UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

RAFFEL PROPHETT, Plaintiff,	:	Case No. 1:17-cv-699
	:	Judge Timothy S. Black
vs.	:	
CITY OF CINCINNATI, *et al.*, Defendants.	:	

ORDER GRANTING DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS (Doc. 11)

This case is before the Court on Defendants' motion for judgment on the pleadings (Doc. 11) and the parties' responsive memoranda (Docs. 13, 14).[1]

I. FACTS AS ALLEGED BY PLAINTIFF

A. The Parties.

Plaintiff Raffel Prophett is a citizen of the United States and a resident of Cincinnati, Hamilton County, Ohio. At all relevant times, he has been employed by the City of Cincinnati as Fire District Chief, District 1. (Doc. 1 at ¶ 1).

Defendant City of Cincinnati (the "City") is a municipality organized under the laws of the State of Ohio. (Doc. 1 at ¶ 2).

Defendant Harry Black is a citizen of the United States and a resident of the State of Ohio, and at all relevant times was the City Manager of the City. (Doc. 1 at ¶ 3). Mr. Black is being sued individually and in his official capacity. (*Id.*)

[1] "Defendants" refers to Defendants the City of Cincinnati and Harry Black.

B. Facts Giving Rise to Plaintiff's Claims.

Mr. Prophett joined the Cincinnati Fire Department ("CFD") in 1988 as a firefighter. (Doc. 1 at ¶ 8). Mr. Prophett was promoted to Lieutenant in 1993; Captain, Company Commander: Suppression Operations in 1999; Captain, Weapons of Mass Destruction Coordinator: Special EMS Operations in 2000; Captain, Paramedic Commander: Emergency Medical Services Operations in 2002; Captain, Training Officer: Human Resource Bureau in 2005; and District Chief, District 1 (U-1) Commander: Suppression Operations in 2011. (*Id.* at ¶ 9). Mr. Prophett remains the District Chief of District 1. (*Id.* at ¶ 10).

In February 2015, Mr. Prophett wrote Mr. Black requesting that he investigate a matter brought forth by CFD District Chief Will Jones against CFD Assistant Chief Mose Demasi. (Doc. 1 at ¶ 11). Chief Jones had verbalized allegations of wrongdoing against Assistant Chief Demasi on February 13, 2014, and he subsequently documented those allegations in writing on February 18, 2014. (*Id.* at ¶ 12). Under City of Cincinnati Administrative Regulation No. 36, Resolution of Employee Concerns, CFD Chief Richard A. Braun was required to act. (*Id.* at ¶ 13). Chief Braun failed to do so. (*Id.*)

Further, given the gravity of Chief Jones' allegations, Chief Braun was required to initiate the investigation process as prescribed in CFD Procedure Manual Section 504, and the City of Cincinnati's Personnel Policies and Procedure Manual, Chapter 5. (Doc. 1 at ¶ 14). These policies and/or procedure manuals require that a preliminary investigation occur to determine if the allegations have merit, and, if so, that a formal investigation ensue. (*Id.*)

Mr. Prophett's request to Mr. Black concluded as follows:

> Sir, our overarching goal is to maintain the integrity of the CFD and the city we serve. We support Chief Jones who, at the risk of alienating himself among his peers and superiors, displayed moral courage in coming forward and reporting possible procedural violations against the CFD and our great city. If we are to preserve one of our most cherished core values, integrity, we will need your assistance. Therefore, we respectfully request that your administration prudently respond and visit this matter most urgently.

(Doc. 1 at ¶ 15). Despite the importance of the matter, and the urgency of Mr. Prophett's request, Mr. Black ignored the matter. (*Id.* at ¶ 16).

In July 2015, Mr. Prophett received a call from an anonymous individual reporting that CFD Assistant Chief Robert Kuhn appeared to be on duty under the influence of alcohol. (Doc. 1 at ¶ 17). Mr. Prophett immediately reported the complaint to his direct supervisor at the time, CFD Assistant Chief Roy Winston. (*Id.* at ¶ 18). Subsequently, Assistant Chief Kuhn was placed on paid leave as the City investigated the allegation. (*Id.* at ¶ 19).

Thereafter, Mr. Prophett heard from numerous individuals that Mr. Black was describing him as a "troublemaker." (Doc. 1 at ¶ 20).

In April 2016, Mr. Prophett applied for the position of Assistant Fire Chief. (Doc. 1 at ¶ 21). He allegedly was the most qualified individual applying for the position. (*Id.*) Despite being the most qualified applicant, his application was denied. (*Id.* at ¶ 22). Mr. Black was the ultimate decision maker on Mr. Prophett's application to become Assistant Fire Chief. (*Id.* at ¶ 23).

In July 2017, Mr. Prophett applied again for the CFD Assistant Fire Chief position. (Doc. 1 at ¶ 24). Again, Mr. Prophett allegedly was the most qualified individual applying, but his application was denied. (*Id.* at ¶¶ 25-26). Again, Mr. Black was the ultimate decision maker on Mr. Prophett's application. (*Id.* at ¶ 27).

Mr. Prophett filed this lawsuit alleging that Mr. Black denied his promotion to Assistant Fire Chief in April 2016 and July 2017 in retaliation for the issues Mr. Prophett raised in February 2015 and July 2015. (Doc. 1 at ¶ 28). The Complaint asserts claims of abuse of power, violation of Mr. Prophett's right to free speech, and violation of Mr. Prophett's substantive and procedural due process rights.

II. STANDARD

The standard of review for a Rule 12(c) motion is the same as for a motion under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. *Fritz v. Charter Twp. of Comstock*, 592 F.3d 718, 722 (6th Cir. 2010). "For purposes of a motion for judgment on the pleadings, all well-pleaded material allegations of the pleadings of the opposing party must be taken as true, and the motion may be granted only if the moving party is nevertheless clearly entitled to judgment." *Id.* (*citing JPMorgan Chase Bank v. Winget*, 510 F.3d 577, 581 (6th Cir. 2007)).

A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) operates to test the sufficiency of the complaint and permits dismissal of a complaint for "failure to state a claim upon which relief can be granted." To show grounds for relief, Fed. R. Civ. P. 8(a) requires that the complaint contain a "short and plain statement of the claim showing that the pleader is entitled to relief."

While Fed. R. Civ. P. 8 "does not require 'detailed factual allegations,' . . . it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)). Pleadings offering mere "'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id*. (citing *Twombly*, 550 U.S. at 555). In fact, in determining a motion to dismiss, "courts 'are not bound to accept as true a legal conclusion couched as a factual allegation[.]'" *Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265 (1986)). Further, "[f]actual allegations must be enough to raise a right to relief above the speculative level[.]" *Id*.

Accordingly, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678. A claim is plausible where "plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. Plausibility "is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id*. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief,'" and the case shall be dismissed. *Id*. (*citing* Fed. Rule Civ. P. 8(a)(2)).

III. ANALYSIS

A. Defendants' Exhibits.

In support of their motion for judgment on the pleadings, Defendants submit three exhibits: the City's Administrative Regulation No. 36, CFD Fire Department Manual Section 504, and the City's Personnel Policies and Procedure Manual, Chapter 5. (Doc. 11-1).

Typically, matters outside the pleadings may not be considered on a Rule 12(b)(6) or Rule 12(c) motion, but the law provides several exceptions. Among them, "[i]f referred to in the complaint and central to the claim, documents attached to a motion to dismiss form part of the pleadings. *Armengau v. Cline*, 7 F. App'x 336, 343 (6th Cir. 2001).

Here, Mr. Prophett's claims are premised on his allegations that Defendants retaliated against him, in part, for conveying to Mr. Black that Chief Braun did not investigate allegations as required by Administrative Regulation No. 36, CFD Fire Department Manual Section 504, and the City's Personnel Policies and Procedure Manual, Chapter 5. (Doc. 1 at ¶¶ 13-14). All three of these documents are referred to in the Complaint and are central to Mr. Prophett's claims. Mr. Prophett did not object to the Court's considering these documents. Accordingly, the Court will consider Defendants' exhibits as part of the pleadings. *Armengau*, 7 F. App'x at 343.

