

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

PIA PYLES	:	CIVIL ACTION
Plaintiff	:	
	:	
vs.	:	NO. 05-1769
	:	
CITY OF PHILADELPHIA	:	
Defendant	:	

DuBois, J.

DECEMBER 8, 2006

MEMORANDUM

This case arises out of plaintiff's termination from her position as an attorney with the Philadelphia City Solicitor's office on or about June 19, 2003. By Order dated September 28, 2005, the Court dismissed plaintiff's retaliation claim under Title VII of the Civil Rights Act of 1964, as amended, and plaintiff's punitive damages claim. Plaintiff's remaining claims in the First Amended Complaint are for: (1) race discrimination under Title VII of the Civil Rights Act of 1964 and 1991, as amended, 42 U.S.C. § 2000(e) and 42 U.S.C. § 1981; (2) violation of procedural due process under 42 U.S.C. § 1983; (3) First Amendment retaliation under 42 U.S.C. § 1983; and (4) wrongful termination.

Presently before the Court is Defendant's Motion for Summary Judgment. For the reasons that follow, the motion for summary judgment is granted.

I. BACKGROUND

Plaintiff Pia M. Pyles, an African-American female, began her employment with the City of Philadelphia Law Department ("Law Department") on June 12, 2000 as a Deputy City Solicitor. Plaintiff's first assignment was with the Commercial Law Unit of the Contracts and

Finance Division. After a series of moves within the Law Department, plaintiff was designated as the Pension Board Legal Advisor on November 18, 2002. Plaintiff replaced Laura Teresinski, a Caucasian female who served as the Pension Board Legal Advisor from March 2000 until the Autumn of 2002. She was selected for the position out of a field of three candidates.

The case involves a dispute between plaintiff and Evan Meyer, a senior attorney in the Law Department. Plaintiff argues that Mr. Meyer was not her supervisor after her appointment to the position of Legal Advisor—that her supervisor was Henry Schwartz—and that Mr. Meyer who was a voting member of the Pension Board¹ had a conflict of interest in supervising her work. For that reason, plaintiff determined it was improper for Mr. Meyer to be involved with her work as the Pension Board Legal Advisor, and resisted his input in her work. See Pl. Dep. 55-57, Def. Mot., Ex. 1. Mr. Meyer, believing that he was plaintiff’s supervisor, viewed plaintiff’s resistance as nearly rising to “insubordination.” Def. Mot., Ex. 16, Email from Evan Meyer to Dona Mouzayck, Feb. 2, 2006.

The case focuses on an opinion prepared by plaintiff in May of 2003. At that time, the Pension Board requested that the Law Department issue a written opinion regarding the participation of a City employee in the City’s Deferred Retirement Option Plan (“DROP”). Plaintiff prepared the opinion; Mr. Meyer suggested revisions and revised her opinion. Plaintiff, believing that it was improper for Mr. Meyer to interfere and disagreeing with the suggested revisions, objected to the changes. Eventually the opinion was sent to Donna Mouzayck, the

¹The City Solicitor has a position as a voting member of the Pension Board. Mr. Meyer was designated as an alternate board member who would sit on the Board whenever the City Solicitor was unavailable. Mr. Meyer previously held the position of Pension Board Legal Advisor, but was replaced by Laura Teresinski some time after his appointment as alternate board member.

First Deputy City Solicitor who has oversight over the Law Department's three groups, for review. Ms. Mouzayck agreed with Mr. Meyer's recommendations, but sent the opinion on to Daniel Cantú-Hertzler, Chair of the Corporate and Tax Group, for further review. Mr. Cantú-Hertzler found the revisions necessary to state the law correctly and protect both the City's and the Pension Board's interests. Thereafter, Ms. Mouzayck directed plaintiff to change her opinion, at which point plaintiff did make the suggested changes.

Shortly after this episode, on or about June 19, 2003, plaintiff's employment by the Law Department was terminated. It is undisputed that plaintiff's resistance to changing her opinion was a critical factor in her termination. After her termination, plaintiff was replaced by Francis Bielli, a Caucasian male.

