For Opinion See 2007 WL 6847408 , 2007 WL 1438763 , 2007 WL 841019 , 2006 WL 891163 , 338 F.Supp.2d 97

United States District Court, District of Columbia.
Sharon BLACKMON-MALLOY, et al., Plaintiffs,
v.
UNITED STATES CAPITOL POLICE BOARD, Defendant.
No. 01-cv-02221 (EGS).
June 18, 2008.

Plaintiff Duvall Phelps' Opposition to Summary Judgment and Motion for Discovery Pursuant to Rule 56(f)

Respectfully submitted, Charles W. Day, Jr., (D.C. Bar No. 459820), Daniel K. Gebhardt, (D.C. Bar No. 975703), Gebhardt & Associates, LLP, 1101 17th Street, N.W., Suite 807, Washington, DC 20036-4716, (202) 496-0400, billday@covad.net, Attorneys for Plaintiff Duvall Phelps.Law Student Assistant: Sean Tran.
Plaintiff Duvall Phelps, by and through undersigned counsel, hereby opposes Defendant's Motion for Summary Judgment and moves this honorable Court to continue the briefing and decision on Defendant's Motion for Summary Judgment until Plaintiff Phelps has had a fair opportunity to take discovery in this case, as set forth below and in the attached Affidavit and discovery requests. In particular, Plaintiff needs further discovery to obtain evidence in the possession of the Defendant that Plaintiff believes will establish that 1) his agreement to resign from the Capitol Police was coerced and constitutes a constructive discharge, 2) his request for counseling based upon his termination was timely, 3) denial of his access to the Capitol buildings after his termination and during the *Blackmon-Malloy* case was discriminatory and retaliatory, and 4) whether the theft of his credentials, which also acted to deny him access to the Capitol buildings, was linked to the Capitol Police. As set forth below and in Plaintiffs' Joint Third Amended Complaint, Plaintiff Phelps has pleaded sufficient facts to set forth claims of discrimination and retaliation, and fairness and the interests of justice require that he be given a reasonable opportunity to obtain from the Defendant evidence of the facts necessary to prove his case and defeat Defendant's Motion for Summary Judgment.

Background

Officer Duvall Phelps' discriminatory termination was the retaliatory culmination of a racially hostile work environment lasting several years. Phelps Aff. at ¶ 5. In 1997, the hostility that Officer Phelps faced became so bad that he and Officer Herman Sabath filed complaints with the Internal Affairs Division (IAD), which Officer Phelps documented by submitting a copy of his journal to IAD. *Id.* In particular, Officer Phelps filed complaints naming the following white officers, copies of which should be on file with the Defendant and discoverable: Lieutenants Michael Komara and William Kaval; Sergeants David Miller, Dennis Kitchen, William Perkins, Harold Fitzgerald and Christopher Givens; and Officers Richard Brown and Susan Galifaro. *Id.* ¶ 6. Among the incidents of harassment were the following:
• On July 6, 1995, Officer Phelps found a newspaper article with a “racial slant” in his locker.
• On August 14, 1995, he noted in his journal that he had spoken to Sgt. Fitz about discriminatory acts toward Officer Sabath.
• By letter dated April 28, 1997, Officer Sabath complained on behalf of himself and Officer Phelps about har-

