

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION**

SCOTT A. STICKLEY,)	Civil Action No. 5:09cv00004
Plaintiff,)	
)	<u>MEMORANDUM OPINION</u>
v.)	<u>& ORDER</u>
)	
TIM SUTHERLY, et al.,)	By: Samuel G. Wilson
Defendants.)	United States District Judge

In this 42 U.S.C. § 1983 action, Plaintiff Scott A. Stickley claims that his demotion and termination from the Strasburg Police Department violated his rights under the First Amendment and the Due Process and Equal Protection clauses of the Fourteenth Amendment. Stickley sues Strasburg’s Chief of Police, Tim Sutherly, and Strasburg’s Town Manager, Kevin Fauber, both in their individual and official capacities, and the Town of Strasburg (collectively “Defendants”). Defendants have moved to dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). The court denies the motion with respect to Stickley’s claim of First Amendment retaliation, but grants the motion as to all other claims.

I.

The allegations contained in Stickley’s Complaint are as follows:

Stickley was a non-probationary officer in the Strasburg Police Department. In late 2006, Stickley and another Strasburg officer, Christopher Bodkin, interviewed for the office of Chief of Police, but the Town ultimately selected Tim Sutherly. Shortly after Sutherly began as Chief in early 2007, rumors began spreading that Sutherly wanted to terminate Stickley.

In July 2007, Sutherly placed Stickley on administrative leave, charged him in writing

with various infractions, and requested a written response.¹ When Stickley responded, Sutherly met with Stickley and told him he could either resign or accept a demotion to School Resources Officer, “a position equivalent to a patrol officer on the Department’s organizational chart,” and waive his right to grieve that demotion. (Compl. ¶ 24.) Stickley refused to resign, and Sutherly informally demoted him. Sutherly then issued a written reprimand setting forth Stickley’s violations, and informing Stickley of his right to appeal to the Town Manager. No “punitive penalty” accompanied these violations, but Stickley lost his ability to schedule officers for patrol and his “take home” vehicle privileges.² (Compl. ¶ 27.) Stickley appealed to the Town Manager, Kevin Fauber, and Sutherly held a meeting with Fauber and Stickley. Fauber affirmed the reprimand in writing.

When Sutherly had also “extract[ed] an involuntary resignation” from Bodkin around this same time (Compl. ¶ 36), the Northern Virginia Daily published an article reporting on Sutherly’s personnel practices which included a statement “made by the Chief regarding the matter in a public form.” (Compl. ¶ 37.) A follow-up letter to the editor addressed Stickley’s demotion and called for “full disclosure and an open dialogue.” (Compl. ¶ 38.) Stickley himself “began to hear talk among the citizens of the Town and rumors regarding his employment

¹Throughout his complaint, Stickley alleges that the procedures Defendants followed in demoting and ultimately terminating his employment violated Virginia’s Law-Enforcement Officers Procedural Guarantee Act, Va. Code Ann. §§ 9.1-500 to -507 (2006), which sets forth several procedural guarantees for non-probationary police officers. With respect to his demotion, Stickley alleges that the July 2007 memorandum did not inform him of his right to initiate a grievance in violation of Va. Code Ann. § 9.1-502(A)(4).

²Stickley also requested a hearing relating to his demotion and an investigation into Sutherly’s recent personnel practices. Although Virginia’s Law-Enforcement Officers Procedural Guarantee Act allows an officer to request a hearing after a demotion “for punitive reasons,” Defendants never granted these requests.

matter.” (Compl. ¶ 39.) In November 2007, that newspaper again reported on Sutherly’s personnel practices, including more of Sutherly’s public comments.

On May 29, 2008, with the school year ending, Sutherly formally demoted Stickley from Lieutenant to Patrol Officer and advised him that he could not file a grievance. On June 3, 2008, a concerned citizen complained to Sutherly about Stickley’s demotion. The next day, when a Town Council member also complained about Stickley’s demotion, Sutherly placed Stickley on administrative leave and charged him two infractions: taking an “action which [would] impair the efficiency or reputation of the department, its members, or employees” and committing “[i]nsubordination or serious breach of discipline.”³ (Compl. ¶ 47.) Sutherly’s memo alleged that Stickley “failed to follow the chain of command by speaking with a citizen of the community and a member of the Town Council about his employment concerns,” and Sutherly invited Stickley to respond by June 11, 2008. (Compl. ¶¶ 47-48.) Sutherly threatened to take legal action if Stickley discussed the matter “outside the ‘realm of [the] investigation.’” (Compl. ¶ 48.)

Stickley submitted a written response on June 11, 2008, and that day Sutherly tape recorded an interview with Stickley. During that interview Stickley admitted to talking to a Town Council member about his demotion, but Sutherly did not further inquire into any specific details. Sutherly demanded that Stickley either submit to a polygraph examination or execute a form refusing to sit for such an examination. When Stickley refused to do either without consulting his attorney, Sutherly informed him that he could consult with the Board of Inquiry.

³According to department rules and regulations, these infractions were serious enough to warrant immediate dismissal. (Compl. ¶¶ 20, 47.)

Later that afternoon, Sutherly informed Stickley that the Board of Inquiry would be meeting the following morning, and refused to reschedule so that Stickley's attorney could attend. The Board consisted of Sutherly, Fauber, and an officer from a neighboring jurisdiction. In a memo dated June 20, 2008, Sutherly informed Stickley that the Board unanimously agreed to terminate Stickley's employment due to the two infractions charged in the June 4, 2008 memorandum. Sutherly's memo "include[d] a notice regarding Stickley's procedural rights under the Virginia statute." (Compl. ¶ 56.)

II.

Under Federal Rule of Civil Procedure 12(b)(6), a court may dismiss a claim for relief if it fails to state a claim upon which relief can be granted. The Supreme Court recently clarified this standard in Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009):

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"

Id. at 1949 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556, 557, 570 (2007)). Although the court accepts all factual allegations as true when considering a Motion to Dismiss, Robinson v. Am. Honda Motor Co., Inc., 551 F.3d 218, 222 (4th Cir. 2009), this "tenet . . . is inapplicable to legal conclusions." Iqbal, 129 S. Ct. at 1949. With this plausibility standard in mind, the court now turns to the causes of action Stickley raises in his complaint.

III.

Stickley alleges a First Amendment retaliation claim, maintaining that he was terminated as a result of speaking with a Town Council member and a member of the community about a matter of public concern. Defendants argue that Stickley's conversation was simply "private and personal disgruntlement" and therefore cannot qualify as a matter of public concern. (Def.'s Mem. 10.) In the light most favorable to Stickley, the court finds that his speech potentially touched on a matter of public concern, and therefore denies Defendants' Motion to Dismiss this claim as to Sutherly and Fauber.

A claim of First Amendment retaliation has three elements: (1) "the public employee must have spoken as a citizen, not as an employee, on a matter of public concern;" (2) "the employee's interest in the expression at issue must have outweighed the employer's 'interest in providing effective and efficient services to the public;'" and (3) "there must have been a sufficient causal nexus between the protected speech and the retaliatory employment action." Ridpath v. Bd. of Governors Marshall Univ., 447 F.3d 292, 316 (4th Cir. 2006) (quoting McVey v. Stacy, 157 F.3d 271, 277 (4th Cir. 1998)). An employee's speech involves a matter of public concern "when it involves an issue of social, political, or other interest to a community." Urofsky v. Gilmore, 216 F.3d 401, 406 (4th Cir. 2000) (en banc). This is a question of law for the court, id. at 406, that requires an examination of "the content, form, and context of a given statement, *as revealed by the whole record.*" Connick v. Myers, 461 U.S. 138, 147-48 (1983) (emphasis added). "[C]ritical to a determination of whether employee speech is entitled to First Amendment protection is whether the speech is made primarily in the employee's role as citizen or primarily in his role as employee." Urofsky, 216 F.3d at 407 (citations and quotations omitted). In this regard, "[p]ersonal grievances, complaints about conditions of employment, or

expressions about other matters of personal interest do not constitute speech about matters of public concern that are protected by the First Amendment, but are matters more immediately concerned with the self-interest of the speaker as employee.” Stroman v. Colleton County Sch. Dist., 981 F.2d 152, 156 (4th Cir. 1992).

In essence, Stickley alleges that media coverage and subsequent citizen discussion transformed Sutherly’s personnel practices into a matter of public concern, and that Stickley’s conversations with another citizen and the Town Council member contributed to this pre-existing public debate. Whether this topic, and Stickley’s conversations—the substance of which remains unknown at this point—are sufficiently rooted in public concern is a fact-dependent inquiry that requires the court to consider the “content, tone, and context” of Stickley’s conversations “as revealed by the whole record.” Connick, 461 U.S. at 147-48. With only the pleadings before the court, the context of Stickley’s speech is unclear, but viewing the allegations in the light most favorable to Stickley, the court finds that his speech potentially touched on a matter of public concern. Stickley has sufficiently pled the remaining elements of a First Amendment claim of retaliation⁴ and the court accordingly denies Defendants’ Motion to Dismiss this claim.⁵

⁴Defendants do not challenge the remaining elements, but the court notes that based on the allegations Stickley’s interest in his speech *potentially* could have outweighed his employer’s interest in providing effective and efficient services to the public. See Ridpath 447 F.3d at 317-18 (setting forth the relevant factors and concluding on a motion to dismiss that inferences of workplace impairment are not “to be assessed under Rule 12(b)(6) but in Rule 56 summary judgment proceedings”); see also Andrew v. Clark, 561 F.3d 261, 268 (4th Cir. 2009) (balancing the employee’s and employer’s interests “will depend upon the results of discovery as tested by a motion for summary judgment”).

⁵Defendants have moved to dismiss this claim against the Town of Strasburg and against Sutherly and Fauber in their official capacities. Municipalities “cannot be held liable under § 1983 on a *respondeat superior* theory,” Monell v. Dep’t of Soc. Servs., 436 U.S. 658, 691 (1978), but “municipal officials who have ‘final policymaking authority’ may by their actions

IV.

Stickley also alleges procedural and substantive due process claims. Stickley claims that Defendants' conduct deprived him of his property interest in continued public employment and his liberty interest in his reputation and ability to seek future employment, and violated his substantive due process rights. Addressing each in turn, the court dismisses all of Stickley's due process claims.

A.

Stickley claims that he was deprived of his property interest in continued public employment because Defendants did not afford him procedural due process when they demoted and ultimately terminated him. Defendants dispute the existence of Stickley's property interest. Assuming such an interest, Defendants argue dismissal is still appropriate because Stickley's demotion did not deprive him of that interest and Defendants provided constitutionally sufficient process in terminating Stickley. The court assumes without deciding that Stickley possessed a

subject the government to § 1983 liability.” City of St. Louis v. Praprotnik, 485 U.S. 112, 123 (1988) (plurality). A municipal officer has “final policymaking authority” if he has “the responsibility and authority to implement *final* municipal policy with respect to a particular course of action.” Riddick v. Sch. Bd. of the City of Portsmouth, 238 F.3d 518, 523 (4th Cir. 2000). This is a question of state law requiring an examination into “relevant legal materials, including state and local positive law, as well as custom or usage having the force of law.” Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 737 (1989) (citations omitted).

In the light most favorable, Sutherly and Fauber, two municipal officers who potentially had “final policymaking authority,” ultimately terminated Stickley. Whether state and local law afforded them the “responsibility and authority to implement *final* municipal policy” regarding Strasburg Police Department personnel decisions is a question more appropriately reserved for summary judgment. Riddick, 238 F.3d at 523. Accordingly, the court denies Defendants' Motion to Dismiss this claim against the Town of Strasburg, and for the same reasons, denies Defendants' Motion to Dismiss this claim against Sutherly and Fauber in their official capacities. See Kentucky v. Graham, 473 U.S. 159, 165 (1985) (“As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity.”).

property interest in continued public employment, but finds that Stickley does not allege that Defendants deprived him of that interest when they demoted him. The court also finds that Defendants afforded Stickley constitutionally sufficient process before terminating his employment.

1.

Stickley has insufficiently alleged a procedural due process claim with respect to his demotion because he has alleged no corresponding loss of pay or benefits. A public employee's property interest in continued public employment is "generally in continued employment, and no deprivation exists so long as the employee receives 'payment of the full compensation due under the contract.'" Fields v. Durham, 909 F.2d 94, 98 (4th Cir. 1990) (quoting Royster v. Bd. of Trs., 774 F.2d 618, 621 (4th Cir. 1985)). This interest "does not extend to the right to possess and retain a particular job or to perform particular services." Id. Therefore, Stickley's allegations that he was informally demoted to School Resource Officer, formally demoted to Patrol Officer, and lost his "take home" vehicle privileges and his ability to schedule patrol officers do not state a procedural due process claim. See Mansoor v. County of Albemarle, 124 F. Supp. 2d 367, 380 (W.D. Va. 2000) (holding that a police officer's loss of "incidental benefits of the job, namely the off-duty use of a car, and the right to work overtime" did not deprive the officer of his property interest in continued public employment). Accordingly, the court dismisses Stickley's procedural due process claim with respect to his demotion.

2.

Stickley's procedural due process claim with respect to his termination is also subject to dismissal because Stickley's pretermination process, combined with his available post-

termination redress, was constitutionally sufficient.

Stickley argues that Defendants deprived him of procedural due process because their pretermination procedures did not comply with the Town of Strasburg's Personnel Manual and Virginia's Law-Enforcement Officers Procedural Guarantee Act, Va. Code Ann. §§ 9.1-500 to -507 (2006). However, the question here is not whether Defendants complied with state and local procedures but instead whether their process comported with the Due Process Clause of the Fourteenth Amendment. The Fourth Circuit has made this plain:

Alleged violations of due process in the deprivation of a protectable interest are to be measured against a federal standard of what process is due and that standard is not defined by state-created procedures, even when those state-created procedures exceed the amount of process otherwise guaranteed by the Constitution. If state law grants more procedural rights than the Constitution would otherwise require, a state's failure to abide by that law is not a federal due process issue.

Riccio v. County of Fairfax, 907 F.2d 1459, 1469 (4th Cir. 1990). To satisfy the constitutional standard, "all the process that is due is provided by a pretermination opportunity to respond, coupled with post-termination administrative procedures as provided by . . . statute." Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 547-48 (1985). The pretermination "hearing" is necessary, but "need not be elaborate" and need not "definitively resolve the propriety of the discharge." Id. at 545. Due process only requires "notice and an opportunity to respond," and in this pretermination context "[t]he tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." Id. at 546. "Due process does not mandate that all evidence on a charge or even the documentary evidence be provided, only that such descriptive explanation be afforded as to permit [the public employee] to identify the conduct giving rise to the dismissal and thereby to enable him to make a response." Linton v. Frederick County Bd. of County

Comm'rs, 964 F.2d 1436, 1440 (4th Cir. 1992).

Stripped to its essentials, and ignoring its repeated allegations that Defendants failed to comply with Virginia law, Stickley's Complaint does not state a plausible procedural due process claim with respect to his termination because it alleges constitutionally sufficient process. Before termination, Stickley received a written notice that charged him with two infractions and explained the basis for those allegations. He responded in writing seven days later, discussed his conduct during an interview with Sutherly, and appeared before the Town's Board of Inquiry. Stickley's termination memorandum informed him of his post-termination rights under Virginia law (Compl. ¶ 56),⁶ and he does not dispute the adequacy of these procedures. Under these circumstances, Stickley's claim does not have "facial plausibility" because it does not "allow[] the court to draw the reasonable inference" that Defendants denied him constitutionally sufficient process. Iqbal, 129 S. Ct. at 1949. Accordingly, the court dismisses Stickley's procedural due process claims with respect to his property interest in continued public employment.

B.

Stickley also claims that the Defendants deprived him of his liberty interest in his reputation and his ability to seek further employment because the charges ultimately resulting in his termination remain in his personnel file for prospective employers to view, and were disseminated to the Commonwealth's accrediting agency for police officers. Because the

⁶Within a reasonable time after a dismissal "for punitive reasons," Virginia's Law-Enforcement Officers Procedural Guarantee Act allows non-probationary officers to request a hearing and select one panel member, and during the hearing the officer may present evidence, examine and cross-examine witnesses, and have the assistance of counsel. Va. Code Ann. § 9.1-504(A)-(B).

reasons given for dismissal do not imply the existence of a serious character defect, Stickley has not properly alleged a deprivation of a liberty interest. Accordingly, the court dismisses this claim.

The Fourteenth Amendment protects the “right to procedural due process when governmental action threatens a person’s liberty interest in his reputation and choice of occupation.” Ridpath, 447 F.3d at 307. “To implicate a constitutionally protected liberty interest, defamatory statements must at least ‘imply the existence of serious character defects such as dishonesty or immorality,’ ‘that might seriously damage [the plaintiff’s] standing and associations in his community’ or ‘foreclose[] his freedom to take advantage of other employment opportunities.’” Zepp v. Rehrmann, 79 F.3d 381, 387 (4th Cir. 1996) (quoting Robertson v. Rogers, 679 F.2d 1090, 1092 (4th Cir. 1982) and Bd. of Regents v. Roth, 408 U.S. 564, 573 (1972)).

Here, Stickley was terminated for taking an “action which [would] impair the efficiency or reputation of the department, its members, or employees” and “[i]nsubordination or serious breach of discipline.” (Compl. ¶¶ 47, 56.) These charges relate to Stickley’s job performance; they do not implicate a liberty interest because on their own they do not imply that Stickley has a serious character defect like dishonesty or immorality, and Stickley has not otherwise alleged these charges carry such a connotation. See Ridpath, 447 F.3d at 309 (alleging that an athletic director’s “corrective action” called into question his professional competence, honesty, and integrity within the intercollegiate athletics community implied a serious character defect); see also Luy v. Balt. Police Dep’t, 326 F. Supp. 2d 682, 687, 690-91 (D. Md. 2004) (accusations of “cowardice in responding to a call . . . blatant disregard for police policy, and leadership

problems for [an officer's] questioning of police procedures" do not imply serious character defects). Accordingly, the court dismisses this claim.

C.

The court also finds that Stickley fails to allege a violation of substantive due process. The threshold test for determining if an executive act violates substantive due process is "whether the challenged conduct was 'so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.'" Hawkins v. Freeman, 195 F.3d 732, 738 (4th Cir. 1999) (en banc) (quoting County of Sacramento v. Lewis, 523 U.S. 833, 847 n.8 (1998)). Conscience-shocking conduct involves "abusing [executive] power, or employing it as an instrument of oppression," id. at 742 (quoting Collins v. City of Harker Heights, 503 U.S. 115, 126 (1992)); "the conduct must be 'intended to injure in some way *unjustifiable by any government interest*,'" id. (quoting Lewis, 523 U.S. at 849 (emphasis added)). Only when the executive conduct meets this threshold showing does the court then "inquire into the nature of the asserted liberty interest." Id. at 738.

Here, the Defendants' alleged conduct does not "shock the conscience" and therefore does not implicate substantive due process. Stickley's demotion and ultimate termination were not conduct "intended to injure in some way unjustifiable by any government interest." Lewis, 523 U.S. at 849. Stickley has failed to meet this threshold showing.⁷ Accordingly, the court

⁷The court notes that Stickley's right to continued public employment, if any, was a right created by state law. Substantive due process protects those fundamental rights "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty." Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (citations and quotations omitted). Stickley's asserted right to continued public employment does not, therefore, implicate substantive due process. See Huang v. Bd. of Governors of Univ. of N.C., 902 F.2d 1134, 1142 n.10 (4th Cir. 1990); Myers v. Town of Landis, 957 F. Supp. 762, 770 (M.D.N.C. 1996); see also

dismisses Stickley's substantive due process claim.

V.

Finally, Stickley claims that Defendants "arbitrarily and without any legitimate governmental interest created a class of persons consisting of those senior officers who had competed with Sutherly and who had been interviewed for the Chief of Police position," and that Defendants "engaged in disparate and discriminatory treatment" of this class in violation of Stickley's Equal Protection rights. (Compl. ¶¶ 70-71.) The Supreme Court recently held that the class-of-one theory of equal protection does not apply in the public employment context, stating that the Court had "never found the Equal Protection Clause implicated in the specific circumstance where, as here, government employees are alleged to have made an individualized, subjective personnel decision in a seemingly arbitrary or irrational manner." Engquist v. Or. Dep't of Agric., 128 S. Ct. 2146, 2155 (2008). Stickley's "class-of-two" theory of equal protection is equally without merit because it essentially complains that Defendants arbitrarily singled out Stickley and Bodkin. Accordingly, the court dismisses this claim.

VI.

For the reasons stated, it is **ORDERED** and **ADJUDGED** that Defendants' Motion to Dismiss is **DENIED** with respect to Stickley's claim of First Amendment retaliation, and **GRANTED** as to all other claims.

Enter: This ____ day of June 2009.

Hill v. Borough of Kutztown, 455 F.3d 225, 235 n.12 (3d Cir. 2006) ("This court has held explicitly that public employment is not a fundamental right entitled to substantive due process protection."); McKinney v. Pate, 20 F.3d 1550, 1556 (11th Cir. 1994) (en banc) ("[A]reas in which substantive rights are created only by state law (as is the case with tort law and employment law) are not subject to substantive due process protection.").

UNITED STATES DISTRICT JUDGE