

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

APRIL D. WALLER,	)	
	)	
Plaintiff	)	Civil Action No.
	)	
v.	)	
	)	
CHARLES DEPP, an individual,	)	
SONDRA KLEPSKY, an individual,	)	
and	)	
THE COMMONWEALTH OF	)	
PENNSYLVANIA,	)	JURY TRIAL DEMANDED
	)	
Defendants	)	

CIVIL ACTION COMPLAINT

1. Plaintiff is April D. Waller, an individual who resides within this judicial district at 117 Vernon Drive, West Newton, Westmoreland County, Pennsylvania.

2. Defendant Charles Depp is an individual who at all times relevant hereto resided and is residing within this judicial district.

3. Defendant Sondra Klepsky is an individual who at all times relevant hereto resided and is residing within this

judicial district.

4. At all times relevant hereto, Defendant Depp, now retired, was employed by the Commonwealth of Pennsylvania as a state trooper and was acting under color of state law.

5. At all times relevant hereto, Defendant Klepsky was and is employed by the Commonwealth of Pennsylvania as a state trooper and was acting under color of state law.

6. At all times relevant hereto, Plaintiff was and is employed by the Commonwealth of Pennsylvania as a state police dispatcher.

#### JURISDICTION

7. This is a cause of action brought pursuant to 28 U.S.C. §1983 to enforce rights conferred upon Plaintiff by the First and Fourteenth Amendments to the Constitution of the United States of America and by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et. seq. Jurisdiction of this court is conferred pursuant to the provisions of 28 U.S.C. §1343. The Court has pendent jurisdiction to adjudicate Plaintiff's state law claims pursuant to 28 U.S.C. §1367(a).

COUNT ONE

PLAINTIFF VS. DEFENDANTS DEPP AND KLEPSKY

FIRST AMENDMENT

8. Plaintiff was hired by Defendant Commonwealth of Pennsylvania on or about January 6, 2001 as a state police dispatcher.

9. Plaintiff was transferred to the Uniontown Station, Fayette County, Pennsylvania, in or about July, 2006 to continue her work as a state police dispatcher.

10. At the time of her transfer, the commanding officer of the Uniontown Station was Defendant Depp, at the time a lieutenant in the state police.

11. Sometime during the summer of 2008, a person or persons unknown reported Defendant Depp for having an open bottle of liquor stored in his state police patrol car which, if true, was a violation of state police rules and regulations.

12. For reasons unknown, Defendant Depp falsely believed that Plaintiff was the individual who reported the violation.

13. To get even with Plaintiff for this alleged reporting, Defendants Depp and Klepsky, (acting out of friendship or loyalty to Defendant Depp or for other reasons unknown), acting both individually and in conspiracy between themselves and with

others, began to file or cause to be filed a series of false reports and/or disciplinary actions against Plaintiff Waller, as a result of which Plaintiff Waller was repeatedly disciplined by her superiors and repeatedly suspended without pay.

14. In response to the conduct of Defendants Depp and Klepsky in filing those false reports against her, Plaintiff Waller filed a complaint with the U.S. Equal Employment Opportunity Commission ("EEOC") and the Pennsylvania Human Relations Commission ("PHRC") against them under Title VII of the Civil Rights Act of 1964 and the Pennsylvania Human Relations Act.

15. The charge was initially reported to the EEOC by Plaintiff Waller on or about October 13, 2008, and the charge was formalized on or about January 27, 2009.

16. Plaintiff Waller's First Report against Defendants was cross-filed at PHRC Case No. 200805983 and EEOC No. 533200900057.

17. Since the filing of the First Report, Defendants Depp and Klepsky have retaliated against Plaintiff Waller by greatly increasing the number of false reports against her, as a result of which Plaintiff has been disciplined and suspended at work many times without pay.

18. In further response to the conduct of Defendants Depp

and Klepsky in continuing to file false discipline reports against her as aforesaid, Plaintiff filed a second charge with the EEOC.

19. The second charge was initially reported to the EEOC by Plaintiff on or about May 12, 2009, and the charge was formalized on or about June 10, 2009.

20. Plaintiff Waller's Second Report against Defendants was cross-filed at PHRC Case No. 200901737 and EEOC No. 533200901085.

21. Since the filing of the second PHRC/EEOC complaint, Plaintiff continues to be subject to retaliatory conduct directed at her by Defendants Depp and Klepsky.

22. In addition, Defendants Depp and Klepsky directed and recruited co-workers of Plaintiff to participate in the Defendants' campaign to file false reports against Plaintiff, make Plaintiff's work life unduly burdensome, and to drive Plaintiff out of her employment.

23. The retaliatory and oppressive conduct engaged in and orchestrated by Defendants Depp and Klepsky as a result of Plaintiff's filing of charges with the PHRC and the EEOC, as more fully described above, violate rights secured to Plaintiff by the First and Fourteenth Amendments to the Constitution of the United States.

24. Further, the conduct of Defendants Depp and Klepsky as set forth herein was intentional and malicious, was intended by said Defendants to cause Plaintiff harm and was conducted with reckless indifference to the rights of Plaintiff.

25. As a result of the conduct of Defendants Depp and Klepsky as aforesaid, Plaintiff has been subjected to suspensions without pay in an amount not yet determined.

26. Further, as a result of the conduct of Defendants Depp and Klepsky as aforesaid, Plaintiff suffered anxiety, stress and loss of sleep, was prescribed medication, and her pre-existing condition of depression was exacerbated, such that pursuant to the instructions of her physician Plaintiff was obliged to take a three month medical leave without pay.

27. As a result of having to take a medical leave of absence, Plaintiff lost income in the amount of \$5,400.00.

WHEREFORE, Plaintiff demands judgment against Defendants Depp and Klepsky for compensatory damages, including loss of wages during the above-referenced suspensions and medical leave, as well as damages for emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses, and punitive damages in an amount to be determined. Further Plaintiff seeks counsel fees plus interest and costs of the within proceeding.

COUNT TWO

PLAINTIFF VS. DEFENDANT COMMONWEALTH OF PENNSYLVANIA

TITLE VII

42 U.S.C. §2000e et. seq. (Retaliation)

28. Plaintiff incorporates by reference as though fully set forth herein Paragraphs One through Twenty-Seven of the within complaint.

29. Defendants Depp and Klepsky were authorized by Defendant Commonwealth of Pennsylvania to supervise and manage the work of Plaintiff at all times relevant hereto and were acting within the scope of their employment in doing so. Further, at all times relevant hereto, Defendant Depp was the commanding officer of the state police facility at Uniontown, Pennsylvania where Plaintiff was employed and where all of the conduct giving rise to these causes of action occurred.

30. The conduct of the Defendants Depp and Klepsky in the filing of false disciplinary reports against Plaintiff because she filed complaints with the PHRC/EEOC is retaliation and a violation of the provisions of 42 U.S.C. §2000e-3.

31. Plaintiff's charges of violations of Title VII and retaliation were referred to the U.S. Department of Justice.

32. The U.S. Department of Justice issued Plaintiff "right to sue letters" dated December 17, 2009 (for EEOC No. 533200900057) and January 7, 2010 (for EEOC No. 533200901085). (Copies of these letters are attached to this Complaint as Exhibits A and B, respectively).

33. Further, the conduct of Defendants Depp and Klepsky as set forth herein was intentional and malicious, was intended by said Defendants to cause Plaintiff harm and was conducted with reckless indifference to the rights of Plaintiff.

WHEREFORE, Plaintiff demands judgment against Defendant Commonwealth of Pennsylvania for compensatory damages, including loss of wages during the above-referenced suspensions and medical leave, as well as damages for emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, in an amount to be determined. Further Plaintiff seeks counsel fees, interest and costs of the within action and such other legal and equitable relief as the court deems proper.



THIRD CAUSE OF ACTION  
PENDANT STATE CLAIM  
PLAINTIFF VS. DEFENDANTS COMMONWEALTH OF PENNSYLVANIA,  
DEPP AND KLEPSKY  
PHRA RETALIATION  
43 P.S. §951 et. seq.

34. Plaintiff incorporates by reference as though fully set forth herein Paragraphs One through Thirty-Three of the within complaint.

35. The conduct of Defendants Commonwealth of Pennsylvania, Depp and Klepsky as aforesaid in retaliating against Plaintiff for filing both of her complaints with the PHRC/EEOC is an unlawful discriminatory practice prohibited by the provisions of 43 P.S. §955, Subsections (d) and (e).

36. Further, the conduct of Defendants Commonwealth of Pennsylvania, Depp and Klepsky as set forth herein was intentional and malicious, was intended by said Defendants to cause Plaintiff harm and was conducted with reckless indifference to the rights of Plaintiff.

WHEREFORE, Plaintiff asks the court to assume pendant jurisdiction of this claim brought pursuant to the law of the Commonwealth of Pennsylvania. Plaintiff further demands judgment against Defendants Commonwealth of Pennsylvania, Depp

and Klepsky in an amount of compensatory damages, including loss of wages during the above-referenced suspensions and medical leave, as well as damages for mental anguish and humiliation, and punitive damages to be determined. Further Plaintiff demands such other legal and equitable relief as the court deems proper together with counsel fees, interest and costs of the within proceeding.



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Attorneys for Plaintiff



5. It is admitted only that defendant Klepsky was a Corporal with PSP at the times alleged in the Complaint. The remaining averments are conclusions of law to which no response is required.

6. Denied as stated. Plaintiff is a PCO – Police Communications Operator – with PSP.

7. The averments of paragraph 7 are conclusions of law to which no response is required.

**COUNT I – PLAINTIFF v. DEPP and KLEPSKY (First Amendment)**

8. Defendants incorporate herein their responses to paragraphs 1 through 7 of the Complaint as though fully set forth.

9. Denied as stated. Plaintiff was previously working at Troop B headquarters in Washington. In 2006, she successfully bid on a vacant PCO position at Uniontown station and was transferred.

10. Admitted.

11. Denied.

12. Denied.

13. Denied. Plaintiff's performance had been subpar for several years, and she had been disciplined on numerous occasions for performance inadequacies and rule violations, including before she transferred to Uniontown in 2006. Her record reflects that from 2007 through the present, she has been the subject of numerous supervisor inquiries and investigations (most, if not all, were sustained) initiated by various PSP officers, not just these defendants – involving, *inter alia*, misuse of the

JNET system, use of inappropriate language and racist comments, sexually oriented texting to troopers, and texting personal messages while working the communications desk in the course of officers responding to a major police incident (armed robbery).

14. Denied. These defendants did not file “false reports” against plaintiff. Furthermore, plaintiff misrepresents the content of her first EEOC charge filed on 1/23/09 as it does not mention “false reports” or defendant Klepsky. Rather, plaintiff claimed (i) she had been harassed by Captain Waters and another female PCO while working in Washington, over 2 ½ years earlier, and (ii) she was still being subjected to harassment because she believed Lt. Depp was a friend of Captain Waters. This alleged harassment included limited telephone usage, close scrutiny of her work, and unwarranted discipline. (A copy of this Charge is attached as Exh. A.)

15. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 15, except that the Charge was signed by plaintiff on 1/23/09.

16. Admitted.

17. Denied. See response to ¶13 which is incorporated herein.

18. It is denied that defendants filed any false reports against plaintiff. By way of further response, plaintiff’s second EEOC charge, filed 6/9/09, is attached as Exhibit B and speaks for itself.

19. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 19, except that the second Charge was signed by plaintiff on 6/9/09.

20. Admitted.

21. Denied.

22. Denied.

23. Denied.

24. Denied.

25. Denied. By way of further response, the suspensions plaintiff has received were due to her own actions and/or misconduct as set forth in response to paragraphs 13 and 17.

26. Denied.

27. Denied.

WHEREFORE, defendants request that Count I be dismissed with prejudice.

#### **COUNT II – PLAINTIFF v. COMMONWEALTH (Title VII)**

28. Defendants incorporate herein their responses to paragraphs 1 through 27 of the Complaint as though fully set forth.

29. Denied as stated. Depp and Klepsky were in plaintiff's chain of command but neither directly supervised plaintiff in her daily duties as a PCO. Rather, she was supervised by the patrol corporal on the shift she was working, and her schedule was set by the Patrol Sergeant. Corporal Klepsky, as Staff Corporal, had supervisory authority over plaintiff and the other PCO's as to staff/administrative matters such as evaluations and training.

30. Denied.

31. Denied. Defendants do not believe that there was a referral by the EEOC to the Department of Justice in this matter or that the EEOC even had time to complete

its investigation since plaintiff's counsel requested "right to sue letters" as soon as the 180-day period had elapsed since the filing of plaintiff's second complaint.

32. Admitted. Further, defendants' response to paragraph 31 is incorporated herein, as the right to sue letters do not in any way reflect a determination of cause but were issued at the request of plaintiff's counsel so that this action could be pursued.

33. Denied.

WHEREFORE, defendants request that Count II be dismissed with prejudice.

### **COUNT III – PLAINTIFF v. DEFENDANTS (PHRA)**

34. Defendants incorporate herein their responses to paragraphs 1 through 33 of the Complaint as though fully set forth.

35. Denied.

36. Denied.

WHEREFORE, defendants request that Count III be dismissed with prejudice.

### **SECOND AFFIRMATIVE DEFENSE**

The complaint fails to state a claim for which relief can be granted.

### **THIRD AFFIRMATIVE DEFENSE**

Defendants had legitimate, rational, nondiscriminatory and non-retaliatory employment reasons for the actions taken with respect to plaintiff.

### **FOURTH AFFIRMATIVE DEFENSE**

Defendants were at all times acting in good faith, in an objectively reasonable manner and with a reasonable belief in the lawfulness of their actions.

**FIFTH AFFIRMATIVE DEFENSE**

Any injuries or losses suffered by the plaintiff were the direct result of her own poor job performance, actions or omissions, or were caused by the conduct or actions of third parties over whom the Defendants have no control or responsibility.

**SIXTH AFFIRMATIVE DEFENSE**

The defendants were at all times acting pursuant to a duty required or authorized by statute or regulation; and, therefore, said acts were within the discretion granted to them by statute or statutorily authorized regulations.

**SEVENTH AFFIRMATIVE DEFENSE**

If established through discovery, defendants assert that plaintiff's claims are barred by the statute of limitations.

**EIGHTH AFFIRMATIVE DEFENSE**

Plaintiff's state law claims, including her PHRA claims, are barred by sovereign and by Eleventh Amendment immunity.

**NINTH AFFIRMATIVE DEFENSE**

At no time did the defendants deprive the plaintiff of any rights, privileges, or immunities secured to her by the Constitution or laws of the United States.

**TENTH AFFIRMATIVE DEFENSE**

If established through discovery, defendants assert that Plaintiff failed to exhaust her administrative remedies with respect to all of the claims in the complaint; her claims are untimely under PHRA and EEOC regulation; and the claims asserted in the complaint are beyond the scope of her EEOC and/or PHRC complaint.



**ELEVENTH AFFIRMATIVE DEFENSE**

Defendants are entitled to qualified immunity.

**TWELFTH AFFIRMATIVE DEFENSE**

Plaintiff was not treated differently than other similarly situated employees.

**THIRTEENTH AFFIRMATIVE DEFENSE**

To the extent that plaintiff asserts claims against the individual defendants in their official capacities, those claims are barred by the Eleventh Amendment.

**FOURTEENTH AFFIRMATIVE DEFENSE**

PSP established a readily accessible and effective policy for reporting harassment, retaliation and discrimination, and plaintiff unreasonably failed to avail herself of that policy with respect to all of the claims in her complaint.

**FIFTEENTH AFFIRMATIVE DEFENSE**

The Commonwealth of Pennsylvania is not a proper defendant as plaintiff is employed by the Pennsylvania State Police, an agency and arm of the Commonwealth.

WHEREFORE, defendants request judgment in their favor and against plaintiff.

A JURY TRIAL IS HEREBY DEMANDED TO THE EXTENT PERMITTED BY LAW.

Respectfully Submitted,

**THOMAS W. CORBETT, JR.**

Attorney General

By: /s/ Mary Lynch Friedline

Mary Lynch Friedline

Senior Deputy Attorney General

Pa. I.D. # 47046

SUSAN J. FORNEY

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Date: June 8, 2010

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

<b>APRIL D. WALLER,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v</b>	)	<b>2:10-cv-372</b>
	)	
<b>CHARLES DEPP an individual, SONDR KLEPSKY an individual and THE COMMONWEALTH OF PENNSYLVANIA</b>	)	
	)	
<b>Defendants.</b>	)	
	)	
	)	
	)	
	)	

**MEMORANDUM ORDER**

Now pending before the Court are PLAINTIFF’S MOTION TO ENJOIN DEFENDANTS’ INTIMIDATION OF PLAINTIFF AND PLAINTIFF’S WITNESSES AND REQUEST FOR EXPEDITED HEARING (Document No. 17), Defendants’ response to the motion for expedited hearing (Document No. 18), and the MOTION TO STRIKE EXHIBITS (Document No. 19) filed by counsel for Plaintiff. The motions are ripe for disposition.

Plaintiff April Waller is a female dispatcher who is employed by the State Police at the Uniontown Station in Fayette County, Pennsylvania. In this case, Waller alleges that Defendants have filed allegedly false reports about her conduct at work and taken numerous disciplinary actions (including suspensions without pay) in retaliation for her protected activities, including the filing of complaints with the EEOC. The pending motion arises from the efforts to schedule the depositions of three other female dispatchers.

In essence, counsel for Plaintiff seeks an expedited hearing to “enjoin” Defendants from conspiring to intimidate Plaintiff and the three deposition witnesses. Counsel for Plaintiff, David

Millstein and Jon Pushinsky, allege that the depositions were “scheduled”; that defense counsel was notified; that the names of the deponents were disclosed; and that subpoenas were served on the witnesses. Plaintiff avers that the depositions were originally scheduled for November 30, 2010 but “were rescheduled for a later time for reasons unrelated to this motion.”

Plaintiff claims that the witnesses have experienced “intimidation and retaliation” from Defendants, consisting of: (a) alteration of their work schedules from daylight-only shifts to a rotating schedule of second and third shifts; (b and c) a refusal to allow the witnesses to schedule paid time off (or any time off) to attend the depositions; (d) a warning that if grievance(s) were filed as a result of the schedule changes “things would get much worse”; (e) giving the witnesses last choice in the selection of Christmas vacation time; (f) reassignment of one witness from a private office to a “front desk”; (g) alleged warrantless and illegal tapping of Plaintiff’s cell phone; and (h) continued disciplinary proceedings filed against Plaintiff. Plaintiff requests an expedited hearing to prevent alleged “further intimidation” and asks the Court to restore the alleged “status quo” regarding the work and vacation schedules. Plaintiff’s motion is unverified and not supported by affidavits or declarations from the individuals involved.

In response, counsel for Defendants, Mary Friedline, has vigorously denied the accusations leveled by counsel for Plaintiff. Attorney Friedline explained that although she had been advised in early November that attorney Millstein intended to subpoena the three female dispatchers for depositions on November 30, the Notices of Deposition and/or subpoenas were never sent. On November 24, 2010 (the day before Thanksgiving), attorney Friedline called Rachel Yantos, Esquire, an associate of attorney Millstein to confirm that the depositions would not take place. Attorney Yantos explained that the subpoenas had just been sent out that day (the 24<sup>th</sup>), agreed that the short notice would present scheduling problems (particularly given the Thanksgiving holiday),

and discussed scheduling the depositions for December 12 and 13. In early December, attorney Friedline received a phone message from attorney Millstein which stated that the depositions would not take place on December 12 or 13 because the deponents were reluctant to testify and allegedly were having a hard time getting off work for the depositions. Friedline investigated the allegation and learned that Sergeant Joseph D'Andrea (who schedules the dispatchers) had not been notified of the deposition dates. Nor had the witnesses shown him the subpoenas. Attorney Friedline represented in writing that attendance at the depositions would not be a problem and that Sergeant D'Andrea "will gladly arrange for those employees to be covered if they are subpoenaed to testify during work hours." Exhibit 3.

Defendants have further represented that the changes to the dispatchers' schedules were entirely unrelated to the depositions. In support of their position, Defendants have submitted Declarations from Lieutenant David Hickman and Sergeant D'Andrea, which explained that the schedule changes had been planned for several months in order to address manpower shortages. The Declarations were signed and executed under penalty of perjury in compliance with 28 U.S.C. § 1746. Plaintiff's contention that these Declarations should be stricken as "unverified and unsworn" is without merit. The MOTION TO STRIKE EXHIBITS (Document No. 19) is **DENIED**.

Plaintiff is not entitled to injunctive relief or an expedited hearing regarding the scheduling of the three depositions at issue. This is fundamentally a discovery dispute, which Plaintiff is attempting to transform into an unwarranted collateral proceeding. It is readily apparent that there has been miscommunication regarding the scheduling of these depositions. The Court cannot agree that the reasons for postponement of the original deposition dates are entirely "unrelated" to the pending motion. Nevertheless, Defendants apparently remain willing to make

the witnesses available for deposition – such that a collateral hearing would not be consistent with the “just, speedy, and inexpensive determination” of this case. *See* Fed. R. Civ. P. 1. If the parties remain unable to resolve their differences, appropriate procedures and sanctions are available through the Federal Rules of Civil Procedure which explicitly govern deposition practice. Accordingly, PLAINTIFF’S MOTION TO ENJOIN DEFENDANTS’ INTIMIDATION OF PLAINTIFF AND PLAINTIFF’S WITNESSES AND REQUEST FOR EXPEDITED HEARING (Document No. 17) is **DENIED**.<sup>1</sup>

In the event that Plaintiff complies with all applicable requirements in the Federal Rules of Civil Procedure regarding deposition scheduling and is still unable to obtain Defendants’ cooperation, Plaintiff may file an appropriate motion for relief in this Court. Any such motion must fulfill the “meet and confer” obligation set forth in Fed. R. Civ. P. 37(a)(1), which requires a “certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.”

SO ORDERED this 16<sup>th</sup> day of December, 2010.

BY THE COURT:

s/ Terrence F. McVerry  
United States District Court Judge

cc: David J. Millstein, Esquire  
Email: sponte@aol.com  
Jon Pushinsky, Esquire  
Email: jonpush@aol.com

Mary Lynch Friedline, Esquire  
Email: mfriedline@attorneygeneral.gov

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<sup>1</sup> The Court declines Plaintiff’s request to micromanage the work and vacation schedules of non-parties. Moreover, Plaintiff is not entitled to use the pending litigation as a shield against appropriate work-related discipline.