2005 WL 2245187
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United States District Court,
N.D. Ohio.

Anthony LUKE, et al., Plaintiffs,
v.
CITY OF CLEVELAND, et al., Defendants.

No. 1:02CV1225. | Aug. 22, 2005.

Attorneys and Law Firms

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Opinion

OPINION AND ORDER

GWIN, J.

[Resolving Doc. No. 60]

***1** Before the Court is the motion for summary judgment of Defendants Gerald V. Barrett and Barrett & Associates (collectively, the "Barrett Defendants"). [Doc. 60]. Plaintiffs Anthony Luke, et al., oppose the defendants' motion. [Doc. 89]. For the reasons that follow, the Court GRANTS IN PART AND DENIES IN PART the defendants' motion for summary judgment.

I. Background

A. Barrett & Associates

Barrett & Associates ("B & A") is a privately-held Ohio corporation which provides employment consulting services. B & A assists its clients in developing job selection and promotion practices. B & A services both private and public entities. Gerald Barrett serves as B & A's president and is its principal shareholder.

Clients often retain B & A to develop tests to determine whether to offer promotions to individual employees. B & A personnel custom-design the tests without influence from the clients. B & A views the tests as confidential materials whose disclosure could put B & A at a competitive disadvantage with competitors.

B & A maintains a record retention policy for documents relating to its testing materials, including the tests and answer sheets. Under this policy, B & A destroys the documents after one year unless B & A receives notice of a legal proceeding involving the documents.

B. Cleveland Fire Department Examinations

The City of Cleveland retained B & A to prepare, administer, and score promotion examinations for the Cleveland Fire Department for the years 1996 and 2000. B & A personnel administered the 1996 examinations between July 13 and September 2, 1996. B & A released the test results near January 22, 1997. B & A administered the 2000 examinations between January 8 and February 6, 2002, and provided test results near February 29, 2000. Near June 6, 2002, the City retained B & A to prepare, administer, and score the Cleveland Fire Department's 2002 promotion exams.

In early June 2002, B & A was in the process of relocating to a new office building. The defendants contend that as of June 1, 2002, they did not have notice of any pending litigation involving the 1996 and 2002 promotion examinations. During B & A's move to its new facility, company personnel destroyed documents greater than one year old consistent with the document retention policy. The parties offer no evidence as to what specific types of documents B & A destroyed.

The plaintiffs filed their original complaint in this lawsuit on June 26, 2002. The case was assigned to Chief Judge Paul R. Matia. The first complaint named the City of Cleveland and Cleveland Fire Chief Kevin Gerity as defendants, but did not name Barrett or his company. The complaint generally sought to prevent the administration of the 2002 promotion examination as administered by B & A. On July 26, 2002, the plaintiffs subpoenaed B & A and requested documents relating to the 1996, 2000, and 2002 promotion examinations. B & A had already destroyed the 1996 and 2000 documents in conformity with the retention policy. B & A produced documents relating to the 2002 examinations.

***2** The defendants contend that B & A retained all documents relating to exam preparation, administration, and scoring. The City did not have access to or control

over the purely internal documents. The only documents B & A ever provided to the City were copies of employees' answer sheets, copies of the tests, and other specific documents identified in the 1996, 2000, and 2002 contracts. B & A retained all other documents relating to the exams.

On September 25, 2002, the plaintiffs filed an amended complaint adding B & A and Gerald Barrett as named defendants. [Doc. 29]. On March 31, 2003, the plaintiffs filed a second amended complaint adding additional claims against the defendants. [Doc. 75]. The amended complaint charges the Barrett Defendants with: (1) race discrimination in violation of 42 U.S.C. § 1981; (2) denial of equal protection under the 14th Amendment in violation of 42 U.S.C. § 1983; (3) disparate impact race Discrimination in violation of Ohio Rev.Code §§ 4112.02(A) and 4112.99; (4) disparate treatment race discrimination in violation of Ohio Rev.Code §§ 4112.02(A) and 4112.99; (5) aiding and abetting discrimination in violation of Ohio Rev.Code §§ 412.02(J) and 4112.99; (6) conspiracy in violation of 42 U.S.C. § 1985; (7) destruction of public records in violation of Ohio Rev.Code § 149.351; and (8) spoliation of evidence.

