

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

DONNA LYNNE MILLER, : CIVIL ACTION  
: :  
Plaintiff, : NO. 00-0516  
: :  
v. : :  
: :  
: :  
H. WARREN HOGELAND, DISTRICT :  
JUSTICE, IMMEDIATE SUPERVISOR :  
and COUNTY OF BUCKS, :  
: :  
Defendants. :

MEMORANDUM

BUCKWALTER, J.

October 10, 2001

Plaintiff Donna Lynne Miller ("Plaintiff" or "Miller") filed this action on January 28, 2000, against District Justice H. Warren Hogeland ("Hogeland"), individually and in his official capacity, and the County of Bucks (collectively the "Defendants"). Miller, a Clerk Court Administrator ("CCA") with Hogeland's Court, alleges that Defendants terminated her employment in violation of the Civil Rights Act, 42 U.S.C. § 1983, the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq. and the Pennsylvania Human Relations Act ("PARA"), Pa. Stat. Ann. Tit. 43 § 951 et seq. In addition, Miller asserts state assault and defamation claims against Defendant Hogeland.

Presently before the Court are Defendants' Motions for Summary Judgment. For the reasons that follow, the Court grants in part and denies in part said Motions.

## **I. BACKGROUND**

Plaintiff's employment as a CCA with the County of Bucks, under the supervision of Hogeland, began in October 1994. The CCA is considered a lead worker that performs all supervisory duties required to provide a uniform and continuing flow in the district court functions. Although Miller more than adequately performed the duties of her job, the course of her employment is marred by numerous accounts of problems in her interactions with co-workers and with Hogeland. On September 25, 1998, Miller was terminated. Miller's termination came after 30 memoranda and letters written by Hogeland regarding deficiencies in Miller's conduct at work, numerous oral reprimands by Hogeland regarding Miller's deficiencies in her performance as lead worker, more than 45 memoranda written by Miller's co-workers regarding difficulty in the office and work environment due to Miller's behavior, and three formal grievance proceedings instituted by Miller in response to various disciplinary actions taken against her. While the Court will not articulate every episode that may have contributed to Hogeland's and the County of Bucks' decision to terminate Miller's employment, suffice it to say that over a period of two years there was constant turmoil in the office

between the clerks and Miller, and between Miller and Hogeland, culminating in the final episode before Miller's termination, where Miller accused Hogeland of assaulting her with a telephone receiver.

## II. LEGAL STANDARD

A motion for summary judgment shall be granted where all of the evidence demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A genuine issue of material fact exists when "a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Id.

If the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the nonmoving party to "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986).

When considering a motion for summary judgment, a court must view all inferences in a light most favorable to the nonmoving party. See United States v. Diebold, Inc., 369 U.S.

654, 655, 82 S. Ct. 993, 994, 8 L. Ed. 2d 176 (1962). The nonmoving party, however, cannot "rely merely upon bare assertions, conclusory allegations or suspicions" to support its claim. Fireman's Ins. Co. v. Du Fresne, 676 F.2d 965, 969 (3d Cir. 1982). A mere scintilla of evidence in support of the nonmoving party's position will not suffice; there must be evidence on which a jury could reasonably find for the nonmovant. Liberty Lobby, 477 U.S. at 252, 106 S. Ct. at 2512. Therefore, it is plain that "Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986). In such a situation, "[t]he moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." Id. at 323 (quoting Fed. R. Civ. P. 56(c)).

### **III. DISCUSSION**

#### **A. Section 1983**

In Count I, Plaintiff asserts a Section 1983 claim against Hogeland in his individual capacity and the County of

Bucks. To successfully bring a claim under Section 1983, a plaintiff must demonstrate: "(1) that the conduct complained of was committed by a person acting under color of state law; and (2) that the conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." Robb v. City of Philadelphia, 733 F.2d 286, 290-91 (3d Cir. 1984). Miller contends that her termination was effectuated: (1) without appropriate pre- and post-termination procedures; (2) in retaliation for her reporting that Hogeland was fixing traffic tickets; and (3) to harm her reputation within her working environment.

#### **1. Due Process**

A public employee with a property interest in her job is entitled to notice and some kind of hearing prior to termination, along with post-termination administrative procedures. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542, 105 S. Ct. 1487, 1493, 84 L. Ed. 2d 494 (1985). The essential pre-termination requirements of due process entitle a public employee "to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." Loudermill, 470 U.S. at 546, 105 S. Ct. at 1495. Plaintiff was provided such process on September 22, 1998 when a performance review was conducted at which Miller and her union representative were

present, addressing the incidents of September 18, 1998 when Miller accused Hogeland of assaulting her with a telephone receiver. At this performance review, Miller was given an opportunity to present her side of the story, however, both she and her union representative declined to comment on the events. In addition, Miller was provided with her employer's evidence in the form of copies of the reports concerning the incident, including the report submitted by Miller. The following day, Hogeland issued written notice of the charges against Miller in the form of a letter stating that Miller's termination would be effective September 25, 1998. Thus, the process Plaintiff underwent prior to her termination on September 25, 1998 more than satisfied the criteria outlined above.

There is no reason for Plaintiff to believe that she was terminated on September 18, 1998 when Hogeland demanded she leave his court after the phone incident. First, Hogeland's written notice stated that Miller's termination would not become effective until September 25, 1998. Second, the Deputy District Court Administrator called Miller at her home the afternoon of September 18, 1998 to tell her to report to work on September 22, 1998 for a hearing in connection with that day's events. Finally, Miller was told that she would be paid for her time away from the court building. Thus, because Miller was provided with (1) written notice of the charges against her; (2) Hogeland's

evidence of the events giving rise to her termination; and (3) had ample opportunity to present her side of the story at the September 22, 1998 hearing, the Court holds that Miller was provided with adequate pre-termination procedures.

Plaintiff also claims that she was not afforded a fair hearing in connection with grievance proceedings following her discharge because she faced impartial decision makers, she was not provided with evidence to support her firing and no record of the final grievance was created. The thrust of Miller's complaint is that her termination was orchestrated by Hogeland in concert with the Deputy District Court Administrator's Office, an entity that was supposed to remain neutral in order to afford the employee a meaningful review as provided under the collective bargaining grievance process.

Miller had available and exhausted a three step grievance process. Step one grievance entailed review by Hogeland, i.e., the District Justice supervising the aggrieved employee. Miller's step one grievance was held on September 22, 1998 and constituted her pre-termination hearing. Step two afforded Miller review by the Deputy District Court Administrator. Step three grievance called for review by the President Judge of the Court of Common Pleas of Bucks County.

"In the case of an employment termination case, due process does not require the state to provide an impartial

decision maker at the pre-termination hearing[,]” as long as the discharged employee can take advantage “of his right to a post-deprivation hearing before an impartial tribunal that can rectify any possible wrong committed by the initial decision maker.” McDaniels v. Flick, 59 F.3d 446, 459, 460 (3d Cir. 1995). The McDaniels court noted that it is not unusual for an employment termination decision to be “made initially by the employee’s direct supervisor or someone working in the same organization as the employee . . . given that such person often is already familiar with the employee’s abilities and shortcomings as well as the needs and interests of the employer organization.” Id. at 460. Miller’s termination was ultimately reviewed and affirmed by the President Judge of the Court of Common Pleas of Bucks County. Miller does not claim, nor is there any evidence that the ultimate decision makers with respect to Miller’s termination were biased. Accordingly, Miller was provided a post-termination hearing before an impartial tribunal.

The record demonstrates Plaintiff was amply provided pre- and post-termination due process. Therefore, the Court grants Defendants’ Motion for Summary Judgment with respect to Plaintiff’s claim that she was terminated in violation of due process under the Fourteenth Amendment.

## 2. First Amendment

Plaintiff next claims that her termination was in retaliation for having engaged in the following protected speech activities: reporting vandalism to her car which occurred while her car was parked in the courthouse parking lot; reporting inefficiency by co-workers; reporting that co-workers were spending time on the phone and running up phone charges; reporting an alleged ticket fixing incident by Hogeland; and reporting an alleged assault by Hogeland on Miller with a telephone receiver.

Determining whether a public employee's termination was in retaliation for engaging in protected speech requires a three-step analysis. Swineford v. Snyder County, 15 F.3d 1258, 1270 (3d Cir. 1994). First, the plaintiff must demonstrate that she was engaged in a protected activity. Id. If the plaintiff shows the activity was protected, she must then show the activity was a substantial or motivating factor in the alleged retaliatory action. Id. Finally, if she meets these burdens, defendants have an opportunity to defeat her claim by demonstrating that they would have taken the same action absent the protected conduct. Id.

To qualify as a protected activity, Miller's speech must satisfy the Pickering balancing test. Green v.

Philadelphia Hous. Auth., 105 F.3d 882, 885 (3d Cir. 1997) (citing Pickering v. Board of Educ., 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968)). First, Miller's speech must constitute speech on a matter of public concern. Id. "Second, the public interest favoring [her] expression 'must not be outweighed by any injury the speech could cause to the interest of the state as an employer in promoting the efficiency of the public services it performs through its employees.'" Green, 105 F.3d at 885 (citing Pickering, 391 U.S. at 568, 88 S. Ct. at 1734-35).

**a. A Matter of Public Concern**

"A public employee's speech involves a matter of public concern if it can 'be fairly considered as relating to any matter of political, social, or other concern to the community.'" Green, 105 F.3d at 885-86 (citing Connick v. Myers, 461 U.S. 138, 146, 103 S. Ct. 1684, 1690, 75 L. Ed. 2d 708 (1983)). Miller's reports of vandalism to her car are purely concerns of a personal interest and therefore, do not meet the first prong of the Pickering balancing test. Further, while the public has a significant interest in whistle blowing, Miller's complaints concerning inefficiency of her co-workers and excessive phone charges evidence nothing more than personality conflicts and complaints to Hogeland over trivial office matters, not rising to the level of matters of public concern.

**b. Balance of Interests**

The question remains whether Miller's free speech interest in reporting allegations of ticket fixing and assault is outweighed by any injury the speech could cause to the interests of Hogeland, as supervisor, and the County of Bucks as employer of Miller. Examining the content, form and context of Miller's allegations of assault as revealed by the whole record, see Swineford, 15 F.3d at 1271, establish that Miller's accusation of assault was just one incident of a pattern of disruption in the workplace induced by Miller. Miller's escalating complaints regarding her co-workers and supervisor, culminating in the accusations of assault, (1) impaired discipline by Hogeland; (2) impaired harmony among co-workers; (3) had a detrimental impact on close working relationships for which personal loyalty and confidence are necessary; and (4) interfered with the regular operation of the court room. See Swineford, 15 F.3d at 1272 (listing factors influencing a finding that protected speech is outweighed by the interests of the state). Miller's allegation of assault was the straw that justified her firing. Miller's personal interest in reporting what she characterizes as criminal activity of assault, is outweighed by Hogeland's and the County of Bucks' interest in efficiently meeting their obligations to the public. Therefore, Miller's act of reporting an alleged

assault by Hogeland does not constitute protected activity for purposes of the three-step analysis outlined above.

Miller's reporting of the alleged ticket fixing is the only protected activity meeting the threshold requirement, in that Miller was seeking to bring to light the alleged wrongdoing on the part of a government official. Whether the speech was a substantial factor in Miller's termination and whether Miller would have been fired anyway remain issues in contention between the parties. These questions should be submitted to the jury, the Plaintiff having requested a jury trial in her complaint. See Baldassare v. New Jersey, 250 F.3d 188, 195 (3d Cir. 2001) ("The second and third stages of this analysis present questions for the fact finder and are not subject to review in this case."), Green, 105 F.3d at 889 ("The second step in the Pickering analysis, whether the protected activity was a substantial or motivating factor . . . would be a factual issue for the jury."), Watters v. City of Philadelphia, 55 F.3d 886, 892 n.3 (3d Cir. 1995), Johnson v. Lincoln Univ. of Commonwealth Sys. of Higher Educ., 776 F.2d 443, 454 (3d Cir. 1985) (recognizing the second and third questions should be submitted to the jury). Therefore, Defendants' Motion for Summary Judgment is denied with respect to Plaintiff's claim that she was terminated in retaliation for engaging in the protected activity

of reporting alleged ticket fixing by Hogeland as to Defendant Hogeland only.

Because Section 1983 cannot be interpreted to incorporate doctrines of vicarious liability, see Pembaur v. City of Cincinnati, 106 S. Ct. 1292, 1298 (1986), said Motion is granted as to Defendant County of Bucks. While the President Judge of the Court of Common Pleas of Bucks County had discretion to fire County of Bucks employees who exhausted their remedies pursuant to the collective bargaining grievance process, there is no evidence that the President Judge was the county official responsible for establishing county employment policy. See id. at 1300 n.12. "Municipal liability attaches only where the decision maker possesses final authority to establish municipal policy with respect to the action ordered." Id. at 1299. "The fact that a particular official - even a policymaking official - has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion. Id. Therefore, Defendant County of Bucks Motion for Summary Judgment is granted as it relates to Plaintiff's claim that she was terminated in retaliation for engaging in protected speech activity in violation of Section 1983.

### 3. Injury to Reputation

To the extent that Plaintiff asserts a due process violation in Hogeland's alleged publication that Miller was crazy, Defendants' Motion for Summary Judgment is granted. "The Supreme Court has made clear that federal courts are not to view defamatory acts as constitutional violations." Boyanowski v. Capital Area Intermediate Unit, 215 F.3d 396, 401 (3d Cir. 2000) (citing Paul v. Davis, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976)(holding that defamation by itself did not harm a liberty interest protected under the Fourteenth Amendment)). Plaintiff's claim is more properly read as a state law defamation claim. See discussion infra Part III.C.2.

#### B. ADA

In Count II, Plaintiff asserts ADA and PARA violations against the County of Bucks. To state a claim for employment discrimination under the ADA, a plaintiff must demonstrate that he or she is a "qualified individual with a disability" within the meaning of the ADA, and that he or she has suffered an adverse employment decision as a result of the discrimination. See Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 306 (3d Cir. 1999).

A "qualified individual with a disability" is "an individual with a disability who, with or without reasonable

accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8) (1995). A "disability" is defined as:

- (a) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (b) a record of such impairment; or
- (c) being regarded as having such an impairment.

42 U.S.C. § 12102(2) (1995).

In her ADA claim, Miller asserts that the County of Bucks, as her ultimate employer, regarded her as having a physical or mental impairment that substantially limited one or more of the major life activities. "For an individual to be 'disabled' under the 'regarded as' portion of the ADA's definition of disability, the individual must demonstrate either that: (1) despite having no impairment at all, the employer erroneously believes that the plaintiff has an impairment that substantially limits major life activities; or (2) the plaintiff has a nonlimiting impairment that the employer mistakenly believes limits major life activities." Tice v. Centre Area Transp. Auth., 247 F.3d 506, 514 (3d Cir. 2001).

Plaintiff has not claimed that Defendant County of Bucks discriminated against her because it perceived her as disabled by some impairment that substantially limits one or more of her major life activities. See Walton v. Mental Health Ass'n, 168 F.3d 661, 665 (3d Cir. 1999). Miller asserts that Hogeland

referred to her as a "crazed psychopathic postal worker"; documented in writing that "there is something wrong with her thinking"; and demanded that Miller attend counseling and treatment through Business Employee Assistance Consortium (BEACON). She apparently argues that, if Defendant County of Bucks terminated her for these reasons, they must have perceived her as substantially limited in her ability to work. However, "with respect to the major life activity of working, the term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." Id. "Furthermore, the inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." Id. Even if Defendant's did terminate Miller's employment due to her mental deficiencies, (a fact which Defendant County of Bucks disputes), her claim fails. By asserting that Defendant County of Bucks prevented her from performing her duties as a CCA in the Court of Common Pleas of Bucks County, Miller simply has not claimed that Defendant County of Bucks perceived her as substantially limited in the major life activity of working under this standard. Nor is there any indication that Defendant County of Bucks perceived her mental deficiencies as limiting other major life activities.

Therefore, because Miller is not disabled within the meaning of the ADA, she cannot establish a prima facie case of discrimination and Defendant County of Bucks' Motion for Summary Judgment must be granted. The PARA has adopted the definition of disabled as set forth in the ADA. Thus, Miller's state discrimination claim fails as well. Consequently, Plaintiff's ADA and PARA claims are dismissed with prejudice.

### **C. State Law Claims**

In Count III, Plaintiff asserts a state law claim of assault against Defendant Hogeland. The Court also discusses Plaintiff's state law defamation claim below.

#### **1. Assault**

Plaintiff asserts that Hogeland assaulted her by picking up his phone and throwing it across his desk at Miller. This event allegedly took place after Miller had argued with and complained to Hogeland about another staff member's job performance. Not receiving an adequate response from Hogeland to what Miller believed to be a flagrant work performance deficiency of the staff member, Miller threatened to call the Deputy District Court Administrator to report the events which had just taken place. Hogeland contends that he was merely attempting to hand the telephone receiver to Miller so that she could place her call to the Deputy District Court Administrator, when the phone

cord caught and caused the telephone receiver to hit and drag along the desk.

An assault is an "act intended to put another person in reasonable apprehension of an immediate battery, and which succeeds in causing an apprehension of such battery." Cucinotti v. Ortmann, 399 Pa. 26, 27, 159 A.2d 216, 217 (1960). Clearly, the parties dispute the facts regarding Hogeland's intent. Therefore, the Court must submit Plaintiff's assault claim to the jury to determine whether it can reasonably conclude that an assault occurred. Therefore, Defendant Hogeland's Motion for Summary Judgment regarding Plaintiff's assault claim is denied.

## **2. Defamation**

Plaintiff's defamation claim is premised on Hogeland's reference to Miller as a "crazed psychopathic postal worker" (a comment which Hogeland asserts that he either did not make or did not direct at Miller) and various other negative references concerning Miller's mental capacity.

"Commonwealth parties" may be sued only if the claim is one for negligence and fits within one of the nine enumerated categories under 42 Pa. Cons. Stat. Ann. § 8522(b)(1) through (9), which serve as exceptions to the general rule of sovereign immunity. A Commonwealth party is "[a] Commonwealth agency and any employee thereof, but only with respect to an act within the scope of his office or employment." 42 Pa. Cons. Stat. Ann. §

8501. As a District Justice with the County of Bucks, Hogeland is an employee of a Commonwealth agency. Thus, as a threshold matter, Miller's defamation claim against Hogeland can go forward only if it falls within one of the enumerated exceptions of 42 Pa. Cons. Stat. Ann. § 8522(b). A review of the exceptions under 42 Pa. Cons. Stat. Ann. § 8522(b)(1) through (9) indicates that the instant defamation action does not fall within one of the enumerated exceptions. Therefore, as long as Hogeland was acting within the scope of his employment at the time he allegedly publicized the defamatory comments, there is no liability.

Pennsylvania courts have adopted the Restatement (Second) of Agency § 228, which reads in pertinent part, that conduct of a servant is within the scope of employment if, but only if:

- (a) it is of the kind he is employed to perform;
- (b) it occurs substantially within the authorized time and space limits;
- (c) it is actuated, at least in part, by a purpose to serve the master; and
- (d) if force is intentionally used by the servant against another, the use of the force is not unexpected by the master.

Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits or too little actuated by a purpose to serve the master. See Haas v. Barto, 829 F. Supp. 729, 733-34 (M.D. Pa. 1993); Natt v. Labar, 117 Pa. Commw. 207, 543 A.2d 223, 225 (1988).

The alleged defamatory comments made by Hogeland took place in employment related contexts. Reference to Miller as a "crazed psychopathic postal worker" took place, if at all, during a grievance step at which Hogeland's presence was required pursuant to the collective bargaining grievance process. During this grievance step, Miller was permitted to present her side of the story and Hogeland was expected to justify the disciplinary action prescribed by him. The Court holds that Hogeland's conduct at the grievance step was within the scope of his employment. Therefore, because Hogeland is an employee of a Commonwealth agency and said agency is immune from suit except in nine enumerated circumstances, of which defamation is not included, and the alleged defamatory communications occurred within the scope of Hogeland's employment, Plaintiff's state defamation claim against Defendant Hogeland is barred by the Sovereign Immunity Act.

#### **IV. CONCLUSION**

For the reasons stated above, upon consideration of the Motion of Defendant County of Bucks, Defendant's motion is hereby granted. Accordingly, Plaintiff's Complaint is dismissed with respect to all counts brought against this defendant. Upon consideration of the Motion of Defendant Hogeland, in his individual capacity, Defendant's motion is granted in all counts with the exception of Plaintiff's: (1) Section 1983 claim that

she was terminated in retaliation for engaging in the protected activity of reporting alleged ticket fixing by Hogeland; and (2) state assault claim. Upon consideration of the Motion of Defendant Hogeland, in his official capacity, Defendant's motion is granted in all counts with the exception of Plaintiff's state assault claim.

An appropriate order follows.

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

DONNA LYNNE MILLER,	:	CIVIL ACTION
	:	
Plaintiff,	:	NO. 00-0516
	:	
v.	:	
	:	
	:	
H. WARREN HOGELAND, DISTRICT	:	
JUSTICE, IMMEDIATE SUPERVISOR	:	
and COUNTY OF BUCKS,	:	
	:	
Defendants.	:	

ORDER

AND NOW, this 10<sup>th</sup> day of October, 2001, it is hereby

**ORDERED:**

(1) Upon consideration of the Motion by Defendant County of Bucks for Summary Judgment (Docket No. 22), Plaintiff's response thereto (Docket No. 29), and Defendant's reply (Docket No. 32), Defendant's motion is hereby **GRANTED**. Accordingly, Plaintiff's Complaint is **DISMISSED** with respect to all counts brought against this defendant.

(2) Upon consideration of the Motion by Defendant Hogeland for Summary Judgment, in Whole or in Part, Pursuant to FRCP 56 (Docket No. 21), the Motion by Defendant Hogeland for Summary Judgment (Docket No. 22), Plaintiff's response thereto (Docket No. 29), and Defendant's reply (Docket No. 31), Defendant Hogeland's motion, in his individual capacity, is **GRANTED** with

respect to all counts **except** Plaintiff's: (a) Section 1983 claim that she was terminated in retaliation for engaging in the protected activity of reporting alleged ticket fixing by Hogeland; and (b) state assault claim. Defendant Hogeland's motion, in his official capacity, is **GRANTED** with respect to all counts **except** Plaintiff's state assault claim.

(3) A Pretrial Conference is scheduled for Wednesday, October 24, 2001 at 4:00 P.M. in the chambers of the undersigned. Among other matters, the court intends to set a trial date as soon as reasonably possible.

BY THE COURT:

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RONALD L. BUCKWALTER, J.