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

DWIGHT MCKEE and ALLEN JONES, Plaintiffs, v. HENRY HART, WESLEY RISH, ALBERT MASLAND, JAMES SHEEHAN, and DANIEL SATTELE, Defendants.	:	CIVIL ACTION NO. 3:CV-02-1910 (JUDGE CAPUTO)

MEMORANDUM

Presently before the Court is Defendant Henry Hart, Wesley Rish, Albert Masland, James Sheehan, and Daniel Sattele's (hereinafter Defendants) Motion for Summary Judgment. (Doc. 35.) Plaintiffs Dwight McKee and Allen Jones allege First Amendment retaliation in violation of 28 U.S.C. § 1983. Based upon a lack of specific facts showing that he spoke on a matter of public concern, I will grant Defendants' motion with respect to Mr. McKee's claim. As for Mr. Jones' claim, I will grant the motion as it related to the claim against Henry Hart, but I will deny the motion in all other respects. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331.

BACKGROUND

Plaintiff Dwight McKee has been an investigator for the Pennsylvania Office of Inspector General ("OIG") since 1988. Plaintiff Allen Jones has been an investigator for OIG since May, 2002. Defendant Albert Masland was the Inspector General during the relevant time. Defendant Harry Hart was the Deputy Inspector General. Defendant Daniel Sattele was Mr. Jones' immediate supervisor, and Mr. McKee's direct subordinate,

until Mr. McKee was demoted. Defendants James Sheehan and Wesley Rish were employees of the Pennsylvania Office of General Counsel and worked as counsel for OIG.

In their Amended Complaint, Messrs. McKee and Jones each allege retaliation for exercising their First Amendment rights. Specifically, Plaintiffs allege that they complained that major public corruption investigations were being delayed, obstructed, or otherwise hindered by officials within OIG. (Pls.' Am. Compl. at § 17-18.) Plaintiffs allege they suffered adverse employment actions. Mr. McKee alleges that he was demoted and received a salary reduction (Doc. 36, Tab 12, Ex. 5), while Mr. Jones alleges he was subjected to retaliatory harassment.

Mr. McKee held the position of Special Investigator-In-Charge at OIG. On March 28, 2002, Mr. McKee met with incoming Inspector General Masland to give him an overview of some of his pending cases. (Doc. 36, Tab 1 at 46-47.) Mr. McKee also prepared a memorandum that outlined cases that he felt should be pursued. (*Id.*) Mr. McKee met with Inspector General Masland again on July 18, 2002, to give him another update on his cases. (*Id.* at 64-65.) It was at this meeting where Mr. McKee contends that he voiced his strong objection as to the slow manner in which some of the investigations were proceeding. (*Id.*) In addition to the meetings with Inspector General Masland, Mr. McKee sent his superiors biweekly reports that discussed the status of his investigations. (Doc. 36, Tab 1 at 389.)

Six days after the July 18, 2002, meeting with Inspector Masland, Mr. McKee received notification that he was to attend a Pre-Disciplinary Conference scheduled for July 25, 2002. (Doc. 36, Tab 9, Ex. 2.) The purpose of the conference was to allow Mr.

McKee an opportunity to respond to five allegations. (*Id.*) The allegations included:

1. Excluding an investigator from a surveillance assignment based on her race.
2. Telling a sexually explicit joke to female staff members
3. Giving preferential treatment to investigators, based on criteria other than merit.
4. Advising subordinate staff to disobey existing laws.
5. Advising subordinate staff to disregard OIG policies and procedures.

(*Id.*) Mr. McKee requested additional time to prepare, and the hearing was moved to July 30, 2002. Mr. McKee prepared a ten page, twenty-three attachment, response. (Doc. 36, Tab 11, Ex. 4.) Mr. McKee acknowledged several of the allegations, but defended himself by providing the context of his comments. (*Id.*) On August 22, 2002, Mr. McKee received a letter from the Acting Director of Human Resources informing him that he was being demoted from a Non-Civil Service Special Investigator-In-Charge to Non-Civil Service Senior Special Investigator. (Doc. 36, Tab 12, Ex. 5.) With the demotion came a reduction in Mr. McKee's pay grade. (*Id.*)

As for Mr. Jones, he was hired in May, 2002, as a Special Investigator 2. (Doc. 36, Tab 2 at 13.) Mr. Jones was lead investigator in an investigation of Steve Fiorello, a chief pharmacist at Harrisburg State Hospital. (Doc. 48, Ex. M at 13-14.) Within approximately three weeks of being assigned to the investigation, Mr. Jones told his supervisor, Mr. Sattele, that he had concerns about the pharmaceutical industry bribing state officials and several other possible violations. (*Id.* at 16, Doc. 48, Ex. K at 34-36.)