assment and discrimination against him and Officer Phelps.
• On August 28, 1997, Officer Phelps complained to Sgt. Verderosa that Sgt. Miller was questioning him about whether he was keeping documentation of harassment.
• On September 16, 1999, Officer Phelps returned to work from administrative pay status after Officer Phelps was acquitted of the criminal charge (second degree assault) filed against him and was assigned to work under Sgt. Verderosa, to whom he had previously made complaints of discrimination.
• On November 24, 1999, Officer Phelps made a complaint against Officer Jackson. Sergeant Miller, about whom he had also previously complained, taunted him because he made this complaint.
• On January 1, 2000, his locker was vandalized.
• On February 10, 2000, he was ordered to take a polygraph examination; his doctor objected on the grounds that his high stress level would throw off the results.
• On January 4, 2000, he was unfairly counseled for tardiness while he was on a restricted duty status after he arrived late because of back spasms occurring in the parking lot before resulting from an injury in the line of duty.
• On February 22, 2000, Officer Phelps noted in his journal a pattern of harassment and discrimination.
• On March 21, 2000, Officer Phelps noted the stress he had been under since he filed a complaint against Sgt. Miller.
• On March 27, 2000, IAD responded to Officer Phelps regarding his complaint against Sgt. Miller.
• By letter dated March 31, 2000, Officer Phelps wrote a complaint regarding Violation of General Order No. 2215, but the Division Commander did not forward his complaint to IAD.
• On July 5, 2000, Chief Varey declined to pursue Officer Phelps' complaint against Sgt. Miller, allegedly because Officer Phelps did not cooperate.
• On May 24, 2001, Officer Phelps provided a summary of the pattern of harassment against him to the Office of Compliance.

See Aff. Phelps at ¶ 6(a)-(o), and Ex. 1-15. When Officer Sabath was subsequently killed in an automobile accident, Officer Phelps had to intervene to prevent white Lt. Kaval and white Sgt. Miller from destroying Sabath's possessions, which included the evidence supporting their complaints. From that time, Officer Phelps bore the burden of carrying forward his IAD complaint of discrimination on his own, but his requests to white IAD Sgt. Verderosa went unheeded and the investigation was cut short when false charges were brought against Officer Fhelps. *Id.* ¶ 7.

Officer Phelps stuck by his longtime girlfriend and companion of 12 years, a security aide on the force, while she gradually descended into severe alcoholism. Finally, after his girlfriend erupted into a jealous, alcoholic rage on Friday, February 13, 1998, in the mistaken belief that Officer Phelps had been seen in the company of another woman, she falsely accused Officer Phelps thirty days later of misusing his firearm. However, Officer Phelps did not use or threaten to use the gun in his dispute with his girlfriend, and he was acquitted of any wrongdoing after a jury returned a verdict in the Prince George's Circuit Court on September 13, 1999. Despite being cleared by the jury, Officer Phelps was then subjected to the disciplinary process of the Capitol Police and obliged to resign on October 31, 2000. Phelps Aff. at ¶ 8.

From the outset of the Capitol Police disciplinary process, Officer Phelps had severe misgivings about whether he would be fairly treated in light of his past efforts to enforce civil rights at the Department. In a concerted effort to force out Officer Phelps, who had long been a thorn in the Department's side over its shoddy civil rights record, the Department brought to bear the full range of its resources from Chief on down through General Counsels Benjamin, Caulfield, and Emory, Lts. Kaval and Komara, and Sgts. Miller and Verderosa. Phelps Aff. ¶ 9. Moreover, the Capitol Police embarked on a systematic attempt to isolate and intimidate Officer Phelps that

included blatant violations of its own policies and procedures. To begin with, Officer Phelps was not charged within the 120-day period after his acquittal as mandated by the Department's regulations. *See* Phelps Aff. at ¶9. Once charged, he was sent home for a second time in a "no pay" status. Moreover, the Department only asked for a polygraph two years after the original incident had taken place, even though his doctor had counseled him and informed the department that the level of stress that he was under was likely to vitiate the results of the polygraph test the Department ordered him to take. *Id.* Officer Phelps appealed to members of Congress, Steny Hoyer and Wayne Gilchrest in particular, but to no avail. Inspector Larry Thompson would not even let Officer Phelps join his fellow officers for a funeral for two of his fellow officers killed in the line of duty. *Id.* Contrasting the harshness of the charges against him and his treatment by the Department with the comparative leniency shown to white officers, Officer Phelps became rapidly persuaded that the Department would not give him a fair hearing. In particular, on information and belief, the following officers in similar circumstances received significantly lesser punishments:

• Keith Pickett was accused of domestic violence, but he was suspended for only two weeks and allowed to remain on the job.

• John Kurtz was accused of stalking an ex-girlfriend, but he was suspended and docked only 64 hours of leave and remains on the job.

• Marshall Glenn Hoffman was alleged to have held his family hostage at gunpoint, but was only placed on light duty for two years and remained on the job until he voluntarily retired.

• Gerald Scott Pfister allegedly called in a bomb threat to the United States Capitol and was taken off duty, but was later returned to light duty and reinstated.

See Phelps Aff. at ¶ 9(a)-(d), *see also* Ex. 15. Even as he was being isolated from the Department and deserted by his friends and supporters, Officer Phelps' health began to decline, as he suffered severe headaches, dizziness, loss of balance, and blurry eyes brought on by incipient kidney disease and high blood pressure. Phelps Aff. at ¶ 9. Isolated, exhausted, convinced that he could not get a fair hearing before the Capitol Police, and terrified that his health would collapse while he had no job, no insurance, and no retirement, Officer Phelps broke down and was forced to sign the Department's Settlement Agreement. *Id.*

Nevertheless, Officer Phelps still had hope that he could be vindicated because he believed that one or two Congressmen might look into his situation and correct it, but Congress went into recess and his hopes were dashed. Phelps Aff. at ¶ 10.

Subsequent to his forced resignation/constructive discharge, Officer Phelps volunteered his time to serve as a liaison among the United States Capitol Black Police Association (BPA), retired officers, and eventually the law firm of GEBHARDT & ASSOCIATES, LLP. Phelps Aff. at ¶ 11. Retired police officers are routinely offered free access to the Capitol Buildings upon presentation of their credentials, regardless of their business. *Id.* In the case of Officer Phelps, he was assisting officers in vindicating their statutorily protected rights under the Congressional Accountability Act to challenge unlawful racial discrimination. Nevertheless, white officers repeatedly interfered with his attempts to enter Capitol buildings, either by preventing him outright or by harassing him when he tried to gain entry. *Id.*

The theft of Officer Phelps' credentials came at a time when he needed them to gain continued access to the Capitol buildings in the service of the Plaintiffs in this case. Phelps Aff. at ¶ 12. As such, Officer Phelps regarded the timing of the theft and the fact that only his credentials and his cell phone with all his class action contacts were stolen to be highly suspicious, and he anticipates uncovering more information about the Capitol Police's knowledge of and involvement in the theft, if any, through further discovery. In particular, although a

Congressional staffer informed Officer Phelps that his credentials had been recovered and returned to Sgt. Massie, he did not hear anything further from the Department and was forced to apply and pay for new credentials several weeks after they had been stolen. *Id.*

Response to Defendant's Statement of Undisputed Facts

36. Plaintiff disputes as oversimplified and mischaracterized Defendant's allegation that he was charged with a domestic dispute involving a firearm. Since Officer Phelps never had a hearing or investigation, he had no opportunity to explain the true facts behind what occurred, which were that he was the person assaulted and that he did not use his firearm. *See* Phelps Aff. at ¶ 8.

37. Plaintiff admits that he signed a Settlement Agreement (Def. Ex. 16) but denies that his signature was voluntary in light of his illness, his lack of health insurance, his inability to support himself, his increasing isolation, and the evidence that the Department would not give him a fair hearing.

38. Admit. Furthermore, Plaintiff states that the language quoted by the Defendant supports his contention that he was subjected to coercion, being threatened not only with loss of his job but also all of his accumulated benefits over his many years of service.

39. Admit.

40. Admit.

41. Admit in part. Plaintiff seeks further discovery in part so that he can determine the extent of USCP involvement in the theft of his credentials.

ARGUMENT

As stated in the accompanying Affidavit, Plaintiff Duvall Phelps is seeking discovery on the each of the following issues pursuant to Rule 56(f) of the Federal Rules of Civil Procedure on the grounds that discovery is necessary for him to be able to establish the material facts at issue in this case.

The Standard for Granting a Motion Under Rule 56(f) for Further Discovery

A motion for discovery pursuant to Rule 56(f) of the Federal Rules of Civil Procedure is committed to the sound discretion of the trial court. *See Midgley v. Xelan,* No. 03-7069; 2004 U.S. App. LEXIS 93, 100 (D.C. Cir. 2004); *White v. Fraternal Order of Police,* 909 F.2d 512, 516-17 (D.C. Cir. 1990). In this case, the Court should exercise its discretion to ensure fairness to all parties.

Issue 1: Whether Duvall Phelps' Termination Was A Constructive Discharge.

As this Court has recently stated, a constructive discharge requires a finding of discrimination plus certain "aggravating factors" sufficient to cause a reasonable person to resign. *See Hendricks v. Paulson,* 520 F. Supp. 2d 65, 100 (D.D.C. 2007) (citing *Chambers v. Am. Trans Air,* 17 F.3d 998, 1005-06 (7th Cir. 1994); *Pennsylvania State Police v. Suders,* 542 U.S. 129, 147 (2004); *Mungin v. Katten Muchin & Zavis,* 116 F.3d 1549, 1558 (D.C. Cir. 1997); *Katradis v. Day-El of Washington, D. C.,* 846 F.2d 1482, 1485 (D.C. Cir.1988), *Bishopp v. Dist. of Columbia,* 788 F.2d 781, 790 (D.C. Cir. 1986)). Officer Phelps has alleged sufficient facts to prevail on a claim of constructive discharge, and he should be allowed an opportunity to establish those facts

through discovery before summary judgment is decided.

As stated above, Officer Phelps was subjected to a hostile work environment, about which he made internal complaints of discrimination to the police department, for several years before his discriminatory and retaliatory termination. In order to establish unlawful retaliation, Officer Phelps should have an opportunity to flush out the names of all persons responsible for his termination and to depose such key actors as Chief Albrecht, General Counsels Benjamin, Caulfield, and Emory, Lts. Kaval and Komora, and Sgts. Miller and Vederosa as to their knowledge of his complaints and the actions they took based on those complaints. *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 70 (2006) (holding that an employer's action against an employee can constitute retaliation so long as it might dissuade a resaonable employee from making a claim of discrimination). In order to establish unlawful discrimination, Officer Phelps must first show that he is a member of a protected class (African American), that he was otherwise qualified for his position, and that the circumstances of his termination give rise to an inference of discrimination. *See, e.g.*, *George v. Leavitt*, 407 F.3d 405, 411 (D.C. Cir. 2005) Officer Phelps proposes to do this, through discovery, by showing that white officers and officers with no prior EEO activity were neither threatened and intimidated as Officer Phelps was nor charged with as harsh a penalty. *See* Phelps Aff. Although on information and belief, General Counsel Caulfield was notorious for incidents related to abuse of alcohol and at least two white lieutenants were involved in incidents of alleged domestic abuse without severe consequences, only further discovery and a searching investigation of the Capitol Police disciplinary records will allow Plaintiff an opportunity to prove these allegations conclusively. *See* Phelps Aff.

Once Officer Phelps has established his *prima facie* case, the Defendant must assert a legitimate nondiscriminatory reason for its apparently discriminatory actions. *Leavitt*, 407 F.3d at 411. In response, Defendant has asserted that Plaintiff's entry into the Settlement Agreement was “knowing and voluntary” and that therefore Officer Phelp's claim is barred pursuant to *Brees v. Hampton*, 877 F.2d 111, 117-118 (D.C. Cir. 1989). Defendant seeks to prevail by simply assuming the primary issue in dispute. Sitting alone at home and facing the onset of serious medical problems, with no health insurance and no chance to demonstrate his innocence, Officer Phelps had no choice but to sign the Settlement Agreement, in stark contrast to the kind of easy give and take that was present in the *Brees* case. *Id.* However, the only means by which Officer Phelps can have a fair opportunity to demonstrate the coercive nature of his Settlement Agreement and constructive discharge is by obtaining the Capitol Police's internal communications related to the imposition of the Settlement Agreement and deposing the various white officials who railroaded him out of the department. Moreover, only through discovery can Officer Phelps prove the pretextual and discriminatory nature of the treatment he received by uncovering and exposing the Capitol Police's inequitable leniency toward its white officers.