B. Count One: Abuse of Power.

Count One of the Complaint asserts a claim titled "abuse of power." (Doc. 1 at ¶¶ 29-31). Count One alleges that Mr. Black "acted beyond the scope of his authority under the City Charter in denying Plaintiff's promotion to Assistant Fire Chief in retaliation for Plaintiff raising issues in February 2015 and July 2015, as detailed above." (*Id.* at ¶ 30).

Defendants argue Count One should be dismissed because "abuse of power" is not a viable claim under Ohio law. (Doc. 11 at 5). The Court agrees. Ohio law "does not recognize an abuse of power claim." *Schwartz v. City of Conneaut*, No. 1:09-cv-1222, 2009 U.S. Dist. LEXIS 114435, at * 14 (N.D. Ohio Oct. 22, 2009). Claims for abuse of power may be brought in federal court as "due process arguments." *Id.* Mr. Prophett concedes his abuse of power claim is "founded on his allegations of Defendants' violations of his substantive and procedural due process rights." (Doc. 13 at 4).

Because there is no abuse of power claim under Ohio law, and the allegations supporting a federal abuse of power claim are duplicative of those asserted in Counts Three and Four of the Complaint (for violation of Mr. Prophett's substantive and procedural due process rights), Count One fails as a matter of law.

Accordingly, Defendants' motion for judgment on the pleadings (Doc. 11) is **GRANTED** on Count One.

C. Count Two: 42 U.S.C. § 1983 (Free Speech).

Count Two asserts a claim under 42 U.S.C. § 1983 for violation of Mr. Prophett's right to free speech. (Doc. 1 at ¶¶ 32-36). Count Two argues Defendants' "actions in

denying Plaintiff's promotion to Assistant Fire Chief, in retaliation for his protected speech or conduct, violated Plaintiff's right to free speech on matters of public concern as guaranteed by the First and Fourteenth Amendments to the United States Constitution." (*Id.* at ¶ 34).

To successfully establish a *prima facie* case under 42 U.S.C. § 1983, a plaintiff must prove the following two elements: (1) the defendant must be acting under the color of state law, and (2) the offending conduct must deprive the plaintiff of rights secured by federal law. *Bloch v. Ribar*, 156 F.3d 673, 677 (6th Cir. 1998) (citation omitted). Defendants concede Mr. Prophett has met the first element. (Doc. 11 at 6, "[t]here is no dispute that 'state action' is at play in this Complaint"). However, Defendants argue that the Complaint does not set forth a plausible free-speech violation. (*Id.* at 4-8).

Citizens entering public service must necessarily accept certain limitations on their freedom. *See Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) (citation omitted). However, the state may not abuse its position as an employer to stifle the First Amendment rights its employees would otherwise enjoy as citizens to comment on matters of public interest. *Eng v. Cooley*, 552 F.3d 1062, 1070 (9th Cir. 2009) (citation omitted). The public has a strong interest in hearing from government employees, who are often in the best position to know what ails the agencies for which they. *Dahlia v. Rodriguez*, 735 F.3d 1060, 1067 (9th Cir. 2013) (citation omitted).

Accordingly, public employees do not forfeit all of their First Amendment rights simply because they are employed by the state. In *Garcetti*, the Supreme Court determined that the First Amendment protects a public employee's right to speak "as

citizens about matters of public concern" under certain circumstances: "[s]o long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively." 547 U.S. at 419.

In light of *Garcetti* and its progeny, the Sixth Circuit has held that a public employee asserting a claim of retaliation in violation of the First Amendment must show:

> (1) that her speech was made as a private citizen, rather than pursuant to her official duties; (2) that her speech involved a matter of public concern; and (3) that her interest as a citizen in speaking on the matter outweighed the state's interest, as an employer, in 'promoting the efficiency of the public services it performs through its employees.'

Handy-Clay v. City of Memphis, 695 F.3d 531, 540 (6th Cir. 2012) (quoting *Garcetti*, 547 U.S. at 417).

1. Private Citizen v. Official Duties.

Defendants argue Mr. Prophett was not speaking as a private citizen on either of the matters alleged in the Complaint. (Doc. 11 at 4-8). Defendants claim Mr. Prophett "was a public employee of the City of Cincinnati, and the speech at issue was made pursuant to his official duties." (*Id.* at 5).

When public employees make statements "pursuant to their official duties," the employees are not speaking as private citizens for First Amendment purposes. *Garcetti*, 547 U.S. at 421. The inquiry as to whether statements were made pursuant to an employee's official duties is "a practical one." *Id.* at 424. The Sixth Circuit has identified a number of factors to consider as part of this practical inquiry, including the

content and context of the speech, the impetus for the speech, the speech's audience, the speech's general subject matter, whether the statements were made to individuals "up the chain of command," and whether the speech was made inside or outside of the workplace. *Handy-Clay*, 695 F.3d at 540.

The "critical question" under *Garcetti* is "whether the speech at issue is itself ordinarily within the scope of an employees' duties, not whether it merely concerns those duties." *Lane v. Franks*, 134 S. Ct. 2369, 2379 (2014) (emphasis added).

There are two categories of speech identified in the Complaint as the motivation for Defendants' alleged retaliation. First, there is Mr. Prophett's February 2015 communication to Mr. Black, the City Manager, that Chief Braun did not investigate Chief Jones' allegations of wrongdoing against Assistant Chief Demasi. (Doc. 1 at ¶¶ 11-15). At this juncture, viewing only the allegations of the Complaint, the Court cannot conclude that Mr. Prophett's communication to Mr. Black was made pursuant to his official duties. The Complaint does not list Mr. Prophett's official duties, nor does it allege any facts that suggest communicating Chief Braun's alleged failure to investigate allegations of wrongdoing to the City Manager fall within those official duties.

The Court finds that the facts alleged in the Complaint, taken as true, are sufficient to justify an inference that Mr. Prophett's February 2015 communication to Mr. Black was made as a citizen concerned about the integrity of the Fire Department and the City. (Doc. 1 at ¶ 15); *see also See Handy-Clay*, 695 F.3d at 541-43 (public employee stated a plausible First Amendment violation when "nothing in the complaint . . . suggests that the

duties of her position as a public records coordinator included reporting on government corruption and mismanagement of public funds").

The Court reaches a different conclusion in regards to the second category of protected speech, Mr. Prophett's July 2015 statement to his direct supervisor that Assistant Chief Kuhn was reported to have been on duty under the influence of alcohol. (Doc. 1 at ¶¶ 17-18). Initially, an employee's report of potential misconduct to his direct supervisor is typically not "private citizen" speech protected by the First Amendment. *See Kline v. Valentic*, 283 F. App'x 913, 916-17 (3d Cir. 2008) (police officer's complaint of police misconduct did not constitute speech protected under the First Amendment when it was made "up the chain of command and not in any public forum"); *Thompson v. City of Greensburg*, No. 1:11-cv-195, 2012 U.S. Dist. LEXIS 50243, ** 11-12 (W.D. Ky. Apr. 10, 2012) (police officer's verbal concerns to police chief and mayor regarding the department's storage of evidence was not protected speech because it was "made up the chain-of-command to the Chief of Police and Mayor of the City" and "clearly speech made pursuant to Plaintiff's employment as a city police officer").

Similarly, an employee's report of co-worker misconduct is unprotected "official duty" speech when applicable policies require the employee to report co-worker misconduct. *See Paola v. Spada*, 372 Fed. App'x 143, 144 (2d Cir. 2010) (state trooper's statements to internal affairs officer regarding supervisor's potentially unlawful conduct was made pursuant to official duties because "the employee manual states that '[n]o employee shall fail to report information to a superior, which may prove detrimental to the department"); *Palmerin v. Johnson County*, Case No. 09-2579-CM, 2011 U.S.

Dist. LEXIS 20571, at * 14 (D. Kan. 2011 Mar. 1, 2011) (holding plaintiff's report of co-worker misconduct was not protected citizen speech because "[a]s a county employee, plaintiff had a duty to report misconduct by coworkers under the County's human resources policies"); *Weintraub v. Bd. of Educ.*, 489 F. Supp. 2d 209, 219 (E.D. N.Y. 2007) (explaining that "when a public employee airs a complaint or grievance, or expresses concern about misconduct, to his or her immediate supervisor or pursuant to a clear duty to report imposed by law or employer policy, he or she is speaking as an employee and not as a citizen") (emphasis added).

