IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MARTIN C. MELTZER,	)	
	)	
Plaintiff,	)	
	)	C.A. No. 07C-12-197 MMJ
v.	)	
	)	
CITY OF WILMINGTON, JOHN SHERIDAN and BRENDA JAMES-ROBERTS,	)	
	)	
Defendants.	)	

Submitted: March 4, 2011
Decided: April 6, 2011

On Defendants' Motion for Summary Judgment
GRANTED

OPINION

G. Kevin Fasic, Esquire, Wilmington, Delaware, Attorney for Plaintiff

David H. Williams, Esquire, James H. McMackin, Esquire, Morris James, LLP., Wilmington, Delaware, Attorneys for Defendants

JOHNSTON, J.

This case involves Plaintiff Assistant City Solicitor Martin Meltzer's employment claims against Defendants the City of Wilmington ("City"), City Solicitor John Sheridan, and Senior Assistant City Solicitor Brenda James-Roberts. Plaintiff alleges that defendants discriminated against him based on his age, retaliated against him for participating in protected activity, placed him on unpaid leave in violation of his due process rights, and breached his employment contracts.

Defendants move for summary judgment on all of plaintiff's claims. For the following reasons, defendants' motion is granted.

FACTUAL AND PROCEDURAL CONTEXT

This motion is filed under seal. Therefore, apart from plaintiff and defendants, the individuals involved in this litigation will be referred to in the following manner: ACS (Assistant City Solicitor); HRE (Human Resources Employee); DOLO (Department of Labor Officer); and AUSA (Assistant United States Attorney). Following the above acronyms will be a number designating the particular ACS, for example, to which the decision refers.

Plaintiff, now 61 years of age, graduated law school in 1987. Before joining the City Law Department ("Department"), plaintiff was in private practice for thirteen years, where he gained much litigation experience. In

2001, the Department hired plaintiff as an Assistant City Solicitor primarily to handle employment-related matters. Plaintiff remains employed in this capacity.

ACS 1 worked with plaintiff at the Department. ACS 1 opined that plaintiff was difficult to work with, took credit for ACS 1's work, and blamed ACS 1 for plaintiff's own deficiencies. ACS 1 testified at deposition that plaintiff's written work-product was poor, and plaintiff often would hand ACS 1 written work-product to edit on the eve of filing deadlines. Plaintiff conceded that, on one occasion, he handed ACS 1 written work-product on the eve of a filing deadline due to a miscommunication. ACS 1 requested that he not work with plaintiff again.

ACS 2 also worked with plaintiff. ACS 2 testified that plaintiff's organizational skills were poor and plaintiff misplaced documents on more than one occasion.

On October 29, 2004, as a result of events unrelated to plaintiff, the City terminated ACS 3. Subsequently, ACS 3 applied for workers' compensation, claiming stress due to workplace harassment. The City denied ACS 3's claim. Plaintiff, believing that ACS 3's workers compensation claim was inappropriately denied, reported to the City, Sheridan, and James-Roberts that ACS 3's termination may violate workers'

compensation law. Additionally, plaintiff spoke with HRE 1 about ACS 3's termination. HRE 1 initiated a brief conversation with plaintiff in HRE 1's office during a discussion about an unrelated topic. Plaintiff claims that this amounted to an "informal investigation." HRE 1 characterized the exchange with plaintiff as a passing conversation. Plaintiff testified that Sheridan "chastised" him for his involvement in the "investigation."

The Department administers annual performance appraisals of its attorneys. Plaintiff received an "Above Expectations" performance appraisal for 2004. This is one level below "Far Above Expectations," the highest performance appraisal a Department employee can attain. The appraisal expressed concerns about plaintiff's organizational skills. Plaintiff did not challenge his 2004 performance appraisal.

In December 2004, the Department assigned plaintiff a federal case, *Keller v. City of Wilmington*, which involved ten plaintiffs who alleged employment discrimination and retaliation claims against the City ("Keller Litigation"). Plaintiff complained to the Department that the Keller Litigation amounted to more work than one attorney could handle. Plaintiff testified that the Keller Litigation was document intensive, had an expansive witness list, and was time-sensitive. Plaintiff requested the assistance of two additional attorneys. The Department responded that the Keller Litigation

was not particularly complex and denied plaintiff's request. James-Roberts testified at deposition that, during the Keller Litigation, she assigned cases to other attorneys in the Department, which normally would be handled by plaintiff, in order to lighten his caseload.

On January 31, 2005, the Keller Litigation ongoing, plaintiff was scheduled to take off work for surgery. Plaintiff requested that additional attorneys be assigned to the case in his absence. Sheridan and Jones-Roberts denied plaintiff's request. Further, plaintiff claims that Jones-Roberts asserted that, if anything needed to be done, "he better get to it." Plaintiff cut short his rehabilitation time to address a motion.

Subsequently, plaintiff came across a potential conflict of interest between two of the defendants in the Keller Litigation. Plaintiff brought this to the attention of Jones-Roberts but testified that she responded with impatience. Plaintiff also claims that, at this time, he realized that the Department did not maintain a "conflicts list." On March 3, 2005, plaintiff memorialized these concerns, along with his complaints that the Department needed to devote more resources to the Keller Litigation, in memoranda that he sent to the Mayor's Office and the Department's Personnel Department.

Shortly thereafter, the City assigned ACS 4 to assist plaintiff with the Keller Litigation. ACS 4 testified that working with plaintiff was a

"traumatic process." James-Roberts supervised plaintiff and ACS 4. James-Roberts observed that every suggestion ACS 4 gave to plaintiff turned into a "battle." James-Roberts opined that plaintiff was disrespectful toward ACS 4 and conducted himself unprofessionally.

Plaintiff testified that, around this time, with the exception of ACS 5, his colleagues were overtly hostile to him, and he was "isolated and shunned." Plaintiff explained that ACS 5 is older than 60 and "also experience[ed] hostile treatment."

On March 14, 2005, plaintiff wrote additional memoranda to the Department's Administration and the Department's Personnel Department and filed a formal grievance with the Department. Plaintiff addressed, what he thought to be, several legal and organizational problems with the Department. Regarding his grievance, plaintiff first met with Jones-Roberts, who "chastised" him. Plaintiff appealed to HRE 1, who found that plaintiff did not file a meritorious grievance. Plaintiff did not appeal HRE 1's determination.

On April 28, 2005, Sheridan authored an article for the Wilmington Times, a City employee newsletter, outlining the general functions of the Department. The article did not mention plaintiff or any of his contributions to the Department. Plaintiff testified that the article "hurt [his] feelings" and

was a “humiliation.” Plaintiff brought his sentiments to the Department’s attention, claiming that Sheridan purposely omitted his accomplishments.

The Department gave plaintiff an “Above Expectations” performance appraisal for 2005. The appraisal expressed concerns about plaintiff’s time management, attitude, written work-product, and organizational skills. Plaintiff did not challenge his 2005 performance appraisal.

In February 2006, the Keller Litigation went to trial. The jury delivered a verdict in favor of the City. The Department and plaintiff received several letters of commendation for the Keller Litigation’s outcome.

Subsequently, ACS 4 filed a harassment complaint against plaintiff. ACS 4 alleged that plaintiff made false statements about ACS 4’s competence and told various Department employees that plaintiff “fired” ACS 4 from the Keller Litigation. An investigation found that plaintiff’s conduct was inappropriate, but did not amount to harassment.

Plaintiff responded to ACS 4’s harassment complaint with his own harassment complaint. Plaintiff testified that, unlike ACS 4’s harassment complaint, the Department did not investigate his complaint and did not render a decision.

In April 2006, Sheridan went before the City Council to request $15,000 bonus to supplement the salaries of the Department attorneys, which the Council granted. A Department memo explains that the $15,000 bonus was for "merit increases to recognize individual exemplary performance" (these salary adjustments are referred to as the "2006 Salary Adjustments"). Sheridan and HRE 1, however, testified that the 2006 Salary Adjustments were aimed at addressing salary disparities with other State of Delaware employees. The younger attorneys received bonuses from $1,500 to $3,000, plaintiff received $500, and ACS 5 received nothing. The 2006 Salary Adjustments were applied before—and without considering—the 2006 performance appraisals.

The Department gave plaintiff an "Above Expectations" performance appraisal for 2006. The appraisal expressed concerns about plaintiff's organizational skills, ability to work with others, and written work-product. Plaintiff challenged his 2006 performance appraisal, asserting that he deserved a "Far Above Expectations" evaluation. Plaintiff requested that the Mayor's Chief of Staff review the appraisal. The Mayor's Chief of Staff declined, explaining that, because he does not supervise plaintiff on a day-to-day basis, he cannot review the performance appraisal.

On July 1, 2006, the City created two Senior Assistant City Solicitor positions. The City's objective was to attract and retain talented attorneys with a more senior position at a higher salary. The City's 2006 Re-Organization Plain explained that, to be eligible for the position, an Assistant City Solicitor must have at least three consecutive years of "Far Above Expectations" performance appraisals.

The City promoted ACS 1 and ACS 2, who were both younger than 40 (these promotions are referred to as the "2006 Promotions"). ACS 1 consistently had received "Far Above Expectations" performance appraisals with uniformly positive comments since ACS 1 joined the Department in 2002. Similarly, ACS 2 consistently had received "Far Above Expectations" performance appraisals since ACS 4 joined the Department in 2003. Plaintiff was not considered for the promotion—neither was ACS 5.

On January 7, 2007, plaintiff filed age discrimination charges against the City with the Delaware Department of Labor ("DDOL") and the Equal Employment Opportunity Commission ("EEOC"). DOLO 1 responded that the "materials you submitted to this agency contain grammatical and spelling errors, substantiating Respondent's position that your written work-product is sub standard (sic) for the Senior Assistant City Solicitor position."

In February 2007, the Department offered plaintiff a temporary position with the United States Attorney's Office, which plaintiff accepted. For doing so, plaintiff received a $3,000 salary increase. Plaintiff joined "Operation Fed Up," an effort by the City and the United States Attorney's Office to combat gun crimes in Wilmington. Included in the arrangement was that plaintiff would return to the Department when Operation Fed Up concluded. AUSA 1 supervised plaintiff. AUSA 1 opined that plaintiff's written work-product was poor.

Plaintiff was scheduled to return to the Department in February 2008. Defendants assert that the United States Attorney's Office did not extend the length of plaintiff's stay partly due to his poor written work-product. Plaintiff claims that his performance at the United States Attorney's Office was laudable, and the decision not to extend plaintiff's stay was "influenced by numerous factors . . .."

On December 26, 2007, plaintiff filed this action, alleging that defendants: (1) violated the Delaware Whistleblowers' Protection Act; (2) breached the implied covenant of good faith and fair dealing; (3) violated the City whistleblowers' ordinance; (4) violated the Workers' Compensation Retaliation Act; (5) violated Delaware's Age Discrimination statute; (6)

engaged in intentional infliction of emotional distress; and (7) violated plaintiff's civil rights under 42 U.S.C. § 1983.

By Opinion dated August 6, 2008, the Court granted in part defendants' Motion to Dismiss. The Court ruled:

> The Defendants' Motion to Dismiss Counts II (Breach of the Implied Covenant of Good Faith and Fair Dealing) and VI (Intentional Infliction of Emotional Distress) is hereby **GRANTED**. Defendants' Motion to Dismiss Counts I (Violation of Delaware's Whistleblowers' Protection Act) and IV (Violation of the Workers' Compensation Retaliation Act), as to individual Defendants Sheridan and James-Roberts, is hereby **GRANTED**. Defendants' Motion to Dismiss Count VII (Violation of 42 USCA § 1983) is hereby **DENIED AT THIS TIME**. Defendants' Motion to Dismiss Count III (Public Policy Violation/City Whistleblower Ordinance) is hereby **DENIED**. Defendants' Motion to Dismiss Count V (age discrimination) is hereby **GRANTED** as unopposed. Defendants' Motion to Dismiss Plaintiff's claim for punitive damages is hereby **GRANTED**.[1]

In January 2008, the City, concerned that plaintiff's return to the Department—scheduled for February 2008—might be an ethical violation, requested that plaintiff obtain an advisory opinion from the Delaware State Bar Association Committee on Professional Ethics ("Committee"). The City sought clarification of whether plaintiff's ongoing employment with the Department constituted a conflict of interest due to his participation as co-

[1] *Meltzer v. City of Wilmington*, 2008 WL 4899230, at *5 (Del. Super.).

counsel in this Superior Court action against defendants. Plaintiff refused to seek the Committee's opinion.

After conducting his own research, plaintiff responded that his return would not constitute a conflict of interest. Later, plaintiff commissioned an opinion from Charles Slanina, Esquire, an expert on the Delaware Lawyers' Rules of Professional Conduct. Slanina opined that plaintiff's return to the Department would not constitute a conflict of interest. Because plaintiff did not request an advisory opinion from the Committee, defendants did not allow plaintiff to return to the Department immediately following his time with the United States Attorney's Office.

The City continued to request that plaintiff obtain an opinion from the Committee for the next several months, claiming that the Committee would only give its opinion if plaintiff requested it. Plaintiff announced that he would return to the Department without obtaining an advisory opinion. As a result, on July 28, 2009, the City placed plaintiff on unpaid leave. One day later, plaintiff requested an advisory opinion from the Committee.

The Committee advised that the Department implement safeguards to avoid any conflict of interest. Subsequently, the City returned plaintiff to full-pay status and compensated plaintiff for the time he was on unpaid leave.

On November 14, 2010, plaintiff amended his complaint, alleging that defendants: (1) violated the Delaware Whistleblowers' Act; (2) violated public policy and the City Whistleblowers' Ordinance; (3) violated the Workers' Compensation Retaliation statute; (4) violated the Delaware Age Discrimination statute; (5) violated plaintiff's civil rights under 42 U.S.C. § 1983; (6) violated the City's Personnel Manual; (7) violated public policy by breaching provisions of the Department's Policy Manual; and (8) breached the Operation Fed Up contract.

On January 18, 2011, defendants moved for summary judgment as to "all of [plaintiff's] remaining claims." Plaintiff asserts, however, that defendants' motion is not case dispositive. After reviewing defendants' papers, and considering the March 3, 2011 oral argument, the Court finds that defendants' motion for summary judgment is case dispositive.

SUMMARY JUDGMENT STANDARD

Summary judgment is granted only if the moving party establishes that there are no genuine issues of material fact in dispute and judgment may be granted as a matter of law.[2] All facts are viewed in a light most favorable to the non-moving party.[3] Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if there is a need to

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[2] Super. Ct. Civ. R. 56(c).
[3] *Hammond v. Colt Indus. Operating Corp.*, 565 A.2d 558, 560 (Del. Super. 1989).

clarify the application of law to the specific circumstances.[4] When the facts permit a reasonable person to draw only one inference, the question becomes one for decision as a matter of law.[5] If the non-moving party bears the burden of proof at trial, yet "fails to make a showing sufficient to establish the existence of an element essential to that party's case," then summary judgment may be granted against that party.[6]

DISCUSSION

Age Discrimination and the 2006 Promotions

Parties' Contentions

Defendants argue that plaintiff has not established a *prima facie* case of age discrimination. Specifically, defendants contend that plaintiff has not shown that he was qualified for one of the 2006 Promotions. Plaintiff did not receive three consecutive "Far Above Expectations" performance appraisals—a requirement for the 2006 Promotions. To the extent that plaintiff asserts that the eligibility requirements were designed to affect age discrimination, defendants assert that plaintiff has not put forth evidence to establish his burden of showing discriminatory purpose.

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[4] Super. Ct. Civ. R. 56(c).
[5] *Wootten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).
[6] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Plaintiff responds that he was qualified for the 2006 Promotions, and therefore, he established a *prima facie* case of age discrimination. Plaintiff claims that the City's eligibility requirements for the 2006 Promotions were created with pretext to discriminate against the older Department attorneys.

Analysis

To establish a *prima facie* case of age discrimination, plaintiff must show: (1) he is older than 40 years of age; (2) he was qualified for the 2006 Promotions; (3) he suffered an adverse employment decision; and (4) ACS 1 and ACS 2, employees under 40 years of age, were treated more favorably.[7] "This showing creates a presumption of age discrimination that the employer must rebut by stating a legitimate nondiscriminatory reason for the adverse employment decision."[8] Thereafter, plaintiff may demonstrate that the employer's legitimate nondiscriminatory reason is false, and a pretext for discrimination.[9]

It is undisputed that plaintiff is older than 40 years of age, suffered an adverse employment decision by not attaining the promotion, and ACS 1 and ACS 2 are employees under 40 years of age who were treated more

[7] *Lyles v. Philadelphia Gas Works*, 2005 WL 2573319, at *1 (3d Cir.); *Riner v. Nat'l Cash Register*, 434 A.2d 375, 377 (Del. 1981).
[8] *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993); *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 897 (3d Cir. 1987), *cert. dism'd*, 483 U.S. 1052 (1987).
[9] *Hicks*, 509 U.S. at 515-16.

favorably than plaintiff. Therefore, plaintiff need only demonstrate *prima facie* evidence that he was qualified for one of the 2006 Promotions.

It is undisputed that plaintiff did not receive a "Far Above Expectations" performance appraisal for three consecutive years, an eligibility requirement for the 2006 Promotions. It is also undisputed that ACS 1 and ACS 2 received "Far Above Expectations" performance appraisals for three consecutive years.

The undisputed evidence, set forth by defendants, shows that plaintiff's written work-product was poor. Plaintiff failed to provide any record evidence rebutting the testimony by ACS 1, DOLO 1, and AUSA 1 and the results of plaintiff's performance appraisals, which all indicate that plaintiff's written work-product was consistently problematic. Thus, there is no genuine issue of material fact concerning the quality of plaintiff's written work. Because plaintiff did not achieve a "Far Above Expectations" performance appraisal for three consecutive years, substantiated by—among other issues—his poor written work-product, he has not shown that he was qualified for the 2006 Promotions. Therefore, plaintiff has failed to establish a necessary element for a *prima facie* case of age discrimination.

Even if plaintiff had established a *prima facie* case of age discrimination, defendants have rebutted the presumption. Defendants have

stated a legitimate nondiscriminatory reason for its eligibility requirements. They sought to promote the Department's most talented attorneys. The City used the annual performance appraisals to gauge the ability of the Department attorneys, which was an objective means to achieve their goal.

Plaintiff argues that defendants' legitimate nondiscriminatory reason is false and pretextual. However, plaintiff merely claims, without supporting evidence, that the eligibility requirements were designed to promote younger attorneys. This is insufficient to establish that defendant's asserted legitimate nondiscriminatory reason was pretextual. Plaintiff did not point to any record evidence, "direct or circumstantial, from which a factfinder could reasonably either (1) disbelieve the employer's articulated reasons; or (2) believe that an invidious discriminatory reason was more likely that not a motivating or determinative cause of the employer's action."[10] Therefore, plaintiff has failed to rebut what the undisputed facts demonstrate to be a legitimate and reasonable business decision declining to promote plaintiff.

Age Discrimination and the 2006 Salary Adjustments

Parties' Contentions

Defendants argue that the 2006 Salary Adjustments were applied to address salary disparities with other attorneys employed by the State of

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[10] *Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994).

Delaware, and were not awarded for performance. Defendants contend that plaintiff failed to produce sufficient evidence that the 2006 Salary Adjustments were designed to reward younger Department attorneys. Apart from ACS 1 and ACS 2, Plaintiff did not provide other Department attorneys' performance appraisals—information necessary to ascertain whether the adjustments were applied discriminatorily.

Plaintiff responds that the 2006 Salary Adjustments amounted to age discrimination because he received $500, ACS 5 received nothing, and attorneys under the age of 40 received between $1,500 and $3,000. Plaintiff claims that the purpose of the adjustments was to reward merit, emphasizing that, just prior to the 2006 Salary Adjustments, he achieved a favorable jury verdict in the Keller Litigation.

Analysis

It is undisputed that plaintiff is older than 40 years of age, suffered an adverse employment decision by receiving a smaller bonus than other Department attorneys, and attorneys under 40 years of age were treated more favorably than plaintiff. Therefore, plaintiff need only establish that he was qualified for a larger portion—$1,500 to $3,000—of the $15,000 bonus.

The parties dispute whether the 2006 Salary Adjustments were designed to reward performance or address salary disparities with other

government employees. This issue of fact, however, is neither "genuine" nor "material" because, assuming, *arguendo*, the 2006 Salary Adjustments rewarded performance, plaintiff nonetheless failed to establish a *prima facie* case of age discrimination.

Plaintiff did not establish that he was qualified for a larger portion of the $15,000 bonus because he did not produce the performance appraisals for Department attorneys who did not out-perform plaintiff, yet received $1,500 to $3,000.[11] Plaintiff merely produced evidence that he received $500, ACS 5 received nothing, and younger attorneys received $1,500 to $3,000. Plaintiff cannot rely solely on his success with the Keller Litigation because he still has not established that his overall performance was better than the younger attorneys. Further, it is undisputed that the 2006 Salary Adjustments allocation were decided ***before*** plaintiff's 2006 performance appraisal. With the limited undisputed evidence that plaintiff produced, no reasonable tier of fact could find that the bonus disparities were the result of age discrimination.[12] [13]

[11] ACS 1 and ACS 2 scored higher on their performance appraisals and accordingly, received a larger portion of the $15,000 bonus. Therefore, this evidence rebuts plaintiff's claim that he was qualified for a larger portion of the 2006 Salary Adjustments.

[12] *See, e.g., Mieczkowski v. York City Sch. Dist.*, 2011 WL 573526, at *5 (3d Cir.) ("Mieczkowski failed to present any evidence—beyond the mere fact that she earned less than her African American predecessor and certain subordinate African American employees—from which a reasonable trier of fact could find that the salary disparities were the result of race discrimination.").

Moreover, assuming, *arguendo*, plaintiff had established a *prima facie* case of age discrimination, he failed to rebut the legitimate nondiscriminatory reason that may justify the bonus disparities—the younger attorneys out-performed plaintiff.

<u>Plaintiff's Protected Activity Retaliation Claim</u>

Parties' Contentions

Defendants argue that plaintiff did not engage in "protected activity," and therefore cannot pursue his claim for retaliation. Additionally, defendants contend that plaintiff did not suffer any adverse employment action. For these reasons, defendants assert, plaintiff has not established a *prima facie* case that defendants retaliated against him.

Plaintiff responds that his involvement in the "investigation" surrounding ACS 3's termination and his complaints to the Department, the City, and the Mayor regarding the Keller Litigation constituted protected activity. Consequently, plaintiff argues, he suffered adverse employment action by not being mentioned in the Wilmington Times article; being assigned the Keller Litigation without, initially, the assistance of other

[13] It is worth noting that, in February 2007, the City increased plaintiff's salary by $3,000. Although it appears that this increase was unrelated to the 2006 Salary Adjustments, plaintiff ignores that he had been rewarded for his performance at the Department.

Department attorneys; and only receiving $500 for the 2006 Salary Adjustments.[14]

Retaliation Standard

To establish a *prima facie* case of retaliation, plaintiff must show: (1) he engaged in a protected employee activity; (2) "a reasonable employee would have found the alleged retaliatory actions 'materially adverse' in that they 'well might have dissuaded a reasonable worker from making or supporting a charge of [a Title VII violation];'" and (3) a causal link exists between the protected activity and the adverse action.[15] Defendants concede that genuine issues of material fact exist as to the third element.

Plaintiff did not engage in protected activity.

Plaintiff cites the Delaware Whistleblowers' Act, the City Whistleblowers' Ordinance, and the City Employment Manual, arguing that he engaged in protected activity. City Ordinance 40-6 defers to the Delaware Whistleblowers' Act to determine whether an employee engaged in protected activity.

Under the Delaware Whistleblowers' Act, an employee who "participates or is requested by a public body to participate in an

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[14] Plaintiff did not argue that, for the purpose of his retaliation claims, not receiving one of the 2006 Promotions was an adverse employment action.
[15] *Moore v. City of Philadelphia*, 461 F.3d 331, 341-42 (3d Cir. 2006) (citing *Burlington v. Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 67-68 (2006)).

investigation, hearing, or inquiry held by that public body, or a court action, in connection with a violation as defined in this chapter," is deemed to have engaged in protected activity.[16]

Statutory interpretation, such as determining what constitutes an "investigation" pursuant to 19 *Del. C.* § 1703(2), is a legal determination.[17] This is an issue of first impression. The Merriam-Webster Dictionary defines "investigation" as an "observ[ation] or study by close examination and systematic inquiry."[18]

The undisputed facts are that plaintiff briefly spoke with HRE 1 regarding ACS 3's termination, in HRE 1's office, during a discussion about an unrelated topic. The Court finds, as a matter of law, that this was not an investigation. The facts demonstrate that the Department did not initiate an investigation regarding ACS 3's termination. Plaintiff's exchange with HRE 1 was too brief and informal to amount to a "close examination." The undisputed facts do not show that any additional "investigatory" conversations took place beyond that between plaintiff and HRE 1. This single exchange cannot be characterized as a "systematic inquiry."

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[16] 19 *Del. C.* § 1703(2).
[17] *Dambro v. Meyer*, 974 A.2d 121, 138 (Del. 2009).
[18] MERRIAM-WEBSTER DICTIONARY (online edition).

Accordingly, plaintiff did not engage in protected activity pursuant to the Delaware Whistleblowers' Act or the City Whistleblowers' Ordinance.

City Manual Policy 101.1 provides that "prompt reporting of complaints or concerns so that rapid and constructive action can be taken is encouraged." Further, it explains that "[a]ny reported allegations of harassment will be investigated promptly," and "may include individual interview with the parties involved and, where necessary, with individuals who may have observed the alleged conduct or may have other relevant knowledge." For the same reasons previously identified, the Court finds that plaintiff's conversation with HRE 1 was not an investigation in and of itself, or part of an investigation.[19]

Assuming, *arguendo*, there was an investigation, it was not in connection with a "violation" as defined by Section 1702(6)(a). "Violation" is defined as:

> An act or omission by an employer, or an agent thereof, that is:
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> a. Materially inconsistent with, and a serious deviation from, standards implemented pursuant to a law, rule, or regulation promulgated under the laws of this State, a political subdivision of this State, or the United States, to protect employees or other

[19] *See also Kidwell v. Sybaritz*, 784 N.W.2d 220, 231 (Minn. 2010) (An in-house attorney who sent an email to management calling attention to unlawful company conduct was not acting as a whistleblower to expose illegality, but as an employee doing his job. Therefore, he did not engage in protected activity.)

> persons from health, safety, or environmental hazards while on the employer's premises or elsewhere; or
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> b. Materially inconsistent with, and a serious deviation from, financial management or accounting standards implemented pursuant to a rule or regulation promulgated by the employer or a law, rule, or regulation promulgated under the laws of this State, a political subdivision of this State, or the United States, to protect any person from fraud, deceit, or misappropriation of public or private funds or assets under the control of the employer.[20]

Plaintiff asserts that a potential violation of workers' compensation law amounts to reporting a "health hazard," consistent with section 1702(a). This argument lacks merit. Section 1702(6)(a)'s plain meaning instructs that an employee must report a health hazard on "employer's premises or elsewhere." The undisputed facts show that plaintiff did not identify such a hazard; rather, plaintiff questioned the legality of the City's decision to terminate ACS 3.

Similarly, assuming there was an investigation, it was not in connection with a "violation" as defined by section 1702(6)(b). Plaintiff contends that he reported a violation because he brought attention to, what he thought to be, the Department's failure to devote adequate resources to the Keller Litigation. Plaintiff argues that, if the City lost the Keller litigation, it would have suffered significant financial loss. This argument

[20] 19 *Del. C.* § 1702(6).

also is unpersuasive. Section 1702(6)(b)'s clear language addresses "financial management and accounting standards." The undisputed facts do not in any way support the implication that the Department's decision to limit its resources with the Keller Litigation was based on financial or accounting concerns. The Department considered the volume of work that the Keller Litigation presented and determined that plaintiff, for the most part, could handle it alone.

For these reasons, plaintiff did not show that he engaged in protected activity and therefore, failed to establish a *prima facie* case of retaliation.

Plaintiff did not suffer any materially adverse employment action.

The Court acknowledges that it found that plaintiff suffered an "adverse employment decision" for the purpose of his age discrimination claims. However, the standard that defines "adverse employment action" for the purpose of a retaliation claim is different.

In *Burlington Northern & Santa Fe Railway Co. v. White*,[21] the United States Supreme Court explained held that Congress intended Title VII to protect employees from two distinct harms. First, it protects employees from discrimination because of their racial, ethnic, religious, or

[21] 458 U.S. 53 (2006).

gender-based status.[22] This requires only that an employee establish suffering from an "adverse employment decision."

Second, Title VII also protects employees from retaliation, where an employer interferes with an employee's efforts to secure or advance enforcement of protected activity.[23] The anti-retaliation provision "seeks to prevent employee interference with 'unfettered access' to Title VII's remedial mechanisms."[24] The *Burlington* Court held that, for a retaliation claim, an employee must show that a "reasonable employee would have found the challenged action materially adverse," meaning it well might have "dissuaded a reasonable worker from making or supporting a charge of [a Title VII violation]."[25]

Applying this standard, the Court finds that defendants did not subject plaintiff to materially adverse employment action by choosing not to mention him in the Wilmington Times article. At most, consistent with plaintiff's deposition testimony, his "feelings were hurt." Materially adverse employment action requires something more than the "ordinary tribulations of the workplace," "petty slights," or "minor annoyances."[26]

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[22] *Id*. at 63.
[23] *Id*.
[24] *Id*. at 68.
[25] *Id*. at 68.
[26] *Id*. (citing 1 B. Lindemann & P. Grossman, Employment Discrimination Law 669 (3d ed. 1996)).

Similarly, defendants did not subject plaintiff to materially adverse employment action by initially denying him assistance with Keller Litigation. The parties dispute the volume of work that the Keller Litigation presented. However, it is undisputed that plaintiff, in one way or another, successfully handled the Keller Litigation and achieved a favorable jury verdict. Defendants assert that plaintiff was exempted from other work to free his time for that case. It appears that the Keller Litigation may have been inconvenient. However, the Court finds, as a matter of law based upon undisputed evidence, that the Keller Litigation staffing did not amount to a materially adverse employment action.

Finally, plaintiff did not establish that receiving $500 for the 2006 Salary Adjustments was an adverse employment action. In *DiCampli v. Korman Communities*,[27] the Third Circuit found that an employee did not establish that her new bonus structure amounted to materially adverse employment action because she could not show it was "markedly different" from her previous bonus structure.[28] The Court finds that plaintiff has failed to point to evidence of a disparity sufficient to amount to materially adverse employment action.

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[27] 2007 WL 4351348 (3d Cir.).
[28] *Id*. at *4.

Having found that plaintiff did not engage in a protected activity and that plaintiff was not subject to any materially adverse employment action, the Court need not consider whether a causal link exists between a protected activity and an adverse action.

Plaintiff's First Amendment Retaliation Claim

Because the Court finds that plaintiff did not suffer a materially adverse employment action, the Court also must hold that plaintiff did not establish a *prima facie* case of retaliation for protected speech. Nonetheless, for the sake of a complete analysis, the Court will consider whether defendant's speech was protected by the First Amendment.

Parties' Contentions

Defendants argue that plaintiff's speech was not protected by the First Amendment because it was pursuant to his official duties. Therefore, defendants assert, plaintiff did not establish a *prima facie* case of retaliation for protected speech. Defendants argue that this case is analogous to *Rohrbough v. University of Colorado Hospital Authority*[29] and *Chavez-Rodriguez v. City of Santa Fe*.[30]

In *Rohrbough*, the United States Court of Appeals for the Tenth Circuit held that "an employee's decision to go outside of their ordinary

[29] 596 F.3d 741, 747 (10th Cir. 2010).
[30] 596 F.3d 708 (10th Cir. 2010).

chain of command does not necessarily insulate their speech."[31] Rohrbough, the "Transplant Coordinator" in a hospital's heart transplant unit, identified a patient care issue at the hospital as a result of a "staffing crisis."[32] Rohrbough brought her concerns to her immediate supervisors, the vice president of patient services, and the hospital's chief nursing officer—all to no avail.[33] Finally, Rohrbough escalated the issue to the hospital's president.[34] Ultimately, the hospital terminated Rohrbough.[35]

The Court held that Rohrbough's communications with other hospital employees, including the hospital's president, were pursuant to her official duties.[36] The Court emphasized that Rohrbough's own admissions regarding why she was concerned about the staffing crisis demonstrated that her speech was within the scope of her official duties.[37] Rohrbough was concerned because the staffing crisis affected her ability to perform her duties.[38] The Court did not find that Rohrbough spoke outside of her official

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[31] *Rohrbough*, 596 F.3d at 747.
[32] *Id*. at 743.
[33] *Id*.
[34] *Id*. at 743-44.
[35] *Id*. at 744.
[36] *Id*. at 748.
[37] *Id*.
[38] *Id*.

duties by escalating the issue—and going outside of her ordinary chain of command—to the hospital's president.[39]

In *Chavez-Rodriguez v. City of Santa Fe*, the Tenth Circuit explained that "an employee's statements are made pursuant to official duties when they 'stemmed from and were the type of activities that [the employee] was paid to do.'"[40] Chavez-Rodriguez, Director of the City of Santa Fe's Division of Senior Services ("Division"), spoke with Ben Lujan, Speaker of the New Mexico House of Representatives at a Division function.[41] Chavez-Rodriguez expressed her concerns regarding the Division's funding.[42] As a result, two Santa Fe City Councilors retaliated against Chavez-Rodriguez, and she was demoted.[43]

The Court found that Chavez-Rodriguez's speech was made pursuant to her official duties and therefore, was not protected by the First Amendment.[44] The Court considered that Chavez-Rodriguez's speech occurred at a Division function held during work hours, and Chavez-Rodriguez and Lujan were present by virtue of their governmental roles.[45]

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[39] *Id*.
[40] *Chavez-Rodriguez*, 596 F.3d at 716 (citing *Green v. Bd. Of County Comm'rs*, 472 F.3d 794, 800-01 (10th Cir. 2007)).
[41] *Id*. at 711.
[42] *Id*.
[43] *Id*. at 712.
[44] *Id*. at 714.
[45] *Id*.

Further, although discussing budgetary concerns with Lujan was not specifically part of Chavez-Rodriguez's job description, the Court noted that the conversation was work-related.[46] The Court explained that an "employee's job description is not dispositive and a statement may be made pursuant to one's official duties even though it addresses 'an unusual aspect of an employee's job that is not part of his everyday functions.'"[47]

In this case, plaintiff claims that he engaged in speech protected by the First Amendment when he reported his concerns regarding ACS 3's termination to Sheridan, James-Roberts, and other Department employees; and reported his concerns about the lack of attorneys assigned to the Keller Litigation to Sheridan, James-Roberts, other Department employees, and the Mayor. Plaintiff argues that, because he voiced his concerns outside of the Department, his speech was not part of his official duties. Further, plaintiff contends that, because he is a citizen of Wilmington, he spoke as a citizen on a matter of public concern—the possibility that the City would suffer financial loss due to potential liability from terminating ACS 3 and the

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[46] *Id*.
[47] *Id*. (citing *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1203 (10th Cir. 2007)).

Keller Litigation. Plaintiff asserts that this case is analogous to *Thomas v. City of Blanchard*.[48]

Plaintiff Thomas, a City Building Code Inspector, observed a completed and signed certificate, indicating that a building passed inspection. The building happened to be owned by the Mayor.[49] Thomas, however, had not performed a final inspection on the building.[50] Thomas reported his discovery to the City Clerk and the City Manager.[51] Dissatisfied with their response, Thomas subsequently stormed into City Hall, exclaiming to the City Manager and the City Manager's supervisor that the building's certificate was false.[52] Thomas threatened to report the violation to the Oklahoma State Bureau of Investigation ("OSBI").[53] Thomas retrieved the certificate and tore it up.[54] Thomas also barged into the City Clerk's office and expressed the same concerns.[55]

The Tenth Circuit held that when Thomas "went beyond complaining to his supervisors and instead threatened to report to the OSBI, an agency outside his chain of command, his speech ceased to be merely 'pursuant to

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[48] 548 F.3d 1317 (10th Cir. 2008).
[49] *Id*. at 1320.
[50] *Id*.
[51] *Id*. at 1320-21.
[52] *Id*. at 1321.
[53] *Id*.
[54] *Id*.
[55] *Id*.

his official duties' and became the speech of a concerned citizen."[56] The Court noted that Thomas was paid to inspect houses. "[I]naugurating a criminal probe" was not part of his official duties.[57]

Analysis

Whether speech is protected by the First Amendment is a question of law.[58] "[T]he First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern."[59] The Court first must determine whether the employee spoke as a citizen on a matter of public concern.[60] In *Garcetti v. Ceballos*,[61] the United States Supreme Court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." [62] Employees speaking as citizens on a matters of public concern may have a First

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[56] *Id*. at 1326.
[57] *Id*.
[58] *Connick v. Myers*, 461 U.S. 138, 147-48 (1983).
[59] *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006) (citing *United States v. Treasury Employees*, 513 U.S. 454, 466 (1995); *Rankin v. McPherson*, 483 U.S. 378, 384 (1987); *Connick*, 461 U.S. at 147; *Pickering v. Board of Ed. Of Twp. High School Dist. 205, Will City*, 391 U.S. 563, 568 (1968)).
[60] *Garcetti*, 547 U.S. at 418 (citing *Pickering*, 391 U.S. at 568).
[61] 547 U.S. 410 (2006).
[62] *Id*. at 421.

Amendment claims.[63] The Court then determines whether the government entity had "adequate justification for treating the employee differently from any other member of the general public."[64]

The Court finds that plaintiff's speech regarding ACS 3's termination was pursuant to his official duties. Plaintiff primarily practices employment law for the Department. He explained that he "routinely handled labor and employment matters for the City, including workers' compensation cases." Plaintiff was concerned that the City terminated ACS 3 in violation of workers' compensation law—a concern consistent with his official duties.

Further, with respect to ACS 3's termination, plaintiff has conceded that his speech was part of his official duties. Plaintiff explained that he participated in the "investigation" because it was "within the performance of [his] duties, and in accordance with Policy 101.1 of the Personnel Manual." Additionally, plaintiff testified that his reports on ACS 3's termination were "made in conformance with the City Code" and pursuant to his "duty as a Labor and Employment attorney for the City."

The Court also finds that plaintiff's speech regarding the Keller Litigation was within the scope of his official duties. Plaintiff was concerned that he could not handle the Keller Litigation alone. This is

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[63] *Id*. at 418.
[64] *Id*. (citing *Pickering*, 391 U.S. at 568).

certainly a work-related issue—not one of public concern. It is commonplace for an employee to express concern regarding a lack of adequate resources to complete a task.

Plaintiff's decision to escalate his concerns to the Mayor regarding the Keller Litigation does not change the fact that his speech was pursuant to his official duties. It is immaterial that plaintiff's job description did not include corresponding with the Mayor about workplace issues.[65] These facts are analogous to those in *Rohrbough* and *Chavez-Rodriguez*. Rohrbough went beyond her immediate supervisors to the hospital's president regarding a work-related concern. Chavez-Rodriguez went outside of her ordinary chain of command to Lujan regarding a work-related concern. Similarly, plaintiff, dissatisfied with how his immediate supervisors handled his grievances regarding the Keller Litigation, brought his concerns to the Mayor's attention. Further, the Tenth Circuit noted that Chavez-Rodriguez and Lujan were government employees. Plaintiff and the Mayor obviously are government employees.

The Court is not persuaded by plaintiff's argument that he was speaking as a citizen about a matter of public concern when he reported that the City is at risk of financial loss. Most workplace issues relate to—or can

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[65] *See Id*.

be connected to—financial considerations. Regarding ACS 3's termination and the Keller Litigation, it was possible that the City would suffer financial loss, and somewhere down the line, so would taxpayers. Plaintiff's concerns as a citizen and taxpayer, however, are too attenuated to rise to the level of protected speech. Rather, these issues are inextricably intertwined with plaintiff's official duties.

Finally, the Court notes that this case is distinguishable from *Thomas*. The Tenth Circuit found that Thomas's speech was outside of official duties because he stormed into the City Manager and City Clerk's offices and threatened to report the building violation to the OSBI. "Inaugurating a criminal probe" was not part of Thomas's job description. Plaintiff expressed his concerns to his superiors and the Mayor in a professional manner. Plaintiff did not threaten to expose the issues to an outside agency. Ultimately, unlike the facts in *Thomas*, considering the legality of ACS 3's termination and addressing the lack of resources devoted to the Keller Litigation was part of plaintiff's official duties, as plaintiff conceded.

The Ethics Opinion

Parties' Contentions

Defendants argue that they did not act in bad faith by placing plaintiff on unpaid leave. Defendants contend that it was their duty to avoid a

potential conflict of interest, and demanding that plaintiff secure an advisory opinion from the Delaware State Bar Association was a reasonable request. Finally, defendants point out that plaintiff received back-pay after he was reinstated at the Department, and therefore, suffered no damages.

Plaintiff responds that defendants violated his due process rights, violated the Department Manual, and breached the Operation Fed Up contract by placing him on unpaid leave. Plaintiff contends that defendants should have afforded him a due process hearing before placing him on unpaid leave. Plaintiff asserts that defendants did not follow the "progressive discipline" policy of the Department Manual, which instructs that defendants should have, at a minimum, given plaintiff a warning before putting him on unpaid leave. Finally, plaintiff claims that defendants breached the Operation Fed Up contract because the contract provided that plaintiff would return to the Department at the conclusion of plaintiff's stay at the United States Attorneys Office. In plaintiff's Amended Complaint, he asks for compensatory damages, punitive damages, "back-pay," and "front-pay."

Analysis

The undisputed facts show that defendants probably could have better handled the potential conflict of interest between plaintiff and the

Department. It appears that placing plaintiff on unpaid leave was unnecessary. Defendants had other resources from which they could ascertain whether plaintiff and the Department had a conflict of interest. Defendants could have conducted their own research or commissioned an expert opinion. In any event, a DSBA Committee opinion is only advisory. It also appears that plaintiff could have mitigated the situation. For several months, plaintiff refused to request an advisory opinion from the DSBA Committee.

Plaintiff did, however, eventually secure an expert opinion. Slanina opined that plaintiff's return to the Department would not constitute a conflict of interest. The DSBA Committee also concluded that plaintiff's return would not constitute a conflict of interest if certain safeguards were implemented.

Despite all of these circumstances, plaintiff has failed to state a claim for compensatory damages. Plaintiff received back-pay when he returned to the Department. Further, the Court finds that plaintiff's request for front-pay fails to state a claim, as he maintains his employment with the Department. In short, plaintiff already has received any compensatory damage to which he conceivably might be entitled.

Plaintiff has not established that he is entitled to punitive damages. Generally, a party may not recover punitive damages in a breach of contract action, unless the breach amounts to a tort in and of itself or was malicious or willful.[66] Here, neither exception applies. Having considered the undisputed facts, the Court finds that the decision to place plaintiff on unpaid leave, thereby allegedly breaching plaintiff's contracts, cannot form the basis for a tort action. There is no record evidence supporting allegations of malicious or willful conduct by defendants.

Similarly, plaintiff has not established a *prima facie* case that defendants' alleged due process violation was malicious or willful. While defendants had more appropriate avenues to handle the potential conflict of interest, plaintiff possessed the ability to return to the Department, at any time, by simply requesting an advisory opinion from the Committee. Because defendants afforded plaintiff this option, their decision to place plaintiff on unpaid leave without a prior hearing did not amount to malicious or willful conduct.

CONCLUSION

Viewing the facts in the light most favorable to plaintiff, the Court finds that plaintiff has demonstrated, at most, a generally unpleasant and

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[66] *E.I. DuPont de Nemours & Co. v. Pressman*, 619 A.2d 436, 446 (Del. 1996); *Casson v. Nationwide Ins. Co.*, 455 A.2d 361, 368 (Del. Super. 1982).

divisive work environment. The Court finds that there are no genuine issues of material fact. Plaintiff's claims are based almost entirely on his subjective beliefs that he was treated unfairly by defendants.

Plaintiff has failed to establish a *prima facie* case of age discrimination with respect to the 2006 promotions because he did not show that he was qualified for one of the promotions. Plaintiff did not receive three consecutive "Far Above Expectations" performance appraisals, and was unable to rebut the undisputed evidence of a legitimate reasonable business decision declining to promote him.

Plaintiff failed to establish a *prima facie* case of age discrimination regarding the 2006 Salary Adjustments because he did not produce any comparative evidence that he out-performed other Department attorneys who received larger portions of the $15,000 bonus.

Plaintiff did not establish a *prima facie* case of retaliation because he did not engage in protected activity and was not subject to a materially adverse employment decision. The Court finds that plaintiff's conversation with HRE 1 was not an "investigation" as a matter of law. The Court also finds that the Department's decisions to exclude plaintiff from the Wilmington Times article, assign plaintiff the Keller Litigation, and award

plaintiff $500 for the 2006 Salary Adjustments were not materially adverse employment decisions.

Because the Court holds that plaintiff did not suffer a materially adverse employment decision, plaintiff also failed to establish a *prima facie* case of retaliation for protected speech. Additionally, plaintiff's speech was part of official duties, and therefore, not protected by the First Amendment.

Finally, plaintiff failed to state a claim for money damages regarding defendants' decision to place plaintiff on unpaid leave. Plaintiff received back-pay, and therefore has no claim for compensatory damages or back-pay. Plaintiff is not entitled to front-pay because he remains employed. Plaintiff did not establish that he is entitled to punitive damages because he did not produce evidence of an underlying tort or that defendants acted maliciously or willfully.

THEREFORE, Defendants' Motion for Summary Judgment is hereby **GRANTED**.

IT IS SO ORDERED.

/s/ *Mary M. Johnston*
The Honorable Mary M. Johnston