

**UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE**

<b>HILDA M. NADEAU,</b>	)	
	)	
<b>Plaintiff</b>	)	
	)	
<b>v.</b>	)	<b>CIVIL No. 00-138-B</b>
	)	
<b>STATE OF MAINE</b>	)	
<b>and TIMOTHY CAVERLY,</b>	)	
	)	
<b>Defendants</b>	)	

**RECOMMENDED DECISION**

Hilda Nadeau has filed suit against the State of Maine and Timothy Caverly, Supervisor of the Allagash Wilderness Waterway, a division of the Maine Department of Conservation, based on Caverly’s alleged refusal to hire her for a position as Park Receptionist at Michaud Farm. Nadeau’s two-count complaint seeks relief against the State of Maine pursuant to Title VII for alleged sex discrimination and retaliation in hiring determinations (Count I) and against Caverly pursuant to 42 U.S.C. § 1983 for violation of her equal protection and free speech rights under the 14th Amendment (Count II). Caverly now moves for dismissal of Count II for failure to state a claim upon which relief can be granted, Fed. R. Civ. P. 12(b)(6). I recommend that the Court DENY the motion.

**RULE 12(b)(6) STANDARD**

The facts for purposes of Caverly’s Rule 12(b)(6) motion are the well-pled facts of Nadeau’s complaint and all permissible inferences arising therefrom. *Lanfadinov v. American Airlines, Inc.*, 199 F.3d 68, 69 (1st Cir. 2000). These facts are construed in the light most

favorable to Nadeau, although conclusory allegations and unreasonably attenuated inferences are disregarded. *Aybar v. Crispin-Reyes*, 118 F.3d 10, 13 (1st Cir. 1997). In order to survive Caverly's motion to dismiss, Nadeau's complaint, so construed, must present facts demonstrating the existence of each material element of her § 1983 claim. *Gooley v. Mobil Oil Corp.*, 851 F.2d 513, 515 (1st Cir. 1988).

#### **FACTUAL BACKGROUND**

Hilda Nadeau, a resident of St. Francis, Maine, has sought a paid position as an Assistant Park Ranger on the Allagash Wilderness Waterway (AWW) since on or before 1989. (Complaint at ¶¶ 2, 8, 9.) Since about 1985, Nadeau served as a volunteer on the AWW and continued to do so through at least 1996. (*Id.* at ¶ 8.) In 1989 and in 1994, she applied for Assistant Park Ranger positions that came available in those years. (*Id.* at ¶ 9.) At all times relevant to this suit, Timothy Caverly was employed by the State of Maine Department of Conservation as Supervisor of the AWW. In this position, Caverly was in charge of hiring personnel for the AWW. (*Id.* at ¶¶ 4, 9.) Nadeau and other qualified women were repeatedly denied employment as Assistant Park Rangers or as Park Rangers between 1985 and 1996. (*Id.* at ¶ 8.) On one occasion, Caverly told Nadeau that "we always hire the best man for the job." (*Id.* at ¶ 9.) Less qualified men were hired to fill the positions Nadeau sought. (*Id.*) As of July 1996, the AWW had only one female Park Ranger, who obtained her job after she challenged Caverly's decision to hire a male through a grievance process. (*Id.* at ¶ 10.) In the course of this process, the Maine Human Rights Commission found reasonable grounds to believe Caverly engaged in unlawful sex discrimination. (*Id.*)

On or about May 20, 1996, Nadeau applied for the position of Park Receptionist at Michaud Farm, a location on the AWW. (*Id.* at ¶ 11.) On or about July 2, 1996, Nadeau and two other women met with the Commissioner of the Department of Conservation and the State Affirmative Action Officer to discuss their complaints about sex discrimination in hiring and employment by Caverly. The State found probable cause for these complaints and uncovered witnesses who verified that Caverly made negative comments concerning the employment of women on the AWW. (*Id.* at ¶ 12.) Approximately two weeks later, on July 18, Nadeau interviewed for the receptionist position. Caverly conducted the interview along with two AWW employees, one male and one female. All of the interviewers were aware of Nadeau's complaint to the Commissioner about sex discrimination. (*Id.* at ¶ 13.) Caverly did not hire Nadeau for the position she sought. Instead, he hired another, allegedly less-qualified, female applicant. (*Id.* at ¶ 14-15.) The interviewers concluded that Nadeau was an inferior candidate based on her attitude. (*Id.* at ¶ 14.)

On or about December 31, 1996, Nadeau filed an employment discrimination complaint against the State of Maine, Department of Conservation, with the federal Equal Employment Opportunity Commission (EEOC) and the Maine Human Rights Commission (MHRC) alleging sex discrimination and retaliation for complaining about sex discrimination. After an investigation and fact-finding conference, the MHRC found reasonable grounds to believe that unlawful discrimination occurred when Nadeau was not hired to be the Receptionist at Michaud Farm. (*Id.* at ¶ 18.)

