

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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SIMRIL, et al.,	:	CIVIL ACTION
	:	
Plaintiffs,	:	
	:	
v.	:	NO. 00-5668
	:	
THE TOWNSHIP OF WARWICK, et al.,	:	
	:	
Defendants.	:	

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**MEMORANDUM**

ROBERT F. KELLY, J.

AUGUST 10, 2001

Plaintiffs brought this action against the Defendants premised upon the First Amendment of the United States Constitution, 42 U.S.C. sections 1981, 1983, 1985(3), and 1986, common law torts of Interference with Prospective Contractual Relationship, Intentional Infliction of Emotional Distress, Libel and Slander. See Am. Compl. Before this Court is the Borough of Ephrata's Motion to Dismiss Plaintiffs' Amended Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(6).<sup>1</sup> For the reasons stated, the Motion is GRANTED.

**I. FACTUAL BACKGROUND**

Since the litigation involved in this case is extensive, the Court will give a broad overview of the action.<sup>2</sup>

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<sup>1</sup> Specifically, this Memorandum Opinion deals with the Motion to Dismiss filed by the Borough of Ephrata (Dkt. No. 33) because the other Defendants' Motions to Dismiss have been addressed in a separate Opinion.

<sup>2</sup> The Amended Complaint is forty-two pages, contains one hundred and forty-five paragraphs and involves nine Counts. See

Plaintiff Ronald Z. Simril ("Simril") is a black male who claims that he was denied employment as a Township of Warwick police officer because of racial discrimination. Plaintiffs Police Chief Alfred O. Olsen ("Olsen") and Patrol Sergeant Gary A. Hutchinson ("Hutchinson") are white males who claim that the Defendants conspired against them to create a false impression that they were not properly performing their job duties in retaliation for their support of Simril and their efforts to combat racism.<sup>3</sup> The Defendants primarily include members of the Board of Supervisors, police officers and personnel of the Township of Warwick. The Borough of Ephrata has been included in this action through the Plaintiffs' allegations that Robert Ballenger ("Ballenger"), a Borough detective, violated Simril's civil rights when he was a member of the Warwick Township Police Department's Phase V hiring committee.<sup>4</sup>

Plaintiffs allege that the underpinnings of the failure to hire Simril and the retaliation claims against Olsen and

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Am. Compl. Also, the action involves six Plaintiffs and eighteen Defendants. Id.

<sup>3</sup> Plaintiffs also include the wives of the male Plaintiffs who are Gilma Simril, Marie A. Olsen and Katherine A. Hutchinson. See Am. Compl. The wives are included in this action due to Count XIII Loss of Consortium. Id. at 41.

<sup>4</sup> Detective Ballenger is also a Defendant in this action. See Am. Compl. Detective Ballenger has filed a separate Motion to Dismiss Plaintiffs' Amended Complaint (Dkt. No. 38), which has been addressed by the Court in a separate Memorandum Opinion.

Hutchinson consisted of an involved conspiracy carried out from December 1999 until November 2000. Since the Court is only addressing the Borough of Ephrata's Motion to Dismiss, the Court will not go into extensive discussion about the alleged conspiracy, but will exclusively address the Plaintiffs' particular claims against the Borough. Specifically, Plaintiffs aver that "[i]n December 1999, the Borough of Ephrata authorized Ballenger, a high-ranking detective sergeant, effectively a borough policymaker, to be a member of the Warwick Township Police Department's phase V hiring committee." Id. ¶ 126. At this time, it is alleged that "Ballenger willfully and intentionally, or in reckless disregard for Simril's federally protected rights, participated in the conspiracy that directly caused the Township of Warwick to refuse to hire Simril for the available police officer position solely because he is a black man." Id.

