

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

JANET M. DEGIOVANNI SHARP : CIVIL ACTION
:
vs. :
: NO. 05-CV-4297
WHITMAN COUNCIL, INC., :
ROBERT C. BLACKBURN, :
HENRY LEWANDOWSKI and :
MICHAEL SULLIVAN :

MEMORANDUM AND ORDER

JOYNER, J.

August 3, 2006

This employment action is now before the Court for disposition of the defendants' motion for summary judgment¹ on Plaintiff's Title VII, PHRA and Section 1981a claims. For the reasons which follow, the motion shall be granted and judgment entered as a matter of law in favor of the defendants on Count I of the plaintiff's First Amended Complaint. Given that no ruling was previously issued on the defendants' motion to dismiss the

¹ Defendants initially sought to dismiss Plaintiff's complaint via Rule 12(b)(1) and 12(b)(6) motions. Prior to February 22, 2006, a conflict existed among the Circuit Courts of Appeals as to whether the numerical qualification contained in Title VII's definition of "employer" affected federal court subject matter jurisdiction or instead delineated a substantive ingredient of a Title VII claim for relief. This conflict was resolved on that date by the U.S. Supreme Court's decision in Arbaugh v. Y & H Corp., ___ U.S. ___, 126 S.Ct. 1235, (2006) that "the threshold number of employees for application of Title VII is an element of a plaintiff's claim for relief, not a jurisdictional issue." Arbaugh, 126 S.Ct. at 1245. This holding was in keeping with the law previously established by the Third Circuit Court of Appeals in Nesbit v. Gears Unlimited, Inc., 347 F.3d 72, 83 (3d Cir. 2003) that "the fifteen-employee threshold was a substantive element of a Title VII claim and [was] not jurisdictional." Thus, by order dated December 22, 2005, we converted the motion to a Rule 56 motion and gave the parties until February 6, 2006 to take discovery on the issue of whether the individually named defendants were Plaintiff's supervisors and whether the Office of Housing and Community Development was Plaintiff's *de facto* employer.

other counts of that complaint, we shall address the arguments raised therein and shall partially grant that motion as well.

Factual Background

Plaintiff, Janet Degiovanni Sharp has been employed as the Executive Director of Defendant Whitman Council, Inc. since September, 1991. Whitman Council, Inc. ("Whitman") is a Pennsylvania Non-Profit Corporation which is funded as a Neighborhood Advisory Committee organization ("NAC") by the City of Philadelphia's Office of Housing and Community Development ("OHCD") and which provides services to the Whitman section of South Philadelphia. Whitman is governed by a Board of Directors composed of up to thirteen elected Class "A" members and up to three Class "B" Directors who are chosen by the Class "A" members. Four of the thirteen Class "A" Board members serve as the President, Vice-President, Secretary and Treasurer of the Board. The Board of Directors supervises the Executive Director.

Each year, Whitman enters into a contract, known as an NAC Provider Agreement with OHCD, pursuant to which Whitman agrees to provide housing and community development services and activities for Whitman area residents and OHCD agrees to provide the funding necessary to allow Whitman to provide those services.

According to the allegations of the plaintiff's First Amended Complaint, until August, 2004, one of the Whitman Board Members was a local Catholic pastor. At that time, the pastor

"made the difficult decision to leave the active ministry of priesthood and because he moved from the area, he was no longer eligible to be a member of the Whitman Board." (First Am. Compl., ¶17). Plaintiff, who at that time was divorced, "formed a deep friendship with the former pastor and they ultimately married in June, 2005." (First Am. Compl., ¶18). It was this relationship between Plaintiff and the former priest which was the apparent catalyst for this lawsuit as Plaintiff alleges that also in August, 2004, defendant Robert Blackburn, the President of the Whitman Council Board, called the Director of Neighborhood Coordination for OHCD claiming that Plaintiff was having an affair with a priest and that Whitman wanted grounds to terminate her. Mr. Blackburn purportedly followed that up with a letter asking that OHCD examine its personnel policies. According to the plaintiff, Mr. Blackburn then "proceeded to question community members, church authorities and otherwise spread rumor and innuendo." (First Am. Compl. ¶20).

