

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

John Johnson,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. : 2:14-cv-02381-JHH
)	
City of Bessemer, Alabama, et al.,)	JURY TRIAL DEMANDED
)	
Defendants,)	

FIRSTAMENDED COMPLAINT

The Plaintiff first filed his complaint *pro se*, but has now obtained counsel by and through whom, Plaintiff hereby amends his original complaint pursuant to Rule 15(a)(1)(B), Fed.R.Civ.P., as a matter of course. For his first amended complaint, Plaintiff says as follows:

NATURE OF ACTION AND JURISDICTION

1. This action is based on the First Amendment to the United States Constitutions, 42 U.S.C. §§ 1981, 1982A, 1988, and applicable laws of the State of Alabama.

2. This Court has jurisdiction of this action pursuant to 28 U.S.C. §§ 1331 and 1343. The Court also has pendent jurisdiction pursuant to 28 U.S.C. § 1367.

3. Venue is proper in the United Stated District Court for the Northern

District of Alabama where the Plaintiff resides, where the Defendants regularly conduct business operations, and where all of the wrongful conduct alleged herein took place.

PARTIES

4. Plaintiff, John Johnson ("Johnson") is a fireman with the City of Bessemer Fire Department. He currently resides in Pleasant Grove, Alabama.

5. Defendant, City of Bessemer is a municipal corporation organized under the laws and Constitution of the State of Alabama, and is a corporate entity capable of suing and being sued. Defendant City maintains and operates the City of Bessemer Fire Department.

6. Paul Syx is the chief of the City of Bessemer Fire Department. He is sued for damages in his individual capacity and for declaratory and injunctive relief in his official capacity.

7. Kenneth Gulley is the Mayor of the City of Bessemer. He is sued for damages in his individual capacity and for declaratory and injunctive relief in his official capacity.

8. Captain Eidson is a Captain of the Fire Department of the City of Bessemer. He is sued for damages in his individual capacity and for declaratory and injunctive relief in his official capacity.

9. At all times relevant, Defendants acted under color of state law.

FACTS

10. John Johnson (hereinafter "Plaintiff" or "Johnson") works as a fireman for the City of Bessemer. He was so employed for thirteen years at the time of his suspension for nine (9) working days or three (3) shifts. He has now been employed by the department for a total of fifteen years.

11. Johnson has also been a licensed practical nurse for 18 years. He is employed as a licensed practical nurse in the long term care unit at St. Vincent's East in addition to his employment as a fireman.

12. At all relevant times, all matters regarding compensation, terms, conditions, rights and privileges of Johnson's employment were governed and controlled by The City of Bessemer and its agents and employees.

13. At all relevant times, Johnson fully, adequately and completely performed all of the functions, duties and responsibilities of his employment as a fire fighter with the Bessemer City Fire Department.

14. Johnson started his career with the City of Bessemer Fire Department in 2000. Through at his career, he has been subjected to racial harassment. Approximately two years after his employment began, on or about 2000, while assigned to Station One, Johnson was in the bay area with fellow firefighters, including some superior officers, when one of the firefighters threw a rope with a noose over the rafters and hung it there. The noose was left

hanging over the pool table cover, which had a confederate flag painted on it. Johnson was extremely offended by this inappropriate display of racism in the workplace but felt he could not openly speak out face-to-face without making matters worse against his co-workers. Instead, Johnson reported the incident to his then captain and nothing was done about the matter. He did not take any further action given the fact that superior officers were present when the “noose incident” took place and his complaint was not taken seriously.

15. In 2009, Johnson was sitting in the common area of his assigned station. He was there with his son and fiancé. Three firemen, including one lieutenant, walked into the area. They proceeded to the dry erase board and drew a swastika on the board. The swastika remained on the board for the remainder of the shift. This action offended Johnson and he subsequently filed a report on the matter. The three offending parties were given written reprimands and sent to sensitivity training. The report stated that the men “were not aware that the swastika was offensive to African Americans.”

16. Johnson was not satisfied with the handling of this matter and he subsequently filed an EEOC complaint on or about January 21, 2010.