Mr. Jones explained to Mr. Sattele that through his investigating, he had uncovered a large problem with the pharmaceutical industry. (Doc. 48, Ex. K at 35.) Mr. Sattele told Mr. Jones to remain focused on the Fiorello investigation and not investigate the pharmaceutical industry. (*Id.* at 38, Doc. 48, Ex. M at 17-20.) By late August, 2002,

Mr. Sattele believed that Mr. Jones had "lost focus" and removed him as lead investigator of the Fiorello investigation. (Doc. 48, Ex. M at 12, 20-22.) According to Mr. Sattele, he determined that Mr. Jones had lost focus because he repeatedly asked to to investigate the pharmaceutical industry. (Doc. 48, Ex. M at 17-20.) Mr. Sattele repeatedly told Mr. Jones to focus on the Fiorello investigation, but Mr. Jones would continually raise his concerns about he pharmaceutical industry to Mr. Sattele. (*Id.*)

Because he did not cease in raising his concerns about the pharmaceutical industry, Mr. Jones contends that he was subjected to harassing and intimidating conduct. Mr. Jones offers four specific instances of harassing or intimidating conduct by OIG officials. First, Mr. Sattele told Mr. Jones that "Mac [Mr. McKee] has been torpedoed. Some of the things that he got maybe he deserved, but a lot of them he didn't." (Doc. 36, Tab 2 at 66, 77.) Mr. Jones also recalled that Mr. Sattele suggested that if he (Mr. Jones) could not adjust, he would need to leave OIG. (*Id.* at 50.)

Second, Mr. Jones points to an incident with Mr. Hart, the Deputy Inspector General, as another example of retaliatory conduct. Mr. Hart questioned Mr. Jones about his alleged inappropriate behavior directed toward a 20-year-old female receptionist. (Doc. 36, Tab 2 at 74-75.) The receptionist complained that Mr. Jones looked at her in an inappropriate or suggestive manner. (Doc. 36, Tab 3 at 99-100.) Mr. Jones denied looking at the receptionist in an inappropriate manner, but did acknowledge saying to her while she was "hustling about delivering papers" that "they ought to give you sneakers if they're going to make you work that hard." (Doc. 36, Tab 2 at 75.) A day or two after speaking to Mr. Jones about the incident, Mr. Hart informed Mr. Jones that no disciplinary action would result. (Doc. 36 Tab 2 at 87.)

In the third retaliatory incident, Mr. Jones contends that Mr. Sattele told him to "quit being a salmon." (Doc 36, Tab 2 at 85.) Mr. Jones alleges that comment meant that he should stop pushing to expand the Fiorello investigation to include the pharmaceutical industry. (*Id.*) Mr. Sattele acknowledges making the comment, but asserts that he made the comment while explaining to Mr. Jones that he needed to work within the team concept at OIG and accept that attorneys are part of the investigative process. (*Id.* at 40-43.)

The fourth final retaliatory incident occurred after Mr. Jones called Steve Fiorello to retrieve documents from him for the investigation. (Doc. 36, Tab 2 at 43.) Upon his return to work, Mr. Sattele "demanded to know why I went to the Department of Public Welfare without his permission to pick up papers." (*Id.*) Mr. Jones said that Mr. Sattele accused him of having an interview with the Director of Public Welfare, Steve Karp. (*Id.*) Mr. Jones denied meeting the director. Mr. Jones acknowledged that he was not to speak to anyone regarding the investigation without first obtaining Mr. Sattele's approval. (Doc. 48, Ex. K at 69.) No discipline arose from this incident. At no time during his employment has Mr. Jones' job classification, pay, or benefits been reduced or altered. (Doc. 36, Tab 2 at 97-98.)

Count I is a § 1983 claim by Mr. McKee against all Defendants, except Mr. Sattele alleging a deprivation of his First Amendment rights. Count II is a § 1983 claim by Mr. Jones against Messrs. Hart and Sattele alleging a deprivation of his First Amendment rights.