Once Officer Phelps has established the retaliatory and discriminatory nature of his termination and the invalidity of the Settlement Agreement, the demonstration of aggravating factors should be a relatively simple matter. As the Settlement Agreement quoted by Defendant clearly states, Officer Phelps was not only in danger of being fired, but also of being stripped of a lifetime of accumulated retirement and other benefits. *See* Def. Statement of Facts ¶ 7.

Issue II: Whether Officer Phelps Timely Complained of His Termination

Officer Phelps timely requested counseling from the Office of Compliance on April 28, 2001, well within the 180 days required by the Congressional Accountability Act. *See* 2 U.S.C. § 1402(a). As the Act clearly states:
(a) DISCRIMINATORY PRACTICES PROHIBITED.-All personnel actions affecting covered employees shall be made free from any discrimination based on-(1)

(1) race, color, religion, sex, or national origin, within the meaning of section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2);

2 U.S.C. § 1311(a)(1) (emphasis added). The plain language of the Congressional Accountability Act expressly differs from the language of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2[FN1] and is decidedly more specific than the more sweeping, general language of Title VII. As this Court has previously ruled, Congress's express language can create significant differences between the interpretation of Title VII and the CAA, so much so that time limits that are not jurisdictional in Title VII have been interpreted to be jurisdictional in the CAA. *See Blackmon-Mallov v. United States Capitol Police Board,* 338 F. Supp. 2d 97, 101-103 (D.D.C. 2004).

> FN1. The corresponding, more general language of Title VII, reads as follows:
> It shall be an unlawful employment practice for an employer - (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.
> 42 U.S.C. § 2000e-2(a)(1).

If Congress took the trouble to state explicitly that personnel actions are to be made free of discrimination, then it should be taken at its word. Personnel actions do not mean proposed personnel actions, or threatened personnel actions, or even agreements to take personnel actions, as the Defendant would have it. There can be no doubt that the personnel action in this case is the termination of Officer Phelps' employment on October 31, 2000, about which he filed a timely request for counseling on April 28, 2001. Not only is such an interpretation mandated by the plain language of the Congressional Accountability Act, but it is also consistent with jurisprudence of the executive branch of the federal government, in which adverse personnel actions are subject to review by the Merit Systems Protection Board. For example, the Merit Systems Protection Board ("MSPB"), whose decisions with regard to federal employment are entitled to great weight from this Court (*see Chevron Inc v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984)), has consistently held in the case of a Reduction in Force, that no adverse action occurs until the actual personnel action terminating or demoting the employee. *Cardin v. Department of the Navy,* 4 MSPB 97 (1980); *Korowin v. Department of Justice,* 4 MSPB 140 (1980); *Alford v. Department of Health, Education, and Welfare,* 1 MSPB 305 (1980). *Cf. National Treasury Employees Union v. Federal Labor Relations Authority,* 712 F.2d 669, 674-75 (D.C. Cir. 1983).

Defendant's reliance on *Delaware State College v. Ricks,* 449 U.S. 250 (1980) is in this instance wholly misplaced. *Ricks* involved a college professor who complained of discrimination not when he was denied tenure but when he was terminated, and the Court found his Complaint to be untimely. 449 U.S. 250, 257 (1980). However, not only is *Ricks* inapplicable in that it involves a private defendant subject to different procedures than a federal defendant, but also it involves a different statute from the one at issue here. As noted above, Congress was particular when it laid out the procedural rules to enforce the discrimination laws against itself, in contrast to the different provisions of Title VII as they apply to the executive branch of the federal government (*see* 42 U.S.C. § 2000e-16) and even more different provisions that apply to the private sector. Here, the government, which has previously argued for the uniqueness and particularity of the CAA, now perversely seeks to have its cake and eat it, too, by arguing that general provisions of a Title VII private-sector case should supersede the express will of the Congress in the CAA. Under the CAA, there can be no doubt that the cause of action accrues from the date of the personnel action - Officer Phelps' termination - and that therefore Officer Phelps' Complaint is timely.

Issue III: Whether the Capitol Police's Denial of Building Access to Officer Phelps Is Actionable Retaliation and Discrimination

The Supreme Court in *Burlington Northern* recently clarified the standard for retaliation for protected activity under Title VII of the Civil Rights Act of 1964, stating that a plaintiff must "show that a reasonable employee would have found the challenged action materially adverse, "which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.' " " 548 U.S. at 69-70 (2006). Likewise, the Congressional Accountability Act has an even stronger prohibition against retaliation that should be read in the same light as that for Title VII.[FN2] *See* 2 U.S.C. § 1317. In light of both the expansive definition of "adverse action" for purposes of retaliation enunciated in *Burlington Northern* and the expansive definition of retaliation in the Congressional Accountability Act, Officer Phelps clearly has a cause of action against the Capitol Police's deliberate denial of his access to the Capitol buildings for the clear purpose of obstructing Officer Phelps' right to challenge unlawful racial discrimination against him and his fellow *Blackmon-Malloy* Plaintiffs. After delaying this case for six years with one procedural challenge after another, Defendant now seeks to dismiss Plaintiff Phelps' case on the merits without vouchsafing him *any* discovery necessary to show that his claims are indeed true. Because Plaintiff Phelps has stated viable legal claims, it would be the height of injustice to deny him *any* opportunity to obtain the evidence necessary to prove his claims.

FN2. The anti-retaliation provision of the CAA provides that an employing office shall not "intimidate, take reprisal against, or otherwise discriminate against" an employee who has engaged in protected activity. 2 U.S.C. § 1317.

Issue IV: Whether Officer Phelps' Should Be Allowed to Conduct Discovery Regarding the Theft of His Credentials.

Defendant does not appear to dispute that Officer Phelps' police credentials and cell phone were stolen while Officer Phelps was a key liaison between the *Blackmon-Malloy* plaintiffs and their lawyers. Officer Phelps believes that it is at least suspicious that the only two items taken from his automobile were the key items necessary to contacting the plaintiffs in this case at the time when he was most active in communicating with them. Furthermore, several people raised questions about whether the Capitol Police had recovered his credentials that were never resolved. Officer Phelps deserves at least the chance to inquire whether the Capitol Police took, investigated, recovered, or improperly retained his credentials after they were stolen, and he should be able to do it in a forum where the police are obliged to give truthful answers.

Request for Oral Argument.

Plaintiff Duvall Phelps respectfully requests oral argument on Defendant's Motion for Summary Judgment, Plaintiff's Opposition and Motion for Discovery, and any Oppositions or Replies.

Conclusion

Before the Court makes a decision on summary judgment, the Plaintiff should at least have a fair chance to demonstrate that there are material facts in dispute. In many ways, Plaintiff Phelps has already carried this burden. However, particularly in an employment case such as this one, the vast majority of the facts and evidence remains in the possession of the employer. It is a lonely and perhaps quixotic task for a single plaintiff to take on the United States Congress and its champion, the U.S. Department of Justice, who between them command enormous resources and exercise far-reaching power and influence. But even the United States government in all its majesty is supposed to be an equal person before the United States District Court. Clearly, however, this can

only be the case if both parties before the case are allowed equal access to evidence before the Court renders its decision. However difficult this may sometimes be, it is an ideal that the Court should still strive for. In this case, it can only happen if the Court allows Plaintiff Phelps to obtain information from the United States Capitol Police through discovery.

For all these reasons, a decision on Defendant's Motion for Summary Judgment should be continued until after discovery, Plaintiff Phelps' Motion should be granted, and the Court should set a scheduling conference to plan discovery at the earliest possible date.

Respectfully submitted,

/s/

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