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

ANDRE BOYER, **Plaintiff,** **v.** **THE CITY OF PHILADELPHIA, COMMISSIONER CHARLES RAMSEY, TWO JANE OR JOHN DOES, CAPTAIN ROLLIN LEE, LIEUTENANT KARYN BALDINI, and OFFICER ANGEL ORTIZ,** **Defendants.**	**CIVIL ACTION** **NO. 13-6495**

DuBois, J. **July 14, 2017**

M E M O R A N D U M

I. INTRODUCTION

Plaintiff, Andre Boyer, is an African-American who was employed by the City of Philadelphia (the "City") as a police officer from 1997 until his termination in September 2013. In his Second Amended Complaint, he alleges that the City of Philadelphia, former Police Commissioner Charles Ramsey ("Ramsey"), Captain Rollin Lee ("Lee"), and Lieutenant Karyn Baldini ("Baldini"), along with two Jane or John Does (collectively, the "City Defendants") violated his rights under the Equal Protection Clause of the Fourteenth Amendment pursuant to 42 U.S.C. § 1983, and that the City, Ramsey, and Officer Angel Ortiz ("Ortiz") violated the Pennsylvania Whistleblower Law, 42 Pa. Const. Stat. Ann. § 1421 *et seq*. Presently before the Court are Defendants City of Philadelphia, Charles Ramsey, Roland Lee, and Karyn Baldini's Motion for Summary Judgment and Defendant Police Officer Angel Ortiz's Motion for Summary Judgment. For the reasons set forth below, the City Defendants' Motion for Summary

Judgment is granted in part and denied in part, and Ortiz's Motion for Summary Judgment is granted.

II. FACTUAL BACKGROUND

The following relevant facts, submitted by the parties, are undisputed unless otherwise noted. Plaintiff's claims in this case stem from a series of events leading up to his termination as a police officer with the Philadelphia Police Department. On September 1, 2011, plaintiff and Ortiz conducted a traffic stop while on patrol as police officers in Philadelphia. City Defs.' Statement of Undisputed Material Facts ("City SOF") ¶ 1. According to Ortiz, he received verbal consent from the driver and vehicle owner, James Singleton, to search the vehicle and recovered what Ortiz suspected was heroin. *Id.* ¶ 2. Plaintiff and Ortiz "brought the suspected heroin and Singleton's vehicle" to Officer Dierdre Cuffie at the Narcotics Field Unit headquarters. *Id.* ¶ 4.

At some point in October 2011, during the prosecution of Singleton's case, plaintiff spoke with Assistant District Attorney Allison Worysz, and told her that he believed Officers Ortiz and Cuffie had falsified the police report and other paperwork with respect to the Singleton arrest. *Id.* ¶¶ 6-8.

On September 6, 2011, plaintiff and Ortiz conducted another traffic stop. *Id.* ¶ 18. During this stop, plaintiff confiscated money from an occupant of the vehicle, Wurlin Graham. *Id.* ¶ 19. According to Graham, the money was part of a recent settlement in a case arising from a serious physical injury, and he showed the officers a withdrawal receipt from his bank during the stop. *Id.*; City Defs.' Mem. in Supp. Summ. J. ("City Defs.' Mem.), Ex. F ("Graham Police Complaint") at 2-3. Graham was never charged with a crime in connection with the traffic stop. Graham Police Complaint at 3. On September 26, 2011, Graham submitted a complaint of

police misconduct to the Philadelphia Police Department, alleging that his money had not been returned to him and that plaintiff had, in sum, "stolen" his money. City Defs.' SOF ¶ 20.

On October 5, 2011, Graham's complaint was received by the Internal Affairs Division ("IAD") of the Philadelphia Police Department. Pl.'s Statement of Undisputed Material Facts ("Pl.'s SOF") ¶ 21; City Defs.' Mem., Ex. G ("IAD Investigation"), at 1. On October 12, 2011, Lieutenant Michael Craigshead was assigned to investigate Graham's complaint. IAD Investigation at 1. As part of the investigation, Lieutenant Craigshead interviewed, among others, Ortiz on April 12, 2012, and June 11, 2012, and plaintiff on May 11, 2012, and June 21, 2012. *Id.* at 2, 11, 12.