17. These two incidents were the most severe, but the undercurrent of racism was present throughout Johnson’s employment. After these incidents, Johnson was regularly and continually subjected to various forms of harassment

and repeated attempts to discipline him based upon false allegations. These incidents were clear retaliation against Johnson for his having spoken out against the racist culture within the Bessemer City Fire Department.

18. On or about April 25, 2012, a white fireman with the City of Bessemer Fire Department was upset over the Trayvon Martin shooting. He began posting offensive remarks on his personal Facebook page. This resulted in a few days of back and forth arguments between this employee and a few fellow employees from the City of Bessemer. The arguments did not carry over into the workplace but were strictly limited to posts on Facebook. The same officer has a history of posting racially offensive statements on his personal Facebook page. He has been “counseled” by the Bessemer Fire Department about this activity but was never taken before a review board or suspended. The white officer was not punished at all for the comments he made on Facebook to which Johnson reacted.

19. On or about April 30, 2012, Johnson while at home read the continued arguments on the fireman’s Facebook page about the Martin case. Johnson went onto his personal computer at home on his personal Facebook page and wrote:

“WOW! THIS IS RIDICULOUS! I WORK AT A PLACE WHERE IT'S OK TO MAKE POLITICAL STATEMENTS VIA SOCIAL MEDIA, COMMUNICATIONS BOARDS, VERBAL COMMENTS, ETC SUCH AS POSTS ON FB, DRAWING

SWASTIKS ON DRY ERASE BOARDS, EVEN TO HANGING A NOOSE UP IN THE MIDDLE OF A BUILDING! THE THING THAT IS MOST DISTURBING IS THAT IT IS ALLOWED! THE PEOPLE WHO ARE RESPONSIBLE FOR THOSE ACTS ARE NEVER HELD ACCOUNTABLE. BUT, AS SOON AS SOMEONE COMPLAINS THAT THESE ACTIONS ARE OFFENSIVE OR CAN BE VIEWED AS RACIST THEN THERE IS A PROBLEM....I MEAN COME ON PEOPLE, GROW THE HELL UP, GET YOUR HEAD OUT YOUR ASS! ANYONE EVER HEARD OF A HOSTILE WORKING ENVIRONMENT? I'M JUST SAYING... SUPPOSE THE SHOE WAS ON THE OTHER FOOT? NO NEED TO CALL NAMES, YOU KNOW WHO YOU ARE. BUT I CAN CALL NAMES. I AIN'T SCARED!"

20. The statement did not mention the City of Bessemer, The City of Bessemer Fire Department, the chief of the department, the mayor of the City or any other city personnel or officials.

21. A few days after this post, Johnson received a Facebook friend request from Captain Eidson. This status would allow Johnson's Facebook page to be linked and monitored by Captain Eidson. Nevertheless, Johnson accepted the request. Shortly thereafter he received a "Notice of Contemplated Disciplinary Action" based upon his Facebook post set out in paragraph 18 above. Captain Eidson treated Johnson differently than a similarly situated white employee.

22. A disciplinary hearing was held on or about May 29, 2012, in the Office of the Bessemer City Attorney, R. Shan Paden. Pursuant to said hearing Johnson was notified on June 22, 2012, that disciplinary action would be taken

against him. The City's findings of fact included but are not limited to the following:

- (a) “I find that you chose to make untrue statements in a public forum that creates a misconception that the City of Bessemer allows and tolerates discriminatory conduct in the workplace ...
- (b) Your oral and written statements contain several inconsistencies and rely on Misunderstandings of the rights that you have as an employee in the public service. Specifically if an employee's comments are termed as them speaking only on matters of personal interest, then these are not entitled to constitutional protection. Additionally when an employee of public service speaks about a matter of public concern, an employer can restrict that speech if the topic relates to any matter of political, social or other concern to the community ...
- (c) I find that your Facebook posting addressed a matter of public concern, where you insinuate that a department of the City allows activities to take place which would otherwise prevent it from effectively and efficiently performing its intended function ...”