II. DISCUSSION

A. STANDARD FOR SUMMARY JUDGMENT

A court should grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The Supreme Court has further ruled that a "genuine" issue exists if "the evidence is such that a reasonable jury could return a verdict for the non-moving party," and a factual dispute is "material" when it "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)..

In considering a motion for summary judgment, "the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the

motion.” Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88 (1986). The party opposing the motion, however, cannot rely merely upon bare assertions, conclusory allegations, or suspicions to support its claim. Fireman’s Ins. Co. v. DuFresne, 676 F.2d 965, 969 (3d Cir. 1982).

B. RACE DISCRIMINATION CLAIMS

Plaintiff asserts discrimination claims under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e), and 42 U.S.C. § 1981. Plaintiff alleges that she was “pre-textually subjected to adverse employment actions, harassed and terminated as a result of her race.” Pl’s Resp. at 4.

The familiar framework for evaluating summary judgment motions under Title VII of the Civil Rights Act and 42 U.S.C. § 1981 was established by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The Supreme Court further explained the framework in Tex. Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 252 (1981):

First, the plaintiff has the burden of proving by the preponderance of the evidence a *prima facie* case of discrimination. Second, if the plaintiff succeeds in proving the *prima facie* case, the burden shifts to the defendant “to articulate some legitimate, non discriminatory reason for the employer’s rejection.” Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Id. (quoting McDonnell Douglas, 411 U.S. at 802).

Under this framework, the plaintiff first has the burden of proving by a preponderance of the evidence a *prima facie* case of discrimination. See id. In the context of a challenge to an adverse employment action, plaintiff’s *prima facie* case requires demonstration that: (1) plaintiff is a member of a protected class; (2) plaintiff was qualified for her position; (3) plaintiff suffered

an adverse employment action; and (4) the circumstances of her discharge permit an inference of unlawful discrimination, such as might occur when the position is filled by a person not of the protected class. Pivrotto v. Innovative Sys, 191 F.3d 344, 352 n.4 (3d Cir. 1999).

Defendant argues that plaintiff failed to make a sufficient showing of a *prima facie* case because she failed to demonstrate the fourth element—that the circumstances of her discharge permitted an inference of unlawful discrimination. Specifically, defendant argues that because plaintiff cannot demonstrate that she was treated differently from any other similarly situated non-minority employees, there is no basis for inferring discriminatory animus.

“Common circumstances giving rise to an inference of unlawful discrimination include the hiring of someone not in the protected class as a replacement or the more favorable treatment of similarly situated colleagues outside of the relevant class.” Bullock v. Children’s Hosp. of Phila., 71 F. Supp. 482, 487 (E.D. Pa. 1999). The Court concludes that plaintiff has made an adequate showing of a *prima facie* case by demonstrating that (1) plaintiff is a member of a protected class, (2) plaintiff was qualified for the job, having been selected as the best candidate out of a pool of three, (3) plaintiff suffered an adverse employment action, and (4) the circumstances permit the inference of unlawful discrimination because plaintiff was replaced by a Caucasian male. See Sheridan v. E.I. Dupont de Nemours & Co., 100 F.3d 1061, 1066 n.5 (3d Cir. 1996).

Once a *prima facie* case is established, the defendant has the burden of producing a legitimate, non-discriminatory explanation for its decision. At this point the burden shifts back to the plaintiff who must demonstrate that the proffered explanation for the adverse employment action is a pre-text for discrimination. There are two ways in which a plaintiff can prove pre-

text: (1) present evidence that “casts sufficient doubt upon each of the legitimate reasons proffered by the defendant so that a factfinder could reasonably conclude that each reason was a fabrication,” or (2) present evidence that “allows the factfinder to infer that discrimination was more likely than not a motivating or determinative cause of the adverse employment action.” Akinson v. Lafayette College, 460 F.3d 447, 454 (3d Cir. 2006) (quoting Fuentes v. Perskie, 32 F.3d 759, 762 (3d Cir. 1994)). “This burden is met through demonstration that such ‘weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer’s proffered legitimate reasons for its action are such that a reasonable factfinder could rationally find them unworthy of credence.’” Rosario v. Ken-Crest Servs., 05-3378, 2006 U.S. App. LEXIS 13815, at *7 (3d Cir. June 5, 2006) (quoting Fuentes, 32 F.3d at 765).