At the conclusion of the IAD investigation, Inspector H. Robert Snyder determined that the "investigation could neither prove nor disprove" Graham's allegations that plaintiff had confiscated Graham's money, other than that which plaintiff had recorded on a Property Receipt and which was returned to Graham by the Police Department. *Id.* at 15. However, Inspector Snyder also determined that the investigation revealed several departmental violations, including the fact that plaintiff "was deliberately untruthful" during the investigation with respect to suspected narcotics and other evidence that plaintiff allegedly recovered during the Graham stop but did not document, in violation of departmental procedures. *Id.* at 15, 18.

The IAD investigation report was sent to the Police Board of Inquiry ("PBI"), which held a hearing on July 23, 2013.[1] City Defs.' Mem., Ex. H ("PBI Hr'g") at 1. After the hearing, at which Ortiz and others testified, the PBI found plaintiff guilty of four departmental violations

[1] Both parties state that the PBI hearing was held on July 27, 2013. City Defs.' SOF ¶ 23; Pl.'s SOF ¶ 23. However, the hearing report states that it occurred July 23, 2017. PBI Hr'g at 1.

arising from the IAD investigation,[2] and recommended that plaintiff be dismissed.[3] Ramsey approved the recommendation on July 30, 2013. *Id.*

On August 6, 2013, plaintiff was suspended from the Philadelphia Police Department for thirty days "with the intent to dismiss." City Defs.' SOF ¶ 27. Plaintiff was dismissed from the Philadelphia Police Department on September 2, 2013. City Defs.' Mem., Ex. I ("Arbitration Decision") at 2. Through his union, plaintiff filed a grievance and participated in arbitration proceedings. City Defs.' SOF ¶ 28. After arbitration hearings on May 23, 2014, and June 26, 2014, at which Ortiz testified, plaintiff's grievance was denied on August 28, 2014, and his dismissal was upheld. *Id.* ¶ 31.

III. PROCEDURAL HISTORY

On November 7, 2013, plaintiff filed the original Complaint in this case (Document No. 1), alleging that the City, Ramsey, and five Jane and John Does discriminated against him based on his race and retaliated against him for opposing this discrimination in violation of Title VII, the First and Fourteenth Amendments pursuant to § 1983, the Pennsylvania Human Relations Act ("PHRA"), and the Pennsylvania Constitution. On October 10, 2014, the City and Ramsey filed a partial Motion to Dismiss (Document No. 12), which was granted in part and denied in part by Order dated February 27, 2015.

On February 6, 2015, plaintiff filed a complaint against Ortiz and Wurlin Graham in the Court of Common Pleas in Philadelphia County, alleging, *inter alia*, that Ortiz retaliated against

[2] The four violations were: (1) "Conduct Unbecoming–Lying or attempting to deceive regarding a material fact during the course of any Departmental investigation;" (2) "Conduct Unbecoming–Abuse of authority;" (3) "Disobedience–Failure to follow Departmental procedures for the handling of evidence, personal effects, and all other property taken into custody [with certain exceptions];" and (4) "Disobedience–Failure to follow Departmental procedure for the handling of narcotics, money, explosives, firearms, hazardous materials or forensic evidence." PBI Hr'g at 1.

[3] The "Penalty Range" for the first violation was "Dismissal," for the second and fourth violations "5 Day Suspension to Dismissal," and for the third violation "Reprimand to 5 Days Suspension." PBI Hr'g at 1.

him by falsely testifying at his arbitration hearing because plaintiff had reported wrongdoing by Ortiz. That case, Civil Action No. 15-1073, was removed to this Court on March 3, 2015, and consolidated with the above-captioned case by Order dated May 28, 2015.

By Order dated May 28, 2015, the Court granted plaintiff leave to file an amended complaint and the Amended Complaint was deemed filed as of May 4, 2015 (Document No. 27). The Amended Complaint named the City, Ramsey, Captain Branville Bard, Lee, Baldini, Ortiz and two John or Jane Does as defendants and contained six counts: retaliation and wrongful discharge in violation of Title VII and the PHRA, violation of the First Amendment and Equal Protection Clause of the Fourteenth Amendment pursuant to § 1983, and violations of the Pennsylvania Whistleblower Law and other state law claims. The defendants filed a Motion to Dismiss (Document No. 28, filed June 15, 2015); that Motion was granted in part and denied in part by Order dated December 17, 2015.