The Township of Warwick's Police Department hiring procedure consists of the following five distinct phases:

- (1) Phase I - applicants must complete initial applicant form and return it to the police department within a certain time;
- (2) Phase II - applicants must complete additional documentation to further assess qualifications and return it to the police department within a certain time;
- (3) Phase III - applicants must attend a police department interview and perform a physical fitness test;
- (4) Phase IV - applicants must agree to an intensive background investigation;
- and (5) Phase V - applicants

must attend a final interview.

The police department forms a separate hiring committee for each phase of the five phase hiring process. Each member of each committee assigns a numerical score to each applicant who completes each hiring phase. At the completion of the five phases, each applicant will have five separate numerical scores, which the final interviewing committee totals to arrive at each applicant's final cumulative numerical score.

Am. Compl. ¶¶ 48 and 49. On December 21, 1999, Ballenger was a member of Warwick Township's hiring committee that was involved in the last phase of the hiring process, the final interviews.

Id. ¶ 61. During the interviews, Plaintiffs allege that Ballenger completely participated in the interviews of the white applicants, but during Simril's interview, "Ballenger conspicuously sat back in his chair, folded his arms, and did not participate in the interview." Id. ¶ 65. It is also alleged that Ballenger scored Simril significantly lower than the white applicants. Id. As a result of the actions of Ballenger and the other Defendants, Plaintiffs claim that a less qualified white applicant named Curt Ochs was hired instead of Simril, who had received the highest score and was the most qualified applicant. Id. ¶ 67.

On November 7, 2000, Plaintiffs filed their original Complaint. On March 6, 2001, Plaintiffs filed an Amended Complaint. The Borough of Ephrata filed the instant Motion to Dismiss the Amended Complaint on March 23, 2001.

## II. STANDARD OF REVIEW

The purpose of a motion to dismiss for failure to state a claim is to test the legal sufficiency of the allegations contained in the complaint. Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d Cir. 1993). Under Federal Rule of Civil Procedure 12(b)(6), the court must determine whether the allegations contained in the complaint, construed in the light most favorable to the plaintiff, show a set of circumstances which, if true, would entitle the plaintiff to the relief she requests. FED.R.CIV.P. 12(b)(6); Gibbs v. Roman, 116 F.3d 83, 86 (3d Cir. 1997)(citing Nami v. Fauver, 82 F.3d 63, 65 (3d Cir. 1996)). A complaint will be dismissed only if the plaintiff could not prove any set of facts which would entitle him to relief. Nami, 82 F.3d at 65 (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

## III. DISCUSSION

42 U.S.C. section 1983 ("Section 1983") "creates a cause of action against '[e]very person who, under color of any [state law] . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution.'"<sup>5</sup> Hindes

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<sup>5</sup> The Court's analysis of municipal liability and the theory of respondeat superior under 42 U.S.C. section 1983 applies equally to Plaintiffs' claims against the Borough of

v. Fed. Deposit Ins. Corp., 137 F.3d 148, 158 (3d Cir. 1998)(citing 42 U.S.C. § 1983). Thus, Section 1983 supplies a remedy for federal law violations committed by people acting under state law. Id. (citing Dist. of Columbia v. Carter, 409 U.S. 418, 425 (1973)(citations omitted)). In order to successfully bring a claim under Section 1983, a plaintiff is required to show that: "(1) the conduct complained of must be committed by a person acting under color of law; and (2) the conduct deprived plaintiff of a right or privilege guaranteed by the Constitution or the laws of the United States." Robb v. City of Phila., 733 F.2d 286, 290 (3d Cir. 1984)(citation omitted).

In Monell v. Department of Social Services of City of

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Ephrata under 42 U.S.C. section 1981, Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 702 (1989)(stating "[a] municipality may not be held liable for its employees' violations of [42 U.S.C.] § 1981 under a respondeat superior theory."), 42 U.S.C. section 1985(3), DiMaggio v. O'Brien, 497 F. Supp. 870, 876 (E.D. Pa. 1980)(holding "the Monell analysis that liability under § 1983 cannot be predicated on respondeat superior applies with equal force to § 1985." (citations omitted)) and 42 U.S.C. section 1986, Altieri v. Pennsylvania State Police, No. 98-5495, 2000 WL 427272, at \*17 (E.D. Pa. Apr. 19, 2000)(holding that a City Police Department, Police Sergeant and Police Officer, who were sued in their official capacities, "cannot be liable on a respondeat superior theory under § 1985 or § 1986." (citations omitted)).

Plaintiffs' state law claims of Interference with Prospective Contractual Relationship (Count X), Intentional Infliction of Emotional Distress (Count XI), Libel and Slander (Count XII) and Loss of Consortium (Count XIII) are dismissed because the Borough of Ephrata is provided immunity against suit by the Pennsylvania Political Subdivision Tort Claims Act, 42 Pa.C.S.A. sections 8541-8564. See Hill v. Borough of Swarthmore, 4 F. Supp.2d 395 (E.D. Pa. 1998).

New York, 436 U.S. 658 (1978), the United States Supreme Court determined that municipalities cannot be held directly liable under Section 1983 for the unconstitutional actions of their employees pursuant to a theory of respondeat superior. Id. at 691, 701. In Monell, the Court held, "that a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents." Id. at 694. "Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." Id. Thus, in order to hold a municipality accountable for a violation of Section 1983, the plaintiff must show that the municipality itself, through the implementation of a municipal policy or custom, caused an employee to violate a person's constitutional rights. Id. at 690-695; Colburn v. Upper Darby Township, 946 F.2d 1017, 1027 (3d Cir. 1991). Therefore, a plaintiff who has a viable Section 1983 cause of action against a municipality is required to allege that he has suffered an injury as a result of the implementation of a policy or custom of the municipality. Id. at 694.

For purposes of municipal liability under Section 1983, municipal policy or custom can be found in various ways including:

the formal enactment or adoption of ordinances, regulations and various government edicts . . . however, “[a] plaintiff may be able to prove the existence of a widespread practice that, although not authorized by written law or express municipal policy, is ‘so permanent and well settled as to constitute a ‘custom or usage’ with the force of law.” City of St. Louis v. Praprotnik, 485 U.S. 112, 127 (1988)(citation omitted). Municipalities also can be found liable through attribution to them of the conduct of certain high ranking officials who have final policymaking authority. Praprotnik, 485 U.S. at 123 (citation omitted). Additionally, municipalities can be held liable under § 1983 for their failure to supervise or train their employees. City of Canton v. Harris, 489 U.S. 378 (1989).

Hanenberg v. Borough of Bath, No. 94-1929, 1994 WL 646112, at \*4 (E.D. Pa. Nov. 16, 1994).

The Borough of Ephrata argues that Plaintiffs have failed to plead sufficient facts in order to maintain a cause of action under 42 U.S.C. section 1983. (Br. Supp. Def. Borough of Ephrata’s Mot. to Dismiss Pls.’ Am. Compl. at 4.) The Borough argues that the Plaintiffs “cannot establish that the Borough of Ephrata has ever deprived the Plaintiff[s] of a right secured by the constitution or federal law.” (Id. at 6.) Moreover, the Borough argues that “[i]n light of the absence of any allegations alleging that Ephrata Borough was responsible for enacting or enforcing Warwick Township’s hiring policies, the defense submits that no liability can attach to the Borough of Ephrata based on the alleged conduct of Detective Ballenger.” (Id. at 7.)

Plaintiffs argue that they have alleged "sufficient facts in the Amended Complaint to proceed on all claims against Defendant the Borough of Ephrata." (Pls.' Mot. to Deny Def.'s Mot. to Dismiss at 2.) In order to impose liability on the Borough of Ephrata, Plaintiffs rely on the assumptions that Ballenger was a policymaker for the Borough of Ephrata and that the Borough has a custom of not hiring black male police officers solely because of their race. See Pls.' Mem. Law Supp. Pls.' Mot. Deny Def.'s Mot. to Dismiss. Plaintiffs contend that "[t]he Borough of Ephrata violated 42 U.S.C. § 1983 because it has a policy, custom or practice of refusing to hire black men as police officers solely because of their race or color." (Am. Compl. ¶ 126.) Plaintiffs predicate Borough liability on the premise that "[s]ince 1995, the Township of Warwick hired six police officers and the custom of the police department is to include high ranking, policymaking officials from the Borough of Ephrata Police Department on the Phase V hiring committee." (Pls.' Mem. Law Supp. Pls.' Mot. to Deny Def.'s Mot. to Dismiss at 4.) Based on this "custom," Plaintiffs argue that Ballenger, "effectively a borough policymaker," deprived Simril of the opportunity to be a Warwick Township police officer because of his race. (Am. Compl. ¶ 126.)

Based on the facts of this case, the Court finds that the Borough of Ephrata cannot be held liable because Plaintiffs'

claims against the Borough are premised on the theory of respondeat superior and, therefore, must be dismissed. Monell, 436 U.S. 658, 691. Municipalities can be found liable for violations of Section 1983 through the conduct of certain high ranking officials who have final policymaking authority. Praprotnik, 485 U.S. 112, 123; Pembaur v. City of Cincinnati, 475 U.S. 469, 483 (1986). However, in such cases, "municipalities may be held liable under § 1983 only for acts for which the municipality itself is actually responsible, 'that is, acts which the municipality has officially sanctioned or ordered.'" Praprotnik, 485 U.S. at 123 (quoting Pembaur, 475 U.S. at 480). The purpose of this rule is to "distinguish acts of the municipality from acts of employees of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible." Pembaur, 475 U.S. at 479-80 (footnote omitted). The identification of officials who possess final policymaking authority with regard to a given act is an issue of state, or local, law. Praprotnik, 485 U.S. at 123 (citation omitted). Since the parties have failed to brief the Court with the relevant local law regarding final policymaking authority, the Court is unable to adequately rule on whether Ballenger was a policymaker with final policymaking authority sufficient to impose municipal liability upon the Borough of Ephrata. However, as evidenced below, even assuming

that Ballenger did possess the requisite final policymaking authority, the Court still finds that the Borough of Ephrata cannot be held liable for the acts of Ballenger under the facts of this case because such liability is premised on the theory of respondeat superior.

"A municipality may not be held liable under § 1983 solely because it employs a tortfeasor." Board of County Comm'rs of Bryan County v. Brown, 520 U.S. 397 (1997)(citing Monell, 436 U.S. 658, 692). To impose municipal liability, the plaintiff is required "to identify a municipal 'policy' or 'custom' that caused the plaintiff's injury." Id. at 403 (citing Monell, 436 U.S. at 694 (citations omitted)). A plaintiff who merely identifies a policymaker's conduct that is properly attributable to a municipality, does not establish a "policy" giving rise to municipal liability. Id. at 397. "The plaintiff must also demonstrate that, through its deliberate conduct, the municipality was the 'moving force' behind the injury alleged." Id. at 404. Thus, "a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights." Id. This showing is premised on the basis that "in enacting § 1983, Congress did not intend to impose liability on a municipality unless deliberate action attributable to the municipality itself is the

'moving force' behind the plaintiff's deprivation of federal rights." Id. at 400 (citing Monell, 436 U.S. at 694).

In this case, it is important to note that the Township of Warwick and the Borough of Ephrata are separate and distinct municipal entities. As separate and distinct entities, Warwick Township and Ephrata Borough have their own individual police departments. The facts specific to this case reveal that the Borough of Ephrata was involved in Warwick Township Police Department's hiring process solely through Detective Ballenger's participation on the Phase V hiring committee in December 1999. Plaintiffs rely solely on the customary involvement of high ranking Ephrata Borough police personnel in the Township of Warwick's hiring process in order to impose liability on the Borough. However, the Amended Complaint fails to allege that the policies and customs of the Borough of Ephrata have any interdependence with the policies or customs of the Township of Warwick. That is, besides the allegations leveled against Ballenger, the Amended Complaint fails to demonstrate that the individual policies or customs of the Borough of Ephrata had any force or significance in which to play a role in Warwick Township's hiring process or Simril's alleged deprivation of federal rights.

The delineation of the roles of Ballenger and the Borough of Ephrata in Warwick Township's hiring process is

essential to the analysis of the Borough of Ephrata's liability in this case. The Amended Complaint fails to demonstrate that the Borough of Ephrata is required to be a part of the Township of Warwick's hiring process or that Ballenger was acting as a representative of the Borough's policies while he was a member of the hiring committee. Without making these showings, it appears that Plaintiffs are trying to vicariously impose liability upon the Borough of Ephrata for the alleged discriminatory acts of one of its employees. In fact, Plaintiffs' Amended Complaint states that Ballenger was not picked to be on the hiring committee by the Borough, but was handpicked by his close friend Edward Tobin, a Detective Sergeant Police Officer for the Township of Warwick. (Am. Compl. ¶ 61.) Thus, by failing to allege that Ballenger was part of the hiring committee for the purpose of representing the Borough or its policies, it appears that Ballenger was included on the hiring committee for his individual knowledge dealing with police matters. Without making the requisite showing that the Borough of Ephrata itself had any final decision making authority or control over Warwick Township's decisions regarding who was to be hired for its police force, Plaintiffs fail to sufficiently demonstrate that the Borough is responsible for Simril's alleged deprivation of federal rights. Pembaur, 475 U.S. 469, 479-80.

As a result, Plaintiffs fail to adequately allege or show that through its deliberate conduct the Borough of Ephrata

was the "moving force" behind Simril's injury. Board of County Comm'rs, 520 U.S. 397, 404. Plaintiffs fail to demonstrate that any municipal action was taken with the requisite degree of culpability required to impose liability upon the Borough of Ephrata. Id. In fact, Plaintiffs fail to demonstrate that any municipal action was taken on the part of the Borough of Ephrata regarding the hiring of Simril. Plaintiffs rely heavily on the allegedly discriminatory action by Ballenger, but fail to demonstrate a direct causal link between any action on the part of the Borough of Ephrata and the deprivation of Simril's federal rights. Id. In this case, Plaintiffs' allegations relating to Ballenger's conduct and a racially discriminatory policy within the Borough of Ephrata's Police Department would have significance if Simril had applied for an open police officer position for the Borough of Ephrata or if the Borough had played a direct role in the hiring process for Warwick Township. However, this is not the factual posture of this case. By failing to demonstrate that the Borough of Ephrata was the "moving force" behind Simril's injury, the Plaintiffs have failed to show the requisite direct causal link between any action on the part of the Borough of Ephrata and the deprivation of Simril's federal rights. Id. Without making these showings, Plaintiffs are relying on the theory of respondeat superior to hold the Borough of Ephrata liable for the alleged discriminatory

actions of Ballenger. Since a municipality cannot be held vicariously liable for the actions of one of its employees under Section 1983, Defendant Borough of Ephrata's Motion to Dismiss the Amended Complaint is granted. Monell, 436 U.S. 658, 691.

An appropriate Order follows.

**IIN THE UNITED STATES DISTRICT COURT  
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v.	:	NO. 00-5668
	:	
THE TOWNSHIP OF WARWICK, et al.,	:	
	:	
Defendants.	:	

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**ORDER**

AND NOW, this 10th day of August, 2001, upon consideration of Defendant Borough of Ephrata's Motion to Dismiss Plaintiffs' Amended Complaint (Dkt. No. 33), and Plaintiffs' Response thereto, it is hereby ORDERED that the Motion is GRANTED and the Borough of Ephrata is DISMISSED WITH PREJUDICE.

BY THE COURT:

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Robert F. Kelly,

J.