

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

KAREN BRANDAU, )  
 ) Civil Action  
Plaintiff, )  
 )  
vs. ) No. 03-CV-06014  
 )  
ACS, INC., )  
 )  
Defendant )

\* \* \*

APPEARANCES:

GLENN M. GOODGE, ESQUIRE  
On behalf of Plaintiff

RACHEL E. LINZY, ESQUIRE  
SAMUEL ZURIK, III, ESQUIRE  
On behalf of Defendant

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M E M O R A N D U M

JAMES KNOLL GARDNER,  
United States District Judge

This matter is before the court on the Motion for Summary Judgment filed by defendant ACS on February 15, 2006. For the reasons stated below, we grant defendant's Motion for Summary Judgment. Accordingly, we dismiss Counts One, Two and Three of Plaintiff's Complaint.<sup>1</sup>

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<sup>1</sup> Plaintiff's Complaint contains five counts. Three of those counts allege causes of action against defendant ACS. Count One asserts a cause of action against ACS pursuant to the Pennsylvania Whistleblower Law, Act of December 12, 1986, P.L. 1559, Sec. 1, 43 P.S. §§ 1421-1428. Count Two alleges violation of 42 U.S.C. § 1983 by ACS. Count Three avers that defendant ACS wrongfully terminated plaintiff's employment. The two remaining counts asserted claims against the County of Northampton, which was formerly a defendant in this case. Plaintiff's claims against the County of Northampton were dismissed by previous Orders of the undersigned filed July 20, 2004 and June 19, 2006, respectively.

### JURISDICTION AND VENUE

Jurisdiction is based upon federal question jurisdiction pursuant to 28 U.S.C. § 1331. The court has supplemental jurisdiction over plaintiff's pendent state-law claims. See 28 U.S.C. § 1367. Venue is proper because the events and omissions underlying this action took place in the city of Easton, Northampton County, Pennsylvania, which is located within this judicial district. See 28 U.S.C. § 1391(b).

### FACTS

Based upon the pleadings, record papers and affidavits, the pertinent facts, taken in the light most favorable to the plaintiff, are as follows.

Plaintiff Karen Brandau was an employee of ACS, Inc. ("ACS") from October 1995 through February 2003. A service agreement between County of Northampton ("County") and ACS established that ACS would manage and operate the County's administrative systems environment, providing assistance to the County with respect to its computers and network. Ms. Brandau, through her employment with ACS, provided help-desk assistance to the County, completed daily back-ups of the County's computer system and assisted in purchasing computer software and hardware.

On Sunday, October 13, 2002 plaintiff Brandau was working on the County's computer network from her home when she

noticed unusual activity on the County's back-up server. Ms. Brandau believed that there was an unauthorized user accessing the server, and attempted to disconnect that user. Instead, Ms. Brandau reported that she was locked out of the County's network by someone who remotely accessed her computer.

Subsequently, Ms. Brandau reported the alleged security breach to Cathy Saylor, who was the ACS Network Manager at that time, and to Dimitri Diamandopoulos, the ACS Site Director. On the morning of Monday, October 14, 2002 the ACS staff met to discuss the alleged security breach. In addition, on the same date Lisa Yandrasits, an employee of the County, overheard an ACS employee, Kevin Guess, discussing the suspected breach.

Ms. Yandrasits reported the discussion to Jean Mateff, who was then Director of Fiscal Affairs for the County, and acted as Contract Administrator to facilitate the relationship between ACS and the County.

In response to an inquiry by Ms. Mateff, Mr. Diamandopoulos reported that the preliminary investigation by ACS had found no security breach. Subsequently, Jeffrey Britland,<sup>2</sup> an ACS employee who worked as a help-desk analyst and PC specialist, sent anonymous electronic mails ("e-mails") to Ms. Mateff and other County employees to report that a security

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<sup>2</sup> Jeffrey Britland was formerly a plaintiff in two cases related to this case, Civil Action No. 03-CV-05715 and Civil Action No. 03-CV-6476. He settled his claims against defendants County and ACS, however.

breach actually had occurred. The County then hired an independent firm, DBSi, to conduct a security test of the County's network.

ACS and DBSi both submitted written reports detailing their conclusions regarding the County's network in November 2002. Both reports noted problems with the network.

On February 13, 2003, Ms. Brandau took a personal day. She did not return to work, and her employment was ultimately terminated by ACS in June 2003.

#### STANDARD OF REVIEW

In considering a motion for summary judgment, the court must determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). See also, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S.Ct. 2505, 2509-2510, 91 L.Ed.2d 202, 211 (1986); Federal Home Loan Mortgage Corporation v. Scottsdale Insurance Company, 316 F.3d 431, 443 (3d Cir. 2003). Only facts that may affect the outcome of a case are "material". Moreover, all reasonable inferences from the record are drawn in favor of the non-movant. Anderson, 477 U.S. at 255, 106 S.Ct. at 2513, 91 L.Ed.2d at 216.

Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which it bears the burden of proof. See Watson v. Eastman Kodak Company, 235 F.3d 851, 857-858 (3d Cir. 2000). A plaintiff cannot avert summary judgment with speculation or by resting on the allegations in her pleadings, but rather must present competent evidence from which a jury could reasonably find in her favor. Ridgewood Board of Education v. N.E. for M.E., 172 F.3d 238, 252 (3d Cir. 1999); Woods v. Bentsen, 889 F.Supp. 179, 184 (E.D.Pa. 1995).

#### DISCUSSION

##### Summary of Argument

As stated above, plaintiff has alleged three causes of action against defendant ACS. Defendant ACS argues that there are no genuine issues of material fact and that each of plaintiff's causes of action must fail as a matter of law. Defendant argues that it is therefore entitled to summary judgment with respect to Counts One, Two and Three.

In Plaintiff, Karen Brandau's Brief in Opposition to Defendant, ACS, Inc. and ACS State & Local Solutions, Inc. Motion for Summary Judgment ("Brief in Opposition"), plaintiff argues that genuine issues of material fact exist with respect to each of her three claims against defendant ACS. Therefore, plaintiff

argues, defendant's request for summary judgment must be denied.

Count One

In its Memorandum in Support of ACS' Motion for Summary Judgment ("Memorandum in Support") and its Supplemental Memorandum in Support of ACS' Motion for Summary Judgment, ACS argues that plaintiff cannot prevail in Count One, brought under the Pennsylvania Whistleblower Law, because she was not a public employee, she did not report a wrongdoing, and her employment was not terminated as a result of her report. Specifically, defendant argues that it is an independent contractor, not a public employer, and therefore not subject to the Whistleblower Law.

Further, defendant argues that the report made by Ms. Brandau did not involve a "wrongdoing" as that term is defined in the text of the Whistleblower statute. Finally, defendant argues that no causal connection exists between Ms. Brandau's report and her subsequent discharge.

With respect to Count One, plaintiff argues that defendant ACS does qualify as a public employer under the Pennsylvania Whistleblower Law because ACS was acting as an agent of the County of Northampton when it terminated plaintiff's employment. In addition, plaintiff argues that the security breaches reported by Ms. Brandau constitute "wrongdoing" as defined under the Whistleblower Law.

Finally, plaintiff argues that a causal connection

between plaintiff's report and her job termination exists. Specifically, plaintiff argues that the County initially protected her from retaliation by ACS, but ceased its protection in return for "several hundreds of thousands of dollars of free [computer software] upgrades".<sup>3</sup>

#### Count Two

With regard to Count Two, defendant ACS argues that plaintiff cannot prevail under 42 U.S.C. § 1983 because she cannot demonstrate state action or deprivation of a constitutional right. Defendant asserts that plaintiff's attempts to establish state action under both the "public function" and the "close nexus" tests fail. In addition, defendant avers that plaintiff cannot show that she was deprived of her rights under the First Amendment to the United States Constitution because she admitted in her deposition that she does not claim any violation of her free speech rights.

In reference to Count Two, plaintiff argues that ACS is not entitled to summary judgment on her § 1983 claim because defendant was a state actor who deprived her of a constitutional right. In particular, plaintiff argues that defendant ACS is a state actor under both the "close nexus" and the "public function" tests for state action.

Plaintiff also argues that her First Amendment rights

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<sup>3</sup> Brief in Opposition at page 35.

were violated when she was "mocked, ridiculed and slandered", and ultimately had her employment terminated, as a result of her communications regarding the alleged security breach of the County of Northampton's computer network. Brief in Opposition at page 30.

### Count Three

Defendant ACS argues that plaintiff cannot sustain her claim in Count Three, alleging wrongful termination, because the public policy exception to Pennsylvania's at-will employment doctrine does not apply. In particular, defendant argues that plaintiff was an at-will employee of ACS and that her employment could therefore be terminated at any time.

Defendant further contends that the public policy exception to the at-will employment doctrine, cited by plaintiff, is not applicable in this case because plaintiff cannot identify a Pennsylvania public policy that was violated by the adverse employment action.

Plaintiff contends that issues of material fact exist with respect to Count Three of her Complaint. Plaintiff avers that she can sustain her wrongful discharge claim because the public policy exception to the at-will employment doctrine applies in her case. Ms. Brandau asserts that the public policy exception applies where the discharged employee is protected by the Pennsylvania Whistleblower Law. Because her conduct is privileged

under the Whistleblower Law, plaintiff argues that she is also covered by the public policy exception and can assert a claim of wrongful discharge.

#### Summary of Decision

For the following reasons, we agree with defendants and grant summary judgment on Counts One, Two and Three and dismiss each of these Counts from plaintiff's Complaint.

We grant summary judgment on Count One because plaintiff is not within the group of persons protected by Pennsylvania's Whistleblower Law.

We grant summary judgment on Count Two because plaintiff failed to establish that the defendant acted under the color of state law.

Finally, we grant summary judgment on Count Three because Plaintiff acknowledges that she is an at-will employee and has failed to identify any public policy of the Commonwealth of Pennsylvania that was violated by her discharge from employment.

#### Pennsylvania Whistleblower Law

Pennsylvania's Whistleblower Law makes it unlawful for an employer to "discharge, threaten or otherwise discriminate or retaliate against an employee...because the employee or a person acting on behalf of the employee makes a good faith report or is about to report, verbally or in writing, to the employer or

appropriate authority an instance of wrongdoing or waste." 43 P.S. § 1423.

For the purposes of the Whistleblower Law, an employee is defined as a "person who performs a service for wages or other remuneration under a contract of hire, written or oral, express or implied, for a public body." 43 P.S. § 1422. A public body includes any "body which is created by Commonwealth or political subdivision authority or which is funded in any amount by or through Commonwealth or political subdivision authority or a member or employee of that body." Id.

Defendant ACS argues that it is not a public body and, therefore, that Ms. Brandau does not qualify as an employee of a public body entitled to protection under the Pennsylvania Whistleblower Law.<sup>4</sup> We agree.

As stated in the definition above, a non-governmental entity may nonetheless qualify as a public body if it is created by or funded through the Commonwealth or a subdivision of the Commonwealth. See 43 P.S. § 1422. A private entity performing services pursuant to a government contract, however, does not qualify as being "funded through the Commonwealth". Krajsa v. Keypunch, Inc., 622 A.2d 355, 360, 424 Pa. Super. 230, 240-241 (1993).

Our Court has held that the statutory language "was

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<sup>4</sup> Memorandum in Support at page 22.

obviously not intended to make an individual or corporation a 'public body' solely on the basis that monies were received by it from the state as reimbursement for services rendered". Cohen v. Salick Health Care, Inc., 772 F.Supp. 1521 (E.D.Pa. 1991).

Accordingly, the fact that ACS provided computer network services to the County pursuant to a contract is not sufficient to establish that ACS is a public body under Pennsylvania's Whistleblower Law.

Plaintiff argues, to the contrary, that ACS is an "employer" under the statute because ACS was acting as an agent of the County of Northampton when ACS terminated plaintiff's employment. An employer is defined as a "person supervising one or more employees, including the employee in question; a superior of that supervisor; or an agent of a public body." 43 P.S. § 1422.

Even if plaintiff were correct that ACS was acting as the agent of the County with respect to the adverse employment decision, her claim would still fail because she cannot establish that she meets the statutory definition of an "employee" for the reasons stated above.<sup>5</sup>

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<sup>5</sup> We note that it is also unlikely that plaintiff can establish the existence of an agency relationship with respect to the termination of her employment. Defendant ACS, citing Ms. Mateff's deposition, has averred that the County had no control over personnel decisions made by ACS. Memorandum in Support at page 21. Ms. Brandau alleges without support that the County's approval was required in order for ACS to terminate her employment, and concludes that the "County must have directed ACS that ACS was now allowed to terminate Brandau" because the termination of her employment did, in fact, occur. Brief in Opposition at page 32.

(Footnote 5 continued):

In other words, even if we accept that ACS was acting as a public body when it fired plaintiff, plaintiff has not demonstrated that ACS was a public body with regard to its day-to-day functioning, such that plaintiff might be considered the employee of a public body. Plaintiff is therefore not within the group of persons protected by Pennsylvania's Whistleblower Law. Accordingly, we grant defendant's Motion for Summary Judgment with respect to Count One.

Because plaintiff has failed to establish that the Whistleblower Law applies to the circumstances surrounding the termination of her employment, we will not reach the questions of whether the conduct reported by plaintiff constitutes "wrongdoing" under the Whistleblower Law or whether there was a causal connection between plaintiff's report and the adverse employment decision.

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(Continuation of footnote 5):

Setting aside the parties' dispute over the extent of the County's influence in personnel decisions made by ACS, plaintiff has failed to even allege that the County did more than acquiesce in a decision made by ACS. Under the facts alleged by plaintiff, ACS made the adverse employment decision with the approval of the County. Plaintiff does not indicate that the County made the employment decision, which was then carried out by its agent, ACS.

Accordingly, we see no facts under which we could find that an agency relationship existed such that the adverse employment action taken by ACS can be considered the action of a public employer. See Scott v. Purcell, 490 Pa. 109, 117, 415 A.2d 56, 60 (1980), where the Supreme Court of Pennsylvania explained that the elements of agency are satisfied where there is "manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking and the understanding of the parties that the principal is to be in charge of the undertaking".

42 U.S.C. § 1983

To establish a cause of action under 42 U.S.C. § 1983, a plaintiff must demonstrate that defendant (1) acted under color of state law and (2) deprived plaintiff of a right secured by the Constitution or a federal statute. Anderson v. Davila, 125 F.3d 148, 159 (3d Cir. 1997). Here, defendant argues that plaintiff can establish neither state action<sup>6</sup> nor deprivation of a federal right. For the reasons stated below, we agree with defendant.

Under the "close nexus" test for state action, the proper inquiry is "whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may fairly be treated as that of the State itself." Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351, 95 S.Ct. 449, 453, 42 L.Ed.2d 477, 484 (1974). This standard means that "mere approval or acquiescence of the state" is insufficient--the state must "coerce or encourage a private party to act in a manner that violates the plaintiff's constitutional rights." Klavan v. Crozer-Chester Medical Center, 60 F.Supp.2d 436, 442 (E.D.Pa. 1999).

Similarly to the agency analysis above, plaintiff's

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<sup>6</sup> The United States Supreme Court has stated that the § 1983 requirement that an action be taken "under color of state law" is identical to the state action requirement under the Fourteenth Amendment. Lugar v. Edmondson Oil Company, Inc., 457 U.S. 922, 929, 102 S.Ct. 2744, 2749, 73 L.Ed.2d. 482, 490 (1982).

claim with regard to the "close nexus" test fails because plaintiff has not established the requisite level of state involvement. Although plaintiff claims that she is not relying upon "mere approval or acquiescence" of the County in the employment decision by ACS<sup>7</sup>, she fails to provide any evidence to indicate that the County was an active participant in the decision to terminate plaintiff's employment. Instead, plaintiff asserts that the County initially protected plaintiff's employment from retaliatory action and subsequently failed to do so after receiving "enhanced computer services" from defendant ACS.<sup>8</sup>

Plaintiff's assertion that the County chose to "walk away from its promise to protect" plaintiff's position,<sup>9</sup> taken in the light most favorable to plaintiff, still does not establish state involvement beyond approval or acquiescence. Plaintiff's allegation of inaction by the County simply cannot establish the level of encouragement or coercion required to satisfy the "close nexus" test. Accordingly, we find that no "close nexus" exists sufficient to establish state action.

In applying the "state function" test, the appropriate question is whether the function performed by the private actor is "traditionally the *exclusive* prerogative of the State." Rendell-

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<sup>7</sup> Brief in Opposition at page 26.

<sup>8</sup> Brief in Opposition at pages 27-28.

<sup>9</sup> Brief in Opposition at page 29.

Baker v. Kohn, 457 U.S. 830, 842, 102 S.Ct. 2764, 2772, 73 L.Ed.2d 418, 428 (1982)(citing Jackson, 419 U.S. at 353, 95 S.Ct. at 454, 42 L.Ed.2d at 485)(emphasis in original).

Here, plaintiff alleges that ACS "performed a public function by operating, maintaining and overseeing the computer/communications systems for the executive, legislative and judicial branches" of the County of Northampton.<sup>10</sup> Performance of a public function, however, is not sufficient to establish state action under the test outlined above. The Supreme Court has explained that the fact that "a private entity performs a function which serves the public does not make its acts state action." Rendell-Baker, 457 U.S. at 842, 102 S.Ct. at 2772, 73 L.Ed.2d at 428; see also Black v. Indiana Area School District, 985 F.2d 707, 710 (3d Cir. 1993).

Although plaintiff alleges that the function performed by defendant ACS was "critical", plaintiff does not allege that the operation, maintenance, and oversight of the County of Northampton's computer system is the traditional, exclusive prerogative of the state. Moreover, we are unable to find any caselaw indicating that provision of computer network services falls within the narrow range of functions traditionally reserved to the state. Accordingly, we find that plaintiff has not demonstrated state action under the "state function" test.

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<sup>10</sup> Brief in Opposition at page 30.

Given that plaintiff has not shown state action, her § 1983 claim must fail as a matter of law. We therefore dismiss Count Two of plaintiff's Complaint. Accordingly, we do not address the question of whether plaintiff has demonstrated deprivation of a constitutional right.

#### Wrongful Termination

Pennsylvania law provides that, as a general rule, an employer "may discharge an employee with or without cause, at pleasure, unless restrained by some contract." Smith v. Calgon Carbon Corporation, 917 F.2d 1338, 1341 (3d Cir. 1990)(citing Henry v. Pittsburgh & Lake Erie Railroad Company, 139 Pa. 289, 21 A. 157 (1891) and Clay v. Advanced Computer Applications, 522 Pa. 86, 559 A.2d 917 (1989)).

An exception to this general rule of at-will employment exists, however, where the discharge violates a clear mandate of public policy. The public policy exception applies where "(1) an employer requires an employee to commit a crime, (2) an employer prevents an employee from performing a statutory duty, or (3) a statute prohibits discharge." Denton v. Silver Stream Nursing & Rehabilitation Center, 739 A.2d 571, 577 (Pa.Super. 1999).

Public policies of the Commonwealth of Pennsylvania that are not legislatively enacted may also serve as the basis for application of the public policy exception, but acceptance of

these public policies must be "virtually universal." Fraser v. Nationwide Mutual Insurance Company, 352 F.3d 107, 111-112 (3d Cir. 2003)(citing Shick v. Shirey, 552 Pa. 590, 600, 716 A.2d 1231, 1235-1236 (1998)).

In this case, plaintiff acknowledges that she is an at-will employee.<sup>11</sup> However, she asserts that the public policy exception prohibits discharge where the Whistleblower Law applies. As we stated above, however, the Pennsylvania Whistleblower Law does not, in fact, apply to plaintiff.<sup>12</sup>

Accordingly, because plaintiff has failed to identify any public policy of the Commonwealth of Pennsylvania that was violated by her discharge and because we are unaware of any public policy of the Commonwealth prohibiting termination of employment under the circumstances described here, plaintiff's wrongful termination claim must fail. We therefore grant defendant's Motion for Summary Judgment with respect to Count Three.

#### CONCLUSION

Because the uncontested facts, taken in the light most favorable to plaintiff, do not support her claims under either Pennsylvania's Whistleblower Law, 42 U.S.C. § 1983, or the

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<sup>11</sup> Complaint at paragraph 34.

<sup>12</sup> We also note that the United States Court of Appeals for the Third Circuit has held that Pennsylvania's Whistleblower Law does not evince a public policy applicable to wrongful discharge cases brought by private employees. Clark v. Modern Group Ltd., 9 F.3d 321 (3d Cir. 1993).

Pennsylvania common law regarding wrongful discharge, we grant defendant's Motion for Summary Judgment and dismiss Counts One, Two and Three of plaintiff's Complaint.

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

KAREN BRANDAU,	)
	) Civil Action
Plaintiff,	)
	)
vs.	) No. 03-CV-06014
	)
ACS, INC.,	)
	)
Defendant	)

O R D E R

NOW, this 18<sup>th</sup> day of August, 2006, upon consideration of the Motion for Summary Judgment, which motion was filed by defendant ACS, Inc. on February 15, 2006; upon consideration of the Memorandum in Support of ACS' Motion for Summary Judgment, which memorandum was filed February 15, 2006; upon consideration of Plaintiff, Karen Brandau's Brief in Opposition to Defendant ACS, Inc. and ACS State and Local Solutions, Inc. Motion for

Summary Judgment,<sup>13</sup> which brief was filed March 24, 2006; upon consideration of Plaintiff's Answer to Statement of Material Facts by Defendants ACS, Inc. and ACS State and Local Solutions, Inc., which answer was filed March 24, 2006; upon consideration of Affidavit by Plaintiff, Karen Brandau, in Opposition to Motion for Summary Judgment by Defendants, ACS and County of Northampton, which affidavit was filed March 24, 2006; upon consideration of ACS' Reply to Plaintiffs' Oppositions to Summary Judgment, which reply was filed April 10, 2006,

IT IS ORDERED that defendant ACS's Motion for Summary Judgment is granted.

IT IS FURTHER ORDERED that Counts One, Two and Three against defendant ACS are dismissed from plaintiff's Complaint.

IT IS FURTHER ORDERED that the Clerk of Courts shall mark this case closed for statistical purposes.

BY THE COURT:

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<sup>13</sup> We note that a Stipulation filed in this case on September 29, 2004 stated that ACS State & Local Solutions, Inc. was incorrectly identified as ACS, Inc. in the caption for this case. However, counsel did not amend the caption, so the inaccuracy persists. Throughout this Order and the accompanying Memorandum, we will refer to defendant ACS State & Local Solutions as "ACS". In addition, we note that plaintiff's brief in opposition to the motion for summary judgment and plaintiff's answer to defendant's statement of material facts pertains to a single defendant.

/s/James Knoll Gardner

James Knoll Gardner

United States District Judge