

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

| | | |
|------------------------------|---|------------------------------|
| DENNIS C. MORRIS, |) | CIVIL ACTION NO. 3:00CV00029 |
| MARVIN TOWNSEND, |) | |
| AND JOSEPH CURRY |) | |
| |) | |
| Individually and as Class |) | |
| Representatives, |) | |
| |) | |
| Plaintiffs, |) | <u>MEMORANDUM OPINION</u> |
| |) | |
| v. |) | |
| |) | |
| THE CITY OF CHARLOTTESVILLE, |) | |
| <i>et al.</i> |) | |
| |) | |
| Defendants. |) | JUDGE JAMES H. MICHAEL, JR. |

Before the court are the defendants’ “Motion Opposing Class Certification” and the defendants’ “Motion to Dismiss Pursuant to Rule 12(b) and Motions Pursuant to Rule 12(e) and 12(f),” all filed January 19, 2001. This matter was referred to United States Magistrate Judge B. Waugh Crigler for proposed findings of fact, conclusions of law, and a recommended disposition. See 28 U.S.C. § 636(b)(1)(B). The Magistrate Judge returned his Report and Recommendation on April 9, 2001 in which he recommended that the court grant defendants’ motion opposing class certification. The Magistrate Judge further recommended that the court grant in part and deny in part the defendants’ motions to dismiss. The plaintiffs filed timely objections to the Magistrate Judge’s recommendations. The defendants filed no objections. This court has reviewed *de novo* those portions of the Report and Recommendation as to which objections were made. See 28 U.S.C. § 636(b)(1) (West 1993 & Supp. 2000); Fed. R. Civ. P. 72(b). Having

thoroughly considered the entire case and all relevant law, the court shall grant the defendants' motion opposing class certification and shall grant in part and deny in part the defendants' motions filed pursuant to Rule 12(b)(6), 12(e) and 12(f).

I.

The plaintiffs have been employed as grade Protective III police officers for the Charlottesville Police Department ("CPD"). Plaintiff Morris recently retired after over twenty years of service. Plaintiffs Townsend and Curry are still employed by the CPD where both have worked for over nineteen years. All three plaintiffs are African-American, and all assert that they have been the targets of race discrimination during their service with the CPD.

Dennis Morris joined the CPD in 1980. Morris, who suffers from high blood pressure and diabetes, alleges that these health problems provided his superiors with an excuse to send him home after he had filed a racial discrimination complaint in 1994. The defendant, Captain Albert E. Rhodenizer, required Morris to produce medical certification that he was fit for duty before he could return to work. Morris says Rhodenizer later refused to accept the certification which Morris obtained from his doctor. Subsequently, Morris stayed home for over seven months without pay. Morris contends he should have been offered light duty assignments to accommodate his disabilities, and that such assignments were routinely offered to Caucasian officers in similar situations.

One of Morris' assignments was to patrol a high crime neighborhood, but on April 30, 1999, although he had not requested a new post, he was reassigned. Morris was told by defendant, Lieutenant Jones, that the reassignment was due to his age and disabilities. Morris disputes these reasons. Morris received a high quota of traffic tickets to write but

was assigned by Jones to an area where few tickets could be written. Morris' salary was also consistently below the median range for his pay grade, and, according to Morris, less than the salary of similarly ranked Caucasian officers.

Morris sought assistance from the Human Resources Division during his years on the CPD. Morris attributes low job evaluations from 1995 to 1999 to retaliation for his complaints to Human Resources and the EEOC. Morris further contends that he was denied promotions and harassed because of his race.

Marvin Townsend has been a police officer with the CPD since 1981. Townsend's evaluations contained "glowing comments" but were coupled with other items which Townsend believes were inserted intentionally to keep his salary and merit increases below those of Caucasian officers. Townsend also complains that he rarely received timely backup in dangerous situations, and where backup did arrive, Caucasian officers would then take credit for the arrests.

Townsend received a three day suspension for failing to answer a call and sleeping on duty although witnesses at the scene stated that Townsend's radio had been malfunctioning. Townsend states that the suspension was not lifted until the radio malfunctioned in the presence of Rhodenizer. Townsend was also denied permission to attend special training classes. Such classes are considered important in order to advance within the CPD.

Joseph Curry joined the CPD in July 1981. Like his co-plaintiffs, Curry also complains that he received lower salary and merit increases than Caucasian officers. In particular, Curry states that in 1989, Rhodenizer ordered a sergeant to lower Curry's evaluation. Curry alleges that he rarely received timely backup, and that where backup

did arrive, Caucasian officers took credit for arrests. Curry has repeatedly been denied permission to attend motorcycle training or the driver trainer certification course. Both of these courses would have put Curry in a better position for advancement within the CPD.

On March 28, 2000, plaintiff Morris filed a complaint in which he challenged certain job related conduct by the City of Charlottesville, the Charlottesville Police Department and Chief Julian W. Rittenhouse and Lieutenant Robert O. Jones. This action was referred to the presiding United States Magistrate Judge for proposed findings of fact, conclusions of law, and a recommended disposition. *See* 28 U.S.C. § 636(b)(1)(B). In an amended complaint filed on December 11, 2000, Morris, joined by Townsend and Curry, brought this suit individually and as class representatives. Plaintiffs also added Captain Albert E. Rhodenizer, Jr., Sergeant James Allan Kirby, and Gary O'Connell as defendants.

The complaint, in addition to the individual claims outlined above, also contains class claims of discriminatory practices by the CPD against African-Americans. These include allegations of disparities in how salaries, evaluations, promotions and assignments are determined for African-American and Caucasian officers.

The amended complaint sets forth eight causes of action. Plaintiffs allege discrimination against the named plaintiffs and the class in violation of 42 U.S.C. § 1981 (Count One); discrimination against the named plaintiffs and the class in violation of 42 U.S.C. § 1983 (Count Two); intentional discrimination against the named plaintiffs in violation of Title VII (Count Three); racially disparate impact in violation of Title VII (Count Four); intentional discrimination against the named plaintiffs in violation of 42 U.S.C. §§ 1981 and 1983 (Count Five); racially disparate treatment in violation of Title

VII (Count Six); unlawful discrimination under the ADA (Count Seven); and intentional infliction of emotional distress (Count Eight).¹

Plaintiffs request that the court certify the class as defined in the amended complaint. They further seek declaratory and injunctive relief, lost wages and benefits, compensatory and punitive damages, and attorneys' fees and costs. In response, the defendants filed a motion opposing class certification. The defendants also filed a motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b), and motions pursuant to rules 12(e) and 12 (f).

Following the referral of this action to the presiding Magistrate Judge, a hearing on those motions was held on February 15, 2001. The Magistrate Judge issued his Report and Recommendation on April 9, 2001. On April 19, 2001, Plaintiffs filed a "Response to the Magistrate's Report and Recommendations," which this court receives as objections filed pursuant to Fed. R. Civ. P. 76(b). Defendants filed no objections to the Magistrate Judges' Report and Recommendation; rather, in "Defendants' Reply to Plaintiffs' Response to the Magistrate's Report and Recommendation," filed May 3, 2001, they moved this court to adopt the report in its entirety.

II.

Plaintiffs object to the Magistrate Judge's recommendation that class allegations related to employees of the City of Charlottesville be struck from the complaint and that discovery be limited to determining whether a class may exist within the CPD. Specifically, the Magistrate Judge recommended that defendants' motion to dismiss class

¹ Counts Seven and Eight of the Amended Complaint are brought solely on behalf of Plaintiff Morris.

allegations related to all past, present and future African-American City employees be granted, but that the defendants' motion to dismiss all class claims relating to any employee except police officers be denied without prejudice.²

A.

For a suit to proceed as a class action, the court must determine if a class exists and if so what it includes. *See Roman et al. v. ESB, Inc.*, 550 F.2d 1343, 1348 (4th Cir. 1976). A party seeking certification of a class action must first meet the requirements set forth in Fed. R. Civ. P. 23(a):

Prerequisites to a class action. One or more members of a class may sue or be sued as representative parties on behalf of all only if

- (1) the class is so numerous that joinder of all members is impracticable,
- (2) there are questions of law or fact common to the class,
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and
- (4) the representative parties will fairly and adequately protect the interests of the class.

Second, the court must find that the party seeking certification fits one of the three categories described in Rule 23(b). Because the court finds that the plaintiffs' proposed class does not satisfy Rule 23(a), it is unnecessary to elaborate further on the requirements of 23(b). *See Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 337 n.3

² While the court accepts the Magistrate Judge's findings on this issue, it wants to allay confusion as to how they are presented in the Report and Recommendation. The Magistrate Judge not only presents this as a recommendation to grant in part and deny in part the defendants' Rule 12(b)(6) and Rule 12(f) motions but also as a recommendation to grant in part and deny in part their motion opposing class certification. In that motion, defendants requested only that the court stay any decision on class certification pending completion of discovery. Therefore, the court reads the Report and Recommendation to contain a recommendation that this motion be granted, rather than granted in part and denied in part.

(citing *Lukenas v. Bryce's Mountain Resort, Inc.*, 538 F.2d 594, 596 (4th Cir. 1976)).

A court may decide whether to certify a class action only “after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.” See *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 161 (1982). While a major purpose of the class action is to advance “the efficiency and economy of litigation,” see *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 553 (1974), a court must be aware that an overbroad class may unfairly bind class members to a subsequent judgment. See *Falcon*, 457 U.S. at 161.

B.

Plaintiffs seek for the following class to be certified by the court:

All African-American persons (including those of Hispanic heritage) who are employed, have been employed, or might be employed, by the Defendants, who have been and continue to be or might be adversely affected by or are subject to Charlottesville's employment and human resources policies and practices, including, but not limited to, current or former employees of the CPD and who have been, continue to be, or may in the future be, adversely affected by Charlottesville's racially discriminatory employment policies and practices. (Amended Compl. at ¶ 26)

Defendants assert that plaintiffs failed to satisfy any of the Rule 23(a) requirements and ask the court to stay a decision on class certification pending discovery. (Motion Opposing Class Certification at ¶¶ 1-4). They request that the court dismiss, pursuant to Fed. R. Civ. P. 12(b)(6) and 12(f), plaintiffs' class allegations related to gender discrimination and those asserted on behalf of city employees besides police officers in the CPD. Alternatively, they ask pursuant to Fed. R. Civ. P. 12(e), that the court order

plaintiffs to provide a more definite statement regarding the composition of the proposed class.

The court finds that a class which would include all past, present and future African-American employees of the City of Charlottesville would not satisfy the threshold established by Fed. R. Civ. P. 23(a). Specifically, a class as broad as that defined by plaintiffs fails to meet the commonality and typicality requirements.

The concepts of commonality and typicality in class actions “tend to merge” and “serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff’s claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.” *Falcon*, 457 U.S. at 158 n.13.

The typicality and commonality requirements “ensure that only those plaintiffs who can advance the same factual and legal arguments may be grouped together as a class.” *Broussard*, 155 F.3d at 337 (internal citations omitted). This does not mean that all members of a class must “have identical factual and legal claims in all respects.” *Id.* at 344. However, the existence of unique factual circumstances in the claims of certain members can defeat these class action prerequisites. *See id.* at 340.

In this instance, plaintiffs’ claims of discriminatory treatment deal primarily with the system of evaluations, promotions and compensation within the police department. Plaintiffs’ allegations of discrimination include complaints about the lack of available police backup in dangerous situations, about failure to get credit for arrests, and about unfair reassignments to or from high crime areas, or to low volume areas where few traffic tickets could be written. Moreover, traffic tickets figure prominently in the

evaluation system where “[m]any supervisors rely heavily on the number of tickets written as a demonstration of productivity.” (Amended Compl. at ¶ 48). For example, Morris claimed that he was deliberately given “a very high quota for writing traffic tickets” but assigned to an area where this proved impossible to meet. (Amended Compl. at ¶ 105). According to plaintiffs, a low number of tickets triggers lower evaluations which in turn result in lower salaries and fewer promotions.

These allegations describe circumstances unique to police work. The court rejects plaintiffs’ arguments to the contrary. While the court concurs with plaintiffs that a police officer who does not receive backup and a bus driver who does not receive relief might both conceivably be able to put forth claims of discrimination, this does not mean that those claims should be grouped together for purposes of a class action. Again the court notes that one of the main purposes of maintaining class actions is to achieve “efficiency in the adjudication of duplicative claims.” *See Lilly v. Harris-Teeter Supermarket*, 720 F.2d 326, 333 (4th Cir. 1983), cert. denied, 466 U.S. 951 (1984). A court’s effort to achieve efficiency is defeated where significant separate issues of proof exist. *See id.* at 334. Moreover, such issues destroy claims of commonality and typicality.

The factors involved in deciding how to assign police officers surely differ somewhat if not significantly from those involved in staffing an office or a bus route. For example, an employee’s health, age or agility would likely be factored differently in decisions on what post to give a police officer as opposed to a secretary or bus driver. Thus, the evidentiary issues implicated by plaintiffs’ claims could not be described as typical or common to those which might be raised by non-CPD employees.

Plaintiffs argue that the effect on all city minority employees is the same, that is,

they all suffer impermissible discrimination. (Response to Magistrate’s Report and Recommendation at 8). However, the overall effect of the allegedly discriminatory conduct is not the proper focus for a court when deciding whether to certify a class action. As the Fourth Circuit explained, “any member of any such class who suffers discrimination has the same interest as other members of the class who suffered discrimination in very different circumstances and by very different means, but clearly that is not [a ground for class certification].” *Adams v. Bethlehem Steel Corporation*, 736 F.2d 992, 995 (4th Cir. 1984) (quoting *Hill v. Western Electric, Co.*, 596 F. 2d 99, 101-02 (4th Cir.), cert. denied, 444 U.S. 929 (1979)).

The court in this case finds that the nature of police work involves circumstances sufficiently different from those of other city departments to rule out the possibility that these plaintiffs can bring a class action encompassing all city employees. The court shall not at this time determine whether any class action may be maintained; rather, it accepts the Magistrate Judge’s recommendation to stay certification of a class pending class-related discovery. Such discovery shall be limited to determining whether a class within the CPD may be maintained.

The court therefore grants defendants’ motion to dismiss class allegations relating to all past, present and future African-American city employees. Defendants’ motion to strike all claims unrelated to police officers is denied without prejudice to renew at the conclusion of class-related discovery.

C.

The Magistrate Judge recommended that the court deny as moot the defendants’ motion to dismiss gender-based claims after plaintiffs indicated they had not intended to

raise such claims. As no party objected to this recommendation, see Fed. R. Civ. P. 72(b), the court adopts it and shall order that the defendants' motion to dismiss gender claims be dismissed as moot.

III.

The court at this time addresses plaintiffs' objection to the recommendation of the Magistrate Judge that the court deny as moot the defendants' motion to dismiss termination claims. The defendants moved for the dismissal pursuant to Rule 12(b)(6) of Counts Three, Four and Six for failure to state a claim for relief based on allegations of discrimination in promotions and terminations. The Magistrate Judge's recommendation concerning promotion claims is addressed later in this opinion. On termination claims, the Magistrate Judge reasoned that the complaint could not be construed to allege such claims.

A.

In deciding a motion to dismiss under Rule 12(b)(6), the court must determine "whether the complaint, under the facts alleged and under any facts that could be proved in support of the complaint, is legally sufficient." *Eastern Shore Markets, Inc. v. J.D. Assocs.*, 213 F.3d 175, 180 (4th Cir. 2000). The court must "assume the truth of all facts alleged in the complaint and the existence of any fact that can be proved, consistent with the complaint's allegations . . . [but] need not accept the legal conclusions drawn from the facts. . . . [or] accept as true unwarranted inferences, unreasonable conclusions, or arguments." *Id.* (citations omitted). When a Rule 12(b)(6) motion tests the sufficiency of a civil rights complaint, the court "'must be especially solicitous of the wrongs alleged' and 'must not dismiss the complaint unless it appears to a certainty that the plaintiff would not be entitled to relief *under any legal theory which might plausibly be suggested by the*

facts alleged.’” Edwards v. City of Goldsboro, 178 F.3d 231, 244 (4th Cir. 1999) (emphasis added in *Edwards*) (quoting *Harrison v. United States Postal Serv.*, 840 F.2d 1149, 1152 (4th Cir. 1988)).

B.

The complaint contains several references to terminations. Specifically, in their allegations of the pattern and practice of race discrimination, plaintiffs state:

Terminations. African-American employees at the CPD are involuntarily terminated at a much higher rate than Caucasian employees and African-Americans are often terminated, suspended, or otherwise disciplined for the same or lesser acts as those committed by Caucasian employees who are not even reprimanded. (Amended Compl. at ¶ 5(f)).

Further on in the complaint, under a subsection entitled, “Discrimination in termination, suspensions, and disciplinary actions,” the plaintiffs relate incidents involving terminations:

[A]n African-American officer was fired for dating a Caucasian woman. And, an African-American officer was fired for drawing his weapon against his supervisor, in spite of the fact that the supervisor denied that the incident ever happened; an African American officer trainee was fired from the police academy for throwing a piece of paper from a police car window, in spite of the fact that a Caucasian trainee, riding in that same patrol car, confessed to having thrown the paper [...]. (Amended Compl. at ¶ 43).

Finally, in the section entitled, “Summary of Class Claims,” among the claims the plaintiffs list is “laying off, demoting and discharging African-Americans on a discriminatory basis.” (Amended Compl. at ¶ 96(K)).

Plaintiffs' objection to the Magistrate Judge's recommendation takes the form of a question: "Is the Magistrate Judge saying that unless one of the named Plaintiffs' was unfairly terminated, the class cannot raise unfair and discriminatory terminations as a claim?" (Response to the Magistrate's Report and Recommendation at 13).

The court understands this objection to mean plaintiffs seek to represent a class which includes members who allege unlawful termination. The court recognizes that a class action complaint requires no greater specificity than a complaint filed on behalf of an individual. See 5 Wright & Miller, Federal Practice and Procedure, Civil, § 1231, at 248. Fed. R. Civ. P. 8(a)(2) requires only "a short and plain statement of the claim" intended to provide the defendant with "fair notice of what the plaintiff's claim is and the grounds upon which it rests." See *Conley v. Gibson*, 355 U.S. 41, 47 (1957). The issue here is whether the plaintiffs satisfied this standard, and if so, whether the pleadings are sufficient to survive a 12(b)(6) motion to dismiss Counts Three, Four and Six.

Counts Four and Six are brought on behalf of both the named plaintiffs and the class. Count Four alleges racially disparate impact in violation of Title VII. Count Six alleges racially disparate treatment in violation of Title VII. The court finds that based on the Amended Complaint and the liberal pleadings standard which applies, Counts Four and Six could be read to contain termination claims. The court finds, however, that a decision on the defendants' 12(b)(6) motion with respect to these claims is premature, because they are related to the issue of class certification. As discussed earlier in this opinion, the court shall not decide the certification issue until relevant discovery is complete. The court emphasizes that the plaintiffs will have to demonstrate, *inter alia*, that the class contains members who are alleging discriminatory terminations and that the plaintiffs are adequate

representatives for those class members. Therefore, defendants' motion to dismiss termination claims from Counts Four and Six is denied without prejudice to renew as a motion for summary judgment at the conclusion of class-related discovery.

Count Three, however, relates solely to the named plaintiffs: "Intentional Discrimination against the Named Plaintiffs in Violation of Title VII." Here plaintiffs claim discrimination on the basis of promotions, compensation and a denial of "equal terms and conditions of employment." (Amended Compl. at ¶ 145). As this is not a claim relating to the class, and none of the named plaintiffs is alleging wrongful terminations, the defendants' motion to dismiss termination claims from Count Three is granted.

IV.

The Magistrate Judge recommended the denial of defendants' motions to dismiss Counts Three, Four and Six for failure to state a claim for relief based on allegations of discrimination in promotions. No objections having been filed, and having thoroughly considered the entire case and all relevant law, the court adopts the Magistrate Judge's recommendation. The defendants' motion to dismiss Counts Three, Four and Six is denied without prejudice to renew as a motion for summary judgment once threshold discovery is complete.

V.

No objections were filed to the Magistrate Judge's recommendation that the court deny the defendants' motion to dismiss Count One for failure to state a claim for "pattern-or-practice" discrimination against the individual defendants under 42 U.S.C. § 1981. The court adopts the recommendation to deny the defendants' motion without prejudice to renew as a motion for summary judgment at the conclusion of class-related discovery.

VI.

Concerning the defendants' motion to dismiss for lack of jurisdiction over certain individual defendants because of improper service of process, the Magistrate Judge states that the defendants withdrew any objection to the manner of service during an oral hearing on the motion. The Magistrate Judge subsequently recommended dismissal of this motion as moot. No objections having been filed, the court adopts the Magistrate Judge's recommendation that defendants' motion to dismiss Rhodenizer, Kirby and O'Connell as defendants for improper service of process be denied as moot.

VII.

The Magistrate Judge recommended granting defendants' motion to dismiss individual defendants from Title VII and ADA claims (Counts Three, Four, Six and Seven). No objections have been filed to this recommendation. The Fourth Circuit has expressly held that "supervisors are not liable in their individual capacities for Title VII violations." See *Lissau v. Southern Food Service, Inc.*, 159 F.3d 177, 180 (1998). In 1999, the Fourth Circuit extended this principle to suits brought under the ADA. See *Baird ex rel. Baird v. Rose*, 192 F.3d 462 (4th Cir. 1999). (holding that an ADA retaliation claim could not go forward against individual defendants "[b]ecause Title VII does not authorize a remedy against individuals for violation of its provisions, and because Congress has made the remedies available in Title VII applicable to ADA actions"). It is not disputed that the individual defendants in this case are supervisory employees. Therefore, the court adopts the Magistrate Judge's recommendation to grant defendants' motion to dismiss individuals from the Title VII and the ADA claims.

VIII.

Finally, the plaintiffs object to the Magistrate Judge's conclusions regarding the claim in Count Eight of the intentional infliction of emotional distress. The court notes that the plaintiffs' erroneously write in their response that the "Magistrate concludes that Count Eight should be dismissed on the basis of immunity and not for failure to state a claim." (Response to the Magistrate's Report and Recommendation at 13-14). The court points out that the Magistrate Judge did indeed recommend the granting of defendants' motion to dismiss Count Eight on the merits *or, alternatively*, on sovereign immunity grounds. (See Report & Recommendation at 12-14). The court believes that plaintiffs' would likely have objected to this recommendation had they not erred in their reading of the report. Thus, the court shall review *de novo* the defendants' motion to dismiss Count Eight.

A.

To make out a case for the intentional infliction of emotional distress under Virginia law, the plaintiff must show (1) reckless or intentional conduct with the purpose of inflicting emotional distress or where the actor knew or should have known that emotional distress would result; (2) conduct that was outrageous to the extent it offends generally accepted standards of decency and morality; (3) a causal connection between conduct and distress; and (4) emotional distress which was severe. *See Womack v. Eldridge*, 210 S.E. 2d 145, 148 (Va. 1974).

Plaintiffs must demonstrate that the challenged conduct "has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Russo v. White*, 400 S.E.2d 160, 162 (Va. 1991) (quoting the Restatement (Second) of Torts § 46d (1965)). It is the court which must determine in the first instance "whether the facts

alleged will support a finding of both outrageousness and severe emotional distress.” *Id.* (internal citations omitted).

Virginia courts have declared this tort disfavored in law and have established a very high threshold for plaintiffs to meet. *See Ruth v. Fletcher*, 377 S.E.2d 412, 416 (Va. 1989). Courts regularly find that plaintiffs, who allege employment discrimination, have fallen short of this threshold. *See, e.g., Burke v. AT&T Technical Services Co., Inc.*, 55 F.Supp.2d 432, 441 (E.D.Va. 1999) (holding that racial discrimination alleged to have resulted in demotion and termination does not meet the demanding standard of this tort); *Beardsley v. Isom*, 828 F.Supp. 397, 401 (E.D.Va. 1993), *aff’d*, *Beardsley v. Webb*, 30 F.3d 524 (4th Cir. 1994) (finding that a gender based retaliation claim does not rise to the requisite level of severity); *Harris v. Norfolk and Western Ry. Co.*, 720 F.Supp. 567, 568 (W.D.Va. 1989) (demotion allegedly because of gender discrimination does not satisfy Virginia law standard for severe emotional distress). With this in mind, the court turns to the specific allegations made by plaintiff Morris.

Plaintiff asserts that the defendants caused him severe emotional distress when they lowered his evaluations, denied him equal compensation, prevented him from returning to work, and denied him disability benefits. The court cannot find that such employment practices could be categorized as “atrocious.” The plaintiff also contends that defendants humiliated and degraded him to his co-workers and made comments such as “that they did not want ‘Blacks’ running things.” (Amended Compl. at ¶ 165). Again, the court finds such conduct to be inappropriate but not actionable for the intentional infliction of severe emotional distress under Virginia law. Plaintiff then states he suffered when defendants terminated and disciplined African-American officers “based on false allegations of sexual

misconduct, or for engaging in legally protecting [sic] relationships with Caucasian women.” (Amended Compl. at ¶ 165). On those occasions when courts have found the plaintiff’s pleadings of this tort sufficient to reach a jury, the plaintiff is inevitably the direct target of the challenged conduct. *See Delk v. Columbia/HCA Health Care Corp.*, 523 S.E.2d 826 (Va. 2000) (where defendants failed to inform plaintiff of possible exposure to HIV); *see also Womack*, 210 S.E.2d at 145 (where defendant tricked plaintiff into being photographed and resultant photo was used in child molestation case). In this case, plaintiff is not claiming he was terminated or disciplined; rather, he says he suffered because of the treatment his colleagues received. Therefore, even if the court views all the allegations in a light most favorable to the plaintiff, the conduct, while it rises to the level of inappropriate behavior, does not rise to the extreme level necessary for this tort.

The court therefore grants the defendants’ motion to dismiss Count Eight on the merits.

B.

As the court has granted defendants’ motion to dismiss Count Eight on the merits, it finds it unnecessary to reach the sovereign immunity issue addressed by the Magistrate Judge as an alternative grounds for dismissal. Therefore, plaintiffs’ objections to that portion of the Magistrate Judge’s Report and Recommendation are dismissed as moot.

IX.

In conclusion, the court finds as follows. The defendants’ motion opposing class certification shall be granted in that the court shall stay a decision on class certification pending class-related discovery issues. The defendants’ motion, pursuant to Fed. R. Civ. P. 12(b)(6) and 12(f), to dismiss or strike class claims asserted on behalf of other city

employees besides police officers in the CPD is granted in part and denied in part as follows: (1) The defendants' request to strike class claims on behalf of all African-American city employees is granted; (2) The defendants' request to strike class claims on behalf of any employee besides police officers is denied without prejudice to renew as a summary judgment motion at the conclusion of class-related discovery. The defendants' motion, pursuant to Fed. R. Civ. P. 12(b)(6) and 12(f), to dismiss or strike class claims relating to gender discrimination is denied as moot. As the court has ruled on defendants' 12(b)(6) and 12(f) motions at this time, the defendants' motion pursuant to Rule 12(e), filed as an alternative to the above-mentioned motions, is denied as moot.

The defendants' motion to dismiss Count One is denied without prejudice to renew as a summary judgment motion at the conclusion of class-related discovery. The defendants' motion to dismiss individual defendants from Counts Three, Four, Six and Seven is granted. The defendants' 12(b)(6) motion to dismiss Counts Three, Four and Six for failure to state a claim for relief based on allegations of discrimination in promotions and terminations is granted in part and denied in part as follows: (1) The defendants' motion to dismiss termination claims from Count Three is granted; and (2) The defendants' motion to dismiss promotion claims from Counts Three, Four and Six and to dismiss termination claims from Counts Four and Six is denied without prejudice to renew as a motion for summary judgment at the conclusion of relevant discovery. The defendants' motion to dismiss Count Eight pursuant to Rule 12(b)(6) is granted. Plaintiffs' objections to the findings in the Report and Recommendation concerning Count Eight and the issue of sovereign immunity are dismissed as moot. Also denied as moot is the defendants' motion, pursuant to Fed. R. Civ. P. 12(b)(2) and (5), claiming improper

service.

An appropriate Order this day shall issue.

Senior United States District Judge

Date

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

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those portions of the Report and Recommendation as to which objections were made. See 28 U.S.C. § 636(b)(1) (West 1993 & Supp. 2000); Fed. R. Civ. P. 72(b). For the reasons stated in the accompanying Memorandum Opinion, it is accordingly this day

ADJUDGED, ORDERED, AND DECREED

as follows:

1. The proposed findings and recommendations of the April 9, 2001 Report and Recommendation shall be, and they hereby are, ACCEPTED IN PART, ADOPTED IN PART, AND REJECTED IN PART.

2. Except for the plaintiffs' objections to the Magistrate Judge's findings on sovereign immunity which are DISMISSED AS MOOT, the plaintiffs' objections to the Report and Recommendation shall be, and they hereby are, OVERRULED IN PART and SUSTAINED IN PART.

3. The defendants' "Motion Opposing Class Certification," filed on January 19, 2001, shall be, and it hereby is, GRANTED.

4. The defendants' "Motion to Dismiss Pursuant to Rule 12(b) and Motions Pursuant to Rule 12(e) and 12(f)," filed on January 19, 2001, shall be, and hereby are, GRANTED IN PART and DENIED IN PART, as follows:

5. The defendants' motion to dismiss or strike class allegations of gender discrimination shall be, and it hereby is, DENIED AS MOOT.

6. The defendants' motion to dismiss or strike class claims on behalf of all employees except police officers shall be, and it hereby is, GRANTED IN PART and DENIED IN PART, the latter WITHOUT PREJUDICE to renew as a motion for

summary judgment at the completion of relevant discovery.

7. The defendants' 12(e) motion for a more definite statement shall be, and it hereby is, DENIED AS MOOT.

8. The defendants' motion to dismiss Count One shall be, and it hereby is, DENIED WITHOUT PREJUDICE to renew as a motion for summary judgment at the completion of relevant discovery.

9. The defendants' motion to dismiss the defendants Rittenhouse, Jones, Rhodenizer, Kirby and O'Connell from Counts Three, Four, Six and Seven shall be, and it hereby is, GRANTED.

10. The defendants' motion to dismiss Counts Three, Four and Six for failure to state a claim for relief based on allegations of discrimination in promotions and terminations shall be, and it hereby is, GRANTED IN PART AND DENIED IN PART as follows:

a. The defendants' motion to dismiss termination claims from Count Three shall be, and it hereby is, GRANTED.

b. The defendants' motion to dismiss promotion claims from Counts Three, Four and Six and to dismiss termination claims from Counts Four and Six shall be, and it hereby is, DENIED WITHOUT PREJUDICE to renew as a motion for summary judgment at the conclusion of relevant discovery.

11. The defendants' motion to dismiss Count Eight of the plaintiffs' Amended Complaint, shall be, and it hereby is, GRANTED.

12. The defendants' motion, pursuant to Fed. R. Civ. P. 12(b)(2) and (5),

claiming improper service shall be, and it hereby is, DENIED AS MOOT.

The Clerk of the Court hereby is directed to send a certified copy of this order to all counsel of record and to Magistrate Judge Crigler.

ENTERED: _____
Senior United States District Judge

Date