

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

DAVID B. LLOYD : CIVIL ACTION  
 :  
 v. :  
 :  
 CITY OF BETHLEHEM and :  
 DANA GRUBB : NO. 02-0830

**MEMORANDUM AND ORDER**

HUTTON, J.

October 16, 2002

Currently before the Court are Defendants' Rule 12(b)(6) Motion to Dismiss (Docket No. 8), and Plaintiff's Response to Defendants' Motion to Dismiss (Docket No. 9).

**I. BACKGROUND**

Plaintiff, David B. Lloyd, began working for Defendant, City of Bethlehem, in 1972. Plaintiff's employment with Defendant City terminated on August 22, 2001. At the time of his termination, Plaintiff worked as the Director of Emergency Medical Services for the City.

Plaintiff's employment was governed by, inter alia, the rules of Defendant City's Personnel Manual. See Plnt. Exh. "E." The personnel manual details the City's progressive discipline policy. In the event that disciplinary action is needed, the Supervisor meets with the Director, after which an informal hearing with the employee is held. The employee may have a union representative

present. The type of discipline varies in proportion to the severity of the offense, with punishments ranging from verbal and written warnings to suspension. In the event that these forms of discipline do not work, termination is recommended. Plaintiff asserts that Defendants did not adhere to this manual, thus breaching an implied contract of employment.

In October of 1999, Plaintiff, as director of Emergency Medical Services, was interviewed for a newspaper article entitled "Bethlehem EMS has an Emergency." The Plaintiff indicated that Bethlehem's EMS was inadequately equipped and understaffed. "'We're missing 500 calls a year. I'm only handling 90 percent of my calls a year,' Lloyd said. 'How would a fire commissioner or police commissioner feel if he couldn't respond to that many?'" See Plnt. Exh. "B."

In July 2001, Plaintiff was again interviewed for a newspaper article. In "Ambulance Corps Hanging on for Dear Life," Plaintiff stated "I think we're approaching a crisis and I don't see it going away any time soon." See Plnt. Exh. "C." Plaintiff said that the combination of low pay and high demands were driving EMS paramedics into other fields. Plaintiff stated, "I'm afraid it's going to get a lot worse before it gets better." Plaintiff alleges that after he made these statements, Defendant retaliated against him in violation of his First Amendment rights.

Plaintiff filed a complaint for the instant case on February 19, 2002. After receiving Defendants' Motion to Dismiss on April 29, 2002, Plaintiff filed an Amended Complaint on May 24, 2002. (Docket No. 7). He is seeking damages for alleged age discrimination, whistle-blower retaliation, breach of implied contract and First Amendment retaliation. Defendants move for this Court to dismiss Plaintiff's breach of implied contract and First Amendment retaliation claims under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim.<sup>1</sup> (Docket No. 8). Defendants also seeks a dismissal for all claims of punitive damages. For the reasons set forth below, Defendants' motion is denied.

## **II. LEGAL STANDARD**

When considering a motion to dismiss a complaint for failure to state a claim under Rule 12(b)(6), the Court must accept as true all facts alleged in the complaint and any reasonable inferences that can be drawn therefrom. Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990) (citing Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988)); see also H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 249-50 (1989). The standard of notice pleading under the Federal Rules is extremely lenient. See Weston

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<sup>1</sup>

Plaintiff voluntarily dropped the fifth count concerning Violation of the Pennsylvania Human Relations Act, 43 P.S. §§ 955 and 962, as the charge is against Famous Smoke Shop, which is not party to the instant case. See Plnt. Brief p. 2. Plaintiff also concedes that the official capacity claim against Defendant Grubb in Count IV of the Amended Complaint merges with those against the city. See id. p. 12 n. 4. Plaintiff, therefore, maintains its suit against Defendant Grubb in his individual capacity only. Id.

v. Pennsylvania, 251 F.3d 420, 429-30 (3d Cir. 2001). A court may only dismiss a complaint where Plaintiff can prove no set of facts, consistent with his allegations, which justifies relief.<sup>2</sup> See Ala. Inc. v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994); Crighton v. Schuylkill County, 882 F. Supp. 411, 414 (E.D. Pa. 1995).

The Federal Rules of Civil Procedure do not impose upon a Plaintiff the burden of filing detailed, factually intense pleadings on which his claim is based. See Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997). At the same time, the court is not required to credit a Plaintiff's "bald assertions" or "legal conclusions" when deciding a motion to dismiss. See Id. Instead, all that is required is "a short and plain statement of the claim showing that the pleader is entitled to relief," enough to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Fed. R. Civ. P. 8(a)(2) (West 2001).

The purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of the complaint. In deciding a motion to dismiss, the district court may consider the allegations in the complaint, exhibits attached to the complaint and matters of public record. Pension Ben. Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993).

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<sup>2</sup> Federal Rule of Civil Procedure 12(b)(6) provides that a court may dismiss a complaint "for failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6).

### III. DISCUSSION

#### 1. Breach of Implied Contract

Defendant first asserts that Plaintiff has failed to state a claim for breach of an implied employment contract. There is no fundamental right to retain public employment. Puchalski v. School District of Springfield, 161 F. Supp.2d 395, 405 (E.D. Pa. 2001). Pennsylvania subscribes to the employment at-will presumption. Scott v. Extracorporeal, 545 A.2d 334, 336, 376 Pa.Super. 90 (Pa. Super. Ct. 1988). This presumption holds that, absent a contract to the contrary, an employee may be discharged at any time, for any reason. Id.

The at-will presumption may be overcome by, inter alia, an implied-in-fact contract. Id. Plaintiff points to Defendant's employee handbook in raising his claim of breach of implied contract.

A handbook is enforceable against an employer if a reasonable person in the employee's position would interpret its provisions as evidencing the employer's intent to supplant the at-will rule and be bound legally by its representations in the handbook. The handbook must contain a clear indication that the employer intended to overcome the at-will presumption.

Bauer v. Pottsville Area Emergency Medical Services, Inc., 756 A.2d 1265, 1269, 2000 Pa. Super. 252 (Pa. Super. Ct. 2000). Provisions in an employee manual may constitute a unilateral offer which an employee accepts by performing his duties. Bauer, at 1269. While the Plaintiff must establish that a reasonable person would view

the manual as supplanting the at-will rule, it is for the court to interpret the handbook to discern whether it contains evidence of the employer's intention to be bound legally. Id.

Defendants rely heavily on the notion that overcoming the at-will presumption is a heavy burden at trial. At this stage, however, Defendant's reliance is misplaced and premature. Plaintiff need only show that there is a set of facts consistent with his allegations, which could provide relief. He is not required to prove his claim at the pleading stage. In the instant case, there is a question of how a reasonable person would interpret the employee handbook. There is a set of alleged facts which may entitle Plaintiff to relief. Accordingly, Defendant's Motion to Dismiss this claim is denied.

## **2. First Amendment Retaliation**

Defendants next assert that Plaintiff has failed to state a claim with regard to his § 1983 claim of First Amendment retaliation because Plaintiff's speech was not of public concern. A corollary of First Amendment guarantees for the general public is that public employees should be able to speak freely about matters of public concern without fear of retaliation. Watters v. City of Philadelphia, 55 F.3d 886, 891 (3d Cir. 1995) (citing Pickering v. Board of Educ., 391 U.S. 563, 572, 88 S. Ct. 1731, 1736, 20 L.Ed.2d 811 (1968)). It is incumbent upon the courts to ensure that public employers do not abuse their authority, in an effort to silence

discourse of public import, simply because they do not agree with the content of an employee's speech. Id. While acting as employer, the government has wider latitude to regulate the speech of its employees than when it attempts to regulate speech of the public at large. See Baldassare v. The State of New Jersey, 250 F.3d 188, 194 (3d Cir. 2001). The government, however, is not free to act with impunity. Id.; see also Waters. v. Churchill, 511 U.S. 661, 671, 114 S. Ct. 1878, 128 L.Ed.2d 686 (1994).

A public employee's retaliation claim is evaluated under a three-step process. Baldassare, 250 F.3d at 194. The Court, however, will limit its analysis to the only portion that the Defendant disputes: that the Plaintiff's activity was protected. A public employee's speech is protected when it is a matter of public concern. Id. at 194; see also Watters, 55 F.3d at 892. An employee's speech falls within the ambit of public concern when it can be "fairly considered as relating to any matter of political, social or other concern to the community." Holder v. City of Allentown, 987 F.2d 188, 194 (3d Cir. 1993). The Third Circuit has consistently held that a public employee's criticism of internal operations is a matter of public concern. Zamboni v. Stamler, 847 F.2d 73, 78 (3d Cir. 1988); see also Rode v. Dellarciprete, 845 F.2d 1195 (3d Cir. 1988) (holding that where a civilian employee of the State Police spoke to a reporter concerning allegations that she was being harassed because of racial animus, she "was speaking

on a matter of public concern"); Trotman v. Board of Trustees of Lincoln University, 635 F.2d 216 (3d Cir. 1980) (holding that a professor's criticism of university president's efforts to increase the ration of professors to students was a matter of public concern).

Plaintiff spoke to reporters about the state of the Emergency Medical Services ("EMS") for Defendant city. Plaintiff, the director of the EMS, felt that his team was understaffed and ill-equipped. Over 500 emergency calls were missed in one year. When analyzed for their "content, form and context", Connick v. Myers, 461 U.S. 138, 103 S. Ct. 1684, 75 L.Ed.2d 708 (1983), Plaintiff's statements are the type of protected speech that is designed to raise awareness of "potential threats to the public health and safety of the community." Charvat v. Eastern Ohio Regional Wastewater Authority, 246 F.3d 607, 617-18 (6th Cir. 2001). The public relies on Emergency Medical Services every day. EMS personnel routinely deal with life or death situations. The reliability and promptness of the city's EMS response is, therefore, a matter of public concern. Plaintiff has, therefore, stated a claim upon which relief may be granted. Accordingly Defendant's motion for this claim is denied.

### **3. Punitive Damages**

Defendant asserts that the claims for punitive damages in Counts II and III should be dismissed because Plaintiff may not

pursue a municipality for punitive damages.<sup>3</sup> The Plaintiff concedes that he is not permitted to seek punitive damages against the city. Plaintiff, however, is seeking punitive damages against Defendant Grubb in his individual capacity. The Supreme Court has held that a government official in the role of personal-capacity defendant may be sued for damages. See Hafer v. Melo, 502 U.S. 21, 27, 29-30, 112 S. Ct. 358, 116 L.Ed.2d 301 (1991). Accordingly, Defendants' motion is denied.

An appropriate order follows.

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<sup>3</sup> Defendant also argued that Plaintiff failed to state a claim on both counts, however, this Court has found otherwise.

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O R D E R

AND NOW, this 16<sup>th</sup> day of October, 2002, upon consideration of Defendants' Rule 12(b)(6) Motion to Dismiss (Docket No. 8) and Plaintiff's Response to Defendants' Motion to Dismiss (Docket No. 9), IT IS HEREBY ORDERED that Defendants' Motion is **DENIED**.

BY THE COURT:

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HERBERT J. HUTTON, J.