

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

KENNETH S. HOFFMAN,	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	NO. 01-5622
	:	
CARMEN THOME, CHARLES	:	
MARTIN, MICHAEL FITZPATRICK,	:	
SANDRA MILLER, Bucks County	:	
Commissioners, and COUNTY OF	:	
BUCKS	:	
	:	
Defendants.	:	

MEMORANDUM

BUCKWALTER, J.

February 15, 2002

The Plaintiff, Kenneth S. Hoffman ("Hoffman" or "Plaintiff") brings this action pursuant to 42 U.S.C. §§ 1983 and 1988 alleging violations of the First and Fourteenth Amendments of the United States Constitution. Presently before the Court is Defendants' Motion to Dismiss Plaintiff's Due Process Claims pursuant to Fed. R. Civ. P. 12(b)(6). Because the Court holds that Plaintiff does not maintain a property interest in his employment with the County of Bucks, said motion is granted and Plaintiff's due process claims are dismissed.

I. BACKGROUND¹

¹ The Court takes all well pleaded facts in Plaintiff's complaint as true and views them in the light most favorable to him. See Jenkins v. McKeithen, 395 U.S. 411, 421, 89 S. Ct. 1843, 1849, 23 L. Ed. 2d 404 (1969).

Plaintiff was an employee of the County of Bucks (the "County") in its Department of Information Technology ("IT") until his termination on September 26, 2000. Plaintiff was targeted for investigation and terminated as a result of two episodes occurring during his employment with the County.

The first incident concerns the fact that the County outsourced the operations of its IT Department to a management consulting firm by the name of Staffmasters. Plaintiff was advised by the County that Staffmasters maintained complete charge of IT and its daily operations but that he could be assured of continued job security. Plaintiff was unhappy with the outsourcing arrangement and was verbally critical of Staffmasters, complaining to Staffmasters, as well as County management and employees. Plaintiff asserts that these complaints contributed to his termination.

The second incident occurred when Defendant Charles Martin's secretary asked Plaintiff if he would actively support the Republican candidate for the position of State Representative for District 144. Plaintiff replied that he would not support the candidacy in any way. Plaintiff asserts, that he was terminated in retaliation for his refusal to support the Republican candidate.

In September of 2000 and shortly after the incidents described above, Plaintiff was advised by Defendant Carmen Thome

("Thome") that she had initiated an investigation into Plaintiff's conduct as an employee of IT, which revealed that Plaintiff committed acts that may have created a hostile work environment.² Consequently, Thome suspended Plaintiff, giving him six hours to respond to the allegations. Approximately four days later, Thome advised Plaintiff that he was terminated as a County employee based upon the allegations and Plaintiff's response thereto.

After Thome notified Plaintiff of his termination, Plaintiff requested a specific reason in writing upon which his termination was based. Thome replied that Plaintiff was an "at-will employee" and that she was not required to give Plaintiff a reason for the termination. Thome similarly denied Plaintiff the opportunity to appeal the termination decision.

Plaintiff asserts a property interest in his employment with the County and claims that dismissal from his job without notice or a hearing deprived him of that property interest without due process of law. Defendants assert that Plaintiff, as a public employee, has no property interest in his employment

² At this point in time the record is not detailed with respect to the conduct in which Plaintiff engaged that would have led his employer to conclude that he had created a hostile work environment. From what the Court can gather, Plaintiff allegedly (1) used the term "blow me" in a serious, derogatory fashion toward fellow employees; (2) shouted at others in a bullying or derogatory manner; (3) used derogatory hand gestures at fellow employees; and (4) threatened a fellow employee's job at the County. Plaintiff denies that he engaged in any of the described conduct.

with the County and therefore, Plaintiff's due process claims fail.

II. STANDARD

Under Fed. R. Civ. P. 12(b)(6), the party moving for dismissal has the burden of proving that no claim has been stated. Kehr Packages v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir. 1991). To prevail, the movant must show "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80, 84 (1957). A complaint should be dismissed if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232, 81 L. Ed. 2d 59, 65 (1984).

III. DISCUSSION

Property interests are created by state law. As a rule, public employees in Pennsylvania are at-will employees and cannot be provided with tenure unless there is express legislative authority for doing so. Brown v. Trench, 787 F.2d 167, 170 (3d Cir. 1986). Pennsylvania courts are willing to disregard the general rule and find a property right in public employment "only where the employee has an enforceable expectation of continued employment which can exist only if the

employee, by statute or contract, has been granted some form of guarantee." Batson v. Montgomery County, 557 A.2d 65, 66 (Pa. Commw. Ct. 1989) (internal quotations omitted).

When tenure in public employment is debated, Pennsylvania courts have developed a two-prong test. If the public employee can demonstrate (1) an enforceable expectation of continued employment, or some guarantee of continued employment extended by the public employer and (2) that the public employer had the specific statutory authority to create that interest, then public employees will be found to have attained a property interest deserving of due process.

The first prong can be demonstrated by pointing to any governing employment provision providing for dismissal for just cause, appearing in any official pronouncement, not just a state statute. See Perri v. Aytch, 724 F.2d 362, 365-66 (3d Cir. 1983) (expectation interest in continued employment created by court of common pleas personnel regulation that specifically provided that dismissal during probationary period shall be "for just cause only"); Abraham v. Pekarski, 728 F.2d 167, 170 (3d Cir. 1984) (property interest in employment arising from section of township manager's ordinance providing that no person shall be discharged without just cause); Brown, supra (just cause provision in personnel policy procedures adopted by county gave assistant

director of public information property right in continued employment).

Once the property interest is found to have been created, the question still remains whether the public employer had the power under Pennsylvania law to create a property interest in the particular public employment in question. See Perri, 724 F.2d at 366. In demonstrating this second prong, the employee must point to a state statute that enables the public employer to create such expectancy in continued public employment. Pennsylvania law instructs that the enabling legislation must contain a specific and explicit statement of the public agency's power to contract for tenured employment in order to create a property interest in public employment. See Scott v. Philadelphia Parking Auth., 402 Pa. 151, 157, 166 A.2d 278, 282 (1960). However, federal courts applying Pennsylvania law have been generous in finding statutory authority. See Perri, 724 F.2d at 366 (judiciary had power to create a property interest in worker's employment under Pennsylvania law enabling "the governing authority [to] exercise general supervisory and administrative authority over the personnel of the system"); Abraham v. Pekarski, 537 F. Supp. 858, 867 (E.D. Pa. 1982) (statutory authority found in Pennsylvania Local Agency Law, governing proceedings of township board of commissioners); Brown, 787 F.2d at 171 (deferring to lower court which found authority

to grant tenure in Pennsylvania statute granting county authority to adopt resolutions for "generally regulating the affairs of the county").

In the instant action, Plaintiff claims that the County of Bucks created a property interest in his employment. As support for his contention, Plaintiff points to the County's human resources policy, which provides that "employees may be subject to disciplinary action up to and including discharge for violating any established rules or regulations or committing other improper conduct." While this is far from a "just cause" provision as illustrated in Perri, Abraham, and Brown, supra, the Court concedes that this provision could be interpreted to establish that County employees could be discharged only for the reasons stated in its policy manual.

As additional support under prong one, Plaintiff points to a conversation he had with the County Director of Finance in which Plaintiff was advised that only six County employees were deemed at will. The Director of Finance then went on to identify the six individuals and their respective positions within the County, none of which included Plaintiff or his position. Finally, the Director of Finance advised Plaintiff that he was a protected employee and could only be terminated for just cause.

Even if a property interest was created, as Plaintiff asserts, he has only met prong one of the test developed by

Pennsylvania courts. Plaintiff has not pointed to any Pennsylvania statute, which expressly, or otherwise, grants the County the authority to create such interest in continued employment. Where a state public employer attempts to create tenured employment in the absence of enabling legislation, such creation is invalid and unenforceable. Ballas v. Reading, No.CIV.A.00-CV-2943, 2001 WL 73737 at *3 (E.D. Pa. Jan. 25, 2001) (citations omitted).

Thus, because of the lack of enabling legislation, Plaintiff cannot assert that he has a property interest in his employment with the County of Bucks and therefore, his due process claim fails. Defendants motion to dismiss Plaintiff's due process claims is granted.

An appropriate Order follows.

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 SANDRA MILLER, Bucks County :
 Commissioners, and COUNTY OF :
 BUCKS :
 :
 Defendants. :

ORDER

AND NOW, this 15th day of February, 2002, upon consideration of Defendant's Motion to Dismiss Plaintiff's Due Process Claims (Docket No. 3) and Plaintiff's Opposition thereto (Docket No. 5) it is hereby **ORDERED** that Defendant's motion is **GRANTED** and Plaintiff's due process claims are dismissed.

BY THE COURT:

RONALD L. BUCKWALTER, J.