

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

BRAD GRABIAK	:	CIVIL ACTION
	:	
v.	:	05-6318
	:	
PENNSYLVANIA STATE POLICE, STEVEN	:	
MCDANIEL, WILLIAM LATORRE, and	:	
DOUGLAS O'CONNOR	:	

JOYNER, J.

August 14, 2006

MEMORANDUM AND ORDER

Via the motion now pending before this Court, Defendants seek dismissal of Plaintiff's Complaint for lack of subject matter jurisdiction and failure to state a claim. For the reasons set forth below, this motion shall be granted.

**I. Background**

Plaintiff initiated this suit against his former employer, the Pennsylvania State Police ("PSP") and three of its officers, Captain Steven McDaniel, Corporal William LaTorre, and Sergeant Douglas O'Connor (collectively "Defendant Officers") to recover for alleged violations of his rights under the First and Fourteenth Amendments, and for breach of contract under state law. Plaintiff began his employment with PSP on April 23, 2004 as a trooper in probationary status for one year. (Compl. ¶ 10.) Before entering the PSP academy, Plaintiff was employed as a police officer in some municipality in or around Westmoreland County. (Id. ¶¶ 4, 9.) Plaintiff was assigned to PSP's Troop J-Avondale. (Id. ¶ 10.)

Plaintiff alleges that on his first day with Troop J-Avondale, Sergeant O'Connor stated in Plaintiff's presence that "prior police experience was, and would be, a hindrance to success as a PSP Trooper." (Compl. ¶ 12.) Plaintiff further claims that during his probationary period, he was given "unequal" work assignments and subjected to constant criticism by Corporal LaTorre, particularly with regard to Plaintiff's written reports. (Id. ¶ 13.) Plaintiff states that while he disagreed with some of his evaluations, he was bullied by a supervisor into keeping his objections to himself. (Id. ¶ 14.) Plaintiff asserts that despite these hindrances, he successfully responded to "many more calls" than other Troop J-Avondale probationary troopers. (Id. ¶ 16.)

As Plaintiff's probationary period drew to a close, a full investigatory report was compiled regarding his retention. (Id. ¶ 17.) Plaintiff alleges that the report was largely favorable and seventeen PSP officials recommended Plaintiff's retention, but one Lieutenant and one Sergeant recommended against Plaintiff's retention. (Id. ¶ 18.) After reviewing the report and recommendations, Captain McDaniel decided not to retain Plaintiff. (Id. ¶ 19.) Plaintiff was discharged from PSP employment on April 7, 2005. (Id. ¶ 20.) Another probationary trooper from Troop J-Avondale was also discharged at that time, and Plaintiff believes that this officer also had prior municipal police experience. (Id.)

## II. Legal Standard for Motions to Dismiss

### A. Rule 12(b)(1) -- Subject Matter Jurisdiction

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) made prior to the filing of an answer is a facial attack on subject matter jurisdiction. Nelson v. Commw. Dept. of Pub. Welfare, 244 F. Supp. 382, 386 (E.D. Pa. 2002). In considering such a motion, a district court must accept the allegations of the complaint as true, and review the complaint to ensure that it contains the necessary jurisdictional elements. See Turicentro, S.A. v. Am. Airlines Inc., 303 F.3d 293, 300 n.4 (3d Cir. 2002); Halstead v. Motorcycle Safety Found., Inc., 71 F. Supp. 2d 464, 468 (E.D. Pa. 1999) (citing Sitkoff v. BMW of North America, Inc., 846 F. Supp. 380, 383 (E.D. Pa. 1994)). The court is not obligated to make favorable factual inferences on a plaintiff's behalf. Halstead, 71 F. Supp. 2d at 468 (citing Doe v. William Shapiro, Esquire, P.C., 852 F. Supp. 1246, 1249 (E.D. Pa. 1994)). Rather, the burden is on the plaintiff to prove that jurisdiction exists. Id.