STANDARD OF REVIEW

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56 (c). A fact is material if proof of its existence or non-existence might affect the outcome of the suit under the applicable substantive law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Where there is no material fact in dispute, the moving party need only establish that it is entitled to judgment as a matter of law. Where, however, there is a disputed issue of material fact, summary judgment is appropriate only if the factual dispute is not a genuine one. *See id.* at 248. An issue of material fact is genuine if "a reasonable jury could return a verdict for the nonmoving party." *Id*.

Where there is a material fact in dispute, the moving party has the initial burden of proving that (1) there is no genuine issue of material fact; and (2) the moving party is entitled to judgment as a matter of law. *See* CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2727 (2d ed. 1983). The moving party may present its own evidence or, where the nonmoving party has the burden of proof, simply point out to the court that "the nonmoving party has failed to make a sufficient showing of an essential element of her case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

All doubts as to the existence of a genuine issue of material fact must be resolved against the moving party, and the entire record must be examined in the light most

favorable to the nonmoving party. *See White v. Westinghouse Elec. Co.*, 862 F.2d 56, 59 (3d Cir. 1988). Once the moving party has satisfied its initial burden, the burden shifts to the nonmoving party to either present affirmative evidence supporting its version of the material facts or to refute the moving party's contention that the facts entitle it to judgment as a matter of law. *See Anderson*, 477 U.S. at 256-257.

The court need not accept mere conclusory allegations or denials taken from the pleadings. *See Schoch v. First Fidelity Bancorporation*, 912 F.2d 654, 657 (3d Cir. 1990). In deciding a motion for summary judgment, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

DISCUSSION

To state a claim under 42 U.S.C. § 1983, "a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48 (1988). A defendant in a § 1983 suit acts under color of state law when he abuses the position given to him by the State. *Id.* at 50. A public official or employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law. *Id.*

1. First Amendment

A. Retaliation Claim - Dwight McKee

"A public employee's retaliation claim for engaging in protected activity must be evaluated under a three-step process." *Baldassare v. New Jersey,* 250 F.3d 188, 194

(3d Cir. 2001). First, plaintiff bears the initial burden of showing that the activity in question is protected, that is, that the activity involves a matter of public concern, and that the plaintiff's interest in the speech outweighs the state's countervailing interest in promoting the efficiency of the public services that it performs through its employees. *Id.* at 195. This determination is a question of law for the court. *Id.*

Second, if the Court finds the above criteria are established, "plaintiff must then show the protected activity was a substantial or motivating factor in the alleged retaliatory action." *Id.* Third, the public employer can then rebut the plaintiff's retaliation claim by demonstrating that "it would have reached the same decision . . . even in the absence of the protected conduct." *Id.* These last two stages present questions for the factfinder. *Id.*

1. Matter of Public Concern

In determining whether a public employee's speech is protected, courts distinguish between speech made "as a citizen upon matters of public concern" and speech "upon matters of only personal interest." *Watters v. City of Philadelphia,* 55 F.3d 886, 892 (3d Cir. 1995) (quoting *Connick v. Meyers,* 461 U.S. 138, 146, (1983)). A public employee's speech involves a matter of public concern only "if it can be fairly considered as relating to any matter of political, social or other concern to the community." *Baldassare,* 250 F.3d at 195 (internal quotations and citations omitted). In determining whether a public employee's speech touches a matter of public concern, the court looks to "the content, form, and context of the activity in question." *Id.* The court's inquiry is limited to the question of whether the public employee's speech "attempted to expose

'specific wrongs and abuses within' " the government. *Id.* at 196 (quoting *Morris v. Crow,* 142 F.3d 1379, 1382 (11th Cir. 1998)). "Disclosing corruption, fraud and illegality in a government agency is a matter of significant public concern." *Id.* (citing *Feldman v. Phila. Hous. Auth.*, 43 F.3d 823, 829 (3d Cir. 1995)).

Mr. McKee contends that he complained to superiors within OIG that investigations were either delayed, obstructed, or otherwise hindered, and as a result, he suffered retaliation via a demotion. However, the record does not reveal complaints that implicate matters of public concern. Mr. McKee contends that he expressed his complaints at meetings and in writing.[1] (Doc. 44 at 2.) Mr. McKee acknowledged that a formal complaint procedure existed at OIG and that he was to follow it if he had a problem with a senior manager. (Doc. 36, Tab 1 at 56.) "[I]f I have a complaint against a senior manager like a senior deputy or a deputy or Inspector General, policy-wise, I have to go to Syndi Guido up in General Counsel. I'm not going to do that. I'm not going to go out around the agency." (*Id.*) While not following an internal complaint procedure is not dispositive to this matter, it is worth noting that Mr. McKee did not submit any evidence that he ever followed the formal complaint procedure, notwithstanding his assertion that he complained about investigations being delayed, obstructed, or otherwise hindered.

The first meeting where Mr. McKee contends that he voiced his concern regarding ongoing investigations was on March 28, 2002, at a "meet and greet" with the new incoming Inspector General, Mr. Masland. (*Id.* at 45-47.) Mr. McKee prepared a

[1]Mr. McKee concedes that he never formally complained to former Inspector General Robert DeSousa, who is not a defendant in this action, about investigations that were being delayed, obstructed, or otherwise hindered. (Doc. 36, Tab 1 at 53-54.)

memorandum for the "meet and greet" meeting with Inspector General Masland that "outlined some of the areas that I felt that I was working on that should be pursued. Specifically in the realm of cases, I listed three cases of what I determined to be [sic] merit prosecutive review, and identified those cases, kind of gave like a little snapshot of what they were." (*Id.* at 46-47.)

Mr. McKee concedes that he did not tell Inspector General Masland at the March 28, 2002, meeting that there were meritorious investigations not being pursued. (*Id.* at 48.) Instead, Mr. McKee argues that "[t]he message was clear. When you read a report of three investigations that were all started back in 2000, 2001, and now we're into 2002, there's probably a pretty clear indication here now that I want to move these along, I want to get them closed out, I want to get them resolved." (*Id.*) Mr. McKee did not express this to Inspector General Masland at the meeting, because "I was not going to be a squeaky wheel to say, look, you know, these guys aren't doing anything." (*Id.* at 49.)

It is clear that Mr. McKee did not directly inform Inspector General Masland at the meeting on March 28, 2002, that there were investigations being delayed, obstructed, or otherwise hindered. Mr. McKee argues that it was clear from his memorandum that certain investigations were being hindered; however, he relies on an unacceptable inference to reach that conclusion, namely, that an investigation started in 2000 or 2001, and not completed by March 2002, was being delayed or obstructed. I cannot accept this inference without more evidence. Therefore, I find that with respect to the March 28, 2002, meeting and accompanying memorandum, Mr. McKee's speech did not pertain to matters of public concern.

The second meeting where Mr. McKee contends that he voiced his concern

regarding ongoing investigations was on July 18, 2002. (*Id.* at 65.) It was at this meeting where "I basically voiced very strongly my objections as to the manner in which some of these matters were being handled. My level of authority, who my supervisor was, my exclusion from investigations. It was made very, very clear I was dissatisfied with the course of the last three months." (*Id.*) However, Mr. McKee did not discuss specifics with Inspector General Masland at this meeting with respect to any investigation being stymied or otherwise blocked, nor did he bring to Inspector General Masland's attention any investigations that should have been referred to outside law enforcement agencies. (*Id.* at 70-71.)

It is clear that Mr. McKee did complain to Inspector General Masland, but the complaints did not implicate matters of public concern. Mr. McKee's complaints centered around internal matters and focused on personal issues, such as his authority, work assignments, and office structure. As Mr. McKee said in his deposition, "I wanted more authority." (*Id.* at 101.) There is no evidence that Mr. McKee raised any issue of public concern. Therefore, I find that with respect to the July 18, 2002, meeting and any accompanying memoranda, Mr. McKee's speech did not pertain to matters of public concern.

Mr. McKee also met with Inspector General Masland on July 25 and 30 of 2002, for a Pre-Disciplinary Conference (hereinafter PDC). (*Id.* at 86-87.) The purpose of the PDC was to allow Mr. McKee an opportunity to respond to allegations of misconduct. (Doc. 36, Tab 9, McKee Ex. 2.) With respect to the July 25 meeting, Mr. McKee did not raise the issue of investigations being delayed, obstructed, or otherwise hindered. (*Id.* at

87.) At the July 30 meeting, Mr. McKee presented Inspector General Masland with a ten page memorandum, which included twenty-three attachments, that explained Mr. McKee's response to the allegations. (Doc. 36, Tab 11, McKee Ex. 4, and Tab 1 at 89.) Again, Mr. McKee admits that he never raised the issue of investigative obstructions to Inspector General Masland personally or in his written submission. (Doc. 36, Tab 1 at 87, 95-96.)

Although Mr. McKee asserts that he often raised complaints with respect to OIG investigations being delayed, obstructed, or otherwise hindered, the evidence is to the contrary.

> Q: In Paragraph 22 on Page 9 of the amended complaint, it is alleged as follows, quote, because Dwight McKee made it clear that he believed investigations were being quashed and that investigations were being altered, he was pretextually disciplined. Now, my question is, is there a writing in which you, quote, make it clear that you believed that investigations were being quashed and that investigations were being altered prior to the filing of the federal complaint in this action on October 24, 2002?
>
> A: I did not, again, compose any written documentation where I specifically wrote down, hey, these cases are being screwed with, they need to be addressed. No.

(*Id.* at 395.) Mr. McKee's answer appears to categorically eliminate all forms of written complaints, thus leaving only verbal complaints; however, there is a dearth of evidence of verbal complaints. Mr. McKee has not presented the Court with specific facts showing that he complained to officials within OIG with respect to the integrity of investigations. Therefore, I find that Mr. McKee's speech, both verbal and written, with respect to complaints about investigations at OIG did not pertain to matters of public concern. Accordingly, I will grant Defendants' Motion for Summary Judgment with respect to Mr.

McKee.

B. Retaliation Claim - Allen Jones

Mr. Jones has alleged that Messrs. Hart and Sattele retaliated against him for speaking about matters of public concern. Specifically, Mr. Jones contends that when he requested permission to investigate drug company wrongdoing and complained when no investigation was forthcoming, he was subjected to retaliatory intimidation and harassment by Messrs. Hart and Sattele. Mr. Jones does not contend that his job classification, pay, or benefits were reduced or altered. (Doc. 36, Tab 2 at 97-98.)

The speech at issue centers around Mr. Jones' belief that the pharmaceutical industry, and Janssen Pharmaceutica in particular, was using undue influence with state officials to get its product to market. (Doc. 48, Ex. K at 32-43.) Specifically, Mr. Jones believed that he had uncovered evidence that showed certain state employees were being paid by the pharmaceutical industry to defend the industry, while others received honoraria for speaking in their official capacity at drug-sponsored events. (*Id.* at 33, Doc. 36, Tab 2 at 42.) Mr. Jones believed that some of Janssen Pharmaceutica's activities may have been criminal in nature. (Doc. 36, Tab 2 at 67-68.) Mr. Jones contends that when he discussed these allegations with his supervisor, Mr. Sattele, the retaliatory intimidation and harassment began. (Doc. 48, Ex. K at 34-35.)

1. Matter of Public Concern

I must determine whether Mr. Jones' speech was a matter of public concern. I need not belabor this issue as it is clear that Mr. Jones was commenting on a matter of public concern. Anytime a public employee is attempting to disclose corruption, fraud, or

illegality in a government agency, it is a matter of public concern. *Baldassare*, 250 F.3d at 196. It is clear that Mr. Jones was speaking to his supervisor, Mr. Sattele, about the potential corruption or illegal behavior of certain state employees. I find that Mr. Jones was speaking on a matter of public concern.

2. Balancing the Interests

Once a plaintiff has shown that his speech was protected, he must also demonstrate that his interest in the speech outweighs the state's countervailing interest as an employer in promoting the efficiency of the public services that it provides through its employees. *Baldassare,* 250 F.3d at 195. Courts must balance the speaker's First Amendment interest against any injury the public employer may suffer from the employee's expression. *Brennan v. Norton*, 350 F.3d 399, 413 (3d Cir. 2003). The plaintiff's statement will not be considered in a vacuum; the manner, time, and place of the employee's expression are relevant, as is the context in which the dispute arose. The Supreme Court has recognized as pertinent considerations whether the statement impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise, impairs discipline by superiors or harmony among co-workers, or has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary. *Rankin v. McPherson*, 483 U.S. 378, 388 (1987). "No single factor involved in this balancing is dispositive; they are all 'weights on the scales.'" *Baldassare,* 250 F.3d at 198.

In the present matter, Mr. Jones' told his supervisor, Mr. Sattele, that he wanted to expand the investigation into Steve Fiorello, the chief pharmacist of Harrisburg State

Hospital, to include the pharmaceutical industry for allegedly using undue influence in getting its products to market. (Doc. 48, Ex. M at 13.) Mr. Jones contends that he started to uncover a larger problem with the pharmaceutical industry and certain state officials. (Doc. 48, Ex. K at 35.)

Mr. Jones contends that he brought his findings to Mr. Sattele and requested permission to expand the investigation. (*Id.* at 34-37.) Mr. Sattele did not grant permission to expand the investigation. (Doc. 48, Ex. M at 17.) According to Mr. Sattele, Mr. Jones continued to request permission to expand the investigation, and each time Mr. Sattele told him to focus on the Fiorello investigation. (*Id.* at 17-20.) Mr. Jones was the lead investigator on the Fiorello investigation (Doc. 48, Ex. K at 31), but in September, 2002, Mr. Jones's status as lead investigator changed because Mr. Sattele determined that Mr. Jones had "lost focus" on the Fiorello investigation. (Doc. 48, Ex. M at 21-22.) Mr. Sattele elevated Kathy Butler to act as lead investigator. (*Id.*)

There is no evidence that Mr. Jones' repeated requests to expand the Fiorello investigation impaired discipline within OIG, or had a detrimental impact on any working relationship. Nor is there evidence of a breach of loyalty or confidence in a close working relationship. There is some evidence suggesting that Mr. Jones was distracted and his job performance may have been impacted, but apparently it was not serious enough to warrant Mr. Jones' removal from the Fiorello investigation. Moreover, there is no evidence that OIG's interest in efficient investigations was impacted in any meaningful way. Therefore, I find that Mr. Jones' repeated speech concerning the need to expand the Fiorello investigation to include the pharmaceutical industry was not outweighed by OIG's interest in efficiency.

3. Retaliatory Conduct

To determine whether an employer's acts constitute retaliation, a court must decide whether the alleged acts of harassment are likely to deter a person of ordinary firmness from the exercise of his First Amendment rights. *Suppan v. Dadonna*, 203 F.3d 228, 235 (3d Cir. 2000.) Courts have required that the nature of the retaliatory acts committed by a public employer be more than de minimis or trivial. *Brennan*, 350 F.3d at 399. "[C]ourts have declined to find that an employer's actions have adversely affected an employee's exercise of his First Amendment rights where the employer's alleged retaliatory acts were criticism, false accusations, or verbal reprimands of the plaintiff." *Id.* However, a plaintiff may be able to establish liability under § 1983 based upon a continuing course of conduct even though some or all of the conduct complained of would be de minimis by itself or if viewed in isolation. *Id.* at n.16.

Mr. Jones claims that he was retaliated against in numerous ways. First, Mr. Jones contends that Mr. Sattele told him that "Mac [Mr. McKee] was torpedoed.[2] Some of the things that he got maybe he deserved, but a lot of them he didn't." (Doc. 36, Tab 2 at 66, 77.) Mr. Jones also recalled Mr. Sattele telling him that if he [Mr. Jones] could not adjust, he would need to leave OIG. (*Id.* at 50.)

Second, Mr. Jones points to an incident with Mr. Hart, the Deputy Inspector General, as another example of retaliatory conduct. Mr. Hart questioned Mr. Jones about

[2] It should be noted that the statement, even if true, does not change the analysis or outcome of Mr. McKee's claim since he was not speaking on a matter of public concern. Therefore, any discipline he suffered was not in retaliation for the exercise of his First Amendment rights.

his alleged inappropriate behavior directed toward a twenty-year-old female receptionist. (Doc. 36, Tab 2 at 74-75.) The receptionist complained that Mr. Jones looked at her in an inappropriate or suggestive manner. (Doc. 36, Tab 3 at 99-100.) Mr. Jones denied looking at the receptionist in an inappropriate manner, but did acknowledge saying to her while she was "hustling about delivering papers" that "they ought to give you sneakers if they're going to make your work that hard." (Doc. 36, Tab 2 at 75.) A day or two after speaking to Mr. Jones about the incident, Mr. Hart informed Mr. Jones that no disciplinary action would result. (Doc. 36 Tab 2 at 87.) Mr. Hart "didn't believe that the incident rose any higher than Mr. Jones simply making an apology." (Doc. 36, Tab 3 at 126.)

The third example of retaliatory conduct is when Mr. Sattele told Mr. Jones to "quit being a salmon." (Doc 36, Tab 2 at 85.) Mr. Jones alleges that comment meant that he should stop pushing to expand the Fiorello investigation to include the pharmaceutical industry. (*Id.*) Mr. Sattele acknowledged making the comment, but asserts that he made the comment while explaining to Mr. Jones that he must work within the team concept at OIG and accept that attorneys are part of the investigative process. (*Id.* at 40-43.)

The final retaliatory incident that Mr. Jones points to occurred after he retrieved some paper work from Steve Fiorello for the investigation. (Doc. 36, Tab 2 at 43.) Upon his return to work, Mr. Sattele "demanded to know why I went to the Department of Public Welfare without his permission to pick up papers." (*Id.*) Mr. Jones says that Mr. Sattele accused him of interviewing the Director of Public Welfare, Steve Karp. (*Id.*) Mr. Jones denied meeting the director. Mr. Jones admitted that he was not to speak to anyone regarding the investigation without first obtaining Mr. Sattele's approval. (Doc. 48, Ex. K

at 69.) No discipline arose from this incident.

Determining whether Messrs. Hart and Sattele's conduct constitutes retaliatory harassment or intimidation is a question for the factfinder. A reasonable juror could find that some of the comments, including that "Mac was torpedoed" and "quit being a salmon," would deter a person of ordinary firmness from the exercise of his First Amendment rights. Therefore, I find there is a genuine issue of material fact with respect to whether Messrs. Hart and Sattele's actions constitute retaliatory harassment or intimidation.

4. Substantial or Motivating Factor

In a First Amendment retaliation case, the plaintiff must show that the protected activity was a substantial or motivating factor in the alleged retaliatory action. It is sufficient if a plaintiff establishes that the exercise of the First Amendment rights played some substantial role in the relevant decision; a plaintiff need not establish that the retaliation was motivated solely or even primarily by the protected activity. *Katzenmoyer v. City of Reading*, No. CIV.A 00-5574, 2001 WL 1132374, at *2 (E.D. Pa. Sept. 21, 2001).

With respect to Mr. Hart, there is little evidence suggesting that his actions were motivated by Mr. Jones' speech. The only interaction between Messrs. Hart and Jones was with respect to the receptionist's complaint (Doc. 48, Ex. K at 139-140.), which occurred on October 2, 2002. (Doc. 36, Tab 2 at 74.) The evidence shows that Mr. Jones wanted to expand the Fiorello investigation to include the pharmaceutical industry as early as July 29, 2002. (Doc. 48, Ex. K at 37.) There is no evidence that Mr. Hart

attempted to either silence or punish Mr. Jones for his desire to investigate the pharmaceutical industry in either August or September of 2002. Only after receiving a complaint about alleged inappropriate behavior did Mr. Hart contact Mr. Jones.

With respect to the receptionist incident, Mr. Jones acknowledged commenting directly to the receptionist about her sneakers. (Doc. 48, Ex. K at 121.) This admission indicates that Mr. Hart's discussion with Mr. Jones regarding the incident was not unfounded, as it is not up to Mr. Jones to decide how his comment was to be interpreted. More telling, there was no form of discipline imposed upon Mr. Jones for the incident. (Doc. 36, Tab 2 at 87.) Because of the lack of evidence offered by Mr. Jones demonstrating that his speech regarding the pharmaceutical industry was a substantial or motivating factor in Mr. Hart's actions, I will granted Defendants' motion with respect to Henry Hart.

With respect to Mr. Sattele, Mr. Jones has presented evidence that could lead a reasonable jury to conclude that his requests to investigate the pharmaceutical industry were a substantial or motivating factor in the retaliatory harassment or intimidation he may have suffered. For example, Mr. Jones testified at his deposition that when he expressed his frustration to Mr. Sattele about not being able to investigate the pharmaceutical industry, Mr. Sattele said that "Mac [Mr. McKee] was torpedoed, keep your mouth shut or the same thing can happen to you." (Doc. 36, Tab 2 at 77.) A reasonable jury could find that Mr. Sattele was warning Mr. Jones to not pursue the pharmaceutical investigation at the risk of an adverse employment action.

At his deposition, Mr. Jones recalled the following colloquy with Mr. Sattele: "Dan

said quit being a salmon. I didn't know what that meant. I said, Dan, what does that mean? He said quit swimming against the current with the pharmaceutical case." (Doc. 36, Tab 2 at 85.) Again, a reasonable jury could infer that Mr. Sattele was warning Mr. Jones to not actively push the pharmaceutical investigation. Therefore, I find there is a genuine issue of material fact whether Mr. Jones' speech was a substantial factor or motivation with respect to Mr. Sattele's alleged retaliatory harassment or intimidation.

2. Qualified Immunity

The only defendant remaining is Mr. Sattele, and he raises the defense of qualified immunity. The Third Circuit Court of Appeals uses a three-part inquiry to determine if a defendant is entitled to qualified immunity. First, the court must determine whether the plaintiff has alleged a deprivation of an actual constitutional right. *Conn v. Gabbert*, 526 U.S. 286, 290 (1999). Second, if the plaintiff has alleged a constitutional violation, then the court must determine whether the right was clearly established at the time of the alleged violation. *Id.* Third, the court must determine whether a reasonable official knew of should have known that the alleged action violated the plaintiff's rights. *Rouse v. Plantier*, 182 F.3d 192, 196-97 (3d Cir. 1999).

Mr. Jones has alleged that Mr. Sattele retaliated against him for speaking on a matter of public concern, namely, the need to investigate the pharmaceutical industry. Therefore, Mr. Jones has alleged a deprivation of an actual constitutional right.

Moving to the second prong of the qualified immunity analysis, I must determine if the right was clearly established. The right of public employees to be free from retaliation for speaking on matters of public concern was established in *Pickering v. Bd. of Educ.,*

391 U.S. 563 (1968) and *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274 (1977). However, Mr. Jones alleges something slightly different, namely, that the retaliation was in the form of harassment and intimidation. Traditionally, First Amendment retaliation claims involved actual discharge, transfer, demotion or a like action. *Zugarek v. Southern Tioga Sch. Dist.*, 214 F. Supp. 2d 468, 476 (M.D. Pa. 2002). Two years before this incident the Third Circuit recognized that retaliatory harassment could be actionable under a First Amendment retaliation cause of action. *See Suppan v. Dadonna*, 203 F.3d 228, 235-36 (3d Cir. 2000). Accordingly, I find that the right to be free from retaliatory harassment or intimidation was clearly established at the time of the alleged violation.

Lastly, I must determine whether Mr. Sattele knew of or should have known that his alleged actions violated Mr. Jones' rights. I am unable to make this legal determination because critical facts that underlie the dispute remain at issue. *Cf. Costenbader-Jacobson v. Pennsylvania*, 227 F.Supp.2d 304, 314 (M.D. Pa. 2002) Specifically, I have already determined that there is a genuine issue of material fact with respect to whether Mr. Sattele's actions constituted retaliatory harassment or intimidation. Absent a factual determination, I cannot determine whether his actions were objectively reasonable. Whether Mr. Sattele's actions constituted retaliatory harassment or intimidation is for the jury to decide. Therefore, I will deny Mr. Sattele's Motion for Summary Judgment on qualified immunity grounds.

CONCLUSION

Defendants Motion for Summary Judgment will be granted with respect to Mr. McKee's claims because he failed to demonstrate that he spoke on a matter of public concern. I will grant Defendant Henry Hart's motion with respect to Mr. Jones' claims, but deny the motion in all other respects. Only Mr. Jones' claim against Mr. Sattele remains.

An appropriate Order will follow.

February 12, 2004
Date

_____/s/_____
A. Richard Caputo
United States District Judge

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

DWIGHT MCKEE and ALLEN JONES,	:	
Plaintiffs,	:	
	:	CIVIL ACTION NO. 3:CV-02-1910
v.	:	
	:	(JUDGE CAPUTO)
HENRY HART, WESLEY RISH, ALBERT MASLAND, JAMES SHEEHAN, and DANIEL SATTELE,	:	
Defendants.	:	

ORDER

NOW, this 12th day of February, 2004, **IT IS HEREBY ORDERED THAT:**

1) Defendants' Motion for Summary Judgment (Doc. 35) with respect to Dwight McKee's claim is **GRANTED**.

2) Defendants' Motion for Summary Judgement (Doc. 35) with respect to Allen Jones' claim is **GRANTED in part and DENIED in part:**

   a) Defendants' Motion for Summary Judgment as to the claim against Henry Hart is **GRANTED**.

   b) Defendants' Motion for Summary Judgment as to the claim against Daniel Sattele is **DENIED**.

_____/s/_____
A. Richard Caputo
United States District Judge

FILLED 02/12/04