By Order dated April 13, 2016, the Court denied plaintiff's Motion for Leave to Amend the Complaint to the extent that plaintiff's proposed amendments included Captain Bard, and granted plaintiff's Motion in all other respects. The Second Amended Complaint was deemed filed as of April 8, 2016 (Document No. 46), and contains two counts: (Count One) violation of the Equal Protection Clause of the Fourteenth Amendment pursuant to 42 U.S.C. § 1983 against the City, Ramsey, Lee, Baldini, and two John and Jane Doe defendants and (Count Two) violations of the Pennsylvania Whistleblower Law against the City, Ramsey, and Ortiz.

Presently before the Court are Ortiz's Motion for Summary Judgment (Document No. 60, filed Apr. 7, 2017) and the City Defendants' Motion for Summary Judgment (Document No. 61, filed Apr. 7, 2017). Plaintiff filed Responses to the Motions for Summary Judgment on April 28, 2017 (Documents Nos. 62 and 63). The Motions are thus ripe for review.

IV. APPLICABLE LAW

The Court will grant summary judgment if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A fact is material when it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The Court's role at the summary judgment stage "is not . . . to weigh the evidence and determine the truth of the matter but to determine whether . . . there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Id.* at 249. In making this determination, "the court is required to examine the evidence of record in the light most favorable to the party opposing summary judgment, and resolve all reasonable inferences in that party's favor." *Wishkin v. Potter*, 476 F.3d 180, 184 (3d Cir. 2007). The party opposing summary judgment must identify evidence that supports each element on which it has the burden of proof. *Celotex Corp.*, 477 U.S. at 322.

V. DISCUSSION

The Court will address each Count of the Second Amended Complaint in turn.

A. Equal Protection Claim Pursuant to § 1983

Count One of the Second Amended Complaint alleges that the City Defendants violated the Equal Protection Clause when they disciplined plaintiff more harshly than white officers who had committed similar or more serious offenses. The City Defendants' Motion for Summary Judgment raises two arguments with respect to plaintiff's Equal Protection claim: (1) that plaintiff failed to produce evidence of similarly situated persons that were treated differently than plaintiff and (2) with respect to the City's liability under § 1983, that there is no evidence of a

municipal policy or custom that caused the alleged constitutional violation. The Court first addresses the City Defendants' argument that plaintiff has failed to produce evidence of similarly situated persons who were treated differently.

1. Evidence of Similarly Situated Persons Treated Differently

To succeed on a § 1983 Equal Protection claim, a plaintiff must prove "the existence of purposeful discrimination." *Shuman ex rel. Shertzer v. Penn Manor Sch. Dist.*, 422 F.3d 141, 151 (3d Cir. 2005); *see also Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981). To do so, a plaintiff must show that he "received different treatment from that received by other individuals [who were] similarly situated," *Shuman*, 422 F.3d at 151, and that "the different treatment was improperly motivated by discrimination or punishment for exercising a constitutional right," *Zappan v. Pa. Bd. of Prob. & Parole*, 152 Fed. App'x 211, 219 (3d Cir. 2005) (citing *Andrews v. City of Phila.*, 895 F.2d 1469, 1478 (3d Cir. 1990)).

"Persons are similarly situated under the Equal Protection Clause when they are alike 'in all relevant aspects.'" *Startzell v. City of Phila.*, 533 F.3d 183, 203 (3d Cir. 2008) (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992)). Plaintiff's burden to find similarly situated comparators "does not mean [the comparators] must be *identically* situated." *Chan v. Cty. of Lancaster*, Civil Action No. 10-cv-3424, 2013 WL 2412168, at *17 (E.D. Pa. June 4, 2013). Determining whether comparators are similarly situated "requires a court to undertake a fact-intensive inquiry on a case-by-case basis rather than in a mechanistic and inflexible manner." *Monaco v. Am. Gen. Assurance Co.*, 359 F.3d 296, 305 (3d Cir. 2004). "In disciplinary cases or in the context of personnel actions, . . . the relevant factors often include a showing that the two employees dealt with the same supervisor, were subject to the same standards, and had engaged in similar conduct without such differentiating or mitigating as would distinguish their conduct

or the employer's treatment of them." *Houston v. Easton Area Sch. Dist.*, 355 Fed. App'x 651, 654 (3d Cir. 2009) (comparing cases in the context of Title VII race discrimination).

In this case, plaintiff claims that the City Defendants treated him more harshly in disciplinary contexts than similarly situated white officers because he is African-American. The City Defendants seek summary judgment with respect to this issue on the ground that the "two potential comparators" identified in the Second Amended Complaint consist of "a generalization of alleged conduct, a last name and nothing more," and that plaintiff has not met his burden to produce record evidence of any individual that is alike in all relevant respects." City Defs.' Mem. at 5-6. In his Response, plaintiff points to evidence in the form of deposition testimony regarding "similarly-placed Caucasian officers that transgressed discipline in far worse circumstances in far worse than Plaintiff but were not terminated." Pl.'s Resp. to City Defs.' Mot. for Summ. J. ("Pl.'s Resp. to City Defs.") at 6.

The Court rejects the City Defendants' argument with respect to this issue. Plaintiff has produced evidence that at least one white police officer was disciplined less harshly than plaintiff for a similar offense. Plaintiff testified that Captain John McCloskey, a white police officer, was charged with the "same offense" as plaintiff—"conduct unbecoming, Section 1009-10, . . . lying or attempting to deceive an investigator during the course of departmental investigation"—but that McCloskey was not terminated for the offense and remained employed by the Philadelphia Police Department. Pl.'s Resp. to City Defs., Ex. 3 ("Boyer Dep.") at 69:1-9, 69:21-70:2, 79:6-10. On this issue, plaintiff testified that, according to departmental directives, this offense is a "fireable offense" the first time it is committed. *Id.* at 69:16-22. In addition, the "Penalty Range" for this offense, as listed in plaintiff's PBI hearing recommendation, is "Dismissal." PBI Hr'g at 1. With respect to McCloskey, defendant Ramsey testified that "if [his] memory serve[d

him] correct," he suspended him for thirty days and denied him an upcoming promotion. Pl.'s Resp. to City Defs., Ex. 8 ("Ramsey Dep."), at 42:24-43:19.

There is evidence that plaintiff and a white officer were both disciplined by Ramsey for an offense which carried a recommended penalty of dismissal, and plaintiff was terminated, but McCloskey was merely suspended and denied an upcoming promotion. For these reasons, the Court rejects the City Defendant's argument that plaintiff has failed to produce "evidence of any individual that is alike in all relevant respects" and denies the City Defendants' Motion for Summary Judgment with respect to this argument.

2. § 1983 Claim Against the City

The Court analyzes plaintiff's § 1983 claim against the City under the standard of municipal liability first enunciated in *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978); *see Natale v. Camden Cty. Corr. Facility*, 318 F.3d 575, 583 (3d Cir. 2003). "[A] municipality cannot be held liable under § 1983 on a *respondeat superior* theory." *Monell*, 436 U.S. at 691. To demonstrate municipal liability under § 1983, a plaintiff must demonstrate (1) a constitutional violation by a state actor (2) that was caused by a municipal policy or custom. *Id.* at 694; *see also Mulholland v. Gov't Cty. of Berks,* 706 F.3d 227, 237 (3d Cir. 2013).

Plaintiff argues that he has demonstrated a custom of differential treatment. In order to show a custom for the purposes of *Monell*, a plaintiff must show that a practice is "so permanent and well-settled as to virtually constitute law." *Mulholland*, 706 F.3d at 237. To show custom, the plaintiff must show "that an official who has the power to make policy is responsible for . . . the acquiescence in a well-settled custom." *Watson v. Abington Twp.*, 478 F.3d 144, 155 (3d Cir. 2007). The United States Court of Appeals for the Third Circuit "has held the police

commissioner to be a policymaker for the purposes of § 1983 liability." *Jacobs v. City of Phila.*, No. Civ. A. 03-CV-0950, 2004 WL 2850081, at *3 (E.D. Pa. Dec. 10, 2004) (listing cases).

The City Defendants argue that plaintiff has only "alleged, in a conclusory fashion, that the City of Philadelphia has a policy or custom of not supervising or training its officers to prevent a violation of civil rights" and that he has not "identified any policy or custom of the City of Philadelphia that was the moving force behind the alleged violations of his civil rights." City Defs.' Mem. at 6-7. However, contrary to the City Defendants' argument, the Second Amended Complaint and plaintiff's briefing articulate two possible customs of differential treatment based on race: (1) that police officers were subject to different disciplinary proceedings based on their race and (2) "general disparate treatment of minorities." Second Am. Compl. ("SAC") ¶ 45.

The Court begins by addressing the first alleged custom: the practice of using internal investigation through IAD and subsequent disciplinary proceedings such as a PBI hearing prior to disciplining and terminating African-American officers "to undermine" possible claims of discrimination and not using this process against white officers, who are either not terminated or are terminated and able to successfully grieve and/or appeal their termination. *Id.* The Court concludes that there is sufficient evidence to permit a reasonable inference that this alleged practice was well-settled, known by Ramsey,[4] and resulted in plaintiff being disciplined less favorably than similarly situated white officers. With respect to this custom, there is evidence of three instances in which white officers accused of departmental violations or crimes were not disciplined using the same disciplinary process as plaintiff and were either not terminated or were terminated but subsequently got their jobs back. In addition to McCloskey, as detailed above, plaintiff presented evidence that two white officers, Jeffrey and Richard Cujdik, both

[4] The City Defendants do not dispute that Ramsey is a policymaker for the purposes of *Monell* liability.

currently employed by the Philadelphia Police Department, were accused of serious criminal activity and that Ramsey participated in their discipline, but that, while Ramsey "believe[d] there was one that was terminated . . . [and] they did get discipline," "the US Attorney was actually handling that case, and [Ramsey] believe[d] that's one the statute ran out on and he couldn't be charged." Ramsey Dep. 47:20–48:18. It is reasonable to infer from this evidence that the Cujdik brothers were subject to a different disciplinary process than plaintiff. Plaintiff has also presented evidence that Detective Kenny Rutherford, a "homicide detective that Ramsey accused of stealing time from the City by being home working," was terminated by Ramsey through direct action, but "got his job back," even though he had not yet participated in arbitration proceedings. Boyer Dep. 128:2-14, 130:23–132:21.

The Court notes that some of the evidence provided by plaintiff does not support an inference that officers were subject to different disciplinary processes based on their race. First, while there is evidence that a white officer, Raymond Murphy, was arrested for stealing electricity and not terminated, Pl.'s Resp. to City Defs. at 7, there is no evidence regarding the disciplinary process used in that case. Rather, plaintiff testified that he read in the newspaper that Murphy was arrested in 2014 "for stealing electricity [through a federal utility assistance program] and [was] not terminated by defendant Ramsey." Boyer Dep. 81:4–82:4. Second, plaintiff mentions the "predominantly white Thomas Liciardello narcotics unit officers tried for stealing drugs and money." Pl.'s Resp. to City Defs. at 7-8. However, the evidence with respect to the discipline of this group of officers does not support plaintiff's argument. Ramsey testified that he fired all of the officers from the Liciardello narcotics unit, but that, with the exception of one officer who retired, they were all reinstated through the arbitration process. *Id.* at 44:14–46:22. Ramsey further testified that two officers in the group were African-American and the

remaining officers in the group were white. *Id.* This evidence does not support plaintiff's claim of different treatment based on race. Nevertheless, as stated above, the plaintiff has produced evidence from which a reasonable jury could conclude that there was a well-settled municipal practice, known to Ramsey, of using different disciplinary processes for police officers based on their race, and that this practice caused plaintiff, an African-American, to receive less favorable discipline than similarly situated white officers.

The Court next addresses the second alleged custom—"general disparate treatment of minorities"—and concludes that there is insufficient evidence from which to reasonably conclude that there is a municipal custom of "general disparate treatment of minorities." SAC ¶ 45. Plaintiff provides two additional pieces of evidence of this custom. First, that a police officer identified as Corporal Powlawski "referred to African-American people as monkeys and banana-eating monkeys," and that Ramsey testified that he did not know if Powlawski was terminated, but he "[didn't believe] he was terminated [but didn't] know with 100 percent certainty." Ramsey Dep. 40:12–41:10. Second, that Ramsey "was unable to point to any investigation . . . into the racist domelights.com scandal that received extensive press coverage." Pl.'s Resp. to City Defs. at 7-8. On this issue, Ramsey testified that he "never read" the website, was not involved in any way in the lawsuit brought by the Guardian Civic League against the City of Philadelphia with respect to the website, and that he did not know whether the officers involved in creating the website were disciplined. *Id.* at 31:10-33:8.

The Court recognizes the serious nature of failing to respond to racism within a police department. However, the evidence provided by plaintiff—that Ramsey believed an officer was not terminated for using racist slurs and that Ramsey did not participate in the domelights.com litigation or know whether officers involved in creating the website were disciplined—even

when coupled with the evidence of officer discipline discussed above, is insufficient to support an inference that there was a practice of general disparate treatment of minorities that was so permanent and well-settled as to have the force of law.

For these reasons, City Defendants' Motion for Summary Judgment is granted with respect to the alleged custom of "general disparate treatment," but denied with respect to the alleged custom of using different disciplinary proceedings for police officers based on their race.

B. Pennsylvania Whistleblower Law Claim

Count Two of the Second Amended Complaint alleges that the City, Ramsey, and Ortiz violated the Pennsylvania Whistleblower Law, 43 Pa. Const. Stat. Ann. § 1421 *et seq.*, by retaliating against plaintiff for reporting Ortiz's allegedly criminal conduct. SAC ¶¶ 51-52.

1. Pennsylvania Whistleblower Law

Under the Pennsylvania Whistleblower Law ("Whistleblower" or "Whistleblower Law"), employers may not discharge, threaten or otherwise discriminate or retaliate against an employee" with respect to the terms of his or her employment because the employee reported in good faith "an instance of wrongdoing or waste by a public body . . . ." 43 Pa. Const. Stat. Ann. § 1423.

Importantly for the purposes of the pending Motions, a person alleging a Whistleblower violation must bring a civil action "within 180 days after the occurrence of the alleged violation." 43 Pa. Const. Stat. Ann. § 1424(a). This limit is "mandatory and courts have no discretion to extend it." *O'Rourke v. Pa. Dep't of Corr.*, 730 A.2d 1039, 1042 (Pa. Commw. Ct. 1999) (citing *Perry v. Tioga Cty.*, 649 A.2d 186 (Pa. Commw. Ct. 1994)); *see also Jackson v. LeHigh Valley Physicians Grp.*, Civil Action No. 08-3043, 2009 WL 229756, at *5 (E.D. Pa. Jan. 30, 2009) (stating that the time limit must be "strictly applied"). Thus, courts must dismiss Whistleblower

claims filed more than 180 days after the alleged violation. *O'Rourke*, 730 A.2d at 1042; *see also Livingston ex rel. Livingston v. Borough of McKees Rocks*, 223 Fed. App'x 84, 89 (3d Cir. 2007) (upholding dismissal of any claim accruing more than 180 days prior to filing); *Villela v. City of Phila.*, No. CIV. A. 95-1313, 1995 WL 295318, at *4 (E.D. Pa. May 9, 1995) (finding that the exhaustion requirement for § 1983 claims arising from the same event would not toll the 180-day time limit).

2. Discussion

The City Defendants argue that plaintiff's Whistleblower claim is time-barred because the 180-day time limit began to run when plaintiff was terminated on September 2, 2013, and plaintiff did not allege the conduct underlying the Whistleblower claim until, at the earliest, February 6, 2015, in his civil action against Ortiz and Wurlin Graham. City Defs.' Mem. at 10. The City Defendants further argue that the Whistleblower claim in the Second Amended Complaint does not relate back to the original Complaint in this case, filed on November 7, 2013, because the conduct underlying the Whistleblower claim was not alleged in the original Complaint. *Id.* Ortiz argues that each instance of his alleged retaliatory conduct—his interview as part of the IAD investigation, his testimony at plaintiff's PBI hearing on July 17, 2013, and his testimony at plaintiff's arbitration hearing on May 23, 2014, and June 26, 2014—occurred more than 180 days prior to February 6, 2015. Ortiz Mem. at 4. Ortiz also argues that he had no knowledge of plaintiff's report of his alleged wrongdoing. *Id.* at 6.

a. Relation Back Provision of Federal Rule of Civil Procedure 15(c)(1)

The Court first addresses the relation back doctrine raised by the City Defendants and concludes that plaintiff's Whistleblower claim does not relate back to the original Complaint in this case. Under Federal Rule of Civil Procedure 15(c)(1), "[a]n amendment to a pleading relates

back to the date of the original pleading" in three situations. The first situation requires that the "law that provides the applicable statute of limitations allows relation back." Fed. R. Civ. P. 15(c)(1)(A). This provision is inapplicable because the Whistleblower Law does not provide for relation back. 43 P.S. 1421 *et seq*. The second situation provides for an amendment asserting a new claim against the same parties if "the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." Fed. R. Civ. P. 15(c)(1)(B). The third situation permits amendments that "change the party or the naming of party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied" and two conditions relating to notice are met. Fed. R. Civ. P. 15(c)(1)(C).

In order to determine whether plaintiff's Whistleblower claim relates back to the original Complaint with respect to the City, Ramsey, or Ortiz, the Court must first determine whether the claim "arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." Fed. R. Civ. P. 15(c)(1)(B). "The underlying question for Rule 15(c) analysis is whether the original complaint adequately notified the defendants of the basis for liability the plaintiffs would later advance in the amended complaint." *United States ex rel. Gohil v. Aventis, Inc.*, Civil Action No. 02-2964, 2017 WL 85375, at *5 (E.D. Pa. Jan. 10, 2017) (citing *Glover v. FDIC*, 698 F.3d 139, 146 (3d Cir. 2012)). "Applying this rule requires a 'search for a common core of operative facts in the two pleadings.'" *Gordon v. Maxim Healthcare Servs., Inc.*, Civil Action No. 13-7175, 2014 WL 3438007, at *5 (E.D. Pa. July 15, 2014) (citing *Glover*, 698 F.3d at 145).

Plaintiff does not argue that his Whistleblower claim relates back to the original Complaint in this case. Having reviewed the original Complaint and plaintiff's Whistleblower claim in the Second Amended Complaint, the Court concludes that plaintiff's Whistleblower

claim does not arise out of the conduct "set out . . . in the original pleading" and thus does not relate back to the original Complaint. Plaintiff's Whistleblower claim in his Second Amended Complaint is premised entirely on his reporting of Ortiz's alleged criminal activity. SAC ¶¶ 51-54. The original Complaint alleges that the City and Ramsey and five Jane and John Does violated federal and state law by discriminating against him based on his race and retaliating against him for opposing race discrimination. Compl. ¶¶ 33-34, 51-52, 58 ,60, 67-68, 80-81. It does not allege any facts relating to plaintiff's report of Ortiz's alleged criminal activity. While plaintiff's Whistleblower claim arises from the general circumstances alleged in the original Complaint—his disciplinary proceedings and termination—the facts forming the basis of the Whistleblower claim were not set out, or even attempted to be set out, in the original Complaint. *See Gordon*, 2014 WL 3438007, at *5 ("While this newly alleged conduct also arises from [plaintiff's] employment by [defendant] and its failure to pay her earned wages, it is based on factually and legally distinct circumstances."). Thus, plaintiff's Whistleblower claim does not satisfy the requirements of the relation back provision of Rule 15(c).

b. Timeliness

Next, the Court addresses whether plaintiff's Whistleblower claim was timely. Plaintiff argues that his claim was timely because he first alleged violations of the Whistleblower Law against Ortiz within 180 days after his termination became final, which he argues was 30 days after the arbitration decision on August 28, 2014. Pl.'s Resp. to Ortiz at 5.[5] In support of this argument, plaintiff states that, under Pennsylvania law, "[t]he termination date can include actual termination notice date by an employer but also post-termination processes through, for example, the Civil Service Commission to determine when termination becomes final." *Id.* (citing *Bailets*

[5] Plaintiff presents the same arguments in his Response to the City Defendants' Motion for Summary Judgment.

v. Pa. Turnpike Comm'n, 123 A.3d 300, 308 (Pa. 2015)). Further, plaintiff argues that "his actual termination date is an issue of factual dispute," that he was "bound by compulsory arbitration," and that, "the actual harm doctrine requires that an action is ripe only when 'the occurrence of the . . . significant event necessary to make the claim suable.'" *Id.* (quoting *Mack Trucks, Inc. v. Bendix-Westinghouse Auto. Air Brake Co.*, 372 F.2d 18, 20 (3d Cir. 1966).

The Court construes these arguments as an argument that plaintiff's arbitration proceedings tolled the 180-day time limit for each alleged retaliatory action by the City, Ramsey, and Ortiz and rejects this argument. First, while plaintiff may be correct that retaliation or discrimination during "post-termination processes" may be actionable under the Whistleblower Law, the case cited by plaintiff, *Bailets*, does not stand for this proposition or for extending 180-day limit for a claim based on retaliatory termination on the ground that there were post-termination proceedings.[6] *Bailets* does not discuss these issues. 123 A. 3d at 301-08.

Second, the Court rejects plaintiff's arguments that the compulsory nature of arbitration or the actual harm doctrine required or permitted him to wait to file suit until his termination was upheld in arbitration. Under the language of the Whistleblower Law, the alleged retaliatory actions by the City, Ramsey, and Ortiz, including those during arbitration proceedings, were actionable once they occurred. 43 Pa. Const. Stat. Ann. § 1424(a). Plaintiff provides no legal

[6] To the extent that plaintiff is advancing a "continuing violation theory," the Court notes that there is no determinative case law with respect to the application of a continuing violation theory to the Pennsylvania Whistleblower Law. *Jackso*n, 2009 WL 229756, at *5. However, it seems unlikely that the Whistleblower Law would permit a continuing violation theory given the strict nature of the time-limit and courts' reluctance to toll the time limit. *See Albright v. City of Phila.*, 399 F. Supp. 2d 575, 595 n.27 (E.D. Pa. 2005) (while not deciding whether a continuing violation theory would toll the time limit, noting that "decisions of the Pennsylvania Commonwealth Court explicitly deny equitable discretion in extending the period."). Moreover, a continuing violation theory would likely not be applicable in this case. The alleged violations—Ortiz's alleged retaliatory testimony and Ramsey's retaliatory actions—would each be individually actionable as a violation of the Whistleblower Law. *See Livingston*, 223 Fed. App'x 84, at *3 n.3 (in § 1983 First Amendment retaliation context, continuing violation theory was inapplicable because "causes of action that can be brought individually expire within the applicable limitations period").

authority that his Whistleblower claim arising from the alleged retaliatory September 2, 2013, termination was not an actionable until it was upheld by arbitration—the case cited by plaintiff in support of the actual harm doctrine, *Mack Trucks*, does not involve the Whistleblower Law or otherwise provide support for this assertion. Finally, plaintiff's argument is inconsistent with courts' strict application of the 180-day time limit, which includes granting summary judgment on any alleged acts of retaliation that occurred more than 180 days prior to the filing of the complaint, *O'Rourke*, 730 A.2d at 1042, and determining that a plaintiff with both Whistleblower and related federal claims must file the Whistleblower claim before waiting to exhaust related federal claims, *see Villela*, 1995 WL 295318, at *4.

Therefore, the 180-day time limit for the alleged retaliatory actions by the City, Ramsey, and Ortiz began to run on the dates of the alleged retaliatory actions. As discussed above, plaintiff first asserted his Whistleblower claim against Ortiz on February 6, 2015. Thus, any claim based on alleged violations that occurred before August 10, 2014, is time-barred. While both the arbitration decision of August 28, 2014, and the 30-day appeal period after which the arbitration decision became final occurred after August 10, 2014, there is no evidence of any action in this matter by the City, Ramsey, or Ortiz after their participation in the arbitration proceedings in May and June of 2014. In short, there is no evidence of actionable conduct by those defendants within the limitations period. Therefore, plaintiff's Whistleblower claims are time-barred.

For all of these reasons, the Court grants the City Defendants' Motion for Summary Judgment with respect to Count Two and grants Ortiz's Motion for Summary Judgment.

VI. CONCLUSION

For the foregoing reasons, Defendant Police Officer Angel Ortiz's Motion for Summary Judgment is granted. Defendants City of Philadelphia, Charles Ramsey, Roland Lee, and Karyn Baldini's Motion for Summary Judgment is granted as to the alleged custom of "general disparate treatment" alleged in Count One of the Second Amended Complaint and as to the Pennsylvania Whistleblower Law claim alleged in Count Two against defendants the City of Philadelphia and Charles Ramsey, and is denied in all other respects. The claims that remain in this case are the claims in Count One for violations of the Equal Protection Clause of the Fourteenth Amendment pursuant to 42 U.S.C. § 1983 against Charles Ramsey, Roland Lee, Karyn Baldini, and two John and Jane Does, and the claim in Count One against the City of Philadelphia with respect to the alleged custom of using different disciplinary proceedings for police officers based on their race.

An appropriate order follows.