Where the complaint asserts federal question jurisdiction, the plaintiff must show that the federal claim is not frivolous. Bartholomew v. Librandi, 737 F. Supp. 22 (E.D. Pa.), aff'd, 919 F.2d 133 (3rd Cir. 1990). The district court may dismiss a claim for want of subject matter jurisdiction where a claim is either frivolous or immaterial and made solely for the purpose of obtaining federal jurisdiction. Kehr Packages, Inc. v. Fidelcor,

Inc., 926 F.2d 1406, 1408-09 (3rd Cir. 1991); see also Oneida Indian Nat. v. County of Oneida, 414 U.S. 661, 666 (1974).

Dismissal is appropriate only where it appears that the plaintiff cannot assert any colorable claim of subject matter jurisdiction. Halstead, 71 F. Supp. 2d at 468 (citations omitted).

**B. Rule 12(b)(6) -- Failure to State a Claim**

In considering motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the district courts must "accept as true the factual allegations in the complaint and all reasonable inferences that can be drawn therefrom." Allah v. Seiverling, 229 F.3d 220, 223 (3d Cir. 2000)(internal quotations omitted); see also Ford v. Schering-Plough Corp., 145 F.3d 601, 604 (3d Cir. 1998). A motion to dismiss may only be granted where the allegations fail to state any claim upon which relief may be granted. See Morse v. Lower Merion School District, 132 F.3d 902, 906 (3d Cir. 1997). The inquiry is not whether plaintiffs will ultimately prevail in a trial on the merits, but whether they should be afforded an opportunity to offer evidence in support of their claims. In re Rockefeller Center Properties, Inc., 311 F.3d 198, 215 (3d Cir. 2002). Dismissal is warranted only "if it is certain that no relief can be granted under any set of facts which could be proved." Klein v. General Nutrition Companies, Inc., 186 F.3d 338, 342 (3d Cir. 1999)(internal quotations omitted).

### III. Discussion

#### A. Eleventh Amendment Immunity

Defendants argue that this Court lacks subject matter jurisdiction to consider Plaintiff's federal claims against PSP and against the Defendant Officers in their official capacities because such claims are barred by the Eleventh Amendment and by 42 U.S.C. § 1983.

The Eleventh Amendment provides that "the Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against any one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. The Eleventh Amendment has been construed to immunize states and state agencies from suits brought in federal courts by private parties. See, e.g., Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997). This immunity applies to any department or agency of the state that has no existence separate from the state. Laskaris v. Thornburgh, 661 F.2d 23, 25 (3d Cir. 1981), cert. denied, 469 U.S. 886 (1984). This immunity is a bar to subject matter jurisdiction, and motions raising it are, therefore, properly considered under Rule 12(b)(1). Blanciak v. Allegheny Ludlum Corp., 77 F.3d 690, 693, n.2 (3rd Cir. 1996).

There are two well-settled exceptions to Eleventh Amendment immunity. A state may consent to suit in federal court. See Florida Bd. of Regents, 528 U.S. 62, 72-73 (2000).

Alternatively, Congress may, through a valid exercise of its power, abrogate state immunity. Id.

Neither of these exceptions applies in this case. The Commonwealth of Pennsylvania has not consented to suit in federal court. See 42 Pa. C.S. § 8521(b). Nor did Congress abrogate states immunity from suit by enacting civil rights legislation such as 42 U.S.C. § 1983. See Seminole Tribe of Florida v. Florida, 517 U.S. 44, 56 (1996) (finding that a "general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment") (quoting Atascadero St. Hosp. v. Scanlon, 473 U.S. 234, 238-239 (1985)) see also Petsinger v. Pa. Dept. of Trans., 211 F. Supp. 2d 610, 613 (E.D. Pa. 2002) (citations omitted).

State officials acting in their official capacities are afforded the same protection as the state. Hafer v. Melo, 502 U.S. 21, 25 (1991). Thus, a suit against a state official in her official capacity is not considered a suit against that official, but against her office and, therefore, is treated as a suit against the state itself. Id.; Will v. Michigan Dept. of State Police, 491 U.S. 58, 71 (1989).