Here, the CFD Procedure Manual required Mr. Prophett to report Assistant Chief Kuhn's alleged conduct:

> Any member of the Fire Department becoming aware of, or receiving a complaint regarding any infraction of departmental procedures, or violation of City Ordinance, State Law, or Personnel Policies and Procedures of the City of Cincinnati, shall report such conduct.

(Doc. 11-1 at 5).[2] Because Mr. Prophett had a duty under the CFD's written procedures to convey the report he received regarding Assistant Chief Kuhn, and because he conveyed the report to his immediate supervisor, Mr. Prophett's July 2015 statement was necessarily made "pursuant to his official duties," was not made as a private citizen, and is not protected by the First Amendment. *Paola*, 372 Fed. App'x at 144; *Palmerin*, 2011 U.S. Dist. LEXIS 20571, at * 14.

[2] The City of Cincinnati's Human Resources Policies and Procedures provide that a City employee may be disciplined for substance abuse. (Doc. 11-1 at 11).

2. Matter of Public Concern.

Having determined that the Complaint adequately alleges that Mr. Prophett's February 2015 communication to Mr. Black was made as a citizen, the Court turns to the next step in the *Garcetti* inquiry, *i.e.*, whether the statement was made on a matter of public concern.[3]

Speech touching on public concern includes speech on "any matter of political, social, or other concern to the community." *Handy-Clay*, 695 F.3d at 543 (citations omitted). Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record. *Boulton v. Swanson*, 795 F.3d 526, 534 (6th Cir. 2015). Speech amounting to "the quintessential employee beef" or typical complaints of poor management and decision-making are not matters of public concern entitled to First Amendment protection. *See Boulton*, 795 F.3d at 532; *Jackson v. Leighton*, 168, F.3d 903, 911 (6th Cir. 1999).

Even construing the facts of the Complaint in favor of Mr. Prophett, the Court cannot find that his February 2015 communication to Mr. Black involved a matter of public concern. The Complaint merely alleges that Chief Jones accused Assistant Chief Demasi of unidentified "wrongdoing" and that Chief Braun was required—but failed—to investigate those allegations. (Doc. 1 at ¶¶ 11-13). The Complaint does not explain what

[3] Having determined that Mr. Prophett's July 2015 statement regarding Assistant Chief Kuhn was made pursuant to official duties and not as a private citizen, the Court need not consider whether that statement was made on a matter of public concern.

"wrongdoing" Chief Jones accused Assistant Chief Demasi of committing, nor does it contain a single fact that suggests this wrongdoing was a matter of political, social, or other concern to the community (as opposed to an internal office dispute).

The Complaint has simply failed to set forth facts from which the Court could conclude it was plausible that Mr. Prophett's February 2015 communication to Mr. Black was made as a citizen on a matter of public concern. *See Alliance for Children, Inc. v. City of Detroit Pub. Schs.*, 475 F. Supp. 2d 655, 667-68 (E.D. Mich. Feb. 15, 2007) ("[T]he plaintiff has an obligation to plead *some* facts in the complaint from which it might be inferred that the speech touched upon a matter of public concern in order to state a claim.") (emphasis in original).

For the foregoing reasons, Defendants' motion for judgment on the pleadings (Doc. 11) is **GRANTED** as to Count Two.

D. Count Three: 42 U.S.C. § 1983 (Substantive Due Process).

Count Three asserts a claim under 42 U.S.C. § 1983 for a substantive due process violation. (Doc. 1 at ¶¶ 37-40). Count Three alleges that Defendants' actions "deprived Plaintiff of his protected interest in his good name and professional reputation." (*Id.* at ¶ 38).

Substantive due process claims serve as a vehicle to limit potentially oppressive government action. *Handy-Clay*, 695 F.3d at 546-47 (citation omitted). They often fall into one of two categories—claims that an individual has been deprived of a particular constitutional guarantee or claims that the government has acted in a way that "shocks the conscience." *Id.* at 547. Importantly, the doctrine of substantive due process is not

concerned with "garden variety issues of common law contract;" instead, it "affords only those protections 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Sutton v. Cleveland Bd. of Educ.*, 958 F.2d 1339, 1350-51 (6th Cir. 1992) (quoting *Charles v. Baesler*, 910 F.2d 1349, 1353 (6th Cir. 1990)).

