IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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NATHAN SHOATE,

OPINION AND ORDER

Plaintiff,

03-C-0174-C

v.

CITY OF BELOIT POLICE
DEPARTMENT and
RICHARD P. THOMAS,

Defendants.

- -

This is a civil action brought pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 1981 and 1983 and the Fourteenth Amendment to the United States Constitution. Plaintiff Nathan Shoate contended in his complaint that defendants City of Beloit Police Department and Richard P. Thomas, Chief of Police, discriminated against him by failing to give him "specialty" positions as motorcycle patrol officer, child maltreatment investigator, SLANT (State Line Area Narcotics Team) drug investigator and drug and gang investigator and selecting white officers for those positions instead; that defendants disciplined him more harshly than white officers for similar work rule violations; and that defendant Thomas deprived him of a liberty interest by besmirching his reputation

when defendant announced publicly that plaintiff had used excessive force against a citizen and did not give plaintiff an opportunity to be heard on the charge.

After defendants filed a motion for summary judgment, plaintiff acknowledged that he does not have evidence to support his contention that the denial of the special positions was a result of any discrimination. He has not responded to defendants' assertions that the police department is not a suable entity or that defendant Thomas cannot be sued under Title VII. Therefore, I will dismiss the complaint as to defendant City of Beloit Police Department and as to plaintiff's Title VII claims and consider the complaint limited to two contentions: that defendant Thomas discriminated against plaintiff by disciplining him more harshly than he disciplined white officers and that he deprived plaintiff of a liberty interest. I am not considering any allegations that defendant failed to take any action when plaintiff complained about the change in his screen saver or that defendant made tickets to the NAACP banquet available to black officers only because plaintiff made these allegations for the first time in an affidavit he signed after he had been deposed and never alluded to any of these matters in his deposition. In any event, the matters are irrelevant: the NAACP ticket incident involved defendant's predecessor and plaintiff has no evidence that defendant knew anything about his screen saver.

I conclude that plaintiff has failed to adduce enough evidence to persuade a reasonable jury to find that defendant discriminated racially in disciplining plaintiff or that

defendant deprived plaintiff of a constitutionally protected liberty interest.

For the purpose of deciding this motion, I find that the following facts are both material and undisputed.

UNDISPUTED FACTS

Nathan Shoate is an African American male who worked as a police officer for the City of Beloit, Wisconsin, from 1994 until he resigned on July 6, 2002. He is employed as a federal air marshal for the Federal Air Marshal Services.

Defendant Richard P. Thomas was Chief of Police for the City of Beloit Police Department from July 27, 1998 until June 20, 2003.

During the time that plaintiff worked for the Beloit police department, he received the following discipline.

Date	Violation	Discipline	Circumstances
10/23/95	Unsatisfactory performance	Written Reprimand	Placed intoxicated woman in jail without charges
9/5/96	Accepting gifts and gratuities	3-day suspension	Accepted free food and beverages from Super America
12/2/96	Late for duty	Counseling	Late for briefings on 12/1/96 and 12/2/96

3/4/97	Late for duty	Oral Reprimand	Late on 2/16/97
4/3/97	Squad accident	Written Reprimand	Backed into another squad car while transporting a load of prisoners
2/10/00	Failure to report for duty	Counseling and instruction	Failure to appear in court for preliminary hearing on 2/1/00
6/30/00	Unsatisfactory performance	Written Reprimand	Placing juvenile with unrelated adult without consent of guardian
11/6/00	Mishandling of department equipment	Written Reprimand	Lost department-issued radio
12/4/00	Unsatisfactory performance	Written Reprimand	Used profanity in dealing with citizen
6/26/01	Unsatisfactory performance	Written Reprimand	Failure to complete report on two suspects in custody; failure to turn in squad keys
6/26/01	Overall performance	Letter of final warning	6/26/01 discipline and past discipline history

The police department requires officers to turn in their squad keys at the end of their shifts. If too many officers take the keys home or lock them in their lockers, the next shift

would be unable to use the squad cars. On June 26, 2001, plaintiff was given a written reprimand and a final warning for unsatisfactory performance, which consisted of failing to turn in his keys and failing to complete a report on persons placed into custody before his days off. The final warning was issued because of plaintiff's history of poor performance and discipline problems.

On November 16, 2001, defendant filed charges against plaintiff with the Beloit Police & Fire Commission, as a result of an incident in which plaintiff argued with fellow officer Bao Bui. According to the charges, plaintiff used profanity, referred to Bui as "trash" and carried out the argument in public. Defendant sought a three-day suspension without pay.

