Muslim or had engaged in protected activity. Assuming that Sergeant Tamburrino received a request from plaintiff for restoration of the firearm, there is no evidence that he was then empowered to order its return. There is no evidence that Captain Geiger or Chief Hargrave, to whom plaintiff testified he also directed this request, were then aware of the Bacone letter, the Abdullah letter or plaintiff's complaints months earlier to Sergeant Tamburrino and then Chief Hughes.

If there is evidence to support plaintiff's claims, he has not produced it. One cannot reasonably find from the competent evidence of record that plaintiff was terminated or relieved of his firearm because of his religion or engagement in protected activity, that he was treated differently than others similarly situated as a result of purposeful discrimination or that he was deprived of a property or liberty interest without due process.

Defendants are entitled to summary judgment on the record presented. Their motion will be granted. An appropriate order will be entered.

ORDER

AND NOW, this day of April, 2002, upon consideration of defendants' Motion for Summary Judgment (Doc. #18) and plaintiff's response thereto, consistent with the accompanying memorandum, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** and accordingly **JUDGMENT** is **ENTERED** in the above action for the defendants.