Defendant argues that plaintiff cannot prove that defendant’s proffered, non-discriminatory reason for her termination was pre-textual. According to defendant, plaintiff was terminated because of (1) her attitude and continuing inability to get along with others in the workplace including her resistance to the directions of Mr. Meyer and Ms. Mouzayck, (2) her resistance to supervision and criticism, and (3) her inability to perform at a level consistent with her years out of law school. Def. Mot. at 23.

With respect to the proffered explanation for termination of her employment, plaintiff argues that she was terminated as a result of her refusal to change her opinion for the Pension Board. In support of this argument plaintiff points to the fact that her performance in that job was satisfactory and that her prior evaluations reflect this assessment. It is plaintiff’s position that “her termination had nothing to do with her attitude and inability to get along with others, but everything to do with ethical obligations and her refusal to be bullied into compromising her

client's right to an independent legal opinion." Pl. Resp. at 48.

Plaintiff's argument that she was terminated because she resisted changes to her opinion, without more, does not in any way suggest that her employer acted with racial animus. This scenario is similar to that presented in Rosario. In Rosario, plaintiff argued that the alleged reasons for her termination were not true. On that issue, the Third Circuit noted that "even if the abuse allegations against her were not true, this fact, alone, would not necessarily establish that race or national origin played a role in the decision to fire her." Rosario, 2006 U.S. App. 13815, at *8. Likewise, the Third Circuit has ruled that "it is not enough to show that the employer's decision was wrong or mistaken, because the issue is whether the employer acted with discriminatory animus." Abramson v. William Patterson Coll. of N.J., 260 F.3d 265, 283 (3d Cir. 2001). Therefore plaintiff must show not just that the proffered reasons for her termination were untrue, but that those reasons were offered as pretext for discrimination

Plaintiff attributes racial animus to both Mr. Meyer and Ms. Mouzayck. Plaintiff's claim that, in terminating her, Ms. Mouzayck was motivated by racial animus rests on the fact that "there were rumors in the law department that she had problems with minorities." Pl. Dep. at 225. In describing Mr. Meyer's racial animus, plaintiff stated that "I felt he felt I should listen to his opinion, I should listen to his opinion because he wanted the opinion to go forward. I felt that he also was offended that how dare I not comply with whatever he is saying that I should being a woman, being black, being female and not having, you know, been in the department as long as him." Id. at 126. Additionally, with regard to Mr. Meyer, plaintiff argued that he was motivated by racial animus because, although he disagreed with plaintiff's white, female predecessor, Laura Teresinski, to plaintiff's knowledge he never required her to change an opinion. Id. at 127-37.

Plaintiff acknowledges, however, that she never witnessed Mr. Meyer's interaction with Ms. Teresinski, and does not know whether Ms. Teresinski ever resisted changes in her opinions suggested by Mr. Meyer. See Pl. Dep. at 126-27, 133-37.

To meet her burden of showing that defendant's proffered reasons were pre-textual, plaintiff cannot rely solely on factually unsupported allegations that she was a victim of discrimination, and that is what plaintiff has done in this case. See Lujan v. Nat'l Wildlife Fed., 497 U.S. 871, 888 (1990). "Plaintiff's mere pronouncements or subjective beliefs that [she] was disciplined because of her race . . . is not a substitute for competent evidence." Moss v. Potter, No. 04-1566, 2005 U.S. Dist. LEXIS 17505, at *15-16 (W.D. Pa. Aug. 22, 2005). Because plaintiff has not proffered any evidence beyond her personal assertions and beliefs to establish that race played a role in the decision to fire her, she cannot successfully refute defendant's racially-neutral justification for her termination. Thus, the Court grants defendant's summary judgment motion with respect to plaintiff's racial discrimination claims.

C. PROCEDURAL DUE PROCESS CLAIM

Plaintiff asserts a claim under 42 U.S.C. § 1983 alleging that defendant deprived plaintiff of her property interest in government employment without basis, explanation, or hearing in violation of her right to procedural due process. Compl. ¶¶ 40-47.

"To sustain a claim under § 1983 on procedural due process grounds, a plaintiff must first establish a property interest in her employment." Hillegrass v. The Borough of Emmaus, No. 01-5853, 2003 U.S. Dist. LEXIS 10771, at *22 (E.D. Pa. June 25, 2003). A cognizable property interest can be created by state law or implied or express contracts. Miller v. Twp. of Readington, 39 F. App'x 774, 775 (3d Cir. 2002)

Defendant argues that summary judgment should be granted on plaintiff's procedural due process claim because plaintiff has not demonstrated that she had a property interest in her employment. On this issue, under Pennsylvania law there is an employment at-will presumption that provides "absent a contract to the contrary, an employee may be discharged at any time, for any reason." Id. at 24.

Plaintiff argues that defendant's employment policies provided her with a legitimate expectation of continued employment sufficient to overcome the presumption of at will employment. In support of this argument, plaintiff offers two policy statements. First plaintiff points to Mayor Rendell's Statement of Policy, dated April 5, 1999 that states: "In accordance with the principles of civil and equal rights legislation, each employee and prospective employee of the City will be afforded fair and equitable treatment in all terms and conditions of employment." Pl. Resp., Ex. 19. Second, plaintiff points to a policy statement of Linda Seyda, Personnel Director of the City of Philadelphia, dated April 5, 1999, which states that it is the policy of the City to provide opportunities to minorities for upward mobility in accordance with ability. Pl. Resp., Ex. 20. Plaintiff claims that these policies go beyond the obligations imposed on a Pennsylvania employer by law and create a legitimate expectation of continued employment, and accordingly a property interest in employment.

Although the policies of an employer have been found sufficient to create an implied contract, see McDonald v. McCarthy, No. 89-319, 1990 U.S. Dist. LEXIS 11957 (E.D. Pa. Sept. 7, 1990) (holding that a disciplinary code providing reasons for termination modified employment at-will status creating a legitimate property interest in continued employment), those policies were far more explicit than the policies cited in this case. On this issue, courts have

found a property interest in continued employment where an employer's policy enumerated grounds for termination, or specific procedures to be followed upon termination. However, "to establish a denial of due process, plaintiff must have more than a 'unilateral expectation' of continued employment." Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

The Court concludes that the policy statements relied upon by plaintiff do not demonstrate that plaintiff had more than a unilateral expectation of continued employment. Because plaintiff cannot establish a legally cognizable property interest in her employment, she cannot support her procedural due process claim under 42 U.S.C. § 1983. Thus, the Court grants the motion for summary judgment on this claim.

D. FIRST AMENDMENT CLAIM

Plaintiff asserts a second claim under 42 U.S.C. § 1983— that defendant terminated her employment in retaliation for her exercise of her right to expression under the First Amendment to the United States Constitution.²

A public employee's speech garners First Amendment protection when "(1) in making it, the employee spoke as a citizen, (2) the statement involved a matter of public concern, and (3) the government employer did not have 'an adequate justification for treating the employee differently from any other member of the general public' as a result of the statement he made." Hill v. Borough of Kutztown, 455 F.3d 225, 242 (3d Cir. 2006) (quoting Garcetti v. Ceballos, 126 S.Ct. 1951 (May 30 2006)). In Garcetti, the Supreme Court held that public employees do

²Plaintiff also asserts that the retaliation violates the free speech guarantee of the Pennsylvania Constitution. Because plaintiff fails to present any authority to show that Pennsylvania's guarantees are any broader than those of the First Amendment, the Court will confine its discussion to the plaintiff's federal constitutional claims. See Saxe v. State College Area Sch. Dist., 240 F.3d 200, 202 n.1 (3d Cir. 2001).

not speak “as a citizen” when statements are made as part of their official duties. 126 S.Ct. at 1960 (“We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”).

In Garcetti, the plaintiff, a deputy district attorney, determined that a Sheriff’s Search Warrant Affidavit “contained serious misrepresentations.” Id. at 1955. As a result, plaintiff submitted a memorandum to his supervisors regarding the inaccuracies in the Warrant Affidavit and testified about his observations when called by the defense as a witness. Id. at 1955-56. After being demoted and transferred to a less desirable office, plaintiff filed suit alleging that his employer had violated his First and Fourteenth Amendment rights by retaliating against him for his critical speech. Id. The Supreme Court, in reversing the Ninth Circuit, held that, although the First Amendment protects a public employee’s right in certain circumstances to speak as a citizen addressing matters of public concern, speech made pursuant to duties of public employment is not entitled to such protection.

In this case, plaintiff’s retaliation claim centers on her draft opinion for the Pension Board. She alleges that her termination was retaliation for her speech on the matter of pensions (an issue of public concern) and that such retaliation infringed upon her First Amendment rights. As an employee of the City of Philadelphia, plaintiff was a public employee. Her speech on the matter of pensions was made in her official capacity as Pension Board Legal Advisor. Therefore, under Garcetti, because plaintiff was a public employee speaking in her official capacity, she was entitled to no First Amendment protection and the summary judgment motion will be granted as to this claim.

E. WRONGFUL TERMINATION

Plaintiff asserts two theories of wrongful termination. First, plaintiff argues that she was terminated in violation of a legally recognized public policy exception to the employment at will doctrine. Second, plaintiff argues that she was terminated with a specific intent to harm.

1. Public Policy Exception

Pennsylvania's employment at-will doctrine allows an employer to discharge an at-will employee for any reason or no reason at all, and therefore no common law cause of action exists against an employer for termination of at-will employment, unless an exception is applicable. See McLaughlin v. Gastrointestinal Specialist Inc., 750 A.2d 283, 287 (Pa. 2000); Clay v. Advanced Computer Applications, Inc., 559 A.2d 917, 918 (Pa. 1989). An exception is recognized when an employee is terminated for reasons that violate public policy. This exception is limited to situations where (1) an employer requires an employee to commit a crime, (2) an employer prevents an employee from complying with a statutory duty, or (3) the discharge of the employee is specifically prohibited by statute. McGovern v. Jack D's Inc., No. 03-5547, 2004 U.S. Dist. LEXIS 1985, at *15 (E.D. Pa. Feb. 3, 2004).

The Supreme Court of Pennsylvania has stressed that this exception is a narrow one; "an employee will be entitled to bring a cause of action for a termination of that relationship only in the most limited of circumstances where the termination implicates a clear mandate of public policy in this Commonwealth." McLaughlin, 750 A.2d at 287. Pennsylvania courts make a determination as to the existence of such a clear mandate of public policy "by examining the precedent within Pennsylvania, looking to [the Pennsylvania] Constitution, court decisions and statutes promulgated by the Pennsylvania legislature." Id. at 288. The Pennsylvania Rules of

Professional Conduct have also provided support for a claim of wrongful termination based on a violation of public policy. See Paralegal v. Lawyer, 783 F. Supp. 230 (E.D. Pa. 1992); Brown v. Hammond, 810 F. Supp. 644, 646 (E.D. Pa. 1993) (“While courts generally look to constitutional or legislative pronouncements, some courts have found an expression of significant public policy in professional codes of ethics.”).

The Third Circuit has ruled that “the Pennsylvania public policy exception is limited solely to when the employee objects to a course of action that the employer is taking that is clearly illegal.” Kelly v. Ret. Pension Plan for Certain Home Office, Managerial and Other Employees of Provident Mutual, 75 F. App’x 543, 544 (3d Cir. 2003); see also Clark v. Modern Group Ltd., 9 F.3d 321, 330 (3d Cir. 1993) (holding that Pennsylvania law would not recognize a wrongful discharge claim based upon an employee’s disagreement with management about the legality of an action unless the act *actually* violates the law). “Where the public policy claimed to be violated is not ‘clear,’ a cause of action for wrongful discharge has not been recognized.” McGonagle v. Union Fidelity Corp., 556 A.2d 878, 884 (Pa. Super. Ct. 1989).

This case involves plaintiff’s resistance to suggested changes to an opinion by a more senior attorney in the Law Department, Evan Meyer. The conflict between Mr. Meyer and plaintiff stemmed from her inclusion of a discussion of equitable estoppel in her draft opinion. At issue in the opinion was the entrance date of an employee “R.S.” in the city’s Deferred Retirement Option Plan (“DROP”). The Board had requested that the Law Department issue a written opinion on the question whether RS could retroactively change his DROP entry date to an earlier date. Pl. Dep. at 59. The question was complicated by the fact that, in backdating his entry date into DROP, R.S. relied on the advice of a City representative, and that the DROP Ordinance

prohibits backdating.³ In her draft opinion, plaintiff included the following language:

He [R.S.] should not have been allowed to change his DROP entry date retroactively. Since January 24, 2002, [R.S.] has ordered his retirement under the impression that his DROP entry date was April 23, 2001. The Board could decide to change his DROP entry date to the date he originally selected; however, if the matter is litigated, the outcome may not be favorable. The court would view the matter in terms of equitable estoppel It is unclear how a court would rule in this matter, but it could find that [R.S.] had relied to his detriment on the City's representation that he was allowed to select April 23, 2001 as his DROP entry date thereby exposing the City to liability.

Draft Opinion at 4, Def. Mot., Ex. 21. Mr. Meyer suggested deleting all discussion of equitable estoppel on the ground that, under applicable case law, such a theory would be unavailable to R.S., or any other employee, in view of the statutory prohibition on use of a back date.⁴ Meyer Dep. at 15-79, Pl. Resp., Ex. 9. Plaintiff strenuously resisted deleting reference to equitable estoppel from her draft opinion. Pl. Dep. at 73.

Plaintiff argues that her resistance constituted a “refusal to improperly advise a client, violate the law, and conceal information.” Pl. Resp. at 36. It is plaintiff's position that (1) making the revisions would have caused her to violate Rules of Professional Conduct governing

³The DROP Ordinance provides that “the effective date of a member's participation in the DROP shall be the date provided on the member's application, provided that such date . . . shall not be earlier than ninety (90) days after the date the application is filed with the Board.” Phila., Pa., Pub. Employees Ret. Code § 22-310 (2006).

⁴Mr. Meyer's opinion was based upon two cases in the Pennsylvania Commonwealth Court, Carroll v. City of Philadelphia, Bd. of Pensions & Retirement Municipal Pension Fund, 735 A.2d 141, 144 (Pa. Commw. Ct. 1999) (barring the use of equitable estoppel in a case where plaintiff was assured that he could enter a more favorable pension plan that was in fact unavailable to him) and Finnegan v. Public School Employees' Retirement Bd., 560 A.2d 848, 850 (Pa. Commw. Ct. 1989) (“[T]he government cannot be subject to the acts of its agents and employees if those acts are outside the agent's powers, in violation of positive law, or acts that require legislative or executive action.”).

her interaction with her client (the Pension Board) and (2) Mr. Meyer's participation in the drafting of the opinion constituted a conflict of interest in violation of the Rules of Professional Conduct.

With regard to her interaction with her client, the Pension Board, plaintiff cites numerous Rules of Professional Conduct that she argues were implicated by her resistance. First, plaintiff cites Rule 1.2(a), which requires attorneys to "abide by a client's decisions concerning the objectives of representation and consult with the client as to the means by which they are to be pursued." Plaintiff also cites Rule 2.1, which requires that "in representing a client, a lawyer should exercise independent professional judgment and render candid advice." Finally, plaintiff cites various provisions of Rule 8.4, which describes professional misconduct.⁵ Essentially plaintiff's argument is that because she disagreed with the suggested changes to her opinion, and considered the revised opinion tantamount to misrepresentation, revising the draft opinion amounted to a violation of her duty to abide by the Rules of Professional Conduct.

On this issue, plaintiff has not provided any evidence to show that the revisions suggested

⁵Rule 8.4 states in full:

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official; or
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Plaintiff argues that 8.4(a), (c) and (d), in particular, are applicable to her situation.

by Mr. Meyer and approved by Ms. Mouzayck and Mr. Cantú-Hertzler were in any way improper or incorrect. According to Mr. Cantú-Hertzler, “Mr. Meyer’s recommended revisions were not only cogent and legally accurate, and plainly within his discretion as her supervisor, but indeed were necessary in order to state the law correctly and protect the City’s legal interests.” Def. Mot., Ex. 3, Cantú-Hertzler Aff. ¶ 15. Moreover, plaintiff admitted that she did not know, in the final analysis, whether her opinion, or the opinion as altered by Mr. Meyer, was legally correct. Pl. Dep. at 79. On the present state of the record, the Court finds no basis for plaintiff’s argument that, by reluctantly agreeing to changes in her opinion, she was forced to violate Rules of Professional Conduct 1.2, 2.1 or 8.4. At most, the situation presented a conflict between the judgment of plaintiff and her supervisors.

In a case somewhat similar to this one, the Pennsylvania Superior Court in McGonagle v. Union Fidelity Corp., 383 Pa. Super. 223 (Pa. Super. Ct. 1989), faced an issue that turned on a question of judgment. The McGonagle court ruled as follows:

An employee who is also a professional has a dual obligation: to abide by federal and state laws, in addition to staying within the bounds of his/her professional code of ethics. Such responsibility may necessitate that the professional forego the performance of an act required by his/her employer. However, when the act to be performed turns upon a question of judgment, as to its legality or ethical nature, the employer should not be precluded from conducting its business where the professional’s opinion is open to question.

Id. at 237. As in McGonagle, because the act to be performed in this case turned on a question of judgment and plaintiff’s professional opinion was open to question, plaintiff cannot demonstrate that her termination implicated Pennsylvania Rules of Professional Conduct 1.2(a), 2.1 or 8.4.

Finally, plaintiff argues that by terminating her employment based on her resistance to Mr.

Meyer's changes in her opinion, the City violated public policy because her action was based on her conclusion that Mr. Meyer had an impermissible conflict of interest in violation of Pennsylvania Rule of Professional Conduct 1.7. Specifically, plaintiff believed that Mr. Meyer's position as a voting member of the Pension Board barred him from influencing the opinions she prepared for the Pension Board. The Court rejects that argument.

When Mr. Meyer was first asked to serve as a voting member of the Pension Board in March of 2000, he held the position of Pension Board Legal Advisor. In response to concerns about potential conflicts of interest raised by members of the Pension Board, Kenneth Trujillo, Acting City Solicitor, addressed the issue in a Memorandum dated May 11, 2000. Mr. Trujillo stated that "it is my opinion, and you are hereby advised, that no conflict of interest exists by this designation. Further, the term 'conflict of interest' is used incorrectly in this situation." Def. Reply, Ex. 7, at 2. Mr. Trujillo analyzed the situation in terms of procedural due process, and sought to determine whether Mr. Meyer's dual role could lead to "an impermissible commingling of functions." *Id.* He concluded that the only possible impermissible commingling could come in situations where the advisory and prosecutorial functions are combined, and thus stated that "in the event that Evan Meyer has previously rendered legal advice on an issue impacting the fact-finding function of the Board, he will recuse himself from the consideration of such issue as a Board trustee." *Id.* at 3. Mr. Trujillo further noted that "Meyer's prior resolution of purely legal questions will not require his future recusal as a Board trustee." *Id.*

On this issue, there is no evidence that there was any impermissible commingling of functions by Mr. Meyer; Mr. Meyer's input in plaintiff's opinion did not impact the fact-finding function of the Board because it involved the resolution of a purely legal question. Moreover, the

propriety and necessity of Mr. Meyer's edits was affirmed by two other senior attorneys in the Law Department who did not serve as voting members of the Pension Board. Plaintiff presents no evidence beyond her own bare assertions that Mr. Meyer's action involved him in a conflict of interest; that is insufficient to establish the public policy exception.

Because all of plaintiff's public policy arguments fail, she cannot avail herself of the public policy exception to the employment at will doctrine. See Clark, 9 F.3d at 330.

Accordingly, the Court grants defendant's motion for summary judgment on the claim that plaintiff's termination violated public policy.

2. Specific Intent to Harm

Plaintiff's second theory of wrongful discharge is that she was discharged with the specific intent to harm her. Defendant argues that the Court should grant summary judgment on this claim because such a cause of action is not recognized in Pennsylvania. Although, as pointed out by plaintiff, there has been debate on this issue, compare Melendez v. Horizon Cellular Telephone Co., 841 F. Supp. 687, 693 (E.D. Pa. 1994) (Dalzell, J.) and Mulgrew v. Sears Roebuck & Co., 868 F.Supp. 98, 101 (E.D. Pa. 1994) (Yohn, J.), with Altopedi v. Memorex, 834 F. Supp. 800, 805 (E.D. Pa. 1993) (Joyner, J.), based upon the relevant decisions of the Pennsylvania Supreme Court, this Court concludes that, if faced with the question today, the Pennsylvania Supreme Court would hold that there is no exception to the employment at will doctrine for a wrongful discharge with specific intent to harm.

In Geary v. United States Steel Corp., 319 A.2d 174 (1974) the Pennsylvania Supreme Court suggested that wrongful discharge with the specific intent to harm was a *possible* exception to Pennsylvania's employment at will doctrine, but the Supreme Court has never expressly

addressed the viability of that exception. See Melendez, 841 F. Supp. at 694 n.11 (noting that the language in Geary suggesting the availability of the wrongful discharge with specific intent to harm exception “never matured into a formal holding of the Pennsylvania Supreme Court”). Regardless, following Geary, numerous Superior Courts recognized wrongful discharge causes of action under the specific intent to harm exception. See, e.g., Mudd v. Hoffman Homes for Youth, Inc., 543 A.2d 1092 (1988); Tourville v. Inter-Ocean Ins. Co., 508 A.2d 1263 (1986).

Thereafter, in Clay v. Advanced Computer Applications, Inc., 559 A.2d 917 (Pa. 1989), when discussing the at-will employment doctrine, the Pennsylvania Supreme Court only acknowledged the public policy exception. See also Paul v. Lankenau Hosp., 569 A.2d 346 (Pa. 1990) (acknowledging only the public policy exception and emphasizing the importance of confining the exception so as to prevent it from swallowing the rule). Based on these Supreme Court decisions and subsequent Superior Court cases declining to recognize the specific intent to harm exception, see, e.g., Donahue v. Federal Express Corp., 753 A.2d 238, 245 (Pa. Super. Ct. 2000); McLaughlin v. Gastrointestinal Specialists, 696 A.3d 173, 176 n.4 (Pa. Super. Ct. 1997), aff’d, 750 A.2d 283 (Pa. 2000), numerous courts in the Eastern District of Pennsylvania have held that the exception is no longer viable. See, e.g., McLaughlin v. Kvaerner ASA, 2006 U.S. Dist. LEXIS 51482, at *11-12 (E.D. Pa. July 27, 2006) (Kauffman, J.). The Court finds this reasoning persuasive, and concludes that if the Pennsylvania Supreme Court were to be faced with the issue today, it would hold that the tort of wrongful discharge with specific intent to harm is not recognized in Pennsylvania. As no such exception to the employment at will doctrine is available, the Court grants the motion for summary judgment on the claim that plaintiff was discharged with the specific intent to harm her.

III. CONCLUSION

For the foregoing reasons, the Court grants Defendant's Motion for Summary Judgment on all of plaintiff's claims, and enters judgment in favor of defendant, the City of Philadelphia and against plaintiff, Pia M. Pyles.

An appropriate Order follows.

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

PIA PYLES	:	CIVIL ACTION
Plaintiff,	:	
	:	
vs.	:	NO. 05-1769
	:	
CITY OF PHILADELPHIA	:	
Defendant.	:	

ORDER

AND NOW, this 8th day of December, 2006, upon consideration of Defendant’s Motion for Summary Judgment (Doc. No. 15, filed Mar. 22, 2006); Plaintiff’s Memorandum of Law in Opposition to Defendant’s Motion for Summary Judgment (Doc. No. 23, filed June 2, 2006); and Defendant’s Reply Brief in Further Support of its Motion for Summary Judgment (Doc. No. 27, filed June 16, 2006), for the reasons stated in the attached Memorandum, **IT IS ORDERED** that, Defendant’s Motion for Summary Judgment is **GRANTED** and **JUDGMENT IS ENTERED** in **FAVOR** of defendant, City of Philadelphia, and **AGAINST** plaintiff, Pia Pyles.

BY THE COURT:

JAN E. DUBOIS, J.