Before any hearing was held on the charges, defendant discovered allegations of subsequent misconduct, leading to amendments of the charges in January 2002 and on February 21, 2002. One of the charges was using gratuitous force against a citizen and threatening him unlawfully on December 15, 2001. Other charges included misplacing equipment and failing to report to training. Plaintiff was placed on administrative leave on December 18, 2001.

During the period from 1997 to 2000, officers at the police department other than plaintiff received the following discipline. (Plaintiff does not identify these officers by race; for the purpose only of deciding the motion for summary judgment, I will assume that all

were white.)

Employee	Date	Violation	Discipline
Anderson	3/22/99	Left SWAT munitions at Turtle Play Park	Counseling
Anderson	3/18/01	Discourteous behavior to supervisor	Counseling
Benevides	12/12/01	Unjustified showing of weapon	Oral Reprimand
Buckley	7/23/97	Failure to [sic: file?] leave report	None
Buckley	9/11/97	Failure to [sic: file?] leave report	Written Reprimand
Bui	8/8/01	Unbecoming courtesy; lack of cooperation	Written Reprimand
Daley	11/6/01	Equipment rule violation	Counseling
Daugherty	8/25/00	Use of profane language	Counseling
Donovan	12/5/98	Failure to report drugs	Written Reprimand
Fahrney	1/1/00	Advised to avoid the use of hand strikes	Counseling
Fahrney	10/16/00	Destruction of contraband	Counseling

Fahrney	4/9/01	Lost equipment	Counseling
Fearn	9/2/97	Profanity – saying "take your damn skateboard and go back to South Beloit"	Oral Reprimand
Flanagan	11/29/01	Inappropriate threat of use of force	Counseling
Fuller	4/14/02	Unsatisfactory performance	Counseling
Garcia	12/4/00	Failure to follow directive on use of force to retrieve evidence	Written Reprimand
Garcia	11/27/01	Inappropriate threat of use of force	Counseling
Hanaman	7/20/01	Mishandling equipment	Counseling
Hanaman	4/14/02	Unsatisfactory performance	Counseling
Hoffman	4/14/02	Unsatisfactory performance	Counseling
Kreitzmann	3/24/97	Lack of courtesy/cooper-ation between units	Written Reprimand

Kreitzmann	12/22/00	Destruction of contraband - failure to communicate/co-operate	Counseling [Disputed; defendant says "Written Reprimand"]
Kreitzmann	6/3/02	Unsatisfactory performance	Counseling
Kumlein	11/5/99	Argument with AFLAC representative	Counseling
Ludtke	3/3/99	Unacceptable language with dispatchers	Oral Reprimand
Miller	2/9/01	Missing training	Counseling
Mulhollon	9/29/00	Destruction of evidence (not the first time)	Written Reprimand
Northrop	4/14/02	Unsatisfactory performance	Counseling
Summers	2/9/01	Missing training	Counseling
Wandell	9/12/01	Use of force	Counseling
Wandell	3/30/02	Unsatisfactory performance	Counseling

Wells	10/14/97	Use of coarse, profane, obscene and insulting language in loud, threatening, intimidating and provocative manner.	1 day suspension
Wells	12/6/98	Referred to another officer as "that piece of shit."	Counseling
Whaples	8/23/00	Use of profanity and unprofessional conduct at middle school	Written Reprimand
Woods	9/2/97	Failure to find drugs left in squad car	Counseling
Woods	2/4/02	Failure to secure equipment	Oral Reprimand

When an officer is charged with conduct that might violate both a criminal statute and department policy, it is typical for a police department to begin two separate investigations. In an internal investigation, the officer can be compelled to answer questions about the incident, whereas in a criminal investigation, he has the right to remain silent if his answers would tend to incriminate him. In plaintiff's case, the Rock County Sheriff's Department conducted the criminal investigation of the December 15, 2001 incident of

using force against a citizen; the police department conducted the internal investigation. At the conclusion of the criminal investigation, the matter was referred to the district attorney's office, which declined to issue charges against plaintiff. Plaintiff was removed from administrative leave on January 18, 2003, the day on which defendant learned that the district attorney would not file criminal charges.

On February 20, 2002, after defendant filed the second amended charges with the police and fire commission, he placed plaintiff on paid administrative leave again. On March 25, 2002, after two days of hearings before the commission, defendant withdrew the charges against plaintiff and issued him written reprimands and required remedial training. Defendant was concerned about the time and resources that the hearing would consume.

After defendant withdrew the charges and plaintiff returned to work, defendant spoke to the newspapers and continued to assert that plaintiff was guilty of excessive force and use of profanity.

Two other Beloit police officers, Wald and Kumlein, were accused of using excessive force to cause a drug dealer to spit out crack cocaine that she was trying to swallow. Defendant undertook an internal investigation but did not initiate a criminal investigation into the matter. Because the two officers had given testimony at a preliminary hearing on the drug charges, they needed no further protection from self-incrimination. After completing the internal investigation, the department turned the matter over to the district

attorney, who declined to prosecute either officer. Defendant ordered a one-day suspension for Wald without pay and issued Kumlein a written reprimand.

Until plaintiff's last year of employment, he received evaluations rating him "meets standard" in most cases and "below standard" in a few cases.

Defendant Thomas encouraged plaintiff to move to Beloit, believing that the city benefits when police officers live in the city in which they work.

OPINION

At trial, plaintiff would have the burden of proving his claim of discrimination by a preponderance of the evidence. At the summary judgment stage, the burdens are reversed to some extent: to prevail, defendant must bear the burden of showing that no reasonable jury could find in favor of plaintiff on this claim. It does not follow, however, that because defendant bears this burden at summary judgment plaintiff is relieved of the obligation to adduce evidence. He must come forward with evidence sufficient to put the legal issue into dispute. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986) (courts are to enter summary judgment against party who fails to make showing sufficient to establish the existence of element essential to that party's case and on which party will bear burden of proof at trial, after party has had adequate time for discovery).

Plaintiff has no direct evidence that defendant Thomas was motivated by racial

discrimination when he disciplined plaintiff. Plaintiff has no evidence of statements that displayed any racial animus on defendant's part. The only way he can prove discrimination is by showing that defendant treated similarly situated white officers who violated the law or work regulations less severely than he treated plaintiff.

It is apparent from the undisputed facts that no other officer had as many work rule violations as plaintiff during the period from 1997 to 2000. Therefore, no other officer was situated similarly to plaintiff. Despite this strong evidence that defendant did not discriminate against plaintiff when he issued plaintiff a letter of final warning and filed charges against him with the Police and Fire Commission, plaintiff argues that in particular instances defendant discriminated against him by imposing harsher discipline.

Plaintiff asserts, for example, that he received a written reprimand for failing to turn in his squad keys, whereas other officers failed to turn in their keys and were not disciplined. Plaintiff did not propose any facts to support this asserted disparity; he merely makes allegations to this effect in his brief. It appears that he has no first-hand knowledge of the particular incidents, how the matter was handled by the department or what previous violations the other officers had committed. He does not say when the other incidents occurred or whether defendant was chief at the time. Most important, he does not say whether other officers charged with not turning in their keys were charged with another rule infraction at the same time, as plaintiff was. (Plaintiff was charged with failing to turn in

the keys *and* with failing to complete reports about persons he had put into custody.) Plaintiff's allegations about differential treatment for officers charged with failing to turn in their keys do not raise a jury question about the fairness of his discipline.

Plaintiff asserts that non-African-American officers have been charged with using profanity or with similar offenses and have not been brought up on charges before the Police and Fire Commission. Without any indication of who these officers were, what previous offenses they might have committed or the nature of the offenses, the assertion does not suggest discriminatory treatment. In any event, looking at separate incidents does not give a fair picture of the situation; defendant was entitled to take into consideration plaintiff's past rule violations when deciding on appropriate discipline. To the extent that plaintiff had failed to respond to lesser punishment in the past, it was reasonable for defendant to give plaintiff progressively harsher penalties in an effort to persuade him to improve his job performance.

Plaintiff tries to show that other officers committed far worse, or at least similar infractions and were either not disciplined or given milder punishment than he received. He points out, for example, that Officer Buckley received eight citizen complaints within a year, yet he received no discipline. Plaintiff does not say whether defendant Thomas was in office at the time of the complaints or whether he was the one who made the decision not to discipline Buckley; it would not matter unless plaintiff can establish that any or all of the

complaints were meritorious. He has not made that showing.

Plaintiff focuses on Detective Kreitzmann's record, alleging that the Rock County District Attorney filed a complaint against Kreitzmann in February 2002, raising concerns about his mental fitness for duty and advising the police department that it would refuse to file any criminal charges on any criminal investigations Kreitzmann conducted. Defendant did not impose any discipline on Kreitzmann in response to the complaint, but he issued him a written reprimand several months later after investigating a citizen's charge against him. Plaintiff has not shown that Kreitzmann had as extensive a disciplinary record as plaintiff; the undisputed facts show that as of November 2001, when defendant filed charges against plaintiff, Kreitzmann had only two incidents of discipline, one of which had earned him a written reprimand and one of which had been resolved with counseling. (Defendant avers that the second incident drew a written reprimand; for the purpose of deciding this motion, I am resolving the facts in the light most favorable to plaintiff.) Kreitzmann's situation was not so similar to plaintiff's that a jury could reasonably infer that the differences in the discipline reflected racial discrimination.

Plaintiff points out that Bui was involved in the November 2001 argument that led to defendant's filing charges against plaintiff, yet was given a lesser sanction. He fails to note that Bui had only one previous rule violation.

Plaintiff uses Officers Wald and Kumlein as examples of differential treatment. It is

undisputed that defendant disciplined Wald and Kumlein because he believed they had used excessive force in trying to prevent a suspected drug dealer from swallowing drugs. Wald received a one day suspension without pay and Kumlein received a written reprimand. Given their lack of previous discipline (Kumlein had received counseling for an argument in late 1999; Wald had had no discipline), the discipline they received does not appear inappropriate or imply discrimination. Defendant turned the matter of their misconduct over to the district attorney, just as he had done with plaintiff. In this respect, he treated them exactly the same. He did not need to initiate a criminal investigation because no rights against self-incrimination were at stake; the officers had told their story in the courtroom during proceedings related to the criminal case against the suspect.

Plaintiff makes an interesting but ultimately futile argument that defendant cannot defend his discipline of plaintiff by saying that it was grounded on steadily progressing disciplinary steps if plaintiff had received discriminatory punishment from the beginning. In other words, if when plaintiff first violated a work rule, defendant had punished him more severely than white officers who committed the same violation, defendant would have been basing subsequent disciplinary measures on a discriminatory record. I have reviewed the record with this argument in mind but I can find no support for it. (In doing so, I have not considered the fact that defendant was not the chief when plaintiff was disciplined but have assumed for the sole purpose of examining this argument that he should have known that

the earlier discipline was unfair, if in fact it was.)

Plaintiff's first violation was for placing a woman in jail without charges. For this he received a written reprimand. Nothing I can find in the disciplinary records of the other officers suggests that this discipline was more severe than any other officer would have received for committing the same serious rule violation. Plaintiff received a three-day suspension for accepting free food and beverages; no other officer was charged with a similar rule violation, so I can make no comparison. However, he received counseling when he was late for briefings in 1996; this is comparable to discipline meted out to two other officers that missed training and did not have two serious rule violations on their records. Plaintiff's early discipline is not so out of line with that imposed on other officers as to imply discrimination in its application and thus, to taint the progressive discipline that followed.

One additional point. Plaintiff argues that defendant discriminated against him by encouraging him to move to Beloit. In and of itself, encouraging a police officer to move to the city in which he works is not evidence of racial bias. If plaintiff could show that he was the only person subject to such encouragement, he might have proof of different treatment but he has not submitted any admissible evidence to that effect.

I conclude that plaintiff has failed to show that he was treated differently from any other officer situated similarly to him, that is, having the same or closely similar record of rule infractions.

As to plaintiff's claim of denial of a liberty interest, he has failed to make the necessary showing to support such a claim. The Supreme Court has held that governmental action that injures a person's reputation within the community does not always constitute a deprivation of liberty requiring a hearing. See Paul v. Davis, 424 U.S. 693, 708-10 (1976). Generally, the stigma inflicted on the plaintiff must be so severe that he is no longer able to pursue the occupation of his choice. Doyle v. Camelot Care Centers, Inc., 305 F.3d 603, 624 (7th Cir. 2002); see also Colaizzi v. Walker, 812 F.2d 304, 307 (7th Cir. 1987) (defendant's actions must have "the effect of blacklisting the employee from employment in comparable jobs"). "Simple charges of professional incompetence do not impose the sort of stigma that actually infringes an employee's liberty to pursue an occupation." Head v. Chicago School Reform Bd. of Trustees, 225 F.3d 794, 802 (7th Cir. 2000). In other words, to implicate a liberty interest, a defendant's defamatory statements must be coupled with the alteration of a legal status, such as the loss of an employment position or of future opportunities in the employee's chosen field.

Plaintiff was never fired from his job. He left voluntarily to accept a job as an air marshal. These two facts doom his claim of a violation of any liberty interest. He did not lose his employment and whatever defendant said about him did not prevent him from working in his chosen field of law enforcement.

ORDER

IT IS ORDERED that plaintiff Nathan Shoate's complaint is DISMISSED as to defendant City of Beloit Police Department and as to his Title VII claims against defendant Richard P. Thomas; FURTHER, IT IS ORDERED that defendant Richard P. Thomas's motion for summary judgment is GRANTED. The clerk of court is directed to enter judgment for defendants and close this case.

Entered this 9th day of March, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge