IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

WILLIS ABEGGLEN and MARY ABEGGLEN,

OPINION AND ORDER

Plaintiffs,

10-cv-110-wmc

v.

TOWN OF BELOIT, JOHN WILSON, BOB MUSEUS, GREG GROVES, SHANNON LADWIG, PHIL TABER, DICK LAMONTE and DAVID TOWNSEND,

Defendants.

This case arises out of Willis and Mary Abegglen's allegations that their employer, the Town of Beloit, and the individual defendants -- the Chief of Police for the town's police department, the Town Administrator, and Members of the Town Board -- violated their rights and engaged in unlawful employment practices.[1] The Abegglens assert numerous claims against defendants, primarily concerning alleged retaliation based on plaintiffs' exercise of their First Amendment rights.

Currently pending before the court is defendants' motion for partial summary judgment. (Dkt. #101.) Defendants move for summary judgment on two claims brought pursuant to 42 U.S.C. § 1983: (1) Willis Abegglen's claim that he was deprived of his First Amendment right to free speech; and (2) Willis and Mary Abegglen's claim for violation of their rights under the Equal Protection Clause of the Fourteenth

[1] Given the shared last names, the court will at times refer to the individual plaintiffs by their first names.

Amendment.[2]

Defendants' motion is granted as to Willis Abegglen's First Amendment claim because the speech which Willis claims as the basis for the alleged unlawful retaliation was not protected by the First Amendment. As for the Abegglens' Equal Protection claims, defendants' motion was premised on their understanding of the claim as a "class of one claim." In opposition, the Abegglens contend that they are not pursing a "class of one claim," but rather assert Equal Protection claims premised on their being discriminated against solely for exercising their fundamental rights to free speech under the First Amendment. (Pls.' Opp'n Br. (dkt. #108) 15 (citing *Abcarian v. McDonald*, 617 F.3d 931, 938 (7th Cir. 2010)) (holding that an Equal Protection claim "reaches state action that treats a person poorly . . . because the person has exercised a 'fundamental right'").) Therefore, plaintiffs' Equal Protection claims necessarily depend on the validity of their First Amendment claims. The court will therefore grant summary judgment to defendants on Willis's Equal Protection claim as well. Because defendants do not seek summary judgment on Mary's First Amendment claim, her Equal Protection claim will go forward.

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[2] In the motion and in their opening brief in support of the motion, defendants also pursued summary judgment of Willis Abegglen's 42 U.S.C. § 1983 third-party retaliation claim under Title VII. During briefing on this motion, the Supreme Court issued its decision in *Thompson v. North American Stainless LP*, 131 S. Ct. 863 (2011), in which the Court held that an "aggrieved" person under Title VII covers claims for retaliation brought by individuals within the "zone of interest." Specifically, in *Thompson*, the Court allowed the plaintiff to proceed with his Title VII claim based on retaliation because of his fiancée's protected activities. Based on *Thompson*, defendants here withdrew their motion for summary judgment with respect to Willis's Title VII retaliation claim premised on Mary's protected activity.

UNDISPUTED FACTS[3]

Defendants' motion concerns a subset of the facts, most of which are in dispute, underlying plaintiffs' claims. As such, the court will only recount the undisputed facts which are material to the claims at issue in this motion.

Plaintiff Willis Abegglen was employed by the Town of Beloit Police Department from August 15, 1980 until February 19, 2010, when he retired. Willis was the Deputy Chief from March 2004 until June 2009, when he was demoted to police sergeant. As Deputy Chief, Willis was the second in command of the department. Willis testified that he "ran the entire department." (Affidavit of William Retko ("Retko Aff."), Ex. 11 (dkt. #111-11) 222.) Willis had supervisory authority and responsibilities regarding the hiring, scheduling, promoting and training of the other members of the police department. (*Id.* at 221)

Plaintiff Mary Abegglen is currently employed with the Town of Beloit and has been since 1995. During that time, she has served in various capacities, the most recent of which is the Clerk of Court / Administrative Assistant. Mary was at all times relevant to this lawsuit a member of the union representing the police department employees in the Town of Beloit. The Abegglens have been married since 2004.

Defendants consist of (1) the Town of Beloit, a municipality under Wisconsin law, (2) the Town's former appointed Chief of Police John Wilson (who served in this role at all times material to this lawsuit), (3) the appointed Town Administrator Bob

[3] From the parties' proposed findings of facts and responses, the court finds the following facts undisputed for the purpose of deciding the present motion.

Museus, (4) the elected Town Chairman Greg Groves, and (5) the elected Town Supervisors Shannon Ladwig, Phil Taber, Dick LaMonte, and David Townsend.

The events giving rise to the claims at issue in the motion for summary judgment involve the in-service training hours for Officer Burkee, the only male, minority police officer employed by the Town's police department.[4] Due to facts not relevant here, Officer Burkee did not receive his required in-service training hours in 2008. In November 2008, Wilson received a memorandum from the police union questioning why the only minority member of the police department had not received the required training.

According to Mary Abegglen, Wilson called her into her office on November 18, 2008, and after showing her the union's memorandum, told her "Someone's going to fucking get fired over this, I promise you." (Retko Aff., Ex. 12 (dkt. #111-12) 25.) Mary questioned whether he wanted to open that "can of worms" given Wilson's use of the "n-word" on multiple occasions. Wilson then asked her, "you won't have my back?" To which Mary replied, "I [am] not lying for you." (*Id.*) Wilson testified at his deposition that he could recall no such conversation.

On November 19, 2008, Wilson called Burkee and Willis Abegglen into his office. The parties dispute the reason for the meeting, but it is undisputed that at the end of the meeting Wilson looked at Burkee and said, "I'll put every one of you mother fuckers on

[4] Plaintiffs propose a number of findings of fact concerning earlier alleged racist statements Wilson made, namely his use of the "n-word" generally, and specifically directed to Officer Burkee. These facts are in dispute, but also are not material to the present motion, although they may be relevant to plaintiffs' overall claims.

the stand if I have to and I'll fire you if I have to." (Retko Aff., Ex. 11 (dkt. #111-11) 63.)[5]

The next day, on November 20, 2008, Willis was in the Town of Beloit Police Department office, when he confronted Chief of Police Wilson about what he considered to be the hostile environment in the police department because of Wilson's alleged threats to fire officers.

Willis alleges that the following exchange took place:

> Willis informed Chief Wilson he needed to sit down because today Abegglen was the teacher and Wilson was the student, and then told Chief Wilson that Abegglen had had enough because Wilson could not threaten to fire people all the time as he was creating a hostile work environment.
>
> Chief Wilson responded to Willis Abegglen that, "I'll do whatever I want." To which Willis Abegglen informed Chief Wilson, "No you can't." To which Chief Wilson responded, "No, I can do that." And that after a few seconds stated, "Yeah, you're right."

(Am. Compl. (dkt. #35) ¶¶ 17-18; *see also* Retko Aff., Ex. 11 (dkt. #111-11) 99-100.) Willis and Wilson were the only ones present when this conversation took place.

On December 12, 2008, the union representing employees of the Town's police department sent a memorandum to Town Administrator Museus alleging that Wilson had repeatedly used racial epithets in his capacity as Chief of Police and that his repeated use was creating a hostile work environment. Museus hired an attorney to investigate the

[5] Wilson did not outright acknowledge that statement in his deposition, but stated that he "probably could have said that in anger." (Retko Aff., Ex. 13 (dkt. #111-13) 25-26.)

allegations. Mary was interviewed by the investigating attorney, and she indicated to him that she had heard Wilson use racial epithets.[6]

The investigator issued a report recommending that (1) a copy of the report be retained in Wilson's personnel file, (2) Wilson should undergo diversity training, and (3) Wilson be officially warned that his failure to correct his behavior would result in more severe discipline by the Town. On January 5, 2006, Museus sent Wilson a letter of admonishment and required him to attend a minimum of four hours of diversity sensitivity training within six months of the letter. Wilson formally apologized in a written letter to Museus and the Town Board.

On or about January 20, 2010, the union held a vote of its members and issued a written "vote of no confidence" to Wilson. Mary was present at the union meeting. Museus became aware of the union's vote and believed it was a union tactic to pressure Wilson's removal.

On February 16, 2009, the Town Board met and adopted a resolution changing some of the Town's organizational structure. Pursuant to this resolution, the Deputy Chief position was eliminated, and Willis was asked to retire or be demoted to a sergeant with the police department. Willis opted for the latter. He alleges that this demotion was in retaliation for his voicing concerns with Wilson about his creating a hostile work environment by threatening to fire police department employees. The Town contends that it was based on a legitimate reorganization of the Town's structure.

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[6] Willis also spoke to Attorney Levy, but not about Wilson's alleged use of racial epithets. Rather, Willis spoke with Levy about the training issues surrounding Officer Burkee. (Pls.' Opp'n. Br. (dkt. #108) 1 n.1.)

In that same Town meeting and as part of the same resolution, Mary's position as Clerk of Court / Administrative Assistant was also modified, resulting in her hours being reduced from 40 to 30 hours per week. The reduction in hours also decreased her salary and reduced her benefits. Mary alleges that these changes were made because of her cooperation in the investigation of Wilson's use of racial epithets. The Town contends that the reduction in her hours was based on the same reorganization referenced above, and was motivated by budgetary and other concerns related to separation of powers between the police department and municipal court functions.

OPINION

Summary judgment is appropriate if the moving party shows "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). As the moving party, defendants bear the burden of informing the court of the basis for the motion, and identifying the portions of the record that indicate the absence of a genuine dispute of material fact. *Id.* at 323. Once this initial burden has been met, the non-moving party bears the burden of showing that there is a genuine dispute regarding material facts. *Id.* at 324. In deciding this motion, the court must view the evidence in a light most favorable to Willis and Mary Abegglen, the non-moving parties in this case. *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986).

I. Willis Abegglen's First Amendment Claim

Determining whether a public employee's speech is protected by the First Amendment is a two-part inquiry: (1) whether the employee spoke as a citizen on a matter of public concern; and (2) whether the employee's interest as a citizen commenting on a matter of public concern outweighs the public employers' interest in promoting effective and efficient public service. *Spiegla v. Hull,* 481, F.3d 961, 965 (7th Cir. 2007). The Amended Complaint alleges that Willis was retaliated against because he directly informed Wilson that he was creating a hostile work environment. (Am. Compl. (dkt. #35) ¶ 60.)

If Willis was speaking pursuant to his official duties as a public employee, rather than as a private citizen regarding a matter of public concern, his speech is not protected by the First Amendment. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006); *Swearnigen-El v. Cook County Sheriff's Dept.*, 602 F.3d 852, 862 (7th Cir. 2010) (affirming district court's finding that correctional officer "was speaking in his capacity as a public employee contributing to the formation and execution of official policy when he disagreed with [the Sheriff's] plan") (internal quotation marks and citation omitted); *Mills v. City of Evansville, Ind.*, 452 F.3d 646, 648 (7th Cir. 2006) (affirming district court's grant of summary judgment to employer where plaintiff, a sergeant, "was on duty, in uniform, and engaged in discussion with her superiors" about the police chief's plan to reduce the number of crime prevention officers under plaintiffs' supervision). The question of whether Willis's speech is protected is a question of law for the court. *Spiegla*, 481 F.3d

at 965 ("The 'inquiry into the protected status of speech is one of law, not fact.'") (quoting *Connick v. Myers*, 461 U.S. 138, 148 n.7 (1983)).

Willis Abegglen claims that he was retaliated against for directly informing Chief Wilson that he was creating a hostile work environment during their November 20, 2008 meeting. The defendants argue that during this meeting, Willis Abegglen was not speaking as a private citizen on a matter of public concern, but that he was speaking pursuant to his official duties as Deputy Chief. As such, according to defendants, this speech was not entitled to protection under the First Amendment. Willis and Mary Abegglen claim that this conversation was not a part of Willis Abegglen's official duties as Deputy Chief because the Town of Beloit policy on discrimination did not require him to have the conversation. (Pls.' Opp'n Br. (dkt. #108) 5.)

The defendants argue, and Willis and Mary Abegglen concede, that the scope of an employee's official duties is not limited solely by an official policy; rather, "the inquiry is a practical one" that looks at the types of jobs "an employee is actually expected to perform." *Morales v. Jones*, 494 F.3d 590, 596 (7th Cir. 2007). As Deputy Chief, Willis Abegglen was second in command of the police department. From the time he was appointed Deputy Chief, Willis Abegglen testified that he "ran the entire department." Even viewed in a light most favorable to the Abegglens, these facts show that Willis Abegglen's official duties -- the jobs he was actually expected to perform -- are broader than those described in the Town of Beloit's discrimination policy. The court finds that these duties included at least attempting to prevent a hostile work environment from arising, as well as confronting a police department employee or other town official

(whether more or less senior than Willis) who was acting in such a way as to cause a hostile work environment or make one more likely. As such, Willis's conversation with Chief of Police Wilson was not speech protected by the First Amendment, and therefore cannot for the basis for Willis's First Amendment retaliation claim.

In an attempt to salvage Willis's First Amendment claim, the Abegglens argue in their brief that the defendants' motion must be denied for two other reasons: (1) Willis Abegglen's call to Town Chairman Groves was protected speech and he was retaliated against because of what he said during that call; and (2) Willis Abegglen was retaliated against because of Mary Abegglen's exercise of her right to free speech. [7] The Amended Complaint, however, solely alleges that Willis Abegglen was retaliated against after "directly informing Chief Wilson" that he was creating a hostile work environment. (Am. Compl. (dkt. #35) ¶ 60.) The court will not allow the Abegglens to raise new claims now in an attempt to avoid summary judgment. *See Grayson v. O'Neill*, 308 F.3d 808, 817 (7th Cir. 2002) ("[A] plaintiff may not amend his complaint through arguments in his brief in opposition to a motion for summary judgment."); *Auston v. Schubnell*, 116 F.3d 251, 255 (7th Cir. 1997) (holding that the summary judgment stage "is too late in the day to be adding new claims").

[7] In support of their argument that Willis's First Amendment claim should be allowed to proceed based on retaliation for Mary's speech, plaintiffs cite to *Adler v. Pataki*, 185 F.3d 35, 44 (2d Cir. 1999) and *Anderson-Free v. Steptoe*, 970 F. Supp. 945, 957-58 (M.D. Ala. 1997). (Pls.' Opp'n Br. (dkt. #108) 11.) Both of these cases, however, concern a First Amendment right to intimate association, and nowhere in the complaint do plaintiffs even so much as hint at such a claim.

Moreover, plaintiffs' argument concerning Willis's conversation with Groves -- the content of which, and even whether it occurred, is disputed -- fails for another reason. The Abegglens point to case law suggesting that a public employee retains constitutional protections for speech made to contribute to the public discourse, and that public employees retain their rights to complain to an elected official, such as Groves. *Morales,* 494 F.3d at 596 ("[The] right to complain both to an elected public official and to an independent state agency is guaranteed to any citizen in a democratic society regardless of his status as a public employee.") (citing *Freitag v. Ayers,* 468 F.3d 528, 545 (9th Cir. 2006)).

Despite this language, the *Morales* court held that statements made by a police officer to the elected district attorney's office were not protected by the First Amendment, because they were made pursuant to the officer's official duties. *Morales*, 494 F.3d at 598 ("[T]he Milwaukee Police Department requires police officers to report all potential crimes. By informing A.D.A. Chisholm of the allegations . . . , Morales was performing that duty as well. Accordingly, his conversation with A.D.A. Chisholm is not protected under the First Amendment after *Garcetti*."). Similarly, the Ninth Circuit in *Freitag* recognized that even when a public employee is speaking to an elected official, the speech is only protected if made outside the scope of the employee's official duties. *Freitag*, 468 F.3d at 545.

Given Willis's high-ranking position in the police department, calling a Town Board member to raise concerns about the Town's police chief was included in the tasks Willis was expected to perform as Deputy Chief. Although there are factual disputes

about what was said during Willis's call to Groves, these disputes are immaterial. Even assuming the conversation occurred and Willis's version is accurate, the alleged discussion was consistent with the expected duties of the Deputy Chief of Police and cannot form the basis of a First Amendment retaliation claim.

Because the undisputed facts compel the finding that Willis Abegglen was speaking pursuant to his official duties, not as a citizen on a matter of public concern, the court need not reach the second step of the public employee/First Amendment inquiry. Defendants' motion for summary judgment as to Willis Abegglen's First Amendment claim is granted.

II. Willis and Mary Abegglen's Equal Protection Claim

Traditionally, the Equal Protection Clause of the Fourteenth Amendment is understood to protect members of vulnerable groups from inequitable treatment by the states. *LaBella Winetka Inc. v. Vill. of Winetka,* 628 F.3d 937, 941 (7th Cir. 2010). The Equal Protection Clause is also violated, however, when a state treats a person differently because that person has exercised a fundamental right. *Abcarian v. McDonald*, 617 F.3d 931, 938 (7th Cir. 2010). The Supreme Court has also recognized what is known as a "class of one" claim, where a state "irrationally singles out and targets an individual for discriminatory treatment[.]" *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000).

The amended complaint did not state under which particular theory the Abegglens' Equal Protection claim proceeded. In defendants' brief in support, they argue that Willis and Mary Abegglen's claim was a class of one claim, and urge the court to

dismiss it in light of the Supreme Court's decision in *Engquist v. Oregon Department of Agriculture*, 533 U.S. 591 (2008), which significantly limited class of one claims in the public employment context. (Defs.' Br. (dkt. #103) 14.) In their brief, Willis and Mary Abegglen clarified that they were not attempting to bring a class of one claim; rather, they were proceeding under the theory that their Equal Protection rights were violated because they exercised a fundamental right -- their right to free speech under the First Amendment. (Pls.' Opp'n Br. (dkt. #108) 15.)

Because defendants' motion as to Willis Abegglen's First Amendment claim is granted, their motion on his Equal Protection claim based on a violation of that same right is also granted. Mary Abegglen's Equal Protection claim is based on her exercise of her fundamental right to free speech. But the fact that her Equal Protection claim is redundant to, and dependent upon, her First Amendment claim is not a basis to grant summary judgment on one of the claims. A plaintiff may pursue alternative, duplicative causes of action, even if one is dependent on the other. *See Vodak v. City of Chicago*, Nos. 09-2768, 09-2843, 09-2901, 2011 WL 905727, at *10 (7th Cir. Mar. 17, 2011) (noting that it would "streamline" the suits if plaintiffs would confine their claims to the Fourth Amendment "forgoing their largely duplicative appeals to the First Amendment" and other claims, but *not* dismissing the duplicative claims). This is more properly an issue to be addressed in jury instructions and any special verdict.

ORDER

IT IS ORDERED THAT:

1) defendants' motion for partial summary judgment is GRANTED as to Willis Abegglen's First Amendment claim;

2) defendants' motion for partial summary judgment is GRANTED as to Willis Abegglen's Equal Protection claim; and

3) defendants' motion for partial summary judgment is DENIED as to Mary Abegglen's Equal Protection claim.

Entered this 12th day of April, 2011

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge