Commission on Human Rights and Opportunities ex rel. Claude Young	: Commission on Human Rights : and Opportunities : :
v.	: CHRO No. 0720418 :
City of Stamford Police Department	: November 18, 2009

Ruling re: the respondent's motion to dismiss

Preliminary statement

On May 7, 2007, the complainant, Claude Young, filed an affidavit of illegal discriminatory practice with the commission on human rights and opportunities (commission). In his affidavit, Mr. Young alleged that the respondent, the City of Stamford Police Department, violated General Statutes § 46a-64. According to Mr. Young, police officers employed by the respondent subjected him to excessive use of force, police brutality, verbally abusive language and racial slurs, and his race and color were factors in their actions. On August 13, 2008, Mr. Young amended his affidavit to allege that the respondent's actions also violated the equal protection clause of the fourteenth amendment to the United States constitution and General Statutes § 46a-58 (a). On September 11, 2009, the commission determined that there was reasonable cause to believe that an unfair practice had been committed as alleged in the affidavit as amended (affidavit) and certified the affidavit for public hearing.

On October 6, 2009, the respondent filed a motion to dismiss the affidavit for lack of subject matter jurisdiction (motion). On October 30, 2009, the commission filed its objection to the motion (opposition). For the reasons set forth, the motion is denied.

Analysis

I

The respondent first argued that police functions are not public accommodations within § 46a-64a. Prior decisions by commission hearing officers have held that police departments are not within the purview of § 46a-64a. *Commission on Human Rights & Opportunities ex rel. Yohannes Michaels v. Norwalk*, CHRO No. 9120329 (Final decision) (April 20, 1998) and *Commission on Human Rights & Opportunities ex rel. Nathan Mays and Nathaniel Mays v Wethersfield*, CHRO Nos. 8710341 and 8710322 (Ruling on respondent's motion to dismiss) (May 6, 1994). The undersigned, however, finds more persuasive the analysis of the New Jersey Superior Court, Appellate Division, in holding that police departments are public accommodations.

In *Ptaszynski v. Uwaneme*, 371 N.J.Super. 333 (2004), an arrestee and his wife filed a third-party complaint against police officers. They alleged assault and battery, wrongful arrest, violation of civil rights laws, and violation of the state's anti-discrimination law. In reversing the superior court's dismissal of a majority of their third-party claims, the Appellate Division observed that "[a]s a public entity, by its very nature a police force is a place of public accommodation." Id., 347.

According to the Appellate Division:

> No formulistic analysis is required to determine whether the police engage in public solicitation or a police department is similar to those entities enumerated as public accommodations under the statute. A police department is not a private entity that needs to be shoe-horned into a list of other, primarily private, entities that provide services to the public. It would indeed lead to an anomalous result if private organizations with close ties to government agencies were places of public accommodation because of those ties, while the government agency itself was not.
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> If a police force is not subject to [the state's anti-discrimination laws], subject to certain constitutional limitations, the officers may be free to discriminate. . . . To countenance discrimination by a police force, while seeking to eradicate discrimination, for instance, in private organizations, public libraries and universities, would be both inconsistent with and contrary to the goals of the [state's anti discrimination laws].

(Citation omitted.) Id., 347-48.

In *Quinnipiac Council, Boy Scouts of America, Inc. v. Commission on Human Rights & Opportunities*, 204 Conn. 287, 300 (1987), our Supreme Court observed that coverage under our public accommodations statute "depends, in each case, upon the extent to which a particular establishment has maintained a private relationship with its own constituency or a general relationship with the public at large." Clearly, a police department's relationship is inherently with the public at large.

II

A

With respect to the complainant's allegation of a violation of the fourteenth amendment's equal protection clause as enforced through § 46a-58 (a), the respondent argued that there was no evidence of a denial of equal protection because (1) the

complainant failed to show that he was treated different from similarly situated non-basis persons and (2) there is no evidence of damages consistent with his claims. Identifying dissimilar treatment of similarly situated, non-basis persons, however, is not the only method of establishing an equal protection violation. There are three theories that may be utilized to show an equal protection violation:

> First, relying on *Pyke v. Cuomo,* 258 F.3d 107, 110 (2d Cir. 2001), plaintiffs assert that defendants applied a facially neutral law or policy to them in an intentionally discriminatory race-based manner. Under this theory, plaintiffs are not obligated to identify a better treated, similarly situated group of individuals of a different race in order to establish a claim of denial of equal protection. *See also* *Brown v. Oneonta,* 221 F.3d 329 (2d Cir. 2000). This strand of equal protection analysis dispenses with the need to plead that a similarly situated group was treated differently because discriminatory effects are either independently demonstrated or can readily be presumed. Once racially discriminatory intent infects the application of a neutral law or policy, the group that is singled out for discriminatory treatment is no longer similarly situated to any other in the eyes of the law, so adverse effects can be presumed. In effect, the law recognizes that a government that sets out to discriminate intentionally in its enforcement of some neutral law or policy will rarely if ever fail to achieve its purpose.
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> Second, plaintiffs assert, relying on *Le Clair v. Saunders,* 627 F.2d 606 (2d Cir. 1980), that they were treated differently than an identifiable, similarly situated group of individuals for malicious reasons, including but not limited to racial prejudice.
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> Finally, under "class of one" Equal Protection analysis, plaintiffs claim that they were intentionally treated differently from others similarly situated and that there was no rational basis for this difference in treatment. *Village of Willowbrook v. Olech,* 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000).
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> The latter two theories require plaintiffs to identify a similarly situated person or group that was treated differently.

Doe v. Mamaroneck, 462 F. Sup.2d 520, 543 (S.D.N.Y. 2006).

A complainant "alleging a claim of selective *prosecution* in violation of the Equal Protection Clause must plead and establish the existence of similarly situated individuals who were not prosecuted." (Emphasis in original) *Pyke v. Cuomo*, 258 F.3d 107, 109 (2d Cir. 2001). However, as in this case, a complainant "alleging an equal protection claim under a theory of discriminatory application of the law, or under a theory of discriminatory motivation underlying a facially neutral policy or statute, generally need not plead or show the disparate treatment of other similarly situated individuals." Id., 108-09; *Doe v. Mamaroneck*, supra, 462 F. Sup.2d 543. Mr. Young's allegations of foul language, racial slurs and excessive force are evidence of discriminatory motivation dispensing with the need to identify similarly situated, non-basis persons and are also sufficient to support a cognizable claim under the Equal Protection Clause. *Valdez v. East Hartford*, 26 F.Sup.2d 376, 384 (D. Conn. 1998).

The respondent's assertion that Mr. Young produced no evidence of damages consistent with his claims is an evidentiary matter for the public hearing.

B

Claims against a police department under § 46a-58 (a), however, must assert (1) an "allegation that the police department of the city of [Stamford] initiated, advised, participated in, instigated, approved or tolerated the conduct of the officers which was complained of" and (2) a "constitutionally protected right, privilege or immunity of which [Mr. Young] claimed to have been deprived by the officers." *Waterbury v. Commission*

on Human Rights & Opportunities, 160 Conn. 226, 233 (1971) (discussing General Statutes § 53-34 now § 46a-58).

In this case, although the affidavit does not allege that the police department itself instigated, approved or tolerated the conduct of the police officers, in its opposition the commission represents that: "Details of the prior arrest will reveal that the Complainant had complained to the Respondent that he believed that Officer Comerford had a racial animus against the Complainant in regards to the prior arrest." Opposition, at 13. "The Commission intends to include facts regarding the prior arrest in the proposed amended complaint." Id. at n. 5. Construing the offer of proof most favorably for the complainant, it may be possible for the commission to satisfy the first element of the *Waterbury* standard by alleging facts showing that the respondent had prior knowledge of Officer Comerford's racial animus and that this knowledge constituted approval or toleration of such conduct.

The amended affidavit currently satisfies the second element of *Waterbury* in that it alleges deprivation of a constitutionally protected right under the fourteenth amendment.

III

The respondent also argued that General Statutes § 46b-38b (c) provides immunity to police officers from damages arising from physical injury caused in the course of a domestic abuse arrest. Section 46b-38b (c) provides that: "No peace officer shall be held liable in any civil action regarding personal injury or injury to property

brought by any party to a family violence incident for an arrest based on probable cause or for any conditions of release imposed pursuant to subsection (b) of section 54-63c." This section, however, is inapplicable to this case for at least two reasons. First, this action is not a "civil action;" it is an administrative proceeding. Second, as the respondent is not a police officer, liability, if found, and damages, if awarded, will not be assessed against a police officer.

IV

According to the respondent, its review of the commission's website revealed no prior decisions by human rights referees involving allegations of excessive force. Also, if the commission determines that it has jurisdiction, the result would dramatically increase the commission's workload. These arguments do not implicate the commission's subject matter jurisdiction to hear this matter.

V

Finally, the respondent argued that the amendment to the affidavit adding the alleged violations of § 46a-58 (a) and the equal protection clause was untimely and unsupported by evidence. Section 46a-54-38a of the Regulations of Connecticut State Agencies provides in part that: "(a) A complaint, or any part thereof, may be fairly and reasonably amended as a matter of right at any time before the appointment of a presiding officer." In this case, the amendment is timely, fair and reasonable because the complaint was amended prior to the appointment of a presiding officer and merely

alleges additional statutory violations based on the factual allegations already alleged in the affidavit.

As to the respondent's claim of lack of evidence, whether the commission produces sufficient evidence to sustain its burden of proof is a matter for the public hearing, not for a motion to dismiss.

Ruling and order

1. The motion is denied.
2. The commission shall file and serve its motion to amend the affidavit on or before December 2, 2009.
3. The respondent shall file and serve its response to the commission's motion to amend on or before December 17, 2009.
4. The dates previously assigned remain as ordered and set forth in the hearing conference summary and order dated October 22, 2009.

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Hon. Jon P. FitzGerald
Presiding Human Rights Referee

C:
Mr. Claude Young
Kimberly Jacobsen, Esq.
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