

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(FILED: March 31, 2017)

KAREN E. GUILBEAULT,
Plaintiff,

v.

MARCO PALOMBO, JR., Individually,
and in his capacity as Chief of the
Cranston Police Department; JOHN
SCHAFFRAN, Individually, and in his
capacity as a member of the Cranston
Police Department; ROBERT W. RYAN,
Individually, and in his capacity as a
member of the Cranston Police
Department; RUSSELL HENRY,
Individually, and in his capacity as a
member of the Cranston Police
Department; ALAN LOISELLE,
Individually, and in his capacity as a
member of the Cranston Police Department;
STEPHEN ANTONUCCI, Individually;
CARL ROBERT RICCI, Individually;
VINCENT McATEER, Individually;
ALLEN W. FUNG, Individually, and in
his capacity as Mayor of Cranston; CITY
OF CRANSTON by and through its
Treasurer, DAVID CAPUANO; and John
Doe, Alias,
Defendants

C.A. No. PC-13-2109

DECISION

GIBNEY, P.J. The Defendant, Stephen Antonucci (Defendant or Antonucci), brings this Super. R. Civ. P. 12(b)(6) motion to dismiss against Plaintiff Karen E. Guilbeault (Plaintiff or Guilbeault) in lieu of answer to the Plaintiff’s Second Amended Complaint. The Defendant contends that this action brought against him in his individual capacity should be dismissed based on a defense of qualified immunity. The Plaintiff contends that she has met the required

pleading standard in respect to each of her claims in order to survive a motion to dismiss. Further, the Plaintiff maintains that the Defendant cannot properly assert a qualified immunity defense, and therefore, the Defendant's motion should be denied. This Court exercises jurisdiction pursuant to G.L. 1956 § 8-2-14.

I

Facts and Travel

The Plaintiff, a member of the Cranston Police Department (CPD), filed this action on May 3, 2013 against numerous defendants for claims of gender discrimination. On November 30, 2016, the Plaintiff amended her Complaint a second time to include the present Defendant. She asserted claims of gender discrimination and retaliation in violation of G.L. 1956 § 42-112-1, the Rhode Island Civil Rights Act (RICRA), and sought damages under 42 USC § 1983 (§ 1983) for the Defendant's actions taken in his individual capacity. The Plaintiff did not assert any claims under G.L. 1956 § 28-5-1, Rhode Island's Fair Employment Practices Act (RIFEPA), against the Defendant. The Plaintiff also named the Defendant solely in his individual capacity.

The Plaintiff's Second Amended Complaint, the operative complaint, alleges that the Defendant, in his individual capacity, participated in a retaliatory internal investigation against the Plaintiff brought after she filed the instant action alleging gender discrimination at the CPD. With respect to the present Defendant, the Plaintiff specifically alleges that Antonucci engaged in gender-based harassment against the Plaintiff that was hostile, abusive, severe, pervasive, and continuous and which deprived the Plaintiff of the right to work in a reasonable workplace environment free from gender-based harassment.

The Plaintiff alleges in her Second Amended Complaint that on or about October 31, 2013, the Defendant—along with co-defendants—initiated an internal investigation against the

Plaintiff, citing a violation of CPD rules. This violation allegedly stemmed from the Plaintiff's supervision of CPD Sgt. Josefson and the Plaintiff's suggestion to Sgt. Josefson that he document any incidents of discrimination in order to protect himself, after he reported that he was being discriminated against or was not being treated equally. The Plaintiff's alleged failure to report Sgt. Josefson's use of a taping device and the Plaintiff's alleged unauthorized recording of Major Schaffran served as the basis for the internal investigation against the Plaintiff.

The Plaintiff contends in her Second Amended Complaint that while conducting this internal investigation, the Defendant knew that no one in the CPD was aware of any rule against recording fellow employees or the usage of taping devices. The Plaintiff maintains that earlier in December of 2012, the Defendant was directed by other members of the CPD to create a rule and regulation prohibiting members of the CPD from surreptitiously recording other employees. After doing so, the Plaintiff then alleges that the Defendant was specifically instructed not to disseminate the new policy amongst members of the CPD before conducting his internal investigation of the Plaintiff for violation of the unpublished rule.

The Plaintiff alleges that this internal investigation led by the Defendant for violation of an unpublished rule was in retaliation for her filing claims of gender discrimination. She further asserts that this investigation violated her First Amendment right to free speech and constituted an attempt to delay the Plaintiff's promotion to Captain. On January 12, 2017, the Defendant filed his motion to dismiss, asserting a defense of qualified immunity against the Plaintiff's claims.

II

Parties' Arguments

The Defendant asserts that the Plaintiff has not pled sufficient facts for her claims under RICRA and § 1983 in order to survive a motion to dismiss. Additionally, the Defendant maintains that the Plaintiff's claims should be dismissed because her allegations are not based on individual actions of the Defendant; rather, they are founded on the Defendant's actions which were taken in his official capacity as a member of the CPD. The Defendant argues that plaintiffs cannot seek recovery under § 1983 for actions of a defendant taken in an official, rather than in an individual, capacity.

Additionally, the Defendant contends that the Plaintiff's claims should be dismissed based on a defense of qualified immunity. The Defendant argues a qualified immunity defense applies when a plaintiff fails to establish a constitutional violation and when the violation was not clearly established by law so that a reasonable person would know that he or she violated an individual's constitutional rights. The Defendant maintains that the Plaintiff's right to freedom of speech was not violated, and further, that the Defendant, acting as a reasonable person, was not aware of any violation because a right is not clearly established by law.