Mr. Prophett argues Defendants' refusal to promote him "in retaliation for complaining about Defendants' failure to investigate the misconduct of a Cincinnati Assistant Fire Chief, and reporting another Assistant Fire Chief being drunk at work" is behavior that should "shock the conscience." (Doc. 13 at 8).

Defendants argue that Mr. Prophett's desire for a promotion is not the type of fundamental interest protected by substantive due process. (Doc. 11 at 9-10). The Court agrees. The Sixth Circuit has unequivocally and consistently held that substantive due process does not protect an employee's claim to, or desire for, a promotion. *See Black v. Columbus Pub. Schs.*, 79 Fed. App'x 735, 738 (6th Cir. 2003) ("[T]he district court properly concluded that [plaintiff] had no substantive due process right to a promotion."); *Charles*, 910 F.2d at 1353 ("State-created rights such as [plaintiff's] contractual right to promotion do not rise to the level of 'fundamental' interests protected by substantive due process."); *Thomson v. Scheid*, 977 F.2d 1017, 1020 (6th Cir. 1992) ("[T]he right to a promotion is not a fundamental interest protected by substantive due process."); *Paskvan v. Cleveland Civil Service Comm'n*, 946 F.2d 1233, 1236 (6th Cir. 1991) ("[T]here is no substantive due process right involved in [plaintiff's] claim of failure to carry out a purported understanding about promotion procedures.").

Here, Mr. Prophett's claim that Defendants' "unlawfully den[ied] him promotion to the position of Assistant Fire Chief" fails to state a plausible substantive due process violation as a matter of law. *Id.* [4]

Mr. Prophett argues it should "shock the conscience" that Defendants violated his First Amendment free speech rights. (Doc. 13 at 8). This argument is not availing for two reasons. First, as explained in Section III(C), *supra*, Mr. Prophett has not set forth a plausible First Amendment violation. Second, even if Mr. Prophett had asserted a plausible First Amendment violation, he would not also have a substantive due process claim for the same conduct. A plaintiff does not have a substantive due process claim for conduct that is expressly covered by an enumerated constitutional right such as the First Amendment. *Handy-Clay*, 695 F.3d at 531.

Accordingly, Defendants' motion for judgment on the pleadings (Doc. 11) is **GRANTED** on Count Three.

[4] Both the Complaint and Mr. Prophett's memorandum in opposition to Defendants' motion for judgment on the pleadings make clear that Defendants' refusal to promote him is the basis for his substantive due process claim. (Doc. 1 at ¶ 39; Doc. 13 at 8). However, the Complaint also includes a conclusory allegation that Defendants' actions deprived Mr. Prophett of his "protected interest in his good name and professional reputation." (Doc. 1 at ¶ 38). To the extent the Complaint is attempting to assert a substantive due process violation premised on the alleged deprivation of Mr. Prophett's professional reputation, it fails as a matter of law. The Sixth Circuit has explained that a liberty interest in one's reputation is implicated when five elements are satisfied, including, *inter alia*, the defendant makes public, stigmatizing statements or charges about the plaintiff in conjunction with plaintiff's termination from employment. *See Ludwig v. Board of Trustees of Ferris State Univ.*, 123 F.3d 404, 410 (6th Cir. 1997). Here, the Complaint does not allege that Defendants terminated Mr. Prophett's employment or that Defendants made public, stigmatizing statements about Mr. Prophett.

E. Count Four: 42 U.S.C. § 1983 (Procedural Due Process).

Count Four asserts a claim under 42 U.S.C. § 1983 for a procedural due process violation. (Doc. 1 at 41-48).

The Due Process Clause of the Fourteenth Amendment prohibits the state from depriving any person of life, liberty, or property without due process of law. U.S. Const. amend. XIV. The elements of a Fourteenth Amendment procedural due process claim are (1) the existence of a liberty or property interest protected by the Constitution; (2) the plaintiff was deprived of such an interest within the meaning of the Due Process Clause, and (3) adequate procedures were not afforded prior to the deprivation of the protected interest. *See Richardson v. Township of Brady*, 218 F.3d 508, 517 (6th Cir. 2000).