The Barrett Defendants filed a motion for judgment on the pleadings, or alternatively for summary judgment, on January 31, 2003. [Doc. 60]. On February 19, 2003, Judge Matia entered an order giving notice to the parties that he would treat the defendants' motion as a motion for summary judgment. [Doc. 61]. Judge Matia also filed an order extending the deadline for the plaintiff's brief opposing summary judgment to allow the plaintiffs to conduct discovery germane to the issues raised in the defendants' motion. [Doc. 80]. On April 11, 2003, the Barrett Defendants filed a supplement to their summary judgment motion addressing the newly-raised conspiracy claim. [Doc. 82].

On June 3, 2005, the Clerk of Courts reassigned the case to this Court.

II. Legal Standard

Summary judgment is appropriate when the evidence submitted shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). In seeking summary judgment, the moving party has the initial burden of showing the absence of a genuine issue of material fact as to an essential element of the nonmoving party's case. *Waters v. City of Morristown,* 242 F.3d 353, 358 (6th Cir.2001). A fact is material if its resolution will affect the outcome of the lawsuit. *Daughenbaugh v. City of Tiffin,* 150 F.3d 594, 597 (6th Cir.1998) (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). In deciding whether the moving party has met this burden, a court must view the facts and draw all inferences in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 158-59, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). However, "a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

***3** Once the moving party satisfies its burden, the burden shifts to the nonmoving party to set forth specific facts showing a triable issue. *Matsushita Elec. Indus. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). It is not sufficient for the nonmoving party merely to show that there is some metaphysical doubt as to the material facts. *See id.* Additionally, the Court has no duty to "search the entire record to establish that it is bereft of a genuine issue of material fact." *Street v. J.C. Bradford & Co.,* 886 F.2d 1472, 1479-80 (6th Cir.1989).

A factual dispute precludes summary judgment only if it is material, that is, if it relates to a matter essential to adjudication. The dispute must concern facts that, under the substantive law governing the issue, might affect the outcome of the suit. *Anderson,* 477 U.S. at 248. The factual dispute also must be genuine. The facts must be such that if proven at trial a reasonable jury could return a verdict for the nonmoving party. *Id.* at 248. "The disputed issue does not have to be resolved conclusively in favor of the non-moving party, but that party is required to present significant probative evidence which makes it necessary to resolve the parties' differing versions of the dispute at trial." *60 Ivy St. Corp. v. Alexander,* 822 F.2d 1432, 1435 (6th Cir.1987) (citing *First Nat'l Bank of Ariz. v. Cities Serv. Co.,* 391 U.S. 253, 288-89, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968)); *see also Celotex,* 477 U.S. at 322.

III. Analysis

The Barrett Defendants make the following arguments in their motion for summary judgment: (1) the plaintiffs' section 1981 and 1983 claims are time-barred and the plaintiffs cannot meet the legal requirements for such claims; (2) the plaintiffs' section 1985 conspiracy claim fails because the plaintiffs do not show that the Barrett Defendants agreed to deprive anyone of their civil rights; (3) the Barrett Defendants are not "employers" for purposes of claims under Ohio Rev.Code § 4112.02(A); (4) the plaintiffs do not offer evidence that the Barrett Defendants aided and abetted discrimination under Ohio

Rev.Code § 4112.02(J); (5) the destroyed internal documents relating to the 1996 and 2000 exams were not subject to the Ohio Public Records Act; and (6) the spoliation claim fails because there was no pending litigation involving the documents at the time of their destruction. The plaintiffs disagree with the Barrett Defendants on each point.

A. Section 1981 And 1983 Claims

As discussed below, the Court grants summary judgment to the defendants on all section 1981 and section 1983 claims, with one exception: the Court denies summary judgment as to the section 1983 disparate treatment claim arising out of the 2002 promotion examination.

1. Statute Of Limitations

The Barrett Defendants argue that the plaintiffs' section 1981 and 1983 claims based on the 1996 and 2000 examinations are time-barred. Responding, the plaintiffs say that they have alleged sufficient facts to show a continuing violation, thereby tolling the statute of limitations. The Court agrees with the defendants.

***4** Ohio's statute of limitations for actions under 42 U.S.C. §§ 1981 or 1983 is two years. *Friedman v. Estate of Presser,* 929 F.2d 1151, 1158 (6th Cir.1991). The Barrett Defendants provided the results of the 1996 exams no later than January 22, 1997. The plaintiffs thus had to file their section 1981 and 1983 claims related to the 1996 exams by January 22, 1999. Similarly, the Barrett Defendants provided the results of the 2000 exams by February 29, 2000. The plaintiffs needed to file the claims arising out of the 2000 exams by March 1, 2002. The plaintiffs did not file their lawsuit until June 26, 2002, and so their section 1981 and 1983 claims against the Barrett Defendants were not timely.

Where the plaintiffs demonstrate a continuing violation, the statute of limitations is expanded to reach back to the first date of the violation. *Sharpe v. Cureton,* 319 F.3d 259, 268-69 (6th Cir.2003). A continuing violation "requires continued action and not simply continuing harm or 'passive inaction." ' *Moss v. Columbus Bd. of Educ.,* 98 Fed. Appx. 393, 396 (6th Cir.2004).

"[W]hen an employee seeks redress for discrete acts of discrimination or retaliation, the continuing violation doctrine may not be invoked to allow recovery for acts that occurred outside the filing period." *Sharpe,* 319 F.3d at 267. Terminations and failures to promote are discrete acts of discrimination, and thus not subject to the continuing violation doctrine. *Id.* Rather, the continuing violation doctrine applies where the plaintiffs offer evidence that "some form of intentional discrimination against the class of which plaintiff was a member was the company's standard operating procedure." *EEOC v. Penton Indus. Publ'g Co.,* 851 F.2d 835, 848 (6th Cir.1988).

The plaintiffs argue that they "have alleged sufficient acts to show a continuing violation under §§ 1981[and] 1983...." [Doc. 89 at 16]. Specifically, the plaintiffs say that their conspiracy allegations against the Barrett Defendants suffice to show a continuing violation. *Id.* As discussed below, the plaintiffs wholly fail to meet their burden under Fed.R.Civ.P. 56 to show evidence of a conspiracy between the Barrett Defendants and the City. The mere allegation of a conspiracy does not suffice to toll the statute of limitations.

At most, the plaintiffs offer only evidence that the Barrett Associates prepared and administered promotion examinations on particular days, and not that these defendants conspired to further a pattern of discrimination by the City. There is no evidence that the Barrett Defendants had a "longstanding and demonstrable policy of discrimination" requiring tolling of the statute of limitations. *Sharpe,* 319 F.3d at 269.

The plaintiffs' section 1981 and 1983 claims relating to the 1996 and 2000 examinations are time-barred.

2. Availability of Disparate Impact Claim Under Section 1981 And 1983

The Barrett Defendants argue that sections 1981 and 1983 do not permit relief based on disparate impact discrimination. The plaintiffs do not argue otherwise, but only say that their disparate impact claims arise out of Ohio Rev.Code § 4112.99, not section 1981 or 1983.

