

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

ROBERT MULGREW, : CIVIL ACTION  
Plaintiff, :  
 :  
v. :  
 :  
VINCENT J. FUMO, individually as a :  
Pennsylvania State Senator, :  
Defendant. : No. 03-CV-5039

MEMORANDUM AND ORDER

J. M. KELLY, J.

July , 2004

Presently before the Court is a Motion to Dismiss filed by Defendant Vincent J. Fumo ("Defendant" or "Senator Fumo") requesting dismissal of the "Second Cause of Action" from Plaintiff Robert Mulgrew's ("Plaintiff") Complaint, which consists of claims made under the Pennsylvania Constitution and a state law claim for intentional infliction of emotional distress,<sup>1</sup> Plaintiff's Response to Defendant's Motion to Dismiss, and Defendant's Reply thereto.<sup>2</sup>

At issue in this Motion are Plaintiff's claims under the Pennsylvania Constitution. Plaintiff alleges that his

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<sup>1</sup> Plaintiff's Complaint also consists of a "First Cause of Action," which is a 42 U.S.C. § 1983 claim alleging violations of Plaintiff's civil rights. Plaintiff's First Cause of Action is not contested in this Motion and remains before the Court.

<sup>2</sup> In his Response, Plaintiff consents to the Court's dismissal of his claim for intentional infliction of emotional distress, however, in all other respects, Plaintiff requests that Defendant's Motion to Dismiss be denied. Accordingly, by agreement of the parties, Plaintiff's claim for intentional infliction of emotional distress is **DISMISSED**.

termination from Defendant's employment was retaliatory and "violated Plaintiff's rights to free speech and due process of law under the Pennsylvania Constitution," rights which Plaintiff believes are protected, respectively, by Article I, Section 7,<sup>3</sup> and Article I, Section 1<sup>4</sup> of the Pennsylvania Constitution. (See Compl., ¶ 31.) For the following reasons, Defendant's Motion to Dismiss is **GRANTED**.

### I. BACKGROUND

As the Court will focus solely on whether Plaintiff can

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<sup>3</sup> Article I, Section 7 states, in pertinent part:

The printing press shall be free to every person who may undertake to examine the proceedings of the Legislature or any branch of government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty.

Pa. Const. Art. I, § 7.

<sup>4</sup> Article I, Section 1 states:

All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.

Pa. Const. Art. I, § 1.

establish a claim against Defendant for violating specific provisions of Article I of the Pennsylvania Constitution without any existing affirmative legislation, we dispense with a full recitation of the facts. At this procedural juncture, we accept as true the following facts as alleged by Plaintiff in his Complaint.

Plaintiff was employed by Defendant, a Pennsylvania state senator, for over nine years. (Compl., ¶¶ 5, 15, 22.) In advance of an impending Pennsylvania gubernatorial primary, Plaintiff and Defendant attended a cocktail party organized by the Philadelphia Democratic City Committee. (Id. at ¶¶ 15, 17.) When Plaintiff entered the cocktail party, then-gubernatorial candidate Edward G. Rendell handed Plaintiff a campaign sticker reading "RENDELL GOVERNOR." (Id. at ¶ 18.) Subsequent to Plaintiff placing this sticker on his jacket lapel, Defendant approached Plaintiff and demanded that Plaintiff remove such sticker. (Id. at ¶¶ 19, 20.) When Plaintiff did not comply with Defendant's demand, Defendant told Plaintiff that his employment in Defendant's office was terminated. (Id. at ¶ 22.)

Plaintiff contends that this termination took place before a large crowd that included many of Plaintiff's friends and colleagues, and resulted in Plaintiff's embarrassment, emotional harm, and loss of, inter alia, wages, medical insurance, and retirement benefits. (Id. at ¶¶ 26, 28, 29.)

Plaintiff seeks both monetary and equitable relief, including compensatory damages, punitive damages, reinstatement to his former employment position, and reasonable attorneys' fees and costs.

## II. STANDARD OF REVIEW

While Plaintiff's Second Cause of Action involves a matter of state law, procedurally this case is governed by federal law. Hanna v. Plumer, 380 U.S. 460, 473-74 (1965).

Federal Rule of Civil Procedure 12 provides that a party may move to dismiss for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). When reviewing a motion to dismiss pursuant to Rule 12(b)(6), the Court must accept the non-movant's well-plead averments of fact as true and view all inferences in the light most favorable to the non-moving party. Angelastro v. Prudential-Bache Securities, Inc., 764 F.2d 939, 944 (3d Cir. 1985); Society Hill Civic Assoc. v. Harris, 632 F.2d 1045, 1054 (3d Cir. 1980); Abdulaziz v. City of Philadelphia, No. 00-5672, 2001 U.S. Dist. LEXIS 16972, at \*4 (E.D. Pa. Oct. 18, 2001). A motion to dismiss is appropriate only when the movant establishes that he is entitled to judgment as a matter of law and there exists "no set of facts in support of his [plaintiff's] claims which would entitle him to relief." Ford v. Schering-Plough Corp., 145 F.3d 601, 604 (3d Cir. 1998);

Schrob v. Catterson, 948 F.2d 1402, 1405 (3d Cir. 1991). The court does not "inquire whether the plaintiffs will ultimately prevail, only whether they are entitled to offer evidence to support their claims." Nami v. Fauver, 82 F.3d 63, 65 (3d Cir. 1996).

### **III. DISCUSSION**

In view of Plaintiff's allegations and relief sought, the difficult issue before the Court is whether there exists a direct right of action for both money damages and equitable relief against a state government official for violations of Article I of the Pennsylvania Constitution. The parties disagree as to whether, under Pennsylvania law, Plaintiff can establish a claim against Defendant for a violation of Article I of the Pennsylvania Constitution in the absence of any affirmative legislation.

#### **A. Novel Issue of State Law**

After extensive research, we found that the issue of whether a direct right of action exists under Article I of the Pennsylvania Constitution is unclear under Pennsylvania case law. See e.g., Curran v. Southeastern Pennsylvania Trans. Authority, No. 01-2593, 1999 U.S. Dist. LEXIS 521, at \*4 (E.D. Pa. Jan. 21, 1999)(finding that whether a private cause of action exists under

Article I, Section 7 of the Pennsylvania Constitution is a difficult and unsettled issue of state law); see also Graham v. City of Philadelphia, No. 01-2593, 2002 U.S. Dist. LEXIS 13201 (E.D. Pa. July 17, 2002)(same).<sup>5</sup>

As recently as July 2002, the Commonwealth Court of Pennsylvania sitting en banc faced a similar issue, with regard to money damages only, and was unable to find any case where such a cause of action was recognized. See Robbins v. Cumberland County Children & Youth Servs., 802 A.2d 1239, 1244 (Pa. Commw. Ct. 2002)(en banc)(stating that research has not revealed whether there exists a direct right of action for money damages against government officials for violations of the Pennsylvania Constitution). Due to this unsettled issue of law, as to whether such a direct right of action exists, we believe a state court is better equipped to determine the causes of action that may be derived from the Pennsylvania Constitution. See Trump Hotels & Casino Resorts, Inc., v. Mirage Resorts Inc., 140 F.3d 478, 487 (3d Cir. 1998) (explaining that the interpretation of a state constitution is best performed by the state court). We therefore decline to exercise supplemental jurisdiction over the state constitutional claims remaining in the Second Cause of Action of

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<sup>5</sup> Throughout this opinion we describe Plaintiff's state constitutional claims as seeking a "direct right of action" or a "direct cause of action" and avoid the use of the equivalent phrase "private right of action" for clarity purposes only.

Plaintiff's Complaint because they present novel issues of state law. See 28 U.S.C. § 1367(c)(1).

While we decline to exercise jurisdiction, we nevertheless find that there is a dearth of case law in this district discussing the scope of direct causes of action under Article I of the Pennsylvania Constitution and distinguishing those cases considered by the Pennsylvania courts inferring that a direct cause of action exists. Accordingly, we review the Pennsylvania court decisions that have led us to conclude that the matter before us presents novel issues of state law.

Defendant contends that "Pennsylvania's state and federal courts have conclusively decided that no private cause of action exists" under Article I, Sections 1 and 7 of the Pennsylvania Constitution. While Defendant cites several Pennsylvania federal district court cases in support of this argument, the relevant case law cited by Defendant does not persuade this Court that jurisdiction is appropriate under the facts before us. Defendant cites the following federal district court cases in support of this argument: Sabatini v. Reinstein, No. 99-2393, 1999 U.S. Dist. LEXIS 12820, at \*6-7 (E.D. Pa. Aug. 20, 1999); Lees v. West Greene School Dist., 632 F. Supp. 1327, 1335 (W.D. Pa. 1986); Pendrell v. Chatham College, 386 F. Supp. 341, 344 (W.D. Pa. 1974); Holder v. City of Allentown, No. 91-240, 1994 U.S. Dist. LEXIS 7220, at \*3 (E.D. Pa. May 27, 1994). Each of these cases

cited by Defendant rely upon one ruling of the Superior Court of Pennsylvania, Western Pa. Socialist Workers 1982 Campaign v. Conn. General Life Ins. Co., 485 A.2d 1 (Pa. Super. Ct. 1984),<sup>6</sup> which is inapposite to this matter, as we will explain below. Significantly, Pennsylvania courts are not bound by the decisions of the lower federal courts construing Pennsylvania law. See Radar v. Pennsylvania Turnpike Commission, 407 Pa. 609, 615 (1962).

In the case before us, we have a private plaintiff suing a public official directly under Article I of the Pennsylvania Constitution for both money damages and equitable relief. As we will explain, case law reveals that the type of relief sought, monetary versus equitable, and the status of the defendants involved, private versus state actors, are decisive factors for the Pennsylvania courts in finding a direct cause of action under Article I, Sections 1 and 7 of the Pennsylvania Constitution.

**C. Western Pa. Socialist Workers**

In Western Pa. Socialist Workers, a political committee undertook to disseminate information and obtain the necessary signatures at a privately-owned shopping center in hopes of

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<sup>6</sup> Of the Pennsylvania state court cases cited by Defendant, Western Pa. Socialist Workers is the only case that specifically addresses a direct right of action under Article I of the Pennsylvania Constitution.

qualifying a gubernatorial candidate for the election ballot. Western Pa. Socialist Workers 485 A.2d at 2. As the owner of the mall had a pre-existing, nondiscriminatory policy that banned all forms of political activity on its property, members of the committee were denied permission to disseminate information and collect signatures in the mall. Id. These committee members filed a complaint in equity seeking an order which would enjoin the owner from enforcing its ban on their political activities. Id. at 2-3.

In affirming the trial court's decision that a privately-owned mall could constitutionally ban political activity, the Superior Court of Pennsylvania's holding in Western Pa. Socialist Workers addresses suits in equity and clearly only suits against private defendants in finding that Article I, Section 7 "is not a self-executing, affirmative declaration that individuals may exercise the right of free speech wherever they choose and in derogation of the rights of private property owners." See id. at 5 (emphasis added).

The facts of Western Pa. Socialist Workers are distinguishable from those before this Court and, therefore, lend support for this Court's decision to decline jurisdiction. In Western Pa. Socialist Workers, a private-owner of a shopping mall defended against plaintiffs' Pennsylvania constitutional challenges to its pre-existing policy, whereas here, Senator

Fumo, a public official, defends against Plaintiff's allegations that Senator Fumo's impromptu actions were in violation of Plaintiff's rights under the Pennsylvania Constitution. A further distinction in Western Pa. Socialist Workers is that the plaintiffs sought an injunction, an equitable remedy, whereas in the instant matter, by requesting money damages in addition to reinstatement to his former employment position, Plaintiff seeks relief both in law and equity.

As the defending parties and relief requested in the matter before this Court are unlike those in Western Pa. Socialist Workers, as evidenced by the Superior Court's focus on private actor defendants only, any reliance on Western Pa. Socialist Workers is misplaced.

A reasonable inference from Plaintiff's allegations against Defendant "in his administrative capacity for actions taken in his supervisory role over employees" is that Plaintiff contends that Defendant was acting in his capacity as a state actor, and as a state actor, his actions in terminating Plaintiff constituted state action.

The plaintiffs in Western Pa. Socialist Workers argued that the defendant's shopping mall should be considered a state actor because malls serve a public function. Id. at 8. The plaintiffs also contended that the "state action" requirement for claims under the federal right to free speech would be less stringent

under the state right to free speech of Article I, Section 7, and for that reason, their Pennsylvania constitutional claims should be reviewed on the merits. Id. at 5. Unconvinced that the defending shopping mall was in any way a state actor, the Superior Court analyzed the plaintiffs' claims as claims against a purely private party.

The Superior Court did, however, then engage in the academic exercise of analyzing the Pennsylvania Supreme Court's treatment of Article I, Section 7 of its state Constitution, and it compared this treatment to the federal right to free speech. In doing so, the Superior Court expressed that Pennsylvania's Supreme Court has implicitly suggested that both the federal and state constitutional provisions require "state action." See id. at 6 (explaining Brush v. Pennsylvania State University, 414 A.2d 48 (Pa. 1980)(finding under federal constitutional law only)). The Superior Court's analysis suggests that a claim under Article I, Section 7 of the Pennsylvania Constitution that involves "state action" could survive a Pennsylvania court's review on the merits. However, without a clear answer, this Court declines to speculate on unsettled matters of state law.

#### **D. Permissible Direct Actions under Pennsylvania's Constitution**

Our research has found only two other Pennsylvania state court cases that provide some support for a direct right of

action under Article I of the Pennsylvania Constitution. First, in 1903, the Pennsylvania Supreme Court upheld the issuance of an injunction based on a violation of Article I, Section 1 because "this clause, unlike many others in the Constitution, needs no affirmative legislation, civil or criminal, for its enforcement in the civil courts." Erdman v. Mitchell, 56 A. 327, 331 (Pa. 1903). Second, in 1994, by adopting a test for claims brought directly under Article I, Section 1 of the Pennsylvania Constitution to analyze, and ultimately deny, a plaintiff's claim for equitable relief to protect his reputation, the Pennsylvania Supreme Court implicitly recognized the existence of such a claim. R. v. Commonwealth of Pa., Dept. of Public Welfare, 636 A.2d 142, 152-53 (Pa. 1994). While these cases seem to indicate that direct causes of action may prevail under the Pennsylvania Constitution, the plaintiff in each case was not suing a government official and requested equitable relief only, therefore, we are without proper guidance to make a determination in this case wherein Plaintiff seeks both equitable and monetary relief from a government official.

#### IV. CONCLUSION

The existence of a direct right of action for both money damages and equitable relief against a government official for violations of Article I of the Pennsylvania Constitution is an

unsettled issue of state law, and we believe that the Pennsylvania state courts would be better equipped to decide novel issues of state law. We therefore decline to exercise supplemental jurisdiction over the constitutional claims remaining in Plaintiff's Second Cause of Action. Accordingly, they are **DISMISSED WITHOUT PREJUDICE**.

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**O R D E R**

**AND NOW**, this day of July, 2004, in consideration of the Motion to Dismiss Plaintiff's Second Cause of Action ("Motion to Dismiss") filed by Defendant Vincent J. Fumo ("Defendant"), Plaintiff Robert Mulgrew's ("Plaintiff") Response to Defendant's Motion to Dismiss, and Defendant's Reply thereto, it is **ORDERED** that Defendant's Motion to Dismiss (Doc. No. 3) is **GRANTED**:

1. By agreement of the parties, Plaintiff's claim in his Second Cause of Action for intentional infliction of emotional distress is **DISMISSED**; and

2. As the court declines to exercise supplemental jurisdiction over the state constitutional law claims, Plaintiff's claims in his Second Cause of Action for violations of the Pennsylvania Constitution are **DISMISSED WITHOUT PREJUDICE**. Plaintiff's claims in his First Cause of Action, however, remain before the Court.

BY THE COURT:

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JAMES MCGIRR KELLY, J.