23. The disciplinary actions against Johnson included the following:

- (a) “You are advised that the use of social media to post messages (including clicking the "like" function of the post of another employee) that impair discipline by superiors or harmony among co-workers, and that has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary is strictly prohibited.
- (b) You are advised that where close working relationships are essential in fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate.
- (c) You are hereby suspended for 9 working days/3 shifts beginning 0700 hours on June 26, 2012 and ends 0700 hours on July 5, regarding your use of social media and false statements as contained herein and that failure to comply with the above listed rules and regulations could result in further disciplinary action, up to termination.
- (d) Additionally, you are required to be evaluated by our employee assistance provider and will be required to attend sensitivity training with our employee assistance provider and/or the Jefferson County Personnel Board.”

24. Johnson appealed this decision to the Personnel Board of Jefferson County, Alabama. A hearing was held before a Hearing Officer in November of 2012. The Hearing Officer found that "both parties agree that Mr. Johnson's speech addressed matters of public concern ... She further stated, "After balancing the City of Bessemer's interest in quelling public discussion of racially divisive issues against Mr. Johnson's interest in free speech, this hearing officer must conclude that the latter is more compelling under Pickering ... The evidence in this case does not show that Mr. Johnson's speech presented an imminent conflict or a significant threat to any interest of the City of Bessemer. The City of Bessemer has not met its burden in demonstrating that Mr. Johnson violated the Rules and Regulations of the Personnel Board of Jefferson County ..."

25. The Hearing Officer recommended that the Personnel Board of Jefferson County reverse the City of Bessemer's decision to suspend the employment of Mr. Johnson.

26. The matter was then heard by the 3 Member Board on December 11, 2012. The Board issued its Order on December 11, 2012. The Board "agree[d] that the Respondent's [herein Johnson] addressed a matter of public concern ... The Hearing Officer incorrectly found that the suspension should be reversed because there was no actual disruption to the City of Bessemer's function. The Board disagrees with the Hearing Officer that a

showing of actual disruption is required." They upheld the City's decision to suspend Johnson.

27. Johnson filed his complaint and a motion to proceed in the district court in forma pauperis on December 11, 2014 (Doc. 2). On December 17, 2014 the district court denied this motion and ordered Johnson to file his complaint with the \$400 filing fee within 30 days. (Doc. 4). The statute of limitations had not expired when the complaint was filed.

28. The three (3) member Board herein based their decision on facts that were not contained in Johnson's initial disciplinary hearing, the hearing before the Hearing Officer or anything else contained in his file. All of the facts asserted were based upon information that was in the other fireman's Facebook post and subsequent disciplinary hearing. None of the information relied on alleging disruption came from Johnson's file or any testimony rendered or evidence submitted.

29. On or about May 3, 2013, a Notice of Claim was filed with the City of Bessemer.

30. Contrary to the City's statement in Johnson's disciplinary action, neither of the two firemen who clicked "like" to his Facebook post were disciplined. One was promoted shortly thereafter.

31. Johnson's Facebook post on which his suspension was based

contained absolutely no identifiers. It was a general statement. The City claims that they knew it was about the City because they "recognized" the incidents that he was addressing. The City violated his First Amendment Rights by making assumptions about the subject of his post and denying Johnson his free speech rights as a private citizen. In the alternative, they also violated his rights as an employee to address matters that they City admitted were protected speech.

32. The City did not have an Internet or Social Media policy in place. The only policy regarding social media stated "Participation in social chat channels and bulletin boards is not permitted using Bessemer Fire Department computing resources ..."

33. Testimony from fellow firemen, superior officers, during the Personnel Board Hearing indicated that there was no disruption to the workplace after Johnson's post. They testified that the majority of the department was not aware of Johnson's post until he received notice of disciplinary action.

34. Johnson has been the subject of constant harassment and retaliation as a result of complaining of prior incidents as well as the Facebook post that serves as the basis for this Complaint.

CAUSES OF ACTION

COUNT ONE

Constitutional and Civil Rights Pursuant to 42 U.S.C. §§ 1983 and 1988

Violation of First Amendment Free Speech Rights

(Against All Defendants)

35. The foregoing paragraphs are incorporated herein as if realleged herein.

36. The Plaintiff avers that he has met the requirements of *Monell v. Dept. of Social Services of the City of New York*, 436 U.S. 658, 691, 98 S.Ct. 218, 56 L.Ed. 611 (1978), in that the Plaintiff has identified a municipal policy or custom that caused the Plaintiff's injury because he has shown that the policy of racial discrimination and workplace discrimination was a policy created by an official of such rank that he could be said to be acting on behalf of the municipality. Moreover, the Plaintiff has alleged that there is a custom or practice of racial discrimination and workplace harassment that, even though not formally approved by an appropriate decisionmaker, may fairly subject the City of Bessemer to liability based on the theory that the relevant practice is so widespread as to have the force of law. The City of Bessemer had a policy or custom of deliberate indifference that lead to the violation of the Plaintiff's constitutional rights. It would be a rare thing for a municipal corporation to have an official

policy that indorses a constitutional violation but Plaintiff may show that Bessemer had a custom or practice of permitting racial discrimination and that custom or practice was the moving force behind the constitutional violation. Plaintiff avers that the policy making official of the City of Bessemer Fire Department had established a policy, custom, or practice, of racial discrimination that caused the Plaintiff's prosecution for violation of his protected right of free speech because of his race. The Plaintiff avers that a "policy" is a decision that is officially adopted by the municipality or created by an official of such rank that he or she could be said to be acting on behalf of the municipality. A custom is a settled and permanent practice. Moreover, Plaintiff avers that municipal liability may be imposed under the *Monell* doctrine for a single decision by municipal policymakers under appropriate circumstances. In *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986), the United States Supreme Court, relying on *Owen v. City of Independence*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980), held that "it is plain that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances ... under § 1983 for a single decision ... whether or not that body had taken similar action in the past or intended to do so in the future – because even a single decision by such a body unquestionably constitutes an act of official government policy ... *Monell's* language makes clear that it expressly envisioned other officials 'whose

acts or edicts may fairly be said to represent official policy, and whose decisions therefore, may give rise to municipal liability under § 1983.” (475 U.S. at 480).

37. Plaintiff avers that the decision to punish Plaintiff for the post of his Facebook page was made by one or more of the City’s authorized decisionmakers and represents an act of official government policy as that term is commonly understood. Plaintiff avers that where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly. Therefore, to deny compensation to the victim would therefore be contrary to the fundamental purpose of § 1983.

38. Plaintiff avers that he was disciplined and retaliated against for his constitutionally protected speech and avers that his speech involved a matter of public concern and that his free speech interests outweighed the State employer’s interest in effective and efficient fulfillment of its responsibilities, that his speech played a substantial part in the adverse employment action. The Plaintiff further avers that he was not speaking as a government employee, but was speaking instead as his role as a citizen addressing matters of public concern.

39. Plaintiff’s speech did not disrupt the function of the City or have a negative impact on the efficiency of the Fire Department.

40. Plaintiff never engaged in speech that was detrimental to any department of the City.

41. Plaintiff's free speech right to engage in discussion as a private citizen outweighed any interest of the Defendant's in suppressing that speech.

42. The Defendants violated Johnson's right to free speech by suspending him and restricting his personal social media posts because of his discussion about what he considered racial harassment.

43. As a direct and proximate result of the Defendants' violations of Johnson's constitutional rights, Johnson has suffered severe and substantial damages. These damages include lost salary, lost raises, diminished earnings capacity, lost career opportunities, uncomfortable and hostile work environment, litigation expenses including attorney's fees, loss of reputation, humiliation, embarrassment, inconvenience, mental and emotional anguish and distress and other compensatory damages in an amount to be determined by a jury and the Court.

44. Johnson's Facebook post on his private page is speech protected by the First Amendment to the United States Constitution.

45. Johnson was speaking as a private citizen; therefore his conduct fell within the realm of protected public employee speech.

46. Plaintiff's speech did not name the City, the Fire Department, the Chief, the Mayor or any City official.

47. Defendants acted intentionally and with callous disregard for

Johnson's clearly established constitutional rights.

COUNT TWO

Unconstitutional Prior Restraint Pursuant to 42 U.S.C. §§ 1983, 1988

48. The foregoing paragraphs are incorporated herein as if realleged herein.

49. Defendants, via their discipline, prohibited Johnson from expressing himself via his Facebook posts or other social media.

50. Defendants prohibition of Johnson expressing himself on social media and his unlawful suspension constituted an unconstitutional prior restraint.

51. As a result of the actions, statements and/or policies of the Defendants, Johnson suffered an unconstitutional deprivation of his rights under the First and Fourteenth Amendments to the United States Constitution.

52. Defendants acted intentionally and with callous disregard for Johnson known statutory and constitutional rights.

53. As a direct and proximate result of the Defendants' violations of Johnson statutory and constitutional rights as described herein, Johnson has suffered damage to reputation, humiliation, embarrassment, mental and emotional anguish and distress and violation of right to free speech as protected under the Constitution as well as other compensatory damages, in an amount to be determined by a jury and the Court.

COUNT THREE

Negligence

54. The foregoing paragraphs are incorporated herein as if realleged herein.

55. Defendants owed a duty to protect co-employees from inflicting damage on other employees. They have not fulfilled this duty as they have allowed a number of the Plaintiff's employees to harass him.

56. Defendants owed a duty to prevent such actions as a noose being a decoration and a swastika being drawn on a white board in the communal area and to allow other employees to offend and harass the Plaintiff and the family.

57. Defendants were well aware of these racist activities and took no disciplinary action against the employees who engaged in the clearly inappropriate conduct. Defendants' failure to prevent the formulation of a hostile work environment caused the Plaintiff to suffer mental anxiety, stress and financial loss.

COUNT FOUR

Abuse Of Process By Defendants

58. The foregoing paragraphs are incorporated herein as if realleged herein.

59. Defendants abused the administrative process in order to commit a

purposefully discriminatory act.

60. Racist comments were made by a white co-worker for months and that co-worker was never brought before any review board or suspended. Defendant Eidson seeking out the Plaintiff's Facebook page and then bringing a charge against him is an abuse of the disciplinary process of the Bessemer Fire Department. An employee of the Bessemer Fire Department took it upon himself to investigate a matter that is not a violation of any code of conduct or ethics adopted by Bessemer City.

61. No other employee has been punished for his comments on Facebook.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, John Johnson, requests judgment against Defendants as follows:

A. For appropriate declaratory relief regarding the unlawful and unconstitutional acts of the Defendant.

B. For appropriate compensatory damages in an amount to be determined at trial;

C. For appropriate equitable relief against all Defendants as allowed by the Civil Rights Acts of 1871, 42 U.S.C. § 1983, including enjoining and permanent restraining of these violations, and direction to Defendants to take such affirmative action as is necessary to ensure that the effects of the unconstitutional

and unlawful employment practices are eliminated and do not continue to affect Plaintiff, or others' employment environment or opportunities.

D. For such other and further relief to which Plaintiff may show himself justly entitled.

Respectfully submitted,

/s/ Joseph Henry Rutledge, II
Joseph Henry Rutledge, II
Attorney for the Plaintiff

OF COUNSEL:
RUTLEDGE & YAGHMAI
Two Chase Corporate Drive
Suite 460
Birmingham, Alabama 35244
205/985-2411 T.
205/985-2412 F.
henry@rylaw.net

JURY DEMAND

Plaintiff Requests Trial By Jury On All Issues So Triable.

/S/Joseph Henry Rutledge
OF COUNSEL

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been served via U.S Postal Service, on this 26th day of February, 2015 on the following:

Alfred H. Perkins, Jr.
Michael D. Flories
Starnes Davis Florie, LLP
100 Brookwood Place, Seventh Floor
P.O. Box 58512
Birmingham, AL 35259-8512
aperkins@starneslaw.com
mdf@starneslaw.com

/s/Joseph Henry Rutledge, II
OF COUNSEL