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

FAIRFIELD POLICE CORPORAL VINCENT
CRAPELLO and DEBRA CRAPELLO, his
wife,

Plaintiffs,

vs.

THE TOWNSHIP OF FAIRFIELD and THE
FAIRFIELD TOWNSHIP POLICE
DEPARTMENT and JOHN DOE, 1-10,

Defendants.

Civil Action No.: 05-2598 (FSH)

(Electronically Filed)

**BRIEF IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANTS
MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM ON WHICH
RELIEF CAN BE GRANTED**

On The Brief:

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PRELIMINARY STATEMENT

Plaintiff brought this Section 1983 claim after defendants, under the color of state law, violated plaintiff's constitutional rights. In particular, defendants and their employees, currently pled as John Doe 1-10, violated plaintiff's constitutional rights when they **knowingly, willfully and admittedly proceeded to file untimely administrative charges** that besmirched plaintiff's reputation and hindered his potential for career advancement. Discovery will reveal the ulterior motives behind defendants' acts and the ongoing harassment plaintiff was subject to throughout the period he was battling administrative charges that were **knowingly filed out of time**.

Plaintiff also contested the validity of the charges below. The heart of this claim lies with the defendants' wanton disregard of the "45-day rule" found in N.J.S.A. 40A:14-147 and their ensuing treatment of plaintiff despite their violation of same.

Plaintiff herein voluntarily withdraws the three tort claims – intentional infliction of emotional distress, negligence and civil conspiracy – found in the complaint that are subject to the New Jersey Tort Claims Act. Said claims were tangential, at best, in any event. Needless to say, plaintiff will proceed with all the 42 U.S.C. § 1983 claims alleged in the complaint, which really form the crux of this action.

To date, no discovery has been conducted and defendants have not filed their answer.

For reasons discussed below, it is clear that defendants' motion to dismiss for failure to state a claim must flatly and summarily be denied with regard to plaintiff's constitutional claims.

STATEMENT OF RELEVANT FACTS

Plaintiff is currently retired and was a police officer for over 25 years. In October 2001 defendants started an internal affairs investigation that resulted in the admittedly untimely filing of administrative charges in December 2001. Starting with the filing of said charges up to his retirement, plaintiff was subject to myriad improper and unconstitutional acts/violations at the behest of the defendants.

For example, defendants ignored plaintiff who, on numerous occasions, told the defendants that the administrative charges were time-barred. Instead of listening to and addressing plaintiff's timeliness concerns, defendants proceeded with their intentional and blatant violation of N.J.S.A. 40A:14-147 (the 45-day rule), and even went so far as to improperly state that "because of 09-11 (the bombing of the Twin Towers), the 45-day rule did not apply". In turn, plaintiff was forced to undergo the humiliation and stigma of an internal affairs investigation.

On or about September 13, 2003, Judge Rachel N. Davidson, an Essex County Superior Court Judge, summarily ruled that the subject administrative charges brought against the plaintiff clearly fell outside of the dictates of N.J.S.A. 40A:14-147. (Exhibit F attached to the Certification of Eric L. Harrison, Esq.) This is clearly when this cause of action began to accrue. Plaintiff could not and would not have moved forward with this suit if Judge Davidson held that the administrative charges were filed in a timely fashion.

Although Judge Davidson dismissed the matter, the reputation of the plaintiff was forever tarnished within law enforcement community and the Fairfield Police Department. To be sure, plaintiff will produce both expert witnesses and lay witnesses within the law enforcement field to so state. The plaintiff was forced to undergo the

mockery of “an independent administrative trial”, and forced to sustain severe discipline consisting of an eight (8) month suspension, a demotion in rank from Corporal to Patrolman, a two (2) month re-training period and a specific disallowance/exclusion from sitting for and/or taking a Sergeant’s promotional examination (despite protestations by the P.B.A. and other superior officers that plaintiff should in fact be allowed to sit for/take the examination).

Defendants also blatantly violated plaintiff’s procedural and substantive due process rights by not following the clear mandate of the New Jersey State Attorney General Guidelines dealing with internal affairs investigations and/or administrative trials.

LEGAL ARGUMENT

POINT I

PLAINTIFF’S 42 U.S.C. § 1983 CLAIM IS NOT TIME-BARRED

Defendants states that plaintiff’s 42 U.S.C. § 1983 claim is time-barred because it was not filed within the two year statute of limitations period. Defendants argue that the latest date on which plaintiff’s claims began to accrue was December 9, 2002, the date on which the hearing officer rendered his decision. However, starting in June 2003, plaintiff filed an action in New Jersey Superior Court seeking a de novo review of the hearing officer’s decisions. An order regarding same was issued by Judge Davidson on September 12, 2003. (Exhibit F attached to the Certification of Eric L. Harrison, Esq.)

Although plaintiff believed that the administrative action was brought out-of-time, such belief could not rationally, legally or prudently be acted upon until after Judge Davidson dismissed the charges as time-barred. This is obvious and apparent, as plaintiff

has moved forward based solely upon the administrative charges (IA-023) that were dismissed as untimely and not against the charges (IA-0018) upheld by Judge Davidson. Plaintiff could not move forward with a 42 U.S.C. §1983 claim until after Judge Davidson reached a decision regarding the administrative hearing's timeliness. Heck v. Humphrey, 512 U.S. 477 (1994) (stating that a defendant is not permitted to maintain a malicious prosecution claim on a parallel track pending the disposition of the underlying criminal action because the civil claim is dependent, in part, on proof that the criminal proceeding was terminated in favor of the accused). If Judge Davidson affirmed both administrative charges as timely, this action would be moot and plaintiff would not have filed any claims against defendants. Clearly the statute of limitations could only begin to run *after* Judge Davidson reached her decision.

In addition, the discovery rule states that a cause of action will not start to accrue "until the injured party discovers or by an exercise of reasonable diligence and intelligence should have discovered, that he may have a basis for an actionable claim." Lopez v. Swyer, 62 N.J. 267, 272, 300 A.2d 563 (1973). Defendants argue that the statute of limitations began to accrue the moment plaintiff realized that the administrative charges were being filed out of time. This position is disingenuous, to say the least. Although plaintiff may have believed the administrative actions were untimely, it was only *after* Judge Davidson issued her decision that plaintiff had the basis to believe that he had an actionable claim. Applying the discovery rule, it is clear that plaintiff's claim was submitted in a timely manner.

In the event that the Court determines that the plaintiff's complaint was filed out of time and in violation of the statute of limitations, the Court still has the discretion to

allow a relaxation of the statute of limitations so long as the underlying objectives of the statute have been satisfied. Galligan v. Westfield Centre Serv., Inc., 82 N.J. 188 (1980) (stating that a plaintiff should be allowed to assert his claim if dismissal would not further the Legislature's objectives in prescribing the limitation); see also W.V. Pangborne & Co. v. New Jersey Dept. of Transp., 116 N.J. 543, 562 A.2d 222 (1989) (stating that the policy reasons for upholding a strict statute of limitations *recede* when defendants are on notice of the claims and no significant prejudice will result).

In Byrd v. Manning, the court stated that the, "legislative objectives to of the statutes of limitations are to: (1) stimulate litigants to pursue their causes of action diligently so that answering parties will have a fair opportunity to defend; (2) prevent the litigation of stale claims; (3) penalize dilatoriness. and (4) serve as measures of repose". 253 N.J. Super. 307, 313, 601 A.2d 770 (App. Div. 1992). If this court believes this matter to have been filed out of time, which as previously argued, it should not, a strict application of the statute of limitations to the case at bar would inflict unnecessary harm to the plaintiff without advancing the statute's legislative purpose. Plaintiff in this case has moved forward as quickly as he possibly could under the circumstances while the defendants were aware and on notice of the timeliness issue as plaintiff tried to raise this issue with defendants on numerous occasions.

Although defendants proactively addressed issues surrounding a possible malicious use of process claim, no such claim is present in plaintiff's complaint. However, if plaintiff is allowed to amend the complaint to include such a count, it is impossible to address defendants' argument regarding such a claim without conducting any discovery. For example, it is not possible to determine whether defendants acted

with or without malice without conducting some discovery, such as taking the depositions of the individuals responsible for moving forward with the untimely charges against plaintiff.

POINT II

PLAINTIFFS HAVE STATED A VALID CAUSE OF ACTION UNDER 42 U.S.C. § 1983

Defendants contend that plaintiff has failed to establish a viable claim 42 U.S.C. §1983 claim. The gravamen of defendants' argument is that plaintiff failed to allege a deprivation of a federally protected right and the commission of the deprivation by one acting under the color of state law.

Defendants further allege that plaintiff has failed to name the officials which violated the constitutional rights of the plaintiff. Although plaintiff failed to provide specific names in the complaint, John Doe, 1-10, have been named as defendants until the particular names of the offending individuals can be specifically identified during the initial stages of discovery.

Defendants apparently also contend that the police department cannot be sued alongside the municipality itself. While this is true, the courts have addressed this issue by treating municipalities and their respective police departments as a single entity for purposes of §1983 liability. Bonenberger v. Plymouth Township, 132 F.3d 20, 25 n. 4 (3d Cir. 1997): see also Colburn v. Upper Darby Township, 838 F.2d 663, 671 n.7 (3d Cir. 1988). In turn, it is respectfully submitted that the Court treats both entities as a single entity for purposes of defendants' motion.

A municipality may be liable for constitutional violations of its employees if the plaintiff's injuries arose from the municipality's policies or customs. Monell v. New

York City Dept. of Social Servs., 436 U.S. 658 (1978). In essence, the color of law aspect found in §1983 requires that the alleged offender abused a power or position granted by the state while committing the act that has come into question. Bonenberger v. Plymouth Township, 132 F.3d 20 (3d Cir. 1997). In the case currently before the court, defendants, through its employees, abused their power when they **knowingly and willfully filed untimely administrative charges** against plaintiff in direct violation of 45-day rule as stated in N.J.S.A. 40A:14-147. Not only did they do such, but they thereafter disciplined, suspended and demoted him while disallowing him to sit for the promotional exam.

Defendant argues that the violation of a state statute as discussed above does not create a constitutional violation. This is only true if plaintiff alleges that the violation of the state statute in and of itself created a constitutional violation. Maine v. Thiboutot, 448 U.S. 1, (1980). It is possible that a “single instance” of misconduct by a policymaking city official can provide the basis for an inference that an official unconstitutional policy existed. Bartholomew v. Fischl, 782 F.2d 1148, 1154 (3d Cir. 1986); see also Black v. Stephens, 662 F.2d 181 (3d Cir. 1981), cert. denied, 455 U.S. 1008 (1982) (stating that the police chief’s failure to take certain actions, i.e., delaying disciplinary investigations regarding excessive force, provided the basis for an inference that the chief encouraged the use of excessive force); Estate of Bailey v. County of York, 768 F.2d 503, 506 (1985) (stating that informal acts or omissions of supervisory municipal officials can create an inference of official policy).

Although the filing of untimely administrative charges is the main aspect of plaintiff’s §1983 claim herein, there is much, much more to the complaint. Plaintiff

attempted to address the timeliness issue with defendants, but his inquiries were constantly ignored. It is unclear, without conducting discovery, as to whether such timeliness issues were commonplace and constituted an unconstitutional policy with regards to defendants' handling of administrative hearings. Discovery must be conducted to clarify such issues. Despite a lack of information at this preliminary stage, it is clear that plaintiff's complaint has sufficient factual specificity to overcome defendants' 12(b)(6) motion to dismiss.

Defendants further argue that there was no deprivation of plaintiff's substantive and procedural due process while defendants conducted their internal affairs investigation. To the contrary, a close look at the facts stated in the complaint reveals that plaintiff has raised a more than viable substantive due process issue.

Due process protects an individual from the arbitrary action of government. Wolf v. McDonnell, 418 U.S. 539 (1974). The substantive due process guarantee protects individuals against government power that is arbitrarily and oppressively exercised. Daniels v. Williams, 474 U.S. 327 (1986). One test to determine whether an act violated an individual's substantive due process rights is whether the conduct shocks the conscience. The threshold question is whether the behavior of a governmental officer is so egregious, so outrageous, that it may fairly be said to shock the conscience. Benn v. Univ. Health Sys., 371 F.3d 165 (3d Cir. 2004). The determination as to whether an act "shocks the conscience" is a question of law for the courts to decide. Id. at 174.

Plaintiff's complaint sufficiently raises the substantive due process issue. Plaintiff alleges that defendants **knowingly and willfully** filed untimely administrative charges and **ignored** plaintiff when he attempted to raise the timeliness issue. This is

admitted fact, so admitted by the defendants. In turn, plaintiff was forced to endure serious damages such as, but not limited to, plaintiff's inability to sit for and take a promotional exam. Plaintiff will only be able to provide additional information regarding defendants' outrageous conduct by conducting discovery. Thus, it is respectfully submitted that it would be premature for the court to address the "shocks the conscience" and due process issues at this time.

Defendant further alleges that plaintiff has failed to sufficiently state that there was a violation of plaintiff's First Amendment rights. As stated in the complaint, the last few years of plaintiff's employment with defendants was, at best, quite tenuous. Nevertheless, defendant argues that the plaintiff's complaint fails to show that he engaged in protected conduct that led to an adverse decision or job action. Nothing could be further from the truth. Paragraph 16 (c) of the complaint states that the plaintiff was penalized for exercising his First Amendment freedom of speech rights. Defendants are well aware that plaintiff was a vocal opponent of the chief when she was being considered for the position along with James High. In addition, plaintiff was never afraid to voice his opinion regarding his concerns for the future of the Fairfield Police Department. Such speech was not limited to plaintiff's treatment alone. Discovery must be conducted to reveal the true motives behind defendants' decision to file untimely administrative charges.

POINT III

PERMITTING PLAINTIFF TO PROCEED WITH THE COMPLAINT WOULD NOT HAVE A CHILLING EFFECT ON THE EFFECTIVE MANAGEMENT OF MUNICIPAL POLICE DEPARTMENTS

Defendants argue that is necessary to summarily dismiss plaintiff's action in order to maintain the autonomy and integrity of not just Fairfield and its police department, but for all municipalities and police departments. This is not the case. This position is specious, to say the least.

Plaintiff does not request that the Fairfield Police Department turn a blind eye to unprofessional conduct. Plaintiff simply requests that Fairfield and all other municipalities follow proper administrative procedure and abide by the New Jersey State Attorney General's guidelines. (Relevant section attached as exhibit A to the Certification of Mark Niznik, Esq.) A municipality should not be free to **knowingly and willfully** disregard statutory provisions designed to protect an officer's individual rights. A municipality should not be allowed to engage in egregious acts such as abuse of power or procedure that adversely affect their own employees.

POINT IV

LEGAL STANDARD

Under Fed. R. Civ. P. 12 (b)(6), a court should only grant a motion to dismiss for failure to state a claim under which relief can be granted if it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle relief. Conley v. Gibson, 355 U.S. 41 (1957). The crucial question is "whether sufficient facts are pleaded to determine that the complaint is not frivolous, and to provide defendants with adequate notice to frame an answer." Frazier v. Southeastern Pennsylvania

Transportation Authority, 785 F.2d 65, 68 (3d Cir 1986). In reaching its decision, the court must take all the well pleaded allegations as true and construe the complaint in the light most favorable to the plaintiff. Colburn v. Upper Darby Township, 838 F.2d at 665. The court should also consider the fact that no discovery has been conducted at this preliminary stage. Id. at 667. Moreover, plaintiff is not required to provide proof of claims because much of the evidence in civil rights cases can only be developed through discovery. Frazier v. Southeastern Pennsylvania Transportation Authority, 785 F.2d 65.

For the reasons discussed throughout this brief, it is clear that plaintiff has provided sufficient allegations in the complaint to overcome defendants' motion to dismiss under Fed. R. Civ. P. 12 (b)(6). At a minimum, the complaint clearly states a number of claims that entitle the plaintiff to relief.

CONCLUSION

For all the foregoing reasons, defendants' motion to dismiss must be summarily denied.

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BY: /s/ Mark Niznik
MARK NIZNIK

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