It is undisputed that PSP is an agency of the Commonwealth of Pennsylvania, and that it has no existence separate from the Commonwealth. See 71 Pa. C.S. § 61, 65. It is further undisputed that the Defendant Officers are state officials, and

that they are being sued in both their official and individual capacities. Because neither of the exceptions to Eleventh Amendment immunity apply, this court lacks subject matter jurisdiction over Plaintiff's claims against PSP and the Defendant Officers in their official capacities, and those claims must be dismissed.<sup>1</sup> See Fed. R. Civ. P. 12(b)(1), 12(h).

Plaintiff mistakenly relies on 42 U.S.C. § 1983 as a "jurisdictional statute." (Compl. ¶ 3.) While § 1983 may give rise to a federal question that could be the basis for jurisdiction pursuant to 28 U.S.C. § 1331, § 1983 provides only a remedy, not an independent basis for jurisdiction. Furthermore, it is well settled that § 1983 provides no remedy against states and state officials because they are not considered "persons" for the purpose of § 1983. Will, 491 U.S. at 70-71. Plaintiff offers no reason for this Court to contravene Supreme Court precedent by allowing his § 1983 claims to go forward, making both his claims and his assertion of jurisdiction frivolous. (See Pl.'s Resp. to Def.'s Mot. ("Pl.'s Resp.") at 19-20.) Thus, the only claims over which this Court has subject matter jurisdiction are those against the Defendant Officers in their individual capacities.

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<sup>1</sup>The Eleventh Amendment does not immunize state officials from suits in their official capacities where the remedy sought is prospective injunctive relief. Koslow v. Commw. of Pa., 302 F.3d 161, 168 (3d Cir. 2002); see also Ex Parte Young, 208 U.S. 123, 159-60 (1908). Plaintiff, however, seeks only monetary damages.

## **B. Due Process**

Defendants argue that Plaintiff fails to state a valid claim for relief based on violations of either his procedural or substantive due process rights under the Fourteenth Amendment.

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

Procedural due process under the Fourteenth Amendment requires "notice and an opportunity to be heard before the Government deprives [one] of property." United States v. James Daniel Good Real Property, 501 U.S. 43, 48 (1993). To maintain a claim for a violation of procedural due process, a plaintiff must show that the state deprived her of something in which she had a protected property interest. Id. Whether an interest is such a protected property interest is determined by state law. See Bd. of Regents v. Roth, 408 U.S. 564, 576 (1972).

Plaintiff asserts that he has a property interest in continued employment as a PSP trooper. (Pl.'s Resp. at 12.) It is, however, well established that Pennsylvania public employees are generally at-will employees who have no protected property right in their continued employment. Elmore v. Cleary, 399 F.3d 279, 283 (3d Cir. 2005). It is also clear that probationary PSP troopers have no property interest in their continued employment with PSP. Blanding v. Pa. State Police, 12 F.3d 1303, 1307 (3d Cir. 1993). Plaintiff asks us to reconsider this position because, unlike some of the probationary PSP troopers in the cases cited by Defendants, Plaintiff's conduct was not a clear

violation of rules and regulations, incompetency, or inefficiency.<sup>2</sup> (Pl.'s Resp. at 15.) The Third Circuit, however, has already decided that the language of 71 Pa. C.S. § 205(f) on which Plaintiff relies does not override the general presumption of at will employment. Blanding, 12 F.3d at 1307. The reasons for termination are irrelevant to whether a property interest exists, and cannot save Plaintiff's procedural due process claim from dismissal under the clearly established, binding authority of Third Circuit jurisprudence.

## **2. Substantive Due Process**

Defendants argue that Plaintiff cannot sustain a substantive due process claim because continued public employment is not a fundamental right. Substantive due process under the Fourteenth Amendment prohibits governmental infringement on fundamental liberty interests. Reno v. Flores, 507 U.S. 292, 301-02 (1993). Unlike the determination of a protected property right, whether a right is protected under substantive due process turns on whether it is "fundamental" under the United States Constitution. Nicholas v. Pa. State Univ., 227 F.3d 133, 140 (3d Cir. 2000).

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<sup>2</sup>Section 205(f) of the Administrative Code of Pennsylvania provides that

[a]ll new cadets and troopers shall serve a probationary period of eighteen months from the date of original enlistment, during which time they may be dismissed by the Commissioner for violations of rules and regulations, incompetency, and inefficiency without action of a court martial board or the right of appeal to a civil court.