The Plaintiff maintains that she has met her burden for pleadings in respect to both her gender discrimination and retaliation claim. The Plaintiff contends that she has provided sufficient specific factual allegations against the Defendant to survive a motion to dismiss. Further, she argues that her claims are properly based on the Defendant's actions which were taken in his individual capacity, and that she does not name the Defendant in his official capacity; rather, she alleges that the Defendant individually participated in a retaliation effort that was outside the scope of his authority as a member of the CPD.

The Plaintiff contends that a defense of qualified immunity does not apply because she has alleged a proper constitutional violation of her First Amendment right to free speech. She argues that the filing of a gender discrimination claim is protected speech as a matter of public concern and that the Defendant attempted to chill her exercise of free speech when he engaged in a retaliatory investigation. Further, the Plaintiff contends that the law regarding her right to freedom of speech was clearly established at the time and that any reasonable defendant would know that a retaliatory investigation would violate such a right. Therefore, the Plaintiff maintains that the Defendant cannot assert a defense of qualified immunity and, as such, his motion to dismiss should be denied.

III

Standard of Review

“The sole function of a motion to dismiss is to test the sufficiency of the complaint[.]” Palazzo v. Alves, 944 A.2d 144, 149 (R.I. 2008) (citations omitted). Looking at the four corners of a complaint, this Court examines the allegations in a plaintiff’s complaint, assumes them to be true, and views them in a light most favorable to the plaintiff. Barrette v. Yakavonis, 966 A.2d 1231, 1234 (R.I. 2009). This Court is mindful of the policy to interpret the pleading rules liberally so that cases are not “disposed of summarily on arcane or technical grounds.” Haley v. Town of Lincoln, 611 A.2d 845, 848 (R.I. 1992).

The complaint need not include the precise legal theory upon which the claims are based or even the ultimate facts to be proven; all that is required is fair and adequate notice to the opposing party of the claims being asserted. Gardner v. Baird, 871 A.2d 949, 953 (R.I. 2005) (citations omitted); see also Berard v. Ryder Student Transp. Servs., Inc., 767 A.2d 81, 83-84 (R.I. 2001). Consequently, “[a] motion to dismiss is properly granted ‘when it is clear beyond a reasonable doubt that the plaintiff would not be entitled to relief from the defendant under any

set of facts that could be proven in support of the plaintiff's claim.” Woonsocket Sch. Comm. v. Chafee, 89 A.3d 778, 787 (R.I. 2014) (quoting Mendes v. Factor, 41 A.3d 994, 1000 (R.I. 2012)); see also Goddard v. APG Sec.-RI, LLC, 134 A.3d 173, 175 (R.I. 2016).

The Court in Jones v. State of R.I. discussed the standard for a court's consideration of a motion to dismiss on a § 1983 complaint. 724 F. Supp. 25, 31 (D.R.I. 1989). That Court stated that with respect to § 1983 pleadings:

“We require more than conclusions or subjective characterizations. We have insisted on at least the allegation of a minimal factual setting. It is not enough to allege a general scenario which could be dominated by unpleaded facts . . . Therefore, although we must ask whether the ‘claim’ put forth in the complaint is capable of being supported by any conceivable set of facts, we insist that the claim at least set forth minimal facts, not subjective characterizations, as to who did what to whom and why.” Jones, 724 F. Supp. at 31 (citing Dewey v. Univ. of N.H., 694 F.2d 1, 3 (1st Cir. 1982), cert. denied, 103 S.Ct. 2121 (1983)).

IV

Analysis

A

Sufficiency of the Pleadings

The Defendant contends that the Plaintiff has not alleged sufficient facts in her Second Amended Complaint to support her claims of gender discrimination and retaliation under RICRA. The Defendant maintains that such facts are required at the pleading stage in order to survive a motion to dismiss. The Plaintiff contends that she has alleged sufficient factual allegations in her Second Amended Complaint to provide the grounds for a gender discrimination and retaliation claim under RICRA.

Under Rhode Island law, RICRA provides all persons with “full and equal benefit of all laws” regardless of sex or disability. Sec. 42-112-1(a). The statute further states that “[a] person

whose rights under the provision of § 42-112-1 have been violated may commence a civil action for injunctive and other appropriate equitable relief, and for the award of compensatory and exemplary damages[.]” Sec. 42-112-2. Following the United States Supreme Court’s narrow reading of 42 U.S.C. § 1981 (the Civil Rights Act of 1866)—wherein the Court held that the act covered only an employee’s rights in contract formation, hiring, or promotion matters—the Rhode Island Supreme Court held that RICRA must be read as broadly as possible in order to protect employees from a wide range of civil rights violations in the workplace. See Patterson v. McLean Credit Union, 491 U.S. 164 (1989); Ward v. City of Pawtucket Police Dep’t, 639 A.2d 1379, 1381 (R.I. 1994).

Gender discrimination “typically involves conduct rooted in animosity toward people” of a particular gender, and it is actionable under law much like claims of racial discrimination. See 3 Larson Employment Discrimination § 46.01[3] at 46-9 (2d ed. 2006); see also Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971). There are two theories of gender-based employment discrimination that are actionable under RICRA: 1) a gender-based disparate treatment claim, which follows a three-step burden-shifting analysis; and 2) a gender-based hostile work environment claim. DeCamp v. Dollar Tree Stores, Inc., 875 A.2d 13, 21 n.6 (R.I. 2005) (citing Lewis v. Forest Pharm., Inc., 217 F. Supp. 2d 638, 653 (D.Md. 2002)). The Court notes that “[t]he burden of proving a prima facie case is not especially onerous” at the pleading stage. Id. at 21 (citation omitted).

To establish a prima facie showing of gender-based disparate treatment under RICRA, a plaintiff must sufficiently allege that 1) she is a member of a protected class; 2) she was performing her job at a level that rules out the possibility that she was fired for inadequate job performance; 3) she suffered an adverse job action by her employer; and 4) her employer sought

a replacement for her with roughly equivalent qualifications. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); see also DeCamp, 875 A.2d at 21 (citing Smith v. Stratus Comput., Inc., 40 F.3d 11, 15 (1st Cir. 1994)). Once the plaintiff has offered a prima facie showing, the burden then shifts to the employer to offer a “legitimate, nondiscriminatory reason for the adverse employment action,” if such a reason can be offered. DeCamp, 875 A.2d at 21-22 (citing to Casey v. Town of Portsmouth, 861 A.2d 1032, 1037-38 (R.I. 2004)). Lastly, the employee must ultimately convince the fact-finder that the legitimate, nondiscriminatory reason was a pretext for unlawful discriminatory animus. Ctr. for Behavioral Health, R.I., Inc. v. Barros, 710 A.2d 680, 685 (R.I. 1998).

A gender-based hostile work environment claim, in contrast, allows an employee to recover against his or her employer “[w]hen the workplace is permeated with ‘discriminatory intimidation, ridicule, and insult[]’ that is ‘sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.’” DeCamp, 875 A.2d at 21 (citing Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)). The test for determining a gender-based hostile work environment claim is whether: 1) the employee is a member of a protected class; 2) the employee was subjected to unwanted harassment; 3) that harassment was based upon his or her sex; 4) that the harassment was sufficiently severe and pervasive so as to alter the conditions of the plaintiff’s employment and create an abusive work environment; 5) that harassment was both objectively and subjectively offensive, such that a reasonable person would find it hostile or abusive and the victim, in fact, did perceive it to be so; and 6) that some basis for employer liability has been established. Id. at 22-23; see also O’Rourke v. City of Providence, 235 F.3d 713, 728 (1st Cir. 2001).

Under RICRA, an employee can also bring a claim for retaliation in violation of his or her rights. See Iacampo v. Hasbro, Inc., 929 F. Supp. 562, 573 (D.R.I. 1996). The Rhode Island Supreme Court has stated that RICRA provides broad protection against all forms of discrimination in all phases of employment. See Ward, 639 A.2d at 1381. As such, RICRA protects plaintiffs against any discrimination which interferes with the “benefits, terms, and conditions of the employment relationship—whether it takes the form of disparate impact, disparate treatment, retaliation, or harassment.” See Iacampo, 929 F. Supp. at 573. To establish a claim for retaliation, a plaintiff must allege that an adverse employment action was taken because the employee engaged (or was believed to have engaged) in protected conduct. See Conetta v. Nat’l Hair Care Ctrs., Inc., 236 F.3d 67, 76 (1st Cir. 2001); see also Calero-Cerezo v. U.S. Dep’t of Justice, 355 F.3d 6, 25 (1st Cir. 2004).

The Plaintiff brings claims of both types of gender discrimination—namely, gender-based disparate treatment and gender-based hostile work environment—in addition to a claim of retaliation. Pl.’s Second Am. Compl. at ¶ 30. In her Second Amended Complaint, the Plaintiff alleges that:

- She was denied promotion to lieutenant’s rank while, under the same or similar conditions, a male co-employee had been promoted to that same rank. Id. at ¶ 32.
- She was compelled to perform her duties in the Traffic Unit under onerous circumstances while essential personnel hours were reduced and then eliminated, leaving inadequate manpower, which was not the case under previously assigned male officers. Id. at ¶¶ 33-34. The Plaintiff alleges that such a reduction was intended to cause her failure. Id. at ¶ 36.
- She was denied training essential to her duties, which male co-employees were provided upon request. Id. at ¶ 35.
- She was required to perform tasks as a part of her duties that male co-employees, who held the same titles, were not asked to perform. Id. at ¶ 37.

- She was subject to gender-based harassment via text messaging by one or more co-employees. Id. at ¶ 38.
- The Plaintiff further alleges that in January of 2012, a co-employee altered her work schedule by omitting scheduled leave, disparaging her within the computer system, and taunting her via text messaging. Id. at ¶ 40.
- One or more co-defendants attempted to obtain the Plaintiff's confidential testing information in order to subvert the promotional process and to enhance the performance evaluations of male co-employees. Id. at ¶ 42.
- Her claim for Injured On Duty compensation was intentionally delayed for months, resulting in a loss of compensation, whereas her male co-workers' claims were not delayed and they were paid compensation while their claims were pending. Id. at ¶ 49.
- That Defendant engaged in gender-based harassment of the Plaintiff that was hostile, abusive, severe, pervasive, and continuous, which deprived the Plaintiff of the right to work in a reasonable working environment. Id. at ¶ 31.
- In response to her filing a Charge of Discrimination with the Rhode Island Commission for Human Rights, Defendant—in conjunction with other co-defendants—engaged in a retaliatory internal investigation of the Plaintiff for violation of an allegedly unpublished rule. Id. at ¶¶ 63-67.

With respect to her claim for gender-based disparate treatment, the Plaintiff has alleged that she is a woman who was performing her job competently and that she nonetheless suffered adverse job actions by her employer based on her gender. See Pl.'s Second Am. Compl. at ¶¶ 30, 32, 34, 49, 51-52. The Plaintiff has alleged that the CPD created a previously non-existent Lieutenant position for a male co-employee and that—when it was time for a Lieutenant to be promoted to Captain according to a department promotion list—the CPD intentionally delayed promotion, causing the promotion list to expire. Id. at ¶¶ 51-61. The Plaintiff alleges that such a delay was intended to impede her promotion—as she was previously ranked top of the list according to a Collective Bargaining Agreement—which then required the Plaintiff to retest for the promotion to Captain. Id. at ¶ 62. Therefore, this Court finds that the Plaintiff has alleged

sufficient factual allegations to support a prima facie claim of gender-based disparate treatment at the pleading stage. See DeCamp, 875 A.2d at 21-22; Barros, 710 A.2d at 686 (finding that the plaintiff had established a prima facie case of discrimination at the pleading stage under the burden-shifting analysis).

With respect to the Plaintiff's gender-based hostile work environment claim, the Plaintiff has alleged that her workplace at the CPD was permeated with discriminatory harassment, which was sufficiently severe and pervasive to alter the conditions of her employment. See Harris, 510 U.S. at 21. The Plaintiff has alleged at the pleading stage that she is a member of a protected class, that she considers the Defendant's conduct unwelcome, and that the harassment which occurred at the CPD was due to her gender. See DeCamp, 875 A.2d at 23 (finding evidence of connection between harassment and gender in order to survive summary judgment).

The Plaintiff in the present action has sufficiently alleged that she was the subject of gender-based harassment via text messaging by one or more co-employees and that Antonucci, in conjunction with other co-defendants, subjected the Plaintiff to hostile work conditions because of her gender. See Pl.'s Second Am. Compl. at ¶¶ 30, 31, 38, 40, 44. The Plaintiff has alleged that Antonucci specifically participated in this gender-based harassment. See id. at ¶ 31. The Plaintiff alleges that these repeated incidents of harassment created an abusive work environment, which unreasonably interfered with the Plaintiff's work performance. See DeCamp, 875 A.2d at 23. Such factual allegations are sufficient to support a claim for gender-based hostile work environment at the pleading stage, and therefore, the Court finds that the

Plaintiff has provided the required prima facie evidence in her Second Amended Complaint.¹ See Harris, 510 U.S. at 21.

With respect to the Plaintiff's claim for retaliation in violation of RICRA, the Plaintiff alleges that she was the subject of a retaliatory internal investigation after she filed a discrimination claim against the CPD. See Pl.'s Second Am. Compl. at ¶¶ 63-71. The Plaintiff has alleged that the internal investigation constitutes an adverse employment action, since the investigation was allegedly fabricated upon an unpublished rule created to target just the Plaintiff. See id. at ¶ 67. The Plaintiff contends that the Defendant knew that the rule was unpublished, yet continued with the allegedly retaliatory investigation nonetheless. See id. Therefore, this Court finds that the Plaintiff's allegations contained in her Second Amended Complaint are sufficient to support a prima facie showing of retaliation in violation of RICRA. See Conetta, 236 F.3d at 76. Since the Plaintiff has provided sufficient inferences of retaliation in order to make out a prima facie claim, the question of whether the harms rise to a level of "materially adverse employment actions" is a matter best left to the discovery process and the production of evidence at a later time. See Iacampo, 929 F. Supp. at 576 (finding that argument of whether conduct is a "materially adverse employment action[]" should be argued at a later stage, after discovery has been conducted).

In summary, this Court is satisfied that the Plaintiff has provided sufficient factual allegations at the pleading stage to support her claims of gender-based disparate treatment, gender-based hostile work environment, and retaliation in violation of RICRA. See DeCamp, 875 A.2d at 21-22; see also Conetta, 236 F.3d at 76; Iacampo, 929 F. Supp. at 573.

¹ See also Am. Legion Post 12 v. Susa, 2005 WL 3276210 (R.I. Super. Nov. 30, 2005) (applying six factors of gender-based harassment test in a motion to dismiss at the Superior Court level, on appeal from a decision of the Rhode Island Commission for Human Rights).

Particularity of § 1983 Claims

The Defendant contends that the Plaintiff has not stated with sufficient particularity Antonucci's role in the Plaintiff's alleged deprivations in order to survive a motion to dismiss with respect to her § 1983 claim. The Defendant maintains that under Rhode Island law, a plaintiff must allege sufficient specific facts on a defendant's particular role in the deprivation of any right in order to survive a motion to dismiss. The Plaintiff contends that she has provided sufficient factual allegations regarding the specific role of Antonucci at the pleading stage to meet the particularity requirements of her § 1983 claim.

The Court in Jones held that a plaintiff in a § 1983 action must aver objectively and with particularity the facts that support a plaintiff's civil rights claim, must demonstrate personal liability, and must state specifically how each defendant was involved in the deprivation. 724 F. Supp. at 31; see also Dewey, 694 F.2d at 3. Under the particularity requirement of § 1983, “[t]he plaintiff must state specifically how each defendant was personally involved in the deprivation.” Jones, 724 F. Supp. at 31 (quoting DelSignore v. City of McKeesport, 680 F. Supp. 200, 203 (W.D. Pa. 1988)).

In support of her claim under § 1983, the Plaintiff alleges that the Defendant specifically violated her First Amendment right to freedom of speech by drafting a rule prohibiting the recording of fellow employees, and that the Defendant was then instructed not to publish that rule to CPD employees. See ¶¶ 65, 67. The Plaintiff further alleges that despite having this knowledge, the Defendant then continued with an internal investigation of the Plaintiff in retaliation for her filing a complaint of gender discrimination against the CPD. See id. at ¶ 70. Therefore, this Court finds that—under the particularity test for § 1983 claims—the Plaintiff has

alleged sufficient facts regarding the Defendant's individual role in a violation of the Plaintiff's rights in order to proceed past the pleading stage. See Jones, 724 F. Supp. at 31; see also Dewey, 694 F.2d at 3.

2

Individual Versus Official Capacity

The Defendant contends that Plaintiff's claim for damages under § 1983 must be dismissed because the Defendant cannot be sued in his official capacity as a member of the CPD under § 1983. The Defendant stresses that § 1983 does not provide a remedy against defendants who act in their official capacity and within the scope of their employment. The Defendant argues that his actions were undertaken in his role as a member of the Office of Professional Standards at the CPD and occurred on the job, within the scope of his employment. The Defendant maintains that the Plaintiff has not sufficiently alleged that the Defendant was acting in an individual, rather than an official, capacity, and as such, her claim under § 1983 should be dismissed. The Plaintiff contends that her § 1983 claim is brought against the Defendant in his individual capacity only, and not in his official capacity. The Plaintiff maintains that the Defendant's actions were not undertaken within the scope of his employment—but rather occurred in an individual capacity—and therefore, her claims are not barred.

Courts are clear that § 1983 does not create a federal cause of action, but that it is a remedy for the vindication of other federal statutory or constitutional rights. DelSignore, 680 F. Supp. at 203 (citing Carbonell v. La. Dep't of Health & Human Res., 772 F.2d 185, 188 (5th Cir. 1985)). In addition to the particularity requirement, the Court must determine whether the individual defendant is a "person" within the meaning of the statute. Feeney v. Napolitano, 825 A.2d 1, 4 (R.I. 2003) (holding that plaintiffs are not required to state a specific capacity in the

complaint, but that any challenge to capacity should be raised via affirmative defense); see also Super. R. Civ. P. 9(a). In Will v. Mich. Dep't of State Police, the Court held that neither states nor state officials acting in their official capacities are “person[s]” within the meaning of § 1983, and therefore, they are not subject to suit. 491 U.S. 58, 65-66 (1989).

When state officials are sued in their individual capacity under § 1983, the Court must consider whether the plaintiff is truly suing the state—namely, the state actor only or an agent or representative of the state—or whether the alleged violation resulted from specific acts or decisions of the named official. Gallipeau v. Berard, 734 F. Supp. 48, 51 (D.R.I. 1990). The United States Supreme Court stated that personal-capacity § 1983 suits are proper when they seek to impose individual liability upon a government office for actions taken under the color of state law; thus, to establish individual liability in a § 1983 action, it is sufficient to show that the official acting under the color of state law caused the deprivation of a federal right. Hafer v. Melo, 502 U.S. 21, 25 (1991). Likewise, in Jones, the District Court of Rhode Island found that a complaint sets forth sufficient allegations of personal conduct when it alleges with particularity the factual predicate which demonstrates that each of the individual defendants acted willfully, knowingly, purposefully, and with malice to deprive the victim of his or her constitutional rights. 724 F. Supp. at 29.

In the instant action, the Plaintiff brings her § 1983 claim against the Defendant in his individual capacity for actions allegedly taken while he was a member of the CPD and assigned to the Office of Professional Standards, a role which involved the review of internal affairs. See Pl.’s Second Am. Compl. at ¶ 20. The Plaintiff alleges that in his role with the Office of Professional Standards, the Defendant in December of 2012 created a rule and regulation prohibiting members of the CPD from surreptitiously recording other employees of the CPD. See

id. at ¶ 66. The Plaintiff further alleges that on or about August 29, 2013, after many drafts, Antonucci was specifically instructed not to disseminate the new policy amongst members of the CPD. See id. at ¶ 67. The Plaintiff alleges that, despite this knowledge, the Defendant commenced an internal investigation on October 31, 2013 regarding the Plaintiff's violation of the unpublished rule. See id. at ¶ 63.

This Court is satisfied that the Plaintiff has presented, with sufficient particularity, allegations of the Defendant's willful, knowing, and purposeful violation of the Plaintiff's rights in order to sustain her claim under § 1983. See Jones, 724 F. Supp. at 29. The Plaintiff has named the Defendant in his individual capacity and brings her claim for actions that the Defendant allegedly took under color of state law and in his position with the Office of Professional Standards. See Hafer, 502 U.S. at 25. Therefore, this Court finds that the Plaintiff has properly named the Defendant in his individual capacity for purposes of § 1983. See id.

B

Qualified Immunity Analysis

The Defendant contends that this Court should grant his motion to dismiss based on a defense of qualified immunity. The Defendant maintains that a defense of qualified immunity can be asserted against claims under both RICRA and § 1983. The Defendant argues that under the two-step test for qualified immunity, he is entitled to a dismissal at the earliest stage of proceedings as possible. The Defendant argues that the Plaintiff has not shown a valid constitutional violation, and further, that any alleged violation was not clear to the Defendant because the constitutional right was not clearly established at the time.

The Plaintiff contends that the motion to dismiss should not be granted on the Defendant's assertion of a qualified immunity defense. The Plaintiff argues that a defense of

qualified immunity has never been applied under Rhode Island law for claims brought under RICRA. However, the Plaintiff argues that if a defense of qualified immunity were applicable to RICRA claims, the Rhode Island Supreme Court has suggested that the test would mimic federal tests established for qualified immunity under § 1983. The Plaintiff contends that she has demonstrated a constitutional violation—specifically, a violation of her First Amendment right to freedom of speech—which occurred after the Defendant engaged in a retaliatory investigation following her filing of a gender discrimination claim. The Plaintiff maintains that the law regarding freedom of speech and the filing of discrimination claims was clearly recognized by Rhode Island and federal courts at the time of the Defendant’s violation, and, as such, his defense of qualified immunity should be denied.

With respect to the defense of qualified immunity, the parties refer the Court to Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). In Harlow, the court stated that “government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” Id.; see also Lopera v. Town of Coventry, 652 F. Supp. 2d 203, 211 (D.R.I. 2009). Qualified immunity “shields officials who perform their duties reasonably from liability and ‘applies regardless of whether the government official’s error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.’” Lopera, 652 F. Supp. 2d at 211 (citing Pearson v. Callahan, 555 U.S. 223 (2009)).

The qualified immunity doctrine “balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.” Pearson, 555 U.S. at 231. When faced with a claim of qualified immunity, courts should apply a

two-prong analysis: “(1) whether the facts alleged or shown by the plaintiff make out a violation of a constitutional right; and (2) if so, whether the right was ‘clearly established’ at the time of the defendant’s alleged violation.” Maldonado v. Fontanes, 568 F.3d 263, 269 (1st Cir. 2009).

The United States Supreme Court has stated that a defense of qualified immunity is an “immunity from suit rather than a mere defense to liability” and, as such, should be raised at the earliest possible instance to avoid “subject[ing] government officials either to the costs of trial or to the burdens of broad-reaching discovery” in cases where a constitutional violation was not clearly established at the time. See Mitchell v. Forsyth, 472 U.S. 511, 526 (1985); see also Harlow, 457 U.S. at 818.

1

Qualified Immunity under RICRA

The Plaintiff contends that the Rhode Island Supreme Court has not yet applied a defense of qualified immunity to a claim brought under RICRA, rather than under § 1983. Therefore, she argues that the Defendant cannot assert this defense against her claims for gender discrimination and retaliation in violation of RICRA. However, the Plaintiff does note that if a defense of qualified immunity could be applied to RICRA claims, it would mimic the analysis for qualified immunity as espoused by federal courts and as applied to § 1983 claims. The Defendant contends that a defense of qualified immunity applies to both the Plaintiff’s claims under RICRA and § 1983, and therefore, his defense would operate to dismiss the Plaintiff’s entire action.

In Ensey v. Culhane, the Rhode Island Supreme Court stated that, “We are of the opinion that, in an appropriate case, the doctrine of qualified immunity might well be applied by this Court.” 727 A.2d 687, 690 (R.I. 1999); see also Pontbriand v. Sundlun, 699 A.2d 856, 867 (R.I.

1997) (holding that a member of the executive branch “may be entitled to some form of . . . qualified immunity for . . . acts performed in good faith”). The Supreme Court went on to discuss Rhode Island’s potential analysis for qualified immunity, stating that it would be an identical analysis to a defense of qualified immunity employed by federal courts in the context of § 1983 claims. See Ensey, 727 A.2d at 691.

Therefore, this Court finds that a defense of qualified immunity can be raised against claims brought under both RICRA and § 1983 for the violation of a plaintiff’s constitutional rights. See id. The Defendant in the instant action has raised such a defense in response to the Plaintiff’s claims for gender discrimination and retaliation under RICRA, in addition to her claim for a violation of the Plaintiff’s First Amendment right brought under § 1983. The Court now proceeds to the two-step analysis of a qualified immunity defense as espoused by the federal courts. See Maldonado, 568 F.3d at 269; see also Pearson, 555 U.S. at 231.

2

Constitutional Violation

The Plaintiff contends that her First Amendment right to freedom of speech was violated when the Defendant retaliated against the Plaintiff for the filing of her gender discrimination claim. The Plaintiff maintains that such retaliatory actions were taken in an attempt to chill her expression of free speech. The Plaintiff argues that the filing of a gender discrimination claim is protected speech, since the topic was a matter of public concern. The Plaintiff contends that the Defendant and the CPD took adverse employment actions against her in order to chill that free speech. The Defendant contends that there was no violation of the Plaintiff’s constitutional right to free speech. The Defendant argues that the Plaintiff’s Complaint contains merely legal conclusions, rather than factual allegations of a constitutional violation. The Defendant maintains

that there are no factual allegations to support the claim that the Plaintiff was speaking on a matter of public concern.

The first step of the two-step qualified immunity analysis requires the Court to consider whether the Plaintiff has alleged a recognized constitutional violation. See Maldonado, 568 F.3d at 269. If there is no such evidence of a deprivation, the Court’s “analysis rightly can come to an abrupt halt,” and the Court need not proceed to the second step of the analysis since “the need for invocation of the doctrine of qualified immunity no longer exists.” See Fabrizio v. City of Providence, 104 A.3d 1289, 1294 (R.I. 2014) (citing Monahan v. Girouard, 911 A.2d 666, 674 (R.I. 2006)).

The United States Supreme Court has held that government employees do enjoy the protections of the First Amendment—specifically noting that it is possible for government actors to violate the First Amendment whenever those actions “chill speech on [a] matter[] of public concern.” See Bd. of Cty. Comm’rs v. Umbehr, 518 U.S. 668, 674 (1996). Courts have further stated that public employees “do not forego all the protections of the First Amendment by virtue of working for the government.” See Foley v. Town of Randolph, 598 F.3d 1, 5 (1st Cir. 2010). To evaluate whether a governmental action violates a public employee’s First Amendment right to freedom of speech, Courts examine: 1) “whether the employee spoke as a citizen on a matter of public concern”; 2) “whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public”; and 3) “whether the plaintiff can show that the protected expression was a substantial or motivating factor in the adverse employment decision.” See Curran v. Cousins, 509 F.3d 36, 45 (1st Cir. 2007) (quoting Garcetti v. Ceballos, 547 U.S. 410, 418 (2006)).

In order to determine if the speech constitutes a matter of public concern, the Court must consider whether the kind of expression at issue is of value to the process of self-governance. See Connick v. Myers, 461 U.S. 138, 147 (1983). The United States Supreme Court stated that a determination of whether an employee’s speech addresses a matter of public concern “must be determined by the content, form, and context of a given statement, as revealed by the whole record.” See id. at 147-48. A claim of retaliation in violation of an individual’s First Amendment right is actionable because it “tend[s] to chill individuals’ exercise of constitutional rights.” Powell v. Alexander, 391 F.3d 1, 17 (1st Cir. 2004) (quotation marks omitted); see also Crawford–El v. Britton, 523 U.S. 574, 588 n.10 (1998) (“The reason why such retaliation offends the Constitution is that it threatens to inhibit exercise of the protected right.”). The First Circuit Appellate Court has noted that the pertinent question in a § 1983 retaliation case based on the First Amendment is whether the defendant’s actions would deter a “reasonably hardy individual[.]” from exercising his or her constitutional rights. Agosto–de–Feliciano v. Aponte–Roque, 889 F.2d 1209, 1217 (1st Cir. 1989).

Courts have also noted, however, that the determination of whether an individual’s speech constitutes a matter of public concern is a question of law, rather than fact. See id. at 16 n.7. The Rhode Island Supreme Court has stated that it is a trial judge’s role to determine if the employee’s speech touches on a matter of public concern, and thereafter, it is a jury’s role to decide the two remaining elements: 1) whether the defendant has proven that there were alternative, appropriate reasons for the defendant’s actions; and 2) whether the plaintiff has shown that his or her speech was a substantial motivating factor in those actions. See Adler v. Lincoln Hous. Auth., 544 A.2d 576, 580-81 (R.I. 1988).

In the present matter, the Plaintiff alleges that her First Amendment right to freedom of speech was violated when the Defendant participated in an allegedly retaliatory investigation of the Plaintiff after she filed a gender discrimination claim against the CPD. As an employee of the CPD, the Plaintiff must demonstrate that the filing of her gender discrimination claim constitutes protected speech on a matter of public concern. See Curran, 509 F.3d at 45. Federal courts have held that “[g]ender discrimination in employment is without doubt a matter of public concern.” Konits v. Valley Stream Cent. High Sch. Dist., 394 F.3d 121, 125 (2nd Cir. 2005) (citing Flamm v. Am. Ass’n of Univ. Women, 201 F.3d 144, 150 (2nd Cir. 2000)). The Court in Azzaro v. Cty. of Allegheny similarly stated that gender discrimination is “as much a matter of public concern as racial discrimination . . .” 110 F.3d 968, 978 (3rd Cir. 1997).

In accordance with the jurisprudence espoused by the federal courts, this Court also finds that gender discrimination is a matter of public concern, warranting protection under the First Amendment. See Konits, 394 F.3d at 125 (finding that a use of state authority to retaliate against those who speak out against discrimination can give rise to an action under § 1983). Furthermore, this Court finds that the Plaintiff’s filing of a gender discrimination claim constitutes a matter of public concern within the context of the facts at hand—namely, that the Plaintiff’s filing of her claim regarded gender-based discrimination and harassment from male co-employees at the CPD. See Connick, 461 U.S. at 147. Additionally, the retaliatory conduct allegedly committed by the Defendant is the type of action that would likely chill an individual’s exercise of his or her constitutional rights—in particular, the filing of the Plaintiff’s gender discrimination claim against the CPD. See Powell, 391 F.3d at 17; see also Barton v. Clancy, 632 F.3d 9, 29 (1st Cir. 2011).

Under state and federal law, the Plaintiff's filing of a gender discrimination claim constitutes a matter of public concern, and thus, the Plaintiff has established a recognized constitutional violation as required under the first step of the qualified immunity analysis. See Konits, 394 F.3d at 125; see also Rosado-Quinones v. Toledo, 528 F.3d 1, 6-8 (1st Cir. 2008) (stating that an employee's filing of a racial discrimination claim was "plainly a matter of public concern").² Therefore, this Court finds that the Plaintiff has established a valid constitutional violation, and the Court proceeds to the next step of the qualified immunity analysis to determine whether the law was clearly established at the time of the alleged violation. See Konits, 394 F.3d at 125.

3

Clearly Established

The Defendant contends that the law regarding a constitutional violation of Plaintiff's First Amendment right was not clearly established at the time that he acted as a member of the CPD's Office of Professional Standard. The Defendant maintains that a reasonable person in his shoes would not have realized that any constitutional violation was being committed, and thus, he is entitled to a defense of qualified immunity. The Plaintiff contends that the law regarding a First Amendment right to freedom of speech in the employment context was long-established at the time of violation. The Plaintiff argues that a claim under § 1983 for retaliation in violation of an individual's First Amendment rights was clearly established under law by the early 2000s. The Plaintiff contends that a reasonable person in the Defendant's shoes would know that he or

² While the Court in Rosado-Quinones found that the filing of a racial discrimination claim in Powell was clearly a matter of public concern, it declined to extend that same logic to a lawsuit filed by the plaintiff against his employer for a violation of due process over a dispute regarding employment conditions, finding that such allegations were not a matter of public concern since they did not involve discrimination. Rosado-Quinones, 528 F.3d at 7; Powell, 391 F.3d at 5-7.

she was committing a constitutional violation when acting in a retaliatory fashion in response to the Plaintiff's filing of a gender discrimination claim. Therefore, the Plaintiff maintains that—because she has established a constitutional violation under law that was clearly established at the time—the Defendant is not entitled to a qualified immunity defense and his motion to dismiss should be denied.

The final step of a court's qualified immunity analysis is to determine whether a constitutional right was clearly established at the time of the incident. Maldonado, 568 F.3d at 269. This final step of the analysis further breaks down into two parts: 1) the clarity of the law at the time of the alleged civil rights violation; and 2) whether, given the facts of the particular case, a reasonable defendant would have understood that his conduct violated the plaintiff's constitutional rights. Barton, 632 F.3d at 22 (quotations omitted). An affirmative on these inquiries does "not require a case directly on point, but existing precedent must have placed the . . . constitutional question beyond debate." Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011). Therefore, "the salient question is whether the state of the law at the time of the alleged violation gave the defendant fair warning that his particular conduct was unconstitutional." Maldonado, 568 F.3d at 269.

It is well-grounded in constitutional law that individuals do not lose the protection of the First Amendment merely due to their employment with a government entity. See Foley, 598 F.3d at 5. Indeed, both federal courts and the Rhode Island Supreme Court have long established an individual's right to file a claim of gender discrimination in the workplace, granted under the broad protections of RICRA and federal case law regarding the filing of gender and racial discrimination claims. See Powell, 391 F.3d at 5-7; see also Ward, 639 A.2d at 1381 (stressing that RICRA be read broadly to provide remedy for all claims of gender or sex discrimination in

the workplace). Federal Courts have specifically recognized the right to file gender discrimination claims since the early 2000s, and have since held that retaliatory actions undertaken in violation of an individual's First Amendment rights are actionable under § 1983. See Konits, 394 F.3d at 125; Powell, 391 F.3d at 17.

Further, based on the particular facts of this case, this Court finds that a reasonable person in the Defendant's shoes would have known that his alleged conduct violated the Plaintiff's rights. See Barton, 632 F.3d at 22; see also Maldonado, 568 F.3d at 269. The Plaintiff alleges that this Defendant knew that the rule he drafted was previously unpublished and that he further continued with an allegedly retaliatory investigation despite that knowledge. This Court finds that the status of the law at the time—in conjunction with the particular facts alleged by the Plaintiff regarding the Defendant's knowledge—gave the Defendant fair warning that his alleged conduct was unconstitutional under law and in violation of the Plaintiff's rights. See Maldonado, 568 F.3d at 269. Therefore, this Court finds that the Plaintiff has alleged a recognized constitutional violation in her Second Amended Complaint, and that such law was clearly established at the time, resulting in the denial of the Defendant's claim of a qualified immunity defense. See Maldonado, 568 F.3d at 269; Harlow, 457 U.S. at 818.

V

Conclusion

This Court finds that the Plaintiff has alleged sufficient factual allegations at the pleading stage on both her gender-discrimination and retaliation claims under RICRA and her claim under § 1983. There are facts that could be proven in support of the Plaintiff's claims, and therefore, it is not clear beyond a reasonable doubt that the Plaintiff's claims should be dismissed at this stage. This Court also finds that the Plaintiff has stated her § 1983 claim with particularity and

that she has properly named the Defendant in his individual capacity. Finally, this Court denies the Defendant's qualified immunity defense, since the Plaintiff has alleged a recognized constitutional violation that was clearly established at the time of the alleged incident. Therefore, the Defendant's motion to dismiss is denied in full. Counsel shall submit the appropriate order for entry.



RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: Karen E. Guilbeault v. Marco Palombo, Jr., et al.

CASE NO: PC-13-2109

COURT: Providence County Superior Court

DATE DECISION FILED: March 31, 2017

JUSTICE/MAGISTRATE: Gibney, P.J.

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