## DISCUSSION

Section 1983 authorizes actions for equitable relief and/or damages against “every person who under color of any . . . custom or usage, of any State or Territory . . . subjects or causes to be subjected any citizen of the United States or other person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.” 42 U.S.C. § 1983. “[T]he essential elements of actionable section 1983 claims derive first and foremost from the Constitution itself.” *Calero-Colon v. Betancourt-Lebron*, 68 F.3d 1, 4 (1st Cir. 1995). In order to evaluate the sufficiency of Nadeau’s claims, I must consider her two alleged Fourteenth Amendment grounds for relief and determine whether they support her § 1983 claim.<sup>1</sup>

### *1. Free Speech Retaliation and the Due Process Clause*

According to Nadeau, her claim of retaliation stems from the “well-settled” principle “that a public employee has an independent constitutional right to be free of retaliation for engaging in free speech activities.” (Plaintiff’s Objection, Docket No. 7, at 6.) Although Caverly makes no mention of it, I note one troubling aspect of Nadeau’s argument: her allegations make it clear she was not a public employee. Rather, Nadeau was an applicant for a

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<sup>1</sup> Caverly moves to dismiss Count II on two grounds: (1) that “it is predicated solely upon an alleged violation of the anti-retaliation provisions of Title VII of the Civil Rights Act of 1964”; and (2) that the complaint fails to allege that Caverly “acted with unlawful discriminatory intent.” (Caverly’s Motion to Dismiss Count II, Docket No. 5, at 1.) I have not structured this Decision in accordance with these arguments, but the answer to argument (2) is evident from my analysis. The answer to argument (1) can be made in this footnote. The cases cited by Defendant in his brief actually acknowledge that a § 1983 action can proceed in an employment context if there is an independent constitutional basis for the claim. *See, e.g., Arrington v. Cobb County*, 139 F.3d 865, 872 (11th Cir. 1998) (permitting § 1983 claim to go forward based on alleged violation of Fourteenth Amendment right of equal protection although Title VII claim was untimely); *Saulpaugh v. Monroe Cmty. Hosp.*, 4 F.3d 134, 143 (2d Cir. 1993), *cert. denied*, 510 U.S. 1164 (1994) (“[A] plaintiff can assert a claim under Section 1983 if some law other than Title VII is the source of the right alleged to have been denied.”). *See also Johnson v. Walgreen*, Nos. 92-1084 and 1085, 1992 WL 3578281992, at \*3, U.S. App. LEXIS 32064, at \*11 (1st Cir. December 7, 1992) (unpublished decision) (“[W]hen employment practices violate Title VII and a separate and independent constitutional or statutory right, an aggrieved individual is not necessarily limited to Title VII in the search for relief, and may pursue additional remedies under § 1983.”); *Curran v. Portland Superintending Sch. Cmty.*, 435 F. Supp. 1063, 1082 (D. Me. 1977) (“Title VII does not preempt a separate and independent cause of action under Section 1983.”).

government job. This leads to the questions of whether Nadeau's claim for "failure to hire" due to her free speech activity is actionable under the Fourteenth Amendment's Due Process Clause.<sup>2</sup>

For at least a quarter-century, [the Supreme Court] has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." *Speiser v. Randall*, 357 U.S. 513, 526. Such interference with constitutional rights is impermissible.

*Perry v. Sindermann*, 408 U.S. 593, 597 (1972). The foregoing quotation from *Perry* suggests that the viability of Nadeau's free speech claim does not necessarily depend on her ability to establish loss of a property or liberty interest sufficient to support a procedural due process claim, even though her free speech claim flows through the Due Process Clause of the Fourteenth Amendment. *See id.* at 597-98 (holding that teacher's "lack of a contractual or tenure 'right' to re-employment . . . is immaterial to his free speech claim"). *See also Bd. of Regents v. Roth*, 408 U.S. 564, 569, 579 (1972) (holding that non-tenured teacher hired under one-year contract did not have a procedural due process right to a hearing concerning state university's decision not to hire him for another year because he did not have a property or liberty interest in the position, but remanding for further proceedings on free speech retaliation component of claim.). However, *Perry* does require that the interest at stake at least amount to a valuable governmental benefit or privilege. *Perry*, 408 U.S. at 597. *See also Lynch v. City of Boston*, 180 F.3d 1, 13 (1st Cir. 1999) (assuming *arguendo* that opportunity to serve as a volunteer worker

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<sup>2</sup> Although qualified immunity is referred to in Caverly's statement of the governing standard, Caverly has not presented a qualified immunity challenge at this stage. Whether Nadeau's claim would survive such a challenge appears an open question to me and one best addressed on a more adequate record.

could constitute a valuable government privilege, but holding that it was not clearly established as of August 1994 that a government official could not terminate a volunteer in retaliation for protected speech); *Figueroa v. Aponte-Roque*, 864 F.2d 947, 953 (1st Cir. 1989) (avoiding question in political affiliation employment discrimination suit by construing job non-renewal as termination rather than failure to hire). Caverly has not addressed this aspect of Nadeau’s claim. Nor have I been able to locate governing or persuasive authority that addresses the issue in the context of a “failure to hire” claim.<sup>3</sup> In my view, just as government employment is a valuable governmental benefit that cannot be impermissibly withdrawn from an employee, it should no more be capable of being impermissibly withheld from an applicant. It would make little sense for a governmental actor to be permitted to retaliate against an individual’s exercise of free speech rights when making hiring decisions, but not be permitted to do so when making termination decisions.

Because the facts alleged support the conclusion that Caverly withheld from Nadeau a valuable governmental benefit based on an impermissible ground, the exercise of her free speech rights, I recommend that the Court DENY Caverly’s motion as it relates to this aspect of her § 1983 claim.

## 2. *Gender Discrimination and the Equal Protection Clause*

Unlike First Amendment protections applied to the states through the Fourteenth Amendment’s Due Process Clause, the right to be free from gender discrimination is a right guaranteed by the Fourteenth Amendment’s Equal Protection Clause. Importantly, the

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<sup>3</sup> Other than cases involving the termination of a volunteer, such as *Lynch*, the closest cases I have found are a number of Supreme Court “Cold War Era” freedom of association cases in which state laws proscribing the hiring of Communists and other “subversives” were declared unconstitutional, *see, e.g., Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967) (declaring unconstitutional state laws prohibiting the employment of Communists in its educational institutions but not involving a job applicant as a plaintiff).

vindication of this right does not require proof that a state actor deprived the plaintiff of an interest in life, liberty, or property or of a valuable governmental benefit or privilege. *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 896 (1st Cir. 1988). *Cf. Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (“The ‘equal protection of the laws’ is a more explicit safeguard of prohibited unfairness than ‘due process of law’ . . . .”). The elements of an equal protection, sex discrimination claim are identical to the elements of a Title VII sex discrimination claim.<sup>4</sup> *Lipsett*, 864 F.2d at 896 (citing *White v. Vathally*, 732 F.2d 1037, 1039 (1st Cir. 1984), *cert. denied*, 469 U.S. 933 (1984)). These elements require proof that the plaintiff (1) is a member of a class protected by the Constitution or federal laws; (2) applied for and was qualified for the position in question; and (3) was rejected despite her qualifications; and that (4) the position remained open and the employer continued to accept applicants of her qualifications. *Woods v. Friction Materials*, 30 F.3d 255, 259 (1st Cir. 1994). Additionally, to offend the Equal Protection Clause, gender discrimination must be purposeful. *Crawford-El v. Britton*, 523 U.S. 574, 585 (1998); *Judge v. City of Lowell*, 160 F.3d 67, 72 (1st Cir. 1998). “[T]he element of illegal motive must be pleaded by alleging specific non-conclusory facts from which such a motive may reasonably be inferred, not merely by generalized asseveration alone.” *Judge*, 160 F.3d at 72.

Nadeau has adequately alleged facts demonstrating all of the foregoing elements.<sup>5</sup>

Caverly challenges only the sufficiency of allegations pertaining to purposeful discrimination.

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<sup>4</sup> The standards are the same for Title IX claims as well. *Lipsett*, 864 F.2d at 896. *Lipsett* makes it abundantly clear that Nadeau’s maintenance of separate claims under Title VII and 42 U.S.C. § 1983 is not contrary to the law as it has been prescribed by the First Circuit Court of Appeals.

<sup>5</sup> I note that qualified immunity would not bar this claim. It has been clear since at least the 1970’s that the Constitution’s equal protection guarantees prohibit gender discrimination. *See, e.g., Davis v. Passman*, 442 U.S. 228, 235-36 (1979) (recognizing constitutional, equal protection right to be free from gender discrimination in congressional employment pursuant to the “equal protection component” of the Fifth Amendment Due Process

The allegations contained in paragraphs 8, 9, and 10 of the complaint provide sufficient specific, non-conclusory facts to support an inference of discriminatory purpose. In those paragraphs, Nadeau alleges that Caverly, as the AWW's Supervisor, repeatedly denied employment to women applicants for positions as Park Rangers and Assistant Park Rangers over at least an 11-year period; that Caverly stated on one occasion that "we always hire the best man for the job"; and that the sole woman hired as a Park Ranger obtained her position only through legal action.

Because Nadeau has sufficiently pled all of the elements of a viable equal protection claim under § 1983, I recommend that the Court DENY Caverly's motion with respect to this additional ground of Nadeau's § 1983 claim.

#### CONCLUSION

Nadeau's § 1983 claim against Caverly in his individual capacity for violations of the due process and equal protection clauses of the Fourteenth Amendment is not incompatible with her separate Title VII claim against the State of Maine. Nor is her claim insufficiently pled. For these reasons, I recommend that the Court DENY Caverly's motion.

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Clause); *Curran*, 435 F. Supp. at 1083-84 (collecting cases discussing basic constitutional right to be free from discrimination based on sex, including discrimination in employment on the basis of sex).

**NOTICE**

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated: February 22, 2001

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Margaret J. Kravchuk  
U.S. Magistrate Judge

U.S. District Court

District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 00-CV-138

NADEAU v. MAINE, STATE OF, et al Filed: 07/12/00

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Demand: \$0,000 Nature of Suit: 442

Lead Docket: None Jurisdiction: Federal Question

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Cause: 42:2000 Job Discrimination (Sex)

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(See above)  
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