71 Pa. C.S. § 205(f).

The Third Circuit has held that even tenured public employment -- that is, public employment in which an employee has a protected property right, unlike Plaintiff -- is not a fundamental right under the Constitution. Id. at 138-43. Thus, Plaintiff's argument that we should ignore the Third Circuit's holding in Blanding is irrelevant, because substantive due process is unavailable even for those employees that do have a protected property interest in their employment under state law. See id. Thus, Plaintiff fails to state a claim for violation of his substantive due process rights.

### **C. First Amendment**

Defendants assert that Plaintiff has failed to state a claim for relief for violation of his First Amendment rights. Plaintiff alleges that his termination violated his First Amendment rights because it was based on his prior employment as a municipal police officer. (Pl.'s Resp. at 6-10.)

While it is unclear whether Plaintiff seeks to recover under a retaliation theory, any recovery under the First Amendment is contingent upon whether Plaintiff engaged in speech or expression that is protected by the Constitution. See Holder v. City of Allentown, 987 F.2d 188, 194 (3d Cir. 1993) (noting that in seeking recovery for a retaliatory employment action in violation of the First Amendment, a plaintiff must first "show that the activity in question was protected"); Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh, 229 F.3d 435, 441 (3d Cir. 2000).

Plaintiff claims that his prior employment as a municipal police officer is protected by the Constitution because such employment is expressive or intimate association.<sup>3</sup> (Pl.'s Resp. at 6-8.) Plaintiff presents no authority holding that employment -- much less public employment -- is a form of expressive or intimate association, nor can we find any such authority.<sup>4</sup> The result of so holding would be that any employee could sue an employer, or prospective employer, for any adverse employment action based on that employee's prior employment. This is clearly not what the framers of the constitution, Congress, or the Supreme Court intended. We will not take this giant leap in the absence of any legal authority to do so.

#### **D. Qualified Immunity**

Defendants argue that, even if Plaintiff has pled any valid claim, the Defendant Officers are entitled to qualified immunity. Qualified immunity protects government officials from liability for damages in § 1983 claims brought against them in their

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<sup>3</sup>Plaintiff argues that he had a right not only to be employed by a municipal police department, but also to "associate with others who are involved in the municipal police department." (Pl.'s Resp. at 7.) Whether Plaintiff had a right to associate with others who happened to be municipal police officers is irrelevant, as Plaintiff's claim is that he was fired for being employed as a municipal police officer, not for associating with others who were similarly employed. This is clear in his reliance on Sergeant O'Connor's alleged statement that "prior police experience" would be detrimental.

<sup>4</sup>We do not consider whether there is some First Amendment protection for prior employment where that employment was connected to some other protected right, such as religious or political expression.

individual capacities. Conn v. Gabbert, 526 U.S. 286, 290 (1999). Qualified immunity does not apply, however, where there has been a constitutional violation of a clearly established right. Id. As discussed above, Plaintiff has no valid claim for any constitutional violation. Even if we were persuaded by Plaintiff's arguments, none of the asserted rights can be said to be clearly established, given that they are all either in contravention of binding authority or entirely without supporting jurisprudence. Thus, qualified immunity would protect the Defendant Officers from liability on Plaintiff's claims.

**E. State Law**

In light of our determination that Plaintiff's federal claims lack subject matter jurisdiction or fail to state a valid claim, we decline to exercise supplemental jurisdiction over Plaintiff's state law claims. 28 U.S.C. § 1367(c)(3).

For all of the reasons set forth above, Defendants' motion shall be granted pursuant to the attached order, and Plaintiff's Complaint shall be dismissed with prejudice.<sup>5</sup>

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<sup>5</sup>There is no indication that Plaintiff can set forth any valid claim, even upon amendment.

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**ORDER**

AND NOW, this 14<sup>th</sup> day of August, 2006, upon consideration of Defendants' Motion to Dismiss (Doc No. 4), and Plaintiff's response thereto (Doc. No. 5), it is hereby ORDERED that the motion is GRANTED, and the Complaint is DISMISSED with prejudice.

BY THE COURT:

s/J. Curtis Joyner  
J. CURTIS JOYNER, J.