Count Four alleges Mr. Prophett has a property interest in the position of Assistant Fire Chief to which he should have been promoted, Defendants deprived him of that property right by not promoting him, and Defendants did not provide sufficient process, including written notice or a hearing, prior to refusing to promote Mr. Prophett. (Doc. 1 at ¶¶ 41-45).

Defendants argue Count Four fails because Mr. Prophett did not have a constitutionally protected property interest in the position of Assistant Fire Chief. (Doc. 11 at 10-11). The Court agrees.

The property interests protected by the Due Process Clause are not created by the constitution—they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. *Kizer v. Shelby County Gov't,* 649 F.3d 462, 466 (6th Cir. 2011) (citing *Cleveland Bd. of Educ. v.*

Loudermill, 470 U.S. 532, 538 (1985)). Where a state civil service system categorizes public employees as classified—that is, not subject to removal at will—employees have a state-law-created, constitutionally protectable property interest their employment. *Id.* Conversely, unclassified employees have no property right in maintaining their jobs, and the state may terminate them summarily. *Id.*

Accordingly, courts have consistently rejected due process claims premised on an alleged property interest in unclassified civil service employment. *See Christophel v. Kukulinsky*, 61 F.3d 479, 487 (6th Cir. 1995) ("[T]here was no constitutional violation as a result of the abolishment of [plaintiff's] unclassified position."); *Slyman v. City of Piqua*, 494 F. Supp. 2d 732, 737 (S.D. Ohio Mar. 12, 2007) ("[T]his Court is compelled to conclude that, since Plaintiff was an unclassified, at-will employee, he did not have a property interest in continued employment."); *Myers v. Dean*, No. 2:04-cv-654, 2006 U.S. Dist. LEXIS 10770, at * 14 (S.D. Ohio Mar. 16, 2006) ("[Plaintiff's] unclassified employee status precludes a procedural due process claim[.]"); *Kiser v. Lowe*, 236 F. Supp. 2d 872, 876 (S.D. Ohio 2002) ("As an unclassified civil servant, [plaintiff] had no property interest in his continued employment, and was afforded none of the procedural safeguards available to those in classified service.").

Here, Count Four is premised on Mr. Prophett's allegation that Defendants deprived him of "a property interest in the position of Assistant Fire Chief to which he should have been promoted[.]" (Doc. 1 at ¶ 42). The City Charter expressly categorizes the position of Assistant Fire Chief as "in the unclassified civil service of the city and exempt from all competitive examination requirements." Charter of the City of

Cincinnati, Art. I, Sec. 6 (emphasis added).[5] Mr. Prophett does not have a constitutionally protected property interest in the unclassified position of Assistant Fire Chief. *Christophel*, 61 F.3d at 487; *Slyman*, 494 F. Supp. 2d at 737; *Myers*, 2006 U.S. Dist. LEXIS 10770, at * 14; *Kiser*, 236 F. Supp. 2d at 876.

In response, Mr. Prophett argues he was entitled to be appointed to the position of Assistant Fire Chief because he was the most qualified candidate each time he applied for the position. (Doc. 13 at 10). This argument fails for two reasons. First, Mr. Prophett has not set forth any authority to support his argument that the most "qualified" candidate is entitled to be promoted to Assistant Fire Chief. Second, and more importantly, Mr. Prophett's argument does not address the truth that, as a matter of law, no person, not even the most qualified candidate, has a constitutionally protected property interest in employment in the unclassified position of Assistant Fire Chief.

Accordingly, Defendants' motion for judgment on the pleadings (Doc. 11) is **GRANTED** as to Count Four.

IV. CONCLUSION

For the foregoing reasons, Defendants' motion for judgment on the pleadings (Doc. 11) is **GRANTED**. The Clerk shall enter judgment accordingly, whereupon this case is **TERMINATED** on the docket of this Court.

[5] The Court takes judicial notice of the City's Charter. *See Fisher v. Cincinnati*, 753 F. Supp. 681, 689 (S.D. Ohio 1990).

IT IS SO ORDERED.

Date: 8/3/18

Timothy S. Black
United States District Judge