***5** The Court agrees that sections 1981 and 1983 do not extend to disparate impact claims. *See General Bldg. Contractors Assn., Inc. v. Pennsylvania,* 458 U.S. 375, 383 n. 8, 102 S.Ct. 3141, 73 L.Ed.2d 835 (1982) (section 1981 claims); *Personnel Administrator of Massachusetts v. Feeney,* 442 U.S. 256, 260, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979) (section 1983 equal protection claims). To the extent the plaintiffs base their section 1981 and 1983 claims on a disparate impact theory, those claims fail as a matter of law.

3. Contractual Relationship For Section 1981 Claim

The Barrett Defendants argue that the section 1981 claim fails because the plaintiffs do not offer any evidence of a contractual relationship between the plaintiffs and these defendants. The plaintiffs respond that the section 1981 claim survives because the defendants interfered with their right to contract. As between these arguments, the

Court agrees with the defendants.

The plaintiffs say that the Barrett Defendants are subject to section 1981 because they interfered with the plaintiffs' employment contracts. Section 1981 prohibits discriminatory interference with the making and enforcement of contracts. 42 U.S.C. § 1981. This prohibition extends to third parties' interference with contracts of employment. *See Reddy v. Good Samaritan Hosp. and Health Ctr.,* 137 F.Supp.2d 948, 965 n. 25 (S.D.Ohio 2001) ("In protecting the right to make contracts, section 1981 proscribes not only discrimination by the contracting party at the contract-formation stage but also discriminatory interference by a third party with the right to make contracts.") (quoting *Vakharia v. Swedish Covenant Hosp.,* 765 F.Supp. 461, 471 (E.D.Ill.1991)). The parties agree that the interference must be intentional. *See* Doc. 89 at 21 (citing *Olumuyiwa v. Harvard Protection Servs., Inc.,* No. 98cv5110, 2000 U.S. Dist. LEXIS 6364, at *12 (E.D.N.Y. May 12, 2000)).

In this case, the plaintiffs do not present any direct evidence that the Barrett Defendants intentionally interfered with their contracts of employment. Instead, the plaintiffs rely on inference, asserting that "it can easily be inferred that Barrett acted intentionally to interfere with Plaintiffs' right to contract and be free from discriminatory interference and animus by a third party," and "the inference lies that Barrett served as a quasi-employer for the purposes of promotional aspects of Plaintiffs' employment." [Doc. 89 at 16]. Flimsy inferences are no substitute for the probative evidence the plaintiffs must present. *See 60 Ivy St. Corp.,* 822 F.2d at 1435. The plaintiffs' section 1981 claim fails.

4. Acting Under Color Of State Law For Section 1983 Claim.

The defendants argue that the plaintiffs fail to show they acted under color of state law for purposes of the section 1983 claim. The plaintiffs respond that the defendants acted under color of state law as a co-conspirator with the City and through their involvement with the promotion process. The Court agrees with the plaintiffs that the Barrett Defendants performed a public function through their involvement in the administrative process.

***6** The plaintiffs say that the Barrett Defendants served as state actors by performing a public function. To show that the defendants acted under color of state law by performing a public function, the plaintiffs must show that the City delegated traditionally governmental powers or functions to the defendants. *Rendell-Baker v. Kohn,* 457 U.S. 830, 842, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982). State action exists in a variety of circumstances, including where: (1) a private actor is a "willful participant in a joint activity with the State or its agents," (2) the government delegated a public function to the private actor, (3) the government exercises "coercive power" over the actor's conduct, (4) the government provides "significant encouragement," and (5) where the government and the private actor substantially intertwine. *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n,* 531 U.S. 288, 296, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001).

Here, the hiring and promotion of firefighters is a governmental function. *See* Ohio Rev.Code. §§ 124.45-124.49 (defining requirements for promotion of firefighters). In 2002, the City delegated its authority to administer the promotion of firefighters to private actors through a special ordinance:

> Whereas, this ordinance constitutes an emergency measure providing for the usual daily operation of a municipal department; now, therefore [b]e it ordained by the Council of the City of Cleveland that the Secretary of the Civil Service Commission is hereby authorized to employ by contract one or more consultants for the purpose of supplementing the regularly employed staff of the several departments of the City of Cleveland in order to perform a job analysis and to develop, administer, and grade promotional examinations for the Division of Fire, Department of Public Safety.

Cleveland Ord. No. 290-01 (2002) [Doc. 89 Ex. 1]. The contract between the City and the Barrett Defendants used similar language reflecting the defendants' supplementary role in the promotion process.

In light of the special ordinance and the contract between the City and the Barrett Defendants, the Court finds an issue of material fact as to whether the defendants acted under color of state law. The Court thus denies the defendants' motion for summary judgment as to the section 1983 disparate treatment claim arising out of the 2002 promotion examination.

B. Section 1985 Conspiracy Claim

The plaintiffs also charge the Barrett Defendants with conspiracy in violation of 42 U.S.C. § 1985. Section 1985 generally prohibits conspiracies to deprive persons of their rights under the Constitution and federal law. *See Bartell v. Lohiser,* 215 F.3d 550, 560 (6th Cir.2000). The defendants say the plaintiffs' conspiracy claim fails because they offer no evidence that the Barrett

Defendants entered into a conspiracy. The plaintiffs respond by saying they sufficiently alleged a conspiracy. The Barrett Defendants also allege this claim is not timely. The Court agrees with the defendants.

1. Statute Of Limitations

***7** Like claims under section 1981 and 1983, section 1985 claims are subject to a two-year statute of limitations. *See Walker v. Lakewood,* 742 F.Supp. 429, 430-31 (N.D.Ohio 1990). Just as the section 1981 and 1983 claims regarding the 1996 and 2000 promotion examinations are time-barred, so is the section 1985 claim relating to those examinations.

2. Evidence Of Agreement

Even if the plaintiffs' section 1985 claim were not largely time-barred, it would fail because the plaintiffs offer no evidence of a conspiracy. "The essence of a conspiracy is 'an agreement to commit an unlawful act." ' *United States v. Jimenez,* 537 U.S. 270, 274, 123 S.Ct. 819, 154 L.Ed.2d 744 (2003) (quoting *Iannelli v. United States,* 420 U.S. 770, 777, 95 S.Ct. 1284, 43 L.Ed.2d 616 (1975)). Further, "courts will not accept mere allegations of conspiracy; there must be some showing of facts to support the conspiracy." *O'Hara v. Mattix,* 255 F.Supp. 540, 542 (W.D.Mich.1966).

There is no evidence of an agreement between the City and the Barrett Defendants to discriminate. Instead of offering evidence to avoid summary judgment, the plaintiffs impermissibly rely on the allegations from their complaint. [Doc. 89 at 18-20]. The mere fact that the City retained the Barrett Defendants to administer the promotion exams does indicate that the defendants agreed to discriminate against African Americans. Without any evidence of a conspiracy, the Court grants summary judgment to the defendants on the section 1985 claim.

C. State Law Discrimination Claims

1. Section 4112.02(A)

The plaintiffs make a state law employment discrimination claim against the Barrett Defendants under Ohio Rev.Code § 4112.02(A). The defendants argue that they do not qualify as employers for purposes of the state statute. The plaintiffs respond that Ohio applies a broad definition of "employer" that extends to the defendants. The Court agrees with the defendants.

Section 4112.02(A) of the Ohio Revised Code prohibits employers from discriminating on the basis of race and other protected classifications. For purposes of the statute, the term "employer" extends to "any political subdivision of the state" and "any person acting directly or indirectly in the interest of an employer." Ohio Rev.Code § 4112.01(A)(2). The plaintiffs say the Barrett Defendants qualify as an employer because they acted in the interest of the City.

"[T]he Ohio Legislature intended for section 4112.02 to be liberally construed." *Eyerman v. Mary Kay Cosmetics, Inc.,* 967 F.2d 213, 219 (6th Cir.1992). Although the statute is to be liberally construed, Ohio's courts have found limits to the definition of "employer." Although agents qualify as employers, independent contractors are not employers under the statute. An "independent contractor" is someone who carries on an independent business, in the course of which he undertakes to accomplish some result or do some piece of work, for another, and retaining discretion in the choice of the means and methods. Independent contractors become responsible for results and are not subject to the control, or right to control, of the means used. *Title First Agency, Inc. v. Xpress Closing Serv., Inc.,* No. 03AP-179, 2004 WL 98639, at *3 (Ohio Ct.App. Jan. 22, 2004).

***8** In this case, the contract between the City and the Barrett Defendants identified B & A as an independent contractor. The plaintiff offers no evidence that B & A did not qualify as an independent contractor-they point to no evidence that the City "retained control of, or the right to control, the mode and manner of doing the work contracted." *Berge v. Columbus Community Cable Access,* 136 Ohio App.3d 281, 301, 736 N.E.2d 517 (Ohio Ct.App.1999). Alternatively, "[i]f the employer retained control but is interested merely in the ultimate result to be accomplished, the relationship is that of independent contractor." *Id.* In light of the evidence presented, B & A was an independent contractor, and excluded from the definition of employer.

In determining whether the Barrett Defendants were employers, the Court also considers their "power to employ, retain, and dismiss the employee at issue." *Id. See also Foran v. Fisher Foods, Inc.,* 17 Ohio St.3d 193, 194, 478 N.E.2d 998 (1985) (noting that "Ohio Supreme Court decisions have affirmed the question to answer when identifying the employer is to identify who exercises day-to-day control over the employee"). Although the Barrett Defendants may have played a significant role in the promotion process, there is no question that they did not exercise day-to-day control over the firefighters. They did not employ, retain, or dismiss the firefighters. Those powers remained with the City.

Because the Barrett Defendants do not qualify as employers, the Court grants summary judgment to the defendants on the section 4112.02(A) claims.

2. Section 4112.02(J)

The plaintiffs allege that the Barrett Defendants are liable for aiding and abetting the City in committing employment discrimination. Such aiding and abetting would violate section 4112.02(J) of the Ohio Revised Code. In response, the defendants argue that the plaintiffs offer no evidence of intent. The plaintiffs do not respond to the defendants' argument. The Court agrees with the defendants.

Section 4112.02(J) makes it unlawful for any person to aid, abet, incite, coerce, or compel the doing of any act of employment discrimination. Although Ohio's anti-discrimination statute does not define "aiding and abetting," Ohio's courts generally define "aid" as "to assist" and "abet" as "to incite or encourage." *Horstman v. Farris,* 132 Ohio App.3d 514, 527, 725 N.E.2d 698 (Ohio Ct.App.1999). Decisions from Ohio's state and federal courts offer only scant analysis of section 4112.02(J). Ohio's courts generally construe aiding and abetting as an intentional act: "[O]ne is not an aider and abetter unless he knowingly does something which he ought not to do ... which assists or tends in some way to affect the doing of the thing which the law forbids." *State v. Stepp,* 117 Ohio App.3d 561, 568, 690 N.E.2d 1342 (Ohio Ct.App.1997). "Mere association with the principal is not enough." *Horstman v. Farris,* 132 Ohio App.3d 514, 527, 725 N.E.2d 698 (Ohio Ct.App.1999) (citation omitted).

***9** Here, the plaintiffs offer no evidence that the Barrett Defendants aided and abetted any unlawful act. The City contracted with the Barrett Defendants to prepare and administer promotion examinations, but there is no indication that the Barrett Defendants knowingly assisted in committing alleged acts of discrimination. The Court thus grants summary judgment to the defendants on the aiding and abetting claim.

D. Destruction Of Public Records

The plaintiffs allege that the Barrett Defendants violated Ohio's public records laws when they destroyed various unidentified documents relating to the 1996 and 2000 promotion examinations. The defendants destroyed the documents in early June 2002, pursuant to B & A's document retention policy. The defendants argue that they are not subject to the Public Records Act with respect to internal documents not turned over to the City. The plaintiffs disagree. The Court agrees with the plaintiffs.

Ohio has adopted a strong policy favoring public access to public records. Ohio Rev.Code § 149.43. Fundamental to this policy is the promotion of open government. *State ex rel. Besser v. Ohio State Univ.,* 89 Ohio St.3d 396, 398, 732 N.E.2d 373 (2000); *State ex rel. The Miami Student v. Miami Univ.* 79 Ohio St.3d 168, 171, 680 N.E.2d 956 (1997). Requests for exceptions to disclosure are strictly construed against the public records custodian, and the custodian bears the burden to establish the applicability of an exception. *State ex rel. McGowan v. Cuyahoga Metro. Hous. Auth,* 78 Ohio St.3d 518, 519, 678 N.E.2d 1388 (1997)

The Ohio Revised Code provides a public cause of action to those aggrieved by the destruction of public records:

> (A) All records are the property of the public office concerned and shall not be removed, destroyed, mutilated, transferred, or otherwise damaged or disposed of, in whole or in part, except as provided by law or under the rules adopted by the records commissions....

Ohio Rev.Code § 149.351(A).

The term "public record" includes "any document, ... or item, ... created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions...." Ohio Rev.Code § 149.011(G). A plaintiff in a public records action may secure injunctive relief or statutory damages for each destroyed record, plus attorneys' fees. *Id.* The purpose of the Ohio Public Records Act is "to expose government activity to public scrutiny, which is absolutely essential to the proper working of a democracy." *State ex rel. Gannett Satellite Network, Inc. v. Petro,* 80 Ohio St.3d 261, 264, 685 N.E.2d 1223 (1997) (citation omitted).

A private entity can be held liable under the Public Records Act where: (1) the private entity prepared the records "to carry out a public office's responsibilities;" (2) the public office was "able to monitor the private entity's performance; and (3) the public office had "access to the records for this purpose." *State ex rel. Mazzaro v. Ferguson,* 49 Ohio St.3d 37, 39, 550 N.E.2d 464 (1990).

***10** The Barrett Defendants do not dispute that they prepared the records in the scope of developing, administering, and grading the promotion exams. The defendants thus meet the first *Mazzaro* requirement.

There is a question of fact as to whether the defendants met the monitoring requirement. The defendants say there is no evidence that the City controlled or monitored the preparation, administration, and scoring of the exams. [Doc. 60 Ex. B ¶ 10]. However, it is not necessary that the City actually monitored the Barrett Defendants, but only that the City *could have* monitored the Barrett Defendants. *Mazzaro,* 49 Ohio St.3d at 39, 550 N.E.2d 464 ("Here, the Auditor either did or could have used [the

third party's] records in furtherance of its responsibility"). The plaintiffs point out that in its letter requesting proposals from consultants, including B & A, the City stated: "To effectively verify proposals and all work performed by the consultant, the Civil Service Commission reserves the right to conduct site visits at the consultant's location." [Doc. 89 at 7]. The final agreement between the City and the Barrett Defendants expressly incorporated the terms of the solicitation letter. [Doc. 60 Ex. A at 6]. In light of the contract language, the Court cannot say that the City lacked the authority to monitor the Barrett Defendants.

Under *Mazzaro,* to qualify a private entity for liability under the Public Records Act, a plaintiff must also show that the public office had "access to the records." *Mazzaro,* 49 Ohio St.3d at 39, 550 N.E.2d 464. (1990). In this case, material issues exist whether the City retained access to the records of Barrett. The agreement Barrett entered with the City incorporated the City's October 11, 2001, Request for Proposal. Among the contract terms agreed to, Barrett agreed:

> To effectively verify proposals and all work performed by the consultant, the Civil Service Commission reserves the right to conduct site visits at the consultant's location.

[Doc. 89, Ex. 3]. In addition, Barrett's contract with the City provided that, upon termination, "all records, documents, materials and wording papers prepared as part of the work under this Agreement shall become and remain the property of the City." The Court finds material issue as to the third *Mazzaro* element.

Because the Barrett Defendants do not dispute that they performed a public function, and because there is an issue of material as to the City's ability to monitor the defendants and access to documents, the Court denies summary judgment on the public records claim.

E. Spoliation Of Evidence

The Barrett Defendants also seek summary judgment on the plaintiffs' spoliation of evidence claim. The plaintiffs base their spoliation claim on the destruction of documents relating to the 1996 and 2000 promotion examinations. In response, the defendants say they destroyed the documents pursuant to a document retention policy, and that they had no knowledge of any pending or probable litigation involving the documents at the time of destruction. The plaintiffs say litigation involving a challenge to test results should have put the defendants on notice to maintain the documents. The Court agrees with the defendants.

***11** To survive summary judgment as to a spoliation claim, a plaintiff must present evidence of the following elements: (1) pending or probable litigation involving the plaintiff; (2) knowledge on the part of the defendant that litigation exists or is probable; (3) willful destruction of evidence by defendant designed to disrupt the plaintiff's case; (4) disruption of the plaintiff's case; and (5) damages proximately caused by the defendant's acts. *Smith v. Howard Johnson Co.,* 67 Ohio St.3d 28, 29, 615 N.E.2d 1037 (1993). Spoliation is an intentional tort-Ohio does not recognize a cause of action for negligent spoliation of evidence. *White v. Ford Motor Co.,* 142 Ohio App.3d 384, 388, 755 N.E.2d 954 (Ohio Ct.App.2001).

The defendants say there was no pending or probable litigation at the time they destroyed the documents in June 2002. In his declaration, Defendant Barrett says his firm destroyed the documents in conformity with a one-year document retention policy when B & A moved to new offices. [Doc. 60 Ex. B ¶¶ 13-14].

To counter this, the plaintiffs point to a separate lawsuit that Plaintiff Michael Odum filed on June 9, 2000. He sued both the City and the Barrett Defendants. [Doc. 89 at 10]. In that case, *Odum v. City of Cleveland,* No. 00-1444 (N.D.Ohio), Odum made claims under section 1981 and 1983, and alleged that someone altered his answers to the February 2000 promotion examination. The plaintiffs say Odum's earlier lawsuit put the Barrett Defendants on notice that they needed to retain all documents relating to the exams. However, Odum voluntarily dismissed his lawsuit without prejudice on February 22, 2001. Under Ohio's Saving Statute, Odum had one year after February 22, 2001, within which to re-file his action. He never refiled it. The two-year statute of limitations on Odum's federal claims expired before the Barrett Defendants destroyed the disputed documents in June 2002. As a result, the Odum lawsuit did not put the defendants on notice of potential litigation relating to the 1996 and 2000 examinations.

The plaintiffs also say that they made a FOIA request for documents relating to the 1996 and 2000 exams in March 2002, and that this request put the defendants on notice of probable litigation. But the plaintiffs offer no evidence of any such FOIA request, relying instead on their attorneys' assertions. Such unsupported assertions are insufficient to avoid summary judgment.

Because there is no evidence that the Barrett Defendants had notice of probable or pending litigation involving the 1996 and 2000 exams, the Court grants summary judgment to the defendants on the spoliation claim.

IV. Conclusion

For the reasons discussed above, the Court GRANTS IN PART AND DENIES IN PART the defendants' motion to dismiss. The Court denies summary judgment with respect to (1) the section 1983 disparate treatment claim arising out of the 2002 promotion examination, and (2) the claim of destruction of public records. The Court grants summary judgment to the Barrett Defendants on all other claims.

***12** IT IS SO ORDERED.