

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY

<p>ERNEST D’ORAZIO, III PLAINITIFF</p> <p>v.</p> <p>WASHINGTON TOWNSHIP, STEPHEN ROLANDO, JASON PLAYER, RICHARD SUMEK, RAFAEL MUNIZ, DENNIS SIMS, AND PAUL MORIARITY DEFENDANTS</p>	<p>CIVIL ACTION NO. 07-5097</p> <p>PLAINTIFF’S ACCEPTANCE OF DEFENDANTS’ RULE 68 OFFER OF JUDGMENT</p>
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PLAINTIFF’S ACCEPTANCE OF DEFENDANTS’  
RULE 68 OFFER OF JUDGMENT

NOW COMES, Plaintiff, Ernest D’Orazio, III (“Plaintiff”) by and through his undersigned counsel, and hereby gives written notice of his acceptance of the Rule 68 Offer of Judgment of Defendants, Washington Township, Steven Rolando, in his individual capacity (incorrectly identified in the caption as “Stephen Rolando”), Jason Player, in his individual capacity, Richard Sumek, in his individual capacity, Rafael Muniz, in his individual capacity, Dennis Sims, in his individual capacity, and Paul Moriarity, in his individual capacity, as follows:

1. Plaintiff accepts Defendants' offer of judgment in the amount of Seventy-Five Thousand Dollars (\$75,000.00), exclusive of attorneys' fees and costs, against all defendants.
2. Plaintiff accepts Defendants' offer that Plaintiff's attorneys' fees and costs will be determined via an application for fees and costs before the Honorable Joseph E. Irenas, Judge of the United States District Court for the District of New Jersey.
3. Defendants' Rule 68 Offer of Judgment includes a term that the Offer of Judgment "is not to be construed as either an admission that Defendants are liable in this action or that Plaintiff has suffered any damage" which is a self-serving characterization, which is not an essential term to the Offer of Judgment under Fed. R. Civ. Pro 68 and which does not affect acceptance, and furthermore is contrary to the concept of a judgment.
4. A copy of defendants' Rule 68 Offer is attached hereto as Appendix I.
5. A Proposed form of Order of Judgment is attached hereto as Appendix II.

WHEREFORE, Plaintiff requests:

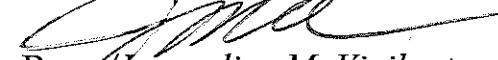
- a. That the Clerk of the Court enter judgment in this matter against all defendants and for the Plaintiff in the amount of \$75,000.00; and
- b. Upon Bill of Costs and Petition by Plaintiff for the Court to determine

and enter an award of reasonable attorneys' fees and costs

Respectfully Submitted:

Dated: March 2, 2011

THE VIGILANTE LAW FIRM, P.C.

  
By: s/Jacqueline M. Vigilante  
Jacqueline M. Vigilante, Esquire  
99 North Main Street  
Mullica Hill, New Jersey 08062  
(856)223-9990  
Jacci@thevigilantelawfirm.com

By: s/Ralph Lamar  
12570 Meade Court  
Broomfield, CO 80020  
(303) 438-9186  
Ralph.lamar@verizon.net

Attorneys for Plaintiff, Ernest D'Orazio, III

ERNEST D’ORAZIO III V. WASHINGTON TOWNSHIP, STEVEN  
ROLANDO, JASON PLAYER, RICHARD SUMEK, RAFAEL  
MUNIZ, DENNIS SIMS AND PAUL MORIARITY

07-CV-5097

PLAINTIFF’S ACCEPTANCE OF  
— DEFENDANTS’ RULE 68 OFFER OF JUDGMENT

**APPENDIX I**

A. Michael Barker, Esquire  
Barker, Scott, Gelfand & James  
a Professional Corporation  
Linwood Greene - Suite 12  
210 New Road  
Linwood, New Jersey 08221  
(609) 601-8677

AMBarker@BarkerLawFirm.net

Our File Number: 47733-139

Attorney for Defendants, Washington Township, Stephen Rolando, Jason Player, Richard Sumek, Rafael Muniz, Dennis Sims, and Paul Moriarty, Jointly, Severally, or in the Alternative

**IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY - CAMDEN**

ERNEST M. D'ORAZIO, III  
Plaintiff,

vs.

WASHINGTON TOWNSHIP;  
STEPHEN ROLANDO;  
JASON PLAYER;  
RICHARD SUMEK;  
RAFAEL MUNIZ;  
DENNIS SIMS; and,  
PAUL MORIARTY,  
Defendant

Civil Action  
Number 07-cv-5097

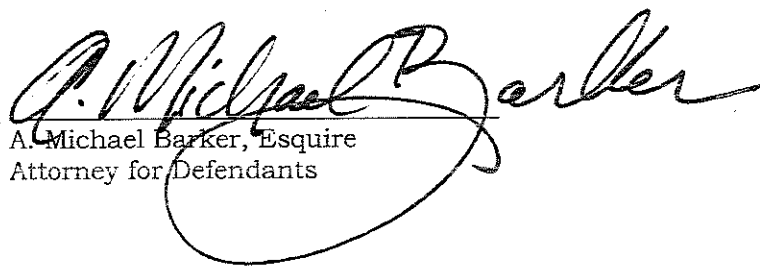
**OFFER OF JUDGMENT**

**TO: Ernest M. D'Orazio, III**  
**c/o Jacqueline M. Vigilante, Esquire**  
The Vigilante Law Firm  
A Professional Corporation  
99 North Main Street  
Mullica Hill, New Jersey 08062  
*Attorney for Plaintiff*

Pursuant to Rule 68 of the Federal Rules of Civil Procedure, Defendants hereby allow Judgment to be entered against them in the amount of Seventy-Five Thousand Dollars (\$75,000.00), without prejudice, exclusive of attorney's fees and costs. Plaintiff's attorney's fees and costs will be determined via an application for fees and costs before Judge Irenas. This Offer of Judgment is made for the purposes specified in Federal Rule of Procedure 68, and is not to be construed as either an admission that Defendants are liable in this action, or that the Plaintiff has suffered any damage. This Offer of Judgment shall not be filed with the Court unless (a) accepted, or (b) in a proceeding to determine costs.

**BARKER, SCOTT, GELFAND & JAMES**  
**a Professional Corporation**

By:

  
A. Michael Barker, Esquire  
Attorney for Defendants

Dated: 2/16/11

ERNEST D’ORAZIO III V. WASHINGTON TOWNSHIP, STEVEN  
ROLANDO, JASON PLAYER, RICHARD SUMEK, RAFAEL  
MUNIZ, DENNIS SIMS AND PAUL MORIARITY

07-CV-5097

PLAINTIFF’S ACCEPTANCE OF  
— DEFENDANTS’ RULE 68 OFFER OF JUDGMENT

**APPENDIX II**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY

<p>ERNEST D’ORAZIO, III PLAINITIFF</p> <p>v.</p> <p>WASHINGTON TOWNSHIP, STEPHEN ROLANDO, JASON PLAYER, RICHARD SUMEK, RAFAEL MUNIZ, DENNIS SIMS, AND PAUL MORIARITY DEFENDANTS</p>	<p>CIVIL ACTION NO. 07-5097</p> <p>PROPOSED ORDER</p>
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ORDER OF JUDGMENT

Based on the acceptance by Plaintiff, Ernest D’Orazio III of the Offer of Judgment made by defendants pursuant to Fed. R. Civ. Pro. 68, **IT IS HEREBY ORDERED:**

1. Judgment is entered in favor of Plaintiff, Ernest D’Orazio III, and against Defendants, Washington Township, Steven Rolando, in his individual capacity (incorrectly identified in the caption as “Stephen Rolando”), Jason Player, in his individual capacity, Richard Sumek, in his individual capacity, Rafael Muniz, in his individual capacity, Dennis Sims, in his individual

capacity, and Paul Moriarity, in his individual capacity, in the amount of \$75,000.00;

2. In accordance with the Defendants' Rule 68 Offer of Judgment, Plaintiff is entitled to an award of reasonable attorneys' fees and costs to be determined by this Court;

ENTERED

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The Honorable Joseph E. Irenas  
United States District Court Judge

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY

<p><b>ERNEST D’ORAZIO, III PLAINTIFF</b></p> <p><b>v.</b></p> <p><b>WASHINGTON TOWNSHIP, STEPHEN ROLANDO, JASON PLAYER, DENNIS SIMS, RICHARD SUMEK, RAFAEL MUNIZ, DENNIS SIMS, AND PAUL MORIARITY DEFENDANTS</b></p>	<p><b>CIVIL ACTION NO. 07-5097</b></p> <p><b>CERTIFICATION OF COUNSEL IN SUPPORT OF FEE PETITION</b></p>
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**CERTIFICATION OF JACQUELINE M. VIGILANTE, ESQUIRE**

Jacqueline M. Vigilante, Esquire, being of full age, hereby certifies as follows in support of Plaintiff’s Motion for Attorneys’ Fees and Costs:

1. I am an attorney with The Vigilante Law Firm, P.C. I am lead counsel for the Plaintiff, Ernest D’Orazio, III, in the action captioned *Ernest D’Orazio III v. Washington Township, Steven Rolando, Jason Player, Richard Sumek, Rafael Muniz, Dennis Sims and Paul Moriarity* in the United States District Court, for the District of New Jersey. As such I am familiar with the facts and circumstances of this matter, I am authorized to make this certification and I have first-hand personal knowledge of the facts set forth herein. I make this certification in connection with Plaintiff’s motion for attorneys’ fees for work performed on his case up through, and including, the entry of judgment and preparation of this fee petition.

2. Plaintiff, Ernest D’Orazio III filed a civil rights lawsuit against Washington

Township, Steven Rolando, Jason Player, Richard Sumek, Dennis Sims, Rafael Muniz and Paul Moriarity pursuant to 42 U.S.C. §1983 for political retaliation and unlawful seizure in violation of his First and Fourth Amendment rights.

3. Prior to filing the litigation, Plaintiff challenged the disciplinary charges and termination of his employment through an administrative hearing process which included more than a dozen witnesses and five days of testimony. During that process, when defendants refused to produced audiotaped evidence which was relevant to the termination process, Plaintiff was forced to file an action in equity in Superior Court of New Jersey in order to compel production of the audiotape. Plaintiff was successful in compelling production and transcription of the audiotape. At the conclusion of the hearing officer recommended dismissal of the disciplinary charges against Plaintiff and reinstatement of Plaintiff to his term of office.

4. When the Township failed to act on the recommendation of its hearing officer, in October 2007, Plaintiff filed his federal lawsuit to be compensated for the unlawfulness associated with the disciplinary process, termination and failure to reinstate. During the discovery process, more than 5,000 pages of documents were produced, twenty-nine witness and party depositions were taken, and three Motions to Quash/for Protective Orders were litigated.

5. At the close of discovery, Defendants filed a Motion for Summary Judgment which included 366 separately state facts and 82 exhibits. The Motion was granted in part and denied in part. Judgment was granted on claims against Washington Township, Paul Moriarity and Dennis Sims.

6. In December 2010, pursuant to the parties' joint pre-trial statement predicting a

four to five week jury trial, this Court set the date for trial to begin on April 24, 2011, After the long discovery and summary judgment process, Plaintiff was set to proceed to trial on his First Amendment claims against Defendants Sumek, Player, Muniz and Rolando, when Defendants offered judgment in the amount of \$75,000.00 under Fed. Civ. R.Pro 68 against all defendants, plus costs and fees to be determined by the Court.

7. On March 1, 2011, Plaintiff accepted judgment against all defendants and on March 22, 2011, judgment pursuant to Rule 68 was entered on the docket against all defendants.

8. In support of the forgoing statements, Plaintiff has marked as Exhibit “A” hereto the Docket Entries for 07-CV-5097.

9. Pursuant to the Order entering judgment under Rule 68, Plaintiff is the prevailing party as to all claims and all defendants and is entitled to an award of reasonable attorneys’ fees and costs. A plaintiff “prevails” when, such as here, the actual relief Plaintiff obtained in the case “materially alters the parties’ legal relationship” in a way that has directly benefitted the Plaintiff. *Buchannon Bd. & Care Home v. West Va. Dept. of Health and Human Services*, 532 U.S. 598 (2001). The reasonable attorneys’ fees and costs should not be reduced for work done in connection with claims dismissed at summary judgment, where those judgments were temporary setbacks en route to success on all claims and against all defendants. *See, Corder v. Gates*, 947 F.2d 374 (9th Cir. 1991), where the Ninth Circuit recognized that compensation for work performed by an attorney on claims that resulted in a temporary setback should not be reduced, unless the claims are permanently lost and severable.

10. The *lodestar* method (multiplying a reasonable hourly rate by the number of hours

reasonably expended during the course of the litigation) is the most widely accepted method for determining the amount of the fee award and the U.S. Supreme Court has established a strong presumption in favor of using the *lodestar* method to calculate a reasonable fee. *City of Burlington v. Dague*, 505 U.S. 557 (1992). The Third Circuit has adopted the lodestar method. *Student Public Interest Research Group of New Jersey v. AT&T Bell Laboratories*, 842 F.2d 1436, 1448 (3d Cir. 1988).

11. To establish the reasonable hourly rate of an attorney, the Third Circuit employs the “community market rate approach,” which requires the court to “assess the experience and skill of the attorneys and compare their rates to those of comparable lawyers in the private business sphere.” *Student Public Interest Research Group of New*, 842 F.2d at 1447.

12. Applying the foregoing to the case at hand, there can be no doubt that the Plaintiff is the prevailing party, having obtained a judgment against all defendants on all claims. There is no doubt that the entry of judgment pursuant to Rule 68 has materially altered the legal relationship of the parties. Therefor Plaintiff is entitled to an award of reasonable attorneys’ fees and costs.

13. As to the reasonable hourly rate applicable to Plaintiff’s attorneys, attorneys Jacqueline M. Vigilante and Ralph E. Lamar have attached hereto affidavits attesting to their respective experience as attorneys and their qualifications as attorneys in the area of law encompassing employment and civil rights, and that the market rate for attorneys practicing in this field in the South Jersey/Philadelphia area with their levels of experience is \$400 to \$405 per hour. Ms. Vigilante’s associate’s hourly rate is \$150, and her paralegal’s hourly rate is \$85.00.

Exhibit “B” Affidavit of Jacqueline M. Vigilante. Exhibit “C” Affidavit of Ralph E. Lamar.

14. In support of their respective hourly rates, both Ms. Vigilante and Mr. Lamar have attached affidavits from attorneys from the South Jersey/Philadelphia area, who practice in the field of employment and civil rights law, attesting that the “community market rate” for an attorney in the South Jersey/Philadelphia area with Ms. Vigilante’s experience and qualifications is \$405 hourly and with Mr. Lamar’s qualifications and experience is \$400.00 hourly. The hourly rate of the associate of The Vigilante Law Firm has also been attested to as within the community market rate for attorneys of her level of experience and qualifications. Exhibit “D” Affidavit of Kevin Cosello, Esquire. Exhibit “E” Affidavit of Alan Schorr, Esquire. Exhibit “F” Affidavit of Carmen Matos, Esquire. (Exhibit “G” to be supplied).

15. In addition, attached as Exhibit “H” is the Community Legal Services (“CLS”) Fee Schedule, which has been adopted by the Third Circuit as evidence of the “community market rate.” The CLS schedule supports the conclusion that attorneys in this Circuit with Ms. Vigilante and Mr. Lamar’s experience and qualifications are entitled to an hourly rate of at least \$400.00. Exhibit “H.” *Maldonado v. Houstoun*, 256 F.3d 181, 187 (3d Cir. 2001).

16. In this case, The Vigilante Law Firm expended in excess of 1000 hours, total of \$319,009.75 at the applicable hourly rates. Exhibit “I” invoices and detailed billing records of The Vigilante Law Firm, P.C. This total includes a non-contingent fee of \$16,020.00 which was paid by Mr. D’Orazio in connection with his administrative hearing process, as further explained in the Affidavit of Jacqueline M. Vigilante, attached hereto as Exhibit B.

17. In this case, Mr. Lamar expended 160.4 (plus time spent on this motion) hours, for

a total of \$64,160.00 at the hourly rate of \$400.00, plus costs of \$612.61. See Exhibit “C” - Billing records of Ralph E. Lamar, Esquire.

18. In addition, Plaintiff is entitled to costs associated with this litigation and with the administrative hearing process in the amount of \$29,073.32 as set forth on Exhibit “J”, invoice for costs with supporting documentation. Of that amount, Plaintiff seeks reimbursement of \$14,839.04, plus Mr. Lamar’s costs of \$612.61 in this petition.

19. Pursuant to Federal R. Civ. Pro 54(d)(1), the following deposition costs have been included in the Bill of Costs filed contemporaneously herewith:

<b>Date</b>	<b>Name of Witness</b>	<b>Cost of Deposition Transcript</b>
10/30/2009	Karen D’Orazio/Rafael Muniz (day 2)	\$422.20
10/22/2009	Councilpeople	\$1,196.80
10/20/2009	Council people	\$563.00
7/16/2009	Ernest D’Orazio Jr	\$669.00
6/16/2009	Louis Brecht, Rafael Muniz (day 1)	\$756.95
6/15/2009	Steven Altamuro	\$547.75
3/31/2009	Jason Player	\$813.25
3/30/2009	Steven Regan and Sean Dalton	\$718.65
3/17/2009	Richard Sumek	\$586.60
2/12/2009	John Porter	\$367.60
1/22/2009	Steven Rolando	\$474.55
1/15/2009	Craig Munch	\$294.60
10/6/2008	Frank Scarpato and Tim Attinasi	\$583.75
11/20/2008	Dennis Sims and Paul Moriarity	\$520.30
4/29/2009	Ernest D’Orazio III	\$712.93
6/15/2009	Kenneth Condit	\$330.65
4/18/2007	Hearing Transcript	\$798.75
4/25/2007	Hearing Transcript	\$863.10
4/27/2007	Hearing Transcript	\$565.25
4/30/2007	Hearing Transcript	\$722.00
8/2/2007	Hearing Transcript	\$802.15
6/25/2007	Hearing Transcript	\$39.50

**\$13,349.33**

D’Orazio v. Washington Township et al, 07-CV-5096

Certification of Counsel in Support of Motion for Fees and Costs **6**

All of these depositions were used in connection with the Summary Judgment proceedings in this case. To the extent any are disallowed or objected to in the Bill of Costs, they are requested herein.

In addition, filings fees of \$500.00 and service and witness fees of \$384.95 were included in the Bill of Costs.

20. Expenses in the amount of \$7,763.75 were incurred in connection with in the administrative hearing proceedings. This amount includes \$3,643.40 for private investigation fees incurred in obtaining witness statements, attendance and investigation into the allegations of misconduct. These were reasonable expenses incurred to develop the factual basis for Mr. D'Orazio's defense of the charges against him, in light of the very limited discovery available to him in the administrative hearing process and in light of the very limited investigation done by Detective Rolando which did not include interviews of any witnesses except Mr. Dove and Mr. Cavaleri. The private investigator obtained statements from Michael Dove, John Cavaleri, Carmen Sampona, David DeFrancesco, Anthony Basile and Jim Hionis, all of whom were on Plaintiff's trial witness list.

21. The balance of the costs in the administrative hearing included the hearing transcripts, all of which were relied up in connection with the motion for and opposition to summary judgment. To the extent any are disallowed or objected to in the Bill of Costs, they are requested herein. The remaining item in the costs associated with the administrative hearing process is the filing fee of \$230.00 for filing the Order to Show Cause with Superior Court in New Jersey to obtain discovery of the consensual intercept.

22. The balance costs requested herein include the costs for expert depositions, video depositions, expert appearance fees, mediation expenses, postage, the costs of hand deliveries, photocopies as set forth below and in Exhibit J:

Riggs Investigative Services -initial investigative service - administrative hearing witness statements, criminal background checks, investigation	3,643.40	4/18/2007	3,643.40
Filing Fee US District Court	350.00	10/23/2007	350.00
Family Practice Assoc. Plaintiff's medical records	49.00	9/18/2008	49.00
Superior Legal Video - Videodep of Steven Regan	385.00	3/31/2009	385.00
Road Runner - hand delivery to District Court	47.25	11/5/2007	47.25
Superior Legal Video - Videodeps of Ernest D'Orazio Jr.	75.00	7/22/2009	75.00
Superior Legal Video - Videodeps of Council persons	700.00	10/27/2009	700.00
Verzilli - economic expert report	1,650.00	11/20/2009	1,650.00
Road Runner Service - hand delivery to Gerald Weinstein	93.00	1/20/2010	93.00
23-2625814 Precision Court Reporters - Deposition Transcript - Andrew Verzilli, plaintiff's economic expert	241.90	2/5/2010	241.90
The Rodgers Group, LLC - Appearance fee Deft's expert	525.00	2/8/2010	525.00
23-2625814 Precision Court Reporters-Deposition Transcript -Defendants liability experts	806.50	2/12/2010	806.50
Frank Rodgers and JohnMercun			
Fox Rothschild - Gerald Weinstein, JSc, ret. - mediation service	2,275.00	2/17/2010	2,275.00
23-2625814 Precision Court Reporters-Deposition Transcript - Dr. Gerald Cooke, defendants damages expert	562.60	2/22/2010	562.60
UPS OVERNIGHT DELIVERY	13.07	6/3/2009	13.07
UPS OVERNIGHT DELIVERY	32.28	3/1/2010	32.28
23-2625814 Precision Court Reporters-Deposition Transcript - Robert P Wolf, defendants Damages expert	214.70	3/3/2010	214.70
23-2213978 - Dr. Gerald Cooke - record copying fee	140.00	3/9/2010	140.00
UPS- overnight delivery for educational records	74.27	3/20/2010	74.27
Pacer research	87.60	5/4/2010	87.60
AT&T conference call service - Court status conference multiple parties	114.00	10/27/2010	114.00
UPS - Delivery to Robert Wolf	29.62	1/16/2010	29.62
23-2213978 - Dr. Gerald Cooke - deposition appearance fee	1,925.00	5/4/2010	1,925.00
photocopies 5717 x 0.10	571.70		571.70
Postage	178.25		178.25

Plaintiff is entitled to recover his expenses incurred in connection with the appearance fees and expert depositions of each of the four expert witnesses identified by the defendants. Defendants identified two liability experts, Frank Rodgers and John Mercun. Rodgers offered opinions related to the conduct of the defendants Muniz and Washington Township in not selecting Plaintiff for a full-time position, and on plaintiff's acquiescence to political pressure.

John Mercun rendered on whether matters were handled appropriately in accordance with police procedures. After depositions, Plaintiff filed motions *in limine* to exclude both experts. The motions were denied as moot once the court's decision on summary judgment was issued. In light of the fact that Plaintiff succeeded in obtaining judgment against all defendants and on all counts, this court's decision on summary judgment should not render this expenses unrecoverable or unreasonable.

Three depositions were taken on video, plaintiff and his father at the request of defendants. Plaintiff took the video deposition of one witness who was incarcerated. Plaintiff's expense for all video-taped depositions is reasonable. Finally, plaintiff submits that the costs for mediation paid to Fox Rothschild were reasonable and should be reimbursed.

23. I certify that all Exhibits attached in support of Plaintiff's Motion for Attorneys' Fees and Costs are true and accurate copies of any reports, facts, and information exchanged in discovery; and, are part of the record in this matter.

Wherefore, Plaintiff respectfully requests that this Honorable Court grant his motion for Attorney's Fees and award Plaintiff \$398,621.40 in attorneys' fees and costs as set forth above plus any cost item disallowed in the Bill of Costs.

Respectfully submitted,  
THE VIGILANTE LAW FIRM, P.C.

April 12, 2011

BY:           s/Jacqueline M. Vigilante            
Jacqueline M. Vigilante, Esquire  
Attorney for Plaintiff

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

ERNEST M. D'ORAZIO, III,

Plaintiff,

v.

WASHINGTON TOWNSHIP, STEPHEN  
ROLANDO, JASON PLAYER, RICHARD  
SUMEK, RAFAEL MUNIZ, DENNIS  
SIMS, and PAUL MORIARTY,

Defendants.

HONORABLE JOSEPH E. IRENAS

CIVIL ACTION NO. 07-5097  
(JEI/KMW)

**OPINION**

**APPEARANCES:**

The Vigilante Law Firm, P.C.  
By: Jacqueline M. Vigilante, Esq.  
99 North Main Street  
Mullica Hill, NJ 08062  
and  
Ralph Lamar, Esq.  
376 Green Lane  
Philadelphia, PA 19128  
Counsel for Plaintiff

Barker, Scott & Gelfand  
By: A. Michael Barker, Esq.  
Vanessa E. James, Esq.  
Linwood Greene - Suite 12  
210 New Road  
Linwood, NJ 08221  
Counsel for Defendants

**IRENAS, Senior District Judge:**

Plaintiff, Ernest M. D'Orazio, III, brings this suit against the Defendants arising out of his employment as a Special Law Enforcement Officer for the Washington Township Police Department. Plaintiff claims that his failure to be promoted to full-time law enforcement officer, the investigation into his alleged revealing of confidential information and his dismissal

from the Washington Township Police Department were discriminatory and violated his civil rights. The Defendants are Washington Township, the former mayor of Washington Township Paul Moriarty, the former chief of the Washington Township Police Department Rafael Muniz, the then-chief of the Washington Township Police Department, and Stephen Rolando, Jason Player, Richard Sumek and Denis Sims, each officers with the Washington Township Police Department.

Plaintiff asserts claims under 42 U.S.C. § 1983 of violations of his First Amendment and Fourth Amendment rights. Plaintiff also asserts a civil conspiracy claim. The Defendants have moved for summary judgment on all claims. The Court will grant summary judgment in part and deny summary judgment in part.<sup>1</sup>

#### I.

Plaintiff applied for a position as a Special Law Enforcement Officer ("SLEO") for the Washington Township Police Department ("WTPD") in 2004. In July 2005, Plaintiff was appointed as an SLEO by resolution of the Washington Township town council ("Council") and in August 2005 was approved as a recruit for the Gloucester County Police Academy ("Academy"). (Defendants' Statement of Facts in Support of Motion for Summary Judgement (SOF) ¶ 54) Plaintiff attended the Academy from August 2005 through December 2005. (*Id.* ¶ 60) After completing his training at the Academy, Plaintiff began his field training as an

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<sup>1</sup>The Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1367.

SLEO and was assigned to solo patrol duty in April 2006. (*Id.* ¶¶ 73, 80) Prior to Plaintiff's completion of field training, Plaintiff began to seek appointment as a full-time law enforcement officer with the WTPD. (*Id.* ¶ 81)

In April 2006, two SLEOs were promoted to full-time law enforcement officer with the WTPD, but Plaintiff was not. (*Id.* ¶ 83) In August 2006, two graduates of the Academy were appointed as full-time law enforcement officers with the WTPD. (*Id.* ¶ 140) Neither of the August 2006 appointees had served as an SLEO or previously worked with the WTPD.

On December 8, 2006, the WTPD and other local law enforcement agencies conducted an undercover narcotics operation at a local bar in Washington Township.<sup>2</sup> (*Id.* ¶ 152) One of the men arrested as part of the operation agreed to serve as a confidential informant ("CI #1") for the WTPD as part of the continuing narcotics investigation. (*Id.* ¶ 153) On December 11, 2006, Defendant Player and another member of the WTPD engaged in an "overhear"<sup>3</sup> on a call between CI #1 and Michael Dove, an alleged narcotics dealer who was subject to an ongoing investigation by the WTPD. (*Id.* ¶ 156) On that overhear, Michael Dove allegedly told CI #1 that Plaintiff had revealed information to him about the arrests made on December 8, and that

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<sup>2</sup> The following is a summary, as asserted by Defendants, of the chronology of the investigation into Plaintiff and his eventual dismissal from the WTPD. Plaintiff takes issue with many of these facts.

<sup>3</sup>An "overhear" is when a police officer, with the consent of one of the participants in the call, will listen to a telephone conversation.

Plaintiff had warned Dove to limit his illegal activities as the narcotics investigation was ongoing. (*Id.* ¶¶ 163-164). This information was the basis for the investigation into Plaintiff.

This information was passed from Defendant Player to his supervisor Defendant Sumek, (*Id.* ¶ 167), who passed it along to Defendant Rolando, an internal affairs officer of the WTPD. (*Id.* ¶ 168) Eventually Defendant Muniz was notified, and he requested that an internal affairs investigation begin immediately. (*Id.* ¶ 171) Defendant Muniz also requested that the Gloucester County Prosecutor's Office ("GCPO") investigate any allegations against Plaintiff. (*Id.* ¶ 174)

On December 18, 2007, Defendant Player attempted to record an overheard conversation between CI #1 and Michael Dove, but due to technical problems the recording was unusable and the content of the conversation is unknown. (*Id.* ¶ 186-187)

On December 20, 2006, another confidential informant ("CI #2") allegedly spoke to Defendant Player and told him that he was in fear for his own safety and the safety of his family because certain of Plaintiff's acquaintances were making threats towards him. (*Id.* ¶ 191-193)

That same day, Defendant Rolando advised Plaintiff that the WTPD and the GCPO were investigating Plaintiff. Rolando and Plaintiff went to the offices of the GCPO, where he was interviewed by Rolando and another member of the WTPD. (*Id.* ¶¶ 198-200) Following completion of the interview, it was decided that criminal charges would not be brought against Plaintiff. (*Id.* ¶ 211)

The WTPD decided to continue to pursue its administrative investigation. (*Id.* ¶¶ 213-214) Defendant Rolando interviewed Plaintiff at the WTPD police station. (*Id.*) Plaintiff's father was present during the administrative interview at Plaintiff's request. (*Id.* ¶ 216)

Defendant Muniz suspended Plaintiff from the WTPD on December 21, 2006. (*Id.* ¶ 227)

Defendant Rolando issued his internal affairs investigation report on January 8, 2007. (*Id.* ¶ 249) The report referenced, amongst other things, the December 11 overhear, CI #2's discussions with Defendant Player and video surveillance evidence that allegedly showed Plaintiff reviewing an arrest log. Defendant Rolando "concluded that evidence existed to support the conclusion that Plaintiff released police information to civilians, which thwarted a narcotics investigation." (*Id.* ¶ 249)

Based on Defendant Rolando's report, on January 23, 2007, Defendant Muniz recommended that Plaintiff be dismissed from the WTPD with no recommendation of reappointment. (*Id.* ¶ 253)

An administrative inquiry on Defendant Muniz's recommendation commenced on April 18, 2007. An administrative judge was retained to administer the inquiry. (*Id.* ¶ 254) The administrative judge's report did not sustain any of the charges against Plaintiff, and held that Plaintiff was entitled to be paid for the wages he lost after his dismissal until the end of

his appointment.<sup>4</sup> (*Id.* ¶¶ 285–286) The report was sent to the Council for approval on October 23, 2007. (*Id.* ¶ 314) No action was taken on the report until March 11, 2009, at which time the report was rejected. Three Council members voted for rejection of the report, no Council members voted to accept and two Council members abstained. (*Id.* ¶ 332)

Plaintiff filed his original complaint on October 23, 2007, and an amended complaint on August 24, 2009. Plaintiff brings multiple claims under 42 U.S.C. § 1983: for violation of his right to political association against each of Defendants Rolando, Player, Sumek, Muniz, Sims and Moriarty, for violation of his right to free speech against each of Defendants Muniz and Moriarty, for violation of his right to be free from unreasonable seizure against each of Defendants Muniz and Rolando, and for ratification of constitutional violations against Defendant Washington Township. Plaintiff also brings a common law civil conspiracy claim against Defendants Rolando, Player, Sumek, Muniz, Sims and Moriarty. Defendants filed their joint motion for summary judgment on all claims on March 15, 2010.

## II.

“[S]ummary judgment is proper ‘if the pleadings, depositions, answers to interrogatories, and admissions on file,

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<sup>4</sup>Because Plaintiff was never reappointed for the 2007 term, the administrative judge held Plaintiff was entitled to be paid for those hours he would have worked from December 21, 2006 to December 31, 2006. (SOF ¶ 286) Plaintiff was scheduled to work 24 hours during this period and was paid at a rate of \$11.25 per hour. (SOF ¶ 287) This comes to \$270.

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.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (quoting Fed. R. Civ. P. 56(c)). In deciding a motion for summary judgment, the Court must construe the facts and inferences in a light most favorable to the non-moving party. *Pollock v. Am. Tel. & Tel. Long Lines*, 794 F.2d 860, 864 (3d Cir. 1986). "'With respect to an issue on which the non-moving party bears the burden of proof, the burden on the moving party may be discharged by 'showing' - that is, pointing out to the district court - that there is an absence of evidence to support the nonmoving party's case.'" *Conoshenti v. Public Serv. Elec. & Gas*, 364 F.3d 135, 145-46 (3d Cir. 2004) (quoting *Celotex*, 477 U.S. at 323). The role of the Court is not "to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

### III.

The Court first addresses the constitutional claims and then the common law conspiracy claim.

Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or

other proper proceeding for redress....

42 U.S.C. § 1983.

As stated previously, Plaintiff asserts that his First and Fourth Amendment rights were violated. Specifically, Plaintiff asserts two First Amendment claims: (1) political association discrimination and (2) retaliation based on Plaintiff's First Amendment protected speech. Plaintiff also claims that during the investigation into Plaintiff's involvement in the thwarted narcotics case, he was unreasonably seized in violation of the Fourth Amendment. Lastly, Plaintiff asserts that Washington Township is liable for the First and Fourth Amendment violations under a ratification theory.

The Court addresses each claim in turn.

A.

Plaintiff alleges that he was twice passed-over for a promotion, in April 2006 and August 2006, and was thereafter suspended and ultimately dismissed with no opportunity for reappointment, all because of his political association with Democrats influential within Washington Township. (Brief of Plaintiff in Opposition to Defendants' Motion for Summary Judgment (Pl's Opp.) 10)

The familiar *McDonell Douglas* burden shifting framework applies. Plaintiff must establish his prima facie case of discrimination based on First Amendment protected association. Defendants must then put forth a legitimate non-discriminatory

reason for each adverse employment action. Lastly, Plaintiff must put forth evidence supporting an inference of pretext.

To establish a prima facie case of discrimination based on political association under § 1983, a public employee must prove:

(1) that the employee worked for a public agency in a position that does not require a political association, (2) that the employee maintained an affiliation with a political party, and (3) that the employee's political association was a substantial or motivating factor in the adverse employment decision.

*Robertson v. Fiore*, 62 F.3d 596, 599 (3d Cir. 1995) (citing *Laskaris v. Thornburgh*, 733 F.2d 260, 265 (3d Cir. 1984), cert. denied, 469 U.S. 886 (1984); *Perez v. Cucci*, 725 F.Supp. 209, 238-39 (D.N.J. 1989), aff'd, 898 F.2d 139 (3d Cir. 1990)).

Implicit in the third prong is a requirement that the plaintiff produce sufficient evidence to show the defendant knew of plaintiff's political association. *Goodman v. Pa. Turnpike Comm'n*, 293 F.3d 655, 664 (3d Cir. 2002) (citing *Laskaris*, 733 F.2d at 265).

If the plaintiff is able to show his political association is a substantial or motivating factor in the adverse employment decision, the burden shifts to the employer to show "by a preponderance of the evidence that it would have reached the same decision.... even in the absence of the protected conduct." *Mt. Healthy City School District Bd. of Ed. v. Doyle*, 429 U.S. 274, 287 (1977); *Robertson*, 62 F.3d at 599 (citations omitted); *Raniero v. Antun*, 943 F.Supp. 413, 423 (D.N.J. 1996) (citations

omitted).

Once the defendant has articulated a nondiscriminatory reason for the employment action, plaintiff may still prevail by discrediting that proffered reason, either circumstantially or directly, or by adducing evidence, whether circumstantial or direct, that discrimination was more likely than not a motivating or substantial cause of the adverse action. See, e.g., *Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994); *Torre v. Casio, Inc.*, 42 F.3d 825, 830 (3d Cir. 1994).

In this case the parties do not dispute that political association was not a required aspect of Plaintiff's job.

With respect to the second prong of Plaintiff's prima facie case, contrary to Defendants' arguments, a reasonable factfinder could conclude that Plaintiff had a political party association and each Defendant knew about it.

There is no defined quantum of participation that is required to establish a protected political association - courts have found discrimination based on as little activity as "stuffing envelopes, speaking to individual members of the public, attending political functions and attending at least one campaign rally." *Frangione v. Twp. of Edison*, 2008 U.S. Dist. LEXIS 49577, at \*6 (D.N.J. June 24, 2008). Importantly, family connections have also been considered when determining whether a plaintiff has established his or her political association. See *Goodman*, 293 F.3d at 661.

The Court finds that Plaintiff has demonstrated that there

is a genuine issue of material fact as to whether Plaintiff has a protected political association, even though Plaintiff's political activities are not vast. Plaintiff is a registered Democrat and has been registered to vote since he was the age 18 (Pl's Dep. 55), he has voted in every election since then, (*Id.*), he has personal connections with a number of people in the Democratic party, (*Id.*), and he volunteered for a number of campaigns throughout his life (D'Orazio Jr. Dep. 26). Importantly, Plaintiff is a member of a well-known family that has been involved in politics for many years. His paternal grandparents were involved in local political elections (*Id.* 24), and his father is a well-known figure in Washington Township politics.<sup>5</sup> Plaintiff's political activities and those of his family, viewed in the light most favorable to Plaintiff, is sufficient to establish that there is a genuine issue of material fact as to whether Plaintiff maintained a protected political association.<sup>6</sup>

Plaintiff has established that there is a genuine issue of material fact as to whether each Defendant knew of Plaintiff's political association. Either direct or circumstantial evidence

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<sup>5</sup>Plaintiff's father's property was even used as the campaign headquarters for Randi Davidson, the then-mayor of Defendant Washington Township and Defendant Moriarty's opponent in the Democratic primary. (*Id.* 33)

<sup>6</sup>The Court will make no ruling on Defendants' assertion that Plaintiff's Declaration is a "sham affidavit", Defendant's Reply Brief p. 2, because Plaintiff has presented sufficient evidence to make a prima facie case even without the affidavit in question.

of the protected political association is adequate to establish knowledge. *Stephens*, 122 F.3d at 179.

There is direct evidence that each of Defendants Sims, Muniz and Ronaldo had knowledge of Plaintiff's political association. Defendant Sims made comments to Plaintiff acknowledging Plaintiff's political association - calling Plaintiff a "political hack" while Plaintiff was in training at the Academy. (Sims Dep. 20-21). Defendant Muniz told a member of the Council that he did not want to hire Plaintiff because it would appear political in nature. (Scarpato Dep. 12) Defendant Ronaldo testified that he was aware of the political pressures to hire Plaintiff. (Ronaldo Dep. 162). All of these statements, taken in the light most favorable to Plaintiff, establish that these Defendants had direct knowledge of Plaintiff's political association.

There is circumstantial evidence that each of Defendants Sumek, Moriarty and Player had knowledge of Plaintiff's political association. Defendants Moriarty and Sumek each testified that he had personal knowledge of Plaintiff's father's political activities. (Moriarty Dep. 11-13; Sumek Dep. 147) Defendant Moriarty further testified that he had personal contact with Plaintiff's father and knowledge of his political associations. (Moriarty Dep. 11-13.) Because Plaintiff was closely associated with his father, and Plaintiff's political association was in large part based on that relationship, a reasonable factfinder could infer that a person who had knowledge of the father's

political association would also have knowledge of Plaintiff's political association.

Defendant Player was in charge of Plaintiff's background investigation before Plaintiff was hired as an SLEO, (SOF ¶ 49), and had personally known Plaintiff for a number of years. (D'Orazio Jr. Dep. 74). Both of these facts made him familiar with Plaintiff and his background. There is also testimonial evidence that Plaintiff's political association was well known within Washington Township and the WTPD. (Dep. Of Sims p. 21). Knowledge by co-workers can be inferred when politics is an important issue in a work place. See *Stephens*, 122 F.3d at 177. A factfinder could reasonably infer from Detective Player's close knowledge of Plaintiff, and the general knowledge in the WTPD of Plaintiff's political association, that Defendant Player had knowledge of Plaintiff's political association.

The Court next discusses the third prong of Plaintiff's prima facie case (causal connection), Defendants' legitimate non-discriminatory reasons, and Plaintiff's evidence of pretext together according to each adverse employment action. To survive summary judgment on the causal connection element, Plaintiff may "prevail by discrediting the proffered legitimate reason, either circumstantially or directly, or by adducing evidence, whether circumstantial or direct, that discrimination was more likely than not a motivating or substantial cause of the adverse action." *Stephens*, 122 F.3d at 181 (Causal connection found when plaintiffs were in the top tier of promotion lists and the

employer failed to adequately justify his failure to promote from the lists). See also *Goodman*, 293 F.3d at 675 (causal connection found when there was a history of significant political patronage at the employer, the promotion decision at issue was clearly made along party lines, the plaintiff had the highest evaluation scores of all candidates, and plaintiff had received nothing but positive commendations); *Suppan v. Dadonna*, 203 F.3d 228, 238 (3d Cir. 2000) (causal connection found when there was evidence that employers had lowered the plaintiffs' hiring scores based on the plaintiffs' political association and the employer admitted that he chose not to hire because of the political activities of plaintiffs). Cf. *Robertson*, 62 F.3d at 601 (no causation when there was ample evidence of plaintiff's poor performance at work); *Wheeler v. Twp. of Edison*, 326 Fed. Appx. 118, 123 (3d Cir. 2009) (no causation when plaintiff had not presented evidence that he was more qualified than other candidates that were treated in similar manner).

*April 2006 Failure to Promote*

Plaintiff has not established a causal connection for the April 2006 failure to promote. Plaintiff, in a limited manner, attempts to both discredit Defendants' proffered reasons for their actions and show that discrimination was more likely than not a substantial or motivating factor in the decision. Plaintiff fails on both attempts.

Defendant Muniz was still a lieutenant at the time of the April 2006 promotions, and no evidence was presented that he was

a decision maker in these promotions.<sup>7</sup> Plaintiff does not contend that any of the other Defendants discriminated against Plaintiff in connection with the April 2006 promotions.

As to Defendant Moriarty, Plaintiff argues that because he shared a letter of recommendation with one of the promoted candidates, (Pl's Opp. 11), he has discredited the proffered reasons for the failure to promote. This evidence though, even when taken in the light most favorable to Plaintiff, is not enough to discredit the contention of Defendants that the other candidate was superior to Plaintiff. Many factors are considered in hiring, not just letters of recommendation.

Plaintiff has also failed to show that his protected political association was a substantial or motivating factor in the decision of Defendant Moriarty. The only evidence supporting Plaintiff's contention is testimony from a member of the Council that he had heard that other members of Council had engaged in discussions with Defendant Moriarty about the promotions and Plaintiff's political association. (Altamuro Dep. 95-96) Besides the fact that this evidence is hearsay,<sup>8</sup> none of the

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<sup>7</sup>A member of Council testified that Defendant Muniz did not want his first appointments to be political. (Scarpato Dep. 17) Although Plaintiff asserts this comment relates to the April 2006 promotions, based on fact that Defendant Muniz was not made chief of the WTPD until the Summer of 2006 and and the professed confusion of Councilman Scarpato during his testimony, the Court finds that Defendant Muniz was actually referring to the August 2006 promotions, his first as chief of the WTPD.

<sup>8</sup>Hearsay evidence that would not be admissable at trial are generally not to be considered on summary judgment. See *Blackburn v. United Parcel Service*, 179 F.3d 81, 95 (3d Cir.

other Council members or Defendant Moriarty himself testified to the existence of such conversations. Plaintiff has presented no other evidence supporting his claim against Defendant Moriarty in regard to the April 2006 promotions.

Because Plaintiff has neither discredited the proffered reasons for his failure to be promoted in April 2006 nor established that his political association was a substantial or motivating factor in that decision, summary judgment will be granted as to the April 2006 promotions.

*August 2006 Failure to Promote*

Plaintiff has not established a causal connection for the August 2006 failure to promote. Plaintiff again attempts to both discredit Defendants' proffered reasons for the actions and to show that discrimination was more likely than not a substantial or motivating factor in the decision. Plaintiff fails on both counts.

In this instance though, it is clear that Defendants have shown that even if Plaintiff had met his burden, Defendants have established by a preponderance of the evidence that the same decision would have been made even in the absence of Plaintiff's political association. Plaintiff was not the most senior SLEO at the time, so he was not due for promotion even had the WTPD promoted an SLEO to full-time law enforcement officer. (Muniz Dep. 65) Even the most senior SLEOs at the time were not

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1999).

considered ready to be promoted to full-time law enforcement officers, and there were doubts about the readiness of all the SLEOs. (*Id.* 65-66) Plaintiff was also getting direct feedback that he was not ready to be promoted. (*Id.*) Defendants have shown that Defendant Muniz used reasonable efforts to hire the best candidate, including interviewing a number of candidates at the Academy. (*Id.* 71-72.) Both candidates that were eventually selected to be full-time law enforcement officers finished high in their classes at the Academy. (SOF ¶¶ 126, 132) Plaintiff, on the other hand, finished relatively low in his class. (SOF ¶ 61) Defendants have shown, by a preponderance of the evidence, that even in the absence of his political association, Plaintiff would not have been promoted in August 2006. Summary judgment will be granted as to the August 2006 promotions.

*Investigations and Dismissal Without Reappointment*

The final instance of alleged discrimination based on political association was the investigation into Plaintiff and his dismissal from the WTPD. Plaintiff has not presented evidence that Defendants Moriarty and Sims were involved in the investigation and dismissal. Although Plaintiff alleges in his Amended Complaint that Defendant Sims leveled false charges against Plaintiff, (Amended Complaint ¶ 122), there was no evidence presented by Plaintiff in support of this allegation. Plaintiff has also claimed that his investigation and dismissal was "at the instruction and encouragement of Defendant Moriarty," *Id.* ¶ 134, but besides this allegation Plaintiff has presented

no evidence to link Defendant Moriarty with the investigation or the dismissal.

Plaintiff has further claimed that Defendant Moriarty's failure to investigate the allegations of police misconduct, and his condoning of the charges against Plaintiff and the termination of Plaintiff, were discriminatory against Plaintiff. Besides the mere allegation of discrimination on the part of Plaintiff, there is no evidence that Plaintiff's political association was a substantial or motivating factor in Defendant Moriarty's decision with regard to an investigation of the allegations of police misconduct. Plaintiff has also failed to discredit Defendant Moriarty's proffered reasons for the action (that he referred any investigation to the GCPO for fear of conflicts of interest).

Defendants Muniz, Rolando, Sumek and Player were each involved in the investigation into Plaintiff and his dismissal. Plaintiff has not adduced direct evidence that discrimination was more likely than not a motivating or substantial cause of the adverse action. Instead, Plaintiff has attempted to discredit the proffered legitimate reasons of the Defendants by showing that the evidence on which the investigation and dismissal were based was not adequate.

Plaintiff has presented evidence, taken in the light most favorable to him, that the investigation into Michael Dove was pretextual, that the investigation and dismissal was based on fabricated or limited evidence, and that the Defendants knowingly

issued reports that contained false information.

The investigation began after the December 11 overhear of the conversation between CI #1 and Michael Dove. The Defendants allege that this overhear was part of an ongoing investigation of Michael Dove. There is scant evidence of such an investigation though, (Plaintiff's Supplemental Statement of Facts ¶¶ 103-09), and Plaintiff has presented evidence that the investigation was pretextual. The fact that Michael Dove was allowed to work at the offices of the WTPD in November 2006, *Id.* ¶ 115, that there was an outstanding bench warrant against him from a different matter that was never executed even though he was in the police station, *Id.* ¶ 112, and that he attended a wedding hosted by one of the Defendants, *Id.* ¶ 113, all serve to discredit the existence of the alleged investigation.

Some of the evidence used against Plaintiff was later contradicted by sworn testimony. Michael Dove testified that he never implicated Plaintiff on the December 11 overhear. (Dove Trans. 249) CI #2 denied under that he ever told the WTPD that he was feeling threatened by Plaintiff's acquaintances. (CI #2 Trans. 32-33) Both of these pieces of evidence were important elements of the investigation into Plaintiff, and served as part of the basis for his dismissal.

It is also clear that false report were submitted by Defendants. Detective Rolando cites a video surveillance tape which allegedly shows Plaintiff reviewing the WTPD arrest log as proof that Plaintiff had knowledge of the names of those arrested

on December 8, 2006. His internal investigation report stated that a "review of the department's video surveillance indicate [sic] that employee D'Orazio... reviewed the patrol briefing log after [the December 8, 2006] arrests had been made...." Defendant Rolando, though, admitted under oath that he could not tell what Plaintiff was doing in the video. (Rolando Dep. 94-96)

Defendant Player wrote in his intelligence report on the December 18 overhear that Michael Dove "explain[ed] how Special Officer D'Orazio told him about the arrests...." Later though, Defendant Player testified under oath that he could not hear what Michael Dove was saying during the failed overhear and that the tape did not capture the conversation. (Player Dep. 134)

All of this evidence, taken in the light most favorable to Plaintiff, undermines the veracity of the evidence that was the basis for the investigation and dismissal and discredits Defendants' proffered reasons for those actions. Plaintiff has met his burden to survive summary judgment as to his political association discrimination claims related to the investigation of Plaintiff and his dismissal from the WTPD, but only against Defendants Player, Sumek, Rolando and Muniz.<sup>9</sup>

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<sup>9</sup>Although Plaintiff's Amended Complaint specifies that he is seeking "back pay, front pay and/or reinstatement," (Amended Complaint ¶ 104), Plaintiff has asserted no basis upon which he could be reinstated as an SLEO or would be due front pay. Plaintiff was never reappointed as an SLEO. A property interest in one's employment requires "a legitimate claim or entitlement to it." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). Plaintiff has no such interest. The maximum amount of compensatory damages available to Plaintiff is \$270 in back pay that would be owed to him for the period after his suspension

B.

Counts VII and VIII are each claims that Defendants Muniz and Moriarty, respectively, subjected the Plaintiff to discrimination based on the Plaintiff's exercise of his right to free speech. Plaintiff argues that Defendants Muniz and Moriarty terminated Plaintiff because of Plaintiff's "complaining about the unlawful refusal to hire him based upon political affiliation...." (Amended Complaint ¶ 144)

The test for establishing a prima facie claim for retaliation based on exercise of free speech has three parts. First, plaintiff must show that the activity in question was protected. *Holder v. City of Allentown*, 987 F.2d 188, 194 (3d Cir. 1993); *Czurlanis v. Albanese*, 721 F.2d 98, 103 (3d Cir. 1983). To be protected, the speech must be on a matter of public concern, and the employee's interest in expression on this matter must not be outweighed by any injury the speech could cause to the interest of the state as an employer in promoting the efficiency of the public services it performs through its employees. *Waters v. Churchill*, 511 U.S. 661, 694-95 (1994) (plurality opinion) (citing *Connick v. Myers*, 461 U.S. 138, 142 (1983), and *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)).

Second, plaintiff must show that the protected activity was a substantial or motivating factor in the alleged retaliatory action. *Mt. Healthy City Sch. Dist. Bd. of Educ.*, 429 U.S. at

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and before the end of his appointed term. See *supra* n.4.

287.

Finally, defendant may defeat plaintiff's claim by demonstrating by a preponderance of the evidence that the same action would have been taken even in the absence of the protected conduct. *Id.*

As discussed *supra*, Defendant Moriarty did not take any part in the dismissal of Plaintiff. Even had Defendant Moriarty participated, Plaintiff has produced no evidence that either Defendants Moriarty or Muniz knew about Plaintiff's speech to members of Council. Without evidence that the Defendants had knowledge of Plaintiff's speech, Plaintiff could not prove that the speech was a substantial or motivating factor in the Defendants' actions. Plaintiff's claim fails without such evidence. Therefore summary judgment is granted on Count VII and Count VIII.

C.

Counts IX and X are each claims that Defendants Rolando and Muniz, respectively, violated Plaintiff's Fourth Amendment right to be free from unreasonable seizures.

A person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave, and as long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would require some particularized and objective justification.

*United States v. Mendenhall*, 446 U.S. 544.

For purposes of the Fourth Amendment, "an arrest requires

either physical force . . . or where, that is absent, submission to the assertion of authority." *California v. Hodari D.*, 499 U.S. 621, 626 (1991); *Sharrar v. Felsing*, 128 F.3d 810, 819 (3d Cir. 1997). Importantly, *Mendenhall* establishes that the test for existence of a "show of authority" is an objective one: not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person. *Hodari D.*, 499 U.S. at 628.

Plaintiff has not presented evidence to establish that a reasonable person in his situation would have perceived that he was not free to leave, either when he was interrogated at the offices of the GCPO or the WTPD. Although the evidence before the Court on this matter is limited, the facts surrounding the interviews are not in dispute. Plaintiff was asked to be interviewed and complied with the request. He was never put in handcuffs, told that he must remain at the interview areas or in any other way given the impression that his movements were limited. The interview at the GCPO ended when he asked for it to end. Plaintiff's father was allowed to be present for the interview at the WTPD at Plaintiff's request. The assertion, without further evidence, that Plaintiff "was not free to leave" (Declaration of D'Orazio III p 37) does not meet Plaintiff's burden because, as discussed in *Hodari*, the test to determine if a seizure has occurred is an objective one. Plaintiff would reasonably be expected to be aware of his rights in such a

situation and know that he was free to leave, especially in light of the fact that Plaintiff was a law enforcement officer at the time.

Because Plaintiff has not presented evidence that a reasonable person would believe his movements were restricted, Plaintiff has not established that he was seized within the meaning of the Fourth Amendment. Summary judgment is granted on Counts IX and X.

D.

Count XI is a claim against Defendant Washington Township that it violated Plaintiff's First and Fourth Amendment rights by rejecting the administrative judge's report, failing to investigate the alleged misconduct engaged in by the other Defendants and condoning the alleged misconduct by the other Defendants.<sup>10</sup>

In *Monell v. Dep't of Soc. Servs.*, the Supreme Court held that a municipality cannot be liable under § 1983 under the principle of respondeat superior. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 695 (1978). Instead, a municipality can only be held liable under § 1983 "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent

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<sup>10</sup>Plaintiff also takes issue with the fact that the Council took two years to act on the report. (Pl.'s Opp. 6) Plaintiff does not make a Fourteenth Amendment procedural due process claim against Defendant Washington Township, so the timeliness of the Council's actions will not be addressed.

official policy, inflicts the injury....” *Id.* The Third Circuit has held that there are three instances when such liability is possible:

First, the municipality will be liable if its employee acted pursuant to a formal government policy or a standard operating procedure long accepted within the government entity, *Jett v. Dallas Independent School District*, 491 U.S. 701, 737 (1989); second, liability will attach when the individual has policy making authority rendering his or her behavior an act of official government policy, *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480-81 (1986); third, the municipality will be liable if an official with authority has ratified the unconstitutional actions of a subordinate, rendering such behavior official for liability purposes, *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988).

*McGreevy v. Stroup*, 413 F.3d 359, 367 (3d Cir. 2005).

Plaintiff relies on the ratification theory to claim liability by Defendant Washington Township. (Pl.’s Opp. 36). “An employee’s invidious intent is not imputed to the government agency even if the employee has discretionary authority.” *Holt Cargo Sys. v. Delaware River Port Auth.*, 20 F. Supp. 2d 803, 840 (E.D. Pa. 1998). A plaintiff must show “that the municipal action was taken with the requisite degree of culpability....” *Martinez v. Koury*, 2008 U.S. Dist. LEXIS 56457, at \*11 (E.D. Pa. July 24, 2008).

The mere acceptance by the Council of the actions of its subordinates is not enough to satisfy the ratification theory. Plaintiff has not presented any evidence of either invidious intent or culpability on the part of Defendant Washington

Township. Therefore summary judgment is granted on Count XI.

E.

Count XII is a claim against Defendants Muniz, Rolando, Sumek, Sims, Player and Moriarty for civil conspiracy, alleging that "[t]he defendants acted in concert to commit unlawful acts for the purpose of depriving Plaintiff of his constitutionally protected rights and furthered the conspiracy by their own actions." (Amended Complaint 181).

Section 1983, on its own, does not punish conspiracies. Instead, a civil conspiracy claim provides plaintiff a legal mechanism of liability against all defendants without regard to who actually performed the illegal act. See *Holt Cargo Sys. v. Delaware River Port Auth.*, 20 F. Supp. 2d 803, 843 (E.D. Pa. 1998). In order for a civil conspiracy claim to survive summary judgment, "a plaintiff must show that two or more conspirators reached an agreement to deprive him or her of a constitutional right under color of law." *Royster v. Beard*, 308 Fed. Appx. 576, 579 (3d Cir. 2009) (quoting *Parkway Garage, Inc. v. City of Philadelphia*, 5 F.3d 685, 700 (3d Cir. 1993)).

Plaintiff asserts that the Defendants worked together, but has presented no evidence to support such allegations. Mere allegations of an agreement will not suffice for a civil conspiracy claim to survive summary judgment. Therefore summary judgment is granted on Count XII.

IV.

For the reasons set forth above, summary judgment will be

granted in full as to Plaintiff's claims that he suffered retaliation based on his First Amendment protected speech, his claims he was unreasonably seized in violation of the Fourth Amendment, his claim against Defendant Washington Township and his civil conspiracy claim. Summary judgment will be granted in part as to Plaintiff's First Amendment claims for political association discrimination, to the extent that such claims relate to the April 2006 and August 2006 failure to promote. Summary judgment will be denied in part as to Plaintiff's First Amendment claims for political association discrimination, to the extent that such claims relate to the investigation and dismissal of Plaintiff. An appropriate Order accompanies this Opinion.<sup>11</sup>

Dated: October 7, 2010

s/ Joseph E. Irenas  
**JOSEPH E. IRENAS, S.U.S.D.J.**

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<sup>11</sup>Plaintiff has also submitted motions in limine to exclude certain expert testimony. The motions to exclude the testimony of John Mercun and Frank Rodgers are moot as they relate to portions of the case for which summary judgment is being granted. The motion to exclude the testimony of Robert P. Wolfe, Ed.D., M.B.A., will be held until the damages phase of the case.