

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

ALFRED TESTA, JR.	:	CIVIL ACTION
and KATHRYN H. TESTA	:	
	:	
v.	:	
	:	
CITY OF PHILADELPHIA and	:	
JOHN F. STREET, MAYOR, in his	:	
Official and Individual capacities	:	
and STEPHANIE FRANKLIN-SUBER in	:	
her Official and Individual	:	
capacities	:	NO. 00-3890

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

October 8, 2003

Plaintiffs Alfred Testa, Jr., ("Testa") and Kathryn H. Testa ("Mrs. Testa") filed an action against the City of Philadelphia,, its Mayor, John Street ("Mayor"), and his former Chief of Staff, Stephanie Franklin-Suber ("Franklin-Suber") for alleged civil rights violations under the Civil Rights Act, 42 U.S.C. § 1983 and pendant state law defamation claims against Franklin-Suber. Defendants' motion to dismiss the complaint was granted in part and denied in part. Defendants' motion for summary judgment was also subsequently granted in part in favor of Mayor Street who is no longer a party to this action. Summary judgment is now granted in favor of Franklin-Suber on the remaining claims of defamation and loss of consortium.

I. FACTS

Testa was Aviation Director for the City of Philadelphia from 1999 until March 13, 2000. As Aviation Director, he managed Philadelphia International Airport ("PIA") operations. On February 23, 2000, he testified at a budget hearing before the Philadelphia City Council. In answer to questions from council members, Testa criticized the City policy that gave control over airport parking lots to the Parking Authority, rather than the Airport Authority. Testa also criticized the Parking Authority's management of the lots. City employees in close contact with the Mayor were present at the Council hearing.

Approximately two weeks after his City Council testimony, Testa was summoned to meet with Franklin-Suber, then the Mayor's Chief of Staff, on Sunday, March 12 at 5:00 p.m., in her office. Franklin-Suber told Testa the Mayor wanted his resignation immediately. Testa agreed to resign in exchange for a favorable severance package, but Franklin-Suber responded that the Mayor wanted his resignation immediately. She threatened to have him escorted from the office immediately and barred from PIA. Testa said he needed to speak with his wife and left.

The following day, Testa went to work as usual. At noon, Franklin-Suber telephoned Testa and again demanded his resignation. Testa refused to resign without an agreement on a severance package, and Franklin-Suber told him things "would become nasty."

Testa began drafting a letter to Franklin-Suber; at 1:45 p.m., before he could have the letter delivered, a group of police officers and City officials arrived at Testa's office. The group included Police Lt. Richard Ross of the Mayor's security detail, several other police officers, the head of PIA security, and Shawn Fordham, Franklin-Suber's special assistant. Fordham delivered a letter from Franklin-Suber telling Testa that, if he did not resign by 1:30 p.m., he would be fired and escorted from his office by police officers before 2:00 p.m. The letter included the statement, "Let me emphasize that the immediate submission of your resignation will, in my opinion, prove to be in your personal and professional best interests."

Testa requested more time to collect his personal effects, but when the request was relayed to Franklin-Suber, it was denied. Philadelphia police officers in plain clothes escorted Testa from his office at approximately 2:00 p.m.

Shortly thereafter, Franklin-Suber stated to reporters in reference to Testa, "when someone indicates that they're going to cause trouble and create a disruption, it's important - when it's a situation, in a location like an airport - that you take appropriate measures." One week later, again referring to Testa, Franklin-Suber told reporters "When someone appears to be acting irrationally, especially with an airport and the security concerns, you have to worry about sabotage."

II. DISCUSSION

A. Standard of Review

Summary judgment is appropriate only if there are no genuine issues of material fact and evidence establishes the moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). A defendant moving for summary judgment bears the initial burden of demonstrating there are no facts supporting the plaintiff's claim; then the plaintiff must introduce specific, affirmative evidence showing there is a genuine issue of material fact. See id. at 322-24. A genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The non-movant must present evidence to support each element of its case for which it bears the burden at trial. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986). The court must draw all justifiable inferences in the non-movant's favor. See id. at 255.

B. Counts VII and VIII (Defamation)

Testa asserts common law defamation claims against Franklin-Suber in her individual capacity for her comments after his dismissal. Franklin-Suber contests that her statements and acts were defamatory and seeks absolute and qualified immunity.

In Pennsylvania, "high public officials are exempted by the doctrine of absolute privilege from all civil suits for damages arising out of false defamatory statements and even from statements motivated by malice, provided the statements are made in the course of the scope of the high official's authority or within his or her jurisdiction." Factor v. Goode, 612 A.2d 591, 593 (Pa. Commw. Ct. 1992), appeal denied, 624 A.2d 112 (Pa. 1993); see also Matta v. Burton, 721 A.2d 1164, 1166 (Pa. Commw. Ct. 1998). "The defense of privilege in cases of defamation 'rests upon the ... idea, that conduct which otherwise would be actionable is to escape liability because the defendant is acting in furtherance of some interest of social importance, which is entitled to protection even at the expense of uncompensated harm to the plaintiff's reputation.'" Montgomery v. Philadelphia, 140 A.2d 100, 102 (Pa. 1958)(quoting DEAN PROSSER, TORTS at 607 (2d ed. 1955)). It should be emphasized that the purpose of immunity is not to protect the public official, but to benefit the public by protecting its right to full disclosure of the facts and conduct of government business. Appel v. Twp. of Warwick, 828 A.2d 469, 474 (Pa. Commw. Ct. 2003).

To qualify for absolute immunity, Franklin-Suber "must establish that: (1) [s]he is a 'high public official;' and (2) the allegedly defamatory statements were made while [s]he was acting within the scope of [her] authority." Pickering v. Sacavage, 642 A.2d 555, 558 (Pa. Commw. Ct. 1994)(citing

Montgomery). The determination of whether a particular individual qualifies as a high public official is determined on a case-by-case basis. Matta, 721 A.2d at 1166. The inquiry has generally focused on the nature of the official's duties, the importance of the office, and whether it has policymaking functions. Id.; see also Montgomery, 140 A.2d at 105; Pickering, 642 A.2d at 558; Rok v. Flaherty, 527 A.2d 211, 212 (Pa. Commw. Ct. 1987).

In Durham v. McElynn, 772 A.2d 68 (Pa. 2001), the Pennsylvania Supreme Court expanded the doctrine of high public official immunity.¹ At issue in Durham was whether high public official immunity should be extended to an assistant district attorney; district attorneys were already entitled to such immunity. See e.g., McCormick v. Specter, 275 A.2d 688 (Pa. Super. Ct. 1971). Plaintiff Durham asserted that assistant district attorneys had no policymaking ability; they could not be high public officials because they simply served at the will of their employer. The Supreme Court emphasized that policymaking ability is not the sole factor in determining whether immunity should be granted; it is "the public interest in seeing that the official not be impeded in the performance of important duties that is pivotal." Durham, 772 A.2d at 70. The Supreme Court

¹Previously, absolute immunity had been applied only to elected officials with one exception. See Montgomery v. Philadelphia, 140 A.2d 100 (Pa. 1958)(extending high public official immunity to a city architect).

concluded that assistant district attorneys are essential to district attorneys in "fulfilling responsibilities of their high public offices...carrying out the prosecutorial function" and entitled to the same immunity. See id.

Franklin-Suber asserts that as the Chief of Staff to the Mayor of Philadelphia, she was the "second most important person in City government," and should be granted high public official status. Franklin-Suber was not an elected official and the position of Chief of Staff is not provided for in the City Charter. The Mayor appointed Franklin-Suber as his Chief of Staff to implement his initiatives and oversee the operations of City government. She answered directly to the Mayor who delegated her broad authority to speak on his behalf and create specific policies to implement his broad goals. As the Mayor himself stated:

Stephanie Franklin-Suber was the most important person in the government during that period of time other than the Mayor. She's a person who had discretion to speak for the Mayor. She...in many instances, when I was either unavailable for a variety of different reasons, she spoke for the Mayor. She was the Chief of Staff of this government....The Chief of Staff in this form -- in this City...speaks for the Mayor. We don't -- the Charter doesn't sort of lay all this out.

Street Dep. Trans. (Def. Ex. A) at 110-111.

Franklin-Suber has presented evidence sufficient to find she was then essential to the Mayor in fulfilling responsibilities of his high public office. See Durham, 772 A.2d at 70. In light of the Pennsylvania Supreme Court's reasoning in Durham, Franklin-

Suber, as Chief of Staff and "second in command," is entitled to high public official status.

The next inquiry is whether Franklin-Suber's acts and statements were within the scope of her authority. Pickering, 642 A.2d at 558. "[T]he privilege must be limited to those statements and actions which are in fact 'closely related' to the performance of those official duties." Mosley v. Observer Publishing Co., 619 A.2d 343, 346 (Pa. Super. Ct. 1993)(quoting McCormick, 275 A.2d at 689). In determining whether statements are protected, courts have analyzed the extent to which the officials' statements or actions are related to their official duties. Pennsylvania courts have held that a public official's statements to the press explaining governmental actions are protected by the absolute privilege. See e.g., Factor, 612 A.2d at 593; McCormick, 275 A.2d at 689.

Plaintiffs, asserting that Ms. Franklin-Suber was acting outside the scope of her authority and official duties in sending police officers to escort Mr. Testa from his office and making statements to the press regarding his resignation, cite McKibben v. Schmotzer, 700 A.3d 484 (Pa. Super. Ct. 1997) and Rok v. Flaherty, 527 A.2d 211 (Pa. Super. Ct. 1987). In McKibben, the court held that a mayor "was engaged in the course of her duties and within the scope of her authority when she suspended [the acting chief] and issued a [press release] regarding his suspension [in which she stated the acting chief was being

suspended for insubordination, assault and battery, and conduct unbecoming of an officer]." McKibben, 700 A.3d at 491. After the borough council unanimously reinstated the acting chief, the mayor told a reporter that the acting chief had lied. Id. at 487. The court held that the mayor was "acting well outside the course of her duties and scope of her authority when she slandered [the acting chief] outside of the courtroom;" she was acting as a private citizen at that point. Id. at 492. Similarly, in Rok v. Flaherty, the court held that comments a city comptroller made to the press after terminating a city contractor were not covered by the absolute immunity privilege because they were outside the scope of his official duties. Rok v. Flaherty, 527 A.2d 211 (Pa. Super. Ct. 1987).

Franklin-Suber's actions regarding Testa's resignation and comments to the media thereafter may have been excessive or unfair, but they did fall within the scope of her duties and are subject to absolute immunity. Having Testa escorted from the PIA was part of Franklin-Suber's duty to follow the Mayor's directive to terminate Testa's employment. She then made a statement to the press that she ordered the police escort because "when someone indicates that they're going to cause trouble and create a disruption, it's important - when it's a situation, in a location like an airport - that you take appropriate measures." A newspaper article reported, "She said Testa agreed to resign Sunday but 'got his lawyers on the phone and decided he was not

going to cooperate, so we escorted him out. He was not led out, and he was not handcuffed." Compl. Ex. D, Philadelphia Inquirer, March 14, 2000. These comments were not outside the scope of Franklin-Suber's authority. Her duties included informing the public of matters pending in her office and overseeing communications with the media.²

Franklin-Suber was publicly criticized for her use of the police in forcing Testa from the airport. Seeking to quell the criticism, she spoke to the media again regarding Testa approximately one week later. In the second Philadelphia Inquirer article, dated March 21, 2000, Franklin-Suber is quoted as saying: "When someone appears to be acting irrationally, especially with an airport and the security concerns, you have to worry about sabotage." Whether this statement falls within the privilege is a much closer question. However, unlike the second statement in McKibben, where the court found that the mayor was speaking as a private citizen, Franklin-Suber was still acting in her capacity as the Chief-of-Staff to the Mayor. The absolute

² The Chief of Staff acts as a trusted advisor to the Mayor and participates in the decision-making process at the highest levels of City government. The Chief of Staff functions as the Mayor's representative and designated spokesperson within the administration-and often to the media and general public-with respect to a wide variety of the Mayor's activities, duties and responsibilities, and is placed in charge of administration management and staffing.

Defendants' Objections and Answers to Interrogatories, Ans. To Interrog. 6.

immunity privilege applies to this statement as well. As a high public official at the time of the conduct, even if Franklin-Suber's actions were arguably defamatory and the statements were false, she is entitled to summary judgment on Counts VII and VIII.

C. Count X (Loss of Consortium)

"A loss of consortium claim is derivative to the spouse's tort claim." Hepps v. General American Life Ins., No. Civ. A. 95-5508, 1998 WL 564497, at *7 (E.D.P.A. 1998) (Shapiro, J.). Because summary judgment will be granted on the defamation claims, the loss of consortium claim also fails.

CONCLUSION

Franklin-Suber's motion for summary judgment will be granted. As former Chief of Staff for the Mayor, she is entitled to absolute immunity for statements, even false statements, made within the scope of her authority. Her statements to the media regarding Testa were also within the scope of her authority for which she was entitled to high public official absolute immunity.³ An appropriate Order follows.

³Having found high public official absolute immunity, the court will not discuss qualified immunity or Pennsylvania's Political Subdivision Tort Claims Act.

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 capacities : NO. 00-3890

ORDER

AND NOW, this day of October, 2003, it is hereby
ORDERED that defendant Stephanie Franklin-Suber's Motion for
Summary Judgment (# 31) on counts VII, VIII and X of plaintiffs'
amended complaint is **GRANTED**.

S.J.

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ORDER

AND NOW, this ____ day of October, 2003, all issues being disposed of in this action, it is **ORDERED** that:

1. Judgment is entered against plaintiffs Alfred Testa and Kathryn Testa.
2. Judgment is entered in favor of defendant Stephanie Franklin-Suber.
3. The clerk is directed to mark this case closed.

S.J.