In October, 2004, Mr. Blackburn and defendant Henry Lewandowski, Whitman's Vice-President went to the Whitman office ostensibly to discuss Plaintiff's 2004 performance evaluation. At that time, however, defendant Blackburn "demanded plaintiff's 'side of the story,'" and "asked personal, inappropriate questions about plaintiff's private life." Plaintiff refused to answer these questions because she believed they were neither job

nor performance related. Defendant Blackburn responded by telling Plaintiff that her refusal to answer constituted a violation of Whitman's employment policies and giving her 24 hours to resign or he would "go public" with some unspecified information. (First Am. Compl., ¶22). Plaintiff, however, refused to resign and Mr. Blackburn then called an emergency meeting of the Whitman Board regarding Plaintiff's employment status. The Board agreed to form a special investigating committee and appropriated \$2,000 of Whitman's funding to conduct an investigation.

Thereafter, in November, 2004, defendant Michael Sullivan, another Whitman Board member who had apparently been appointed the chairman of the newly-created personnel investigation committee, presented Plaintiff with a list of questions to which he wanted immediate answers. Plaintiff asked for a copy of and time to read the questions which, she alleges were of a very personal nature and included inquiries into whether she had had any physical contact with any Board member and asking her to describe the "full nature" of her relationship with Board members including any "intimate association." Plaintiff was advised that failure to answer any of the questions would be considered insubordination and grounds for termination. (First Am. Compl., ¶s25-26). Plaintiff responded by writing a letter of complaint to OHCD on November 10, 2004 in which she included a copy of the

questions and asking that the letter be considered a "formal grievance regarding my employment status as Executive Director." She copied all of the members of the Whitman Council Board of Directors on that letter. OHCD apparently never responded to Plaintiff and did not respond to Mr. Blackburn until January 20, 2005 by which time Mr. Blackburn had denied the plaintiff's grievance as groundless via correspondence dated December 6, 2004. In its letter of January 20, 2005, OHCD Neighborhood Program Director Belinda Mayo merely reiterated that under the OHCD NAC contract, all employee grievances were to be submitted to the NAC Board of Directors and that the Board's decision in such matters would be final.

Shortly before Christmas 2004, Plaintiff injured her back lifting food baskets while doing community food distribution for Whitman. As a result of that injury and the "mental stress put upon her by defendants," she was unable to work for several months. (First Am. Compl., ¶36). Although Plaintiff applied for workers' compensation benefits, her claim was denied and she eventually returned to work in June, 2005 having exhausted all of her leave time. Plaintiff further alleges that the defendants "had a part in that Worker's Compensation denial" and that when she returned to work she "found that a younger woman had been hired to replace her" although "[t]hat woman was eventually terminated." (First Am. Compl. ¶s 39, 40). Shortly after

Plaintiff and her new husband were married, a reunion gathering was held at her church at which some of the attendees "wore badges and T-shirts mocking Mrs. Sharp and her husband and invading her privacy." Plaintiff avers that those people were "acting in concert with some or all of the defendants." (First Am. Compl., ¶31).

Additionally, Plaintiff alleges that on her first day back on the job in the Whitman Council office, she found the same list of questions originally presented to her in late 2004, with another demand that she answer the questions or face termination. This time, Plaintiff answered each question, responding to those she found inappropriate by noting that they violated her rights to a workplace free of harassment, intimidation and discrimination and requesting that an investigation be undertaken into the actions of Messrs. Blackburn, Sullivan and Lewandowski, among others. Defendant Sullivan thereafter responded by claiming her answers to the questions were vague and requesting that she sign a waiver/release of Whitman and its Board and threatening that she would be deemed insubordinate, that a written warning would be placed into her personnel file and that she would face possible termination.

Apparently, plaintiff did not respond to Mr. Sullivan's threats but no further action was forthcoming on the part of the Board as Ms. Degiovanni Sharp continues in her employment as the

Whitman Council Executive Director to this day. Nevertheless, after exhausting her administrative remedies with the EEOC and the PHRC, Plaintiff instituted this lawsuit for having been "subjected to rumor and innuendo," "held up to public ridicule," suffering a loss of "professional status and reputation" as well as of "pay, benefits and other employee remunerations," and "emotional distress, humiliation and loss of life's pleasures." (First Am. Compl., ¶s44-46). Ms. Degiovanni Sharp brings claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et. seq.*, 42 U.S.C. §1981a, the Pennsylvania Human Relations Act, 43 P.S. §951 *et. seq.* ("PHRA"), the Pennsylvania Whistleblower Law, 43 P.S. §1421 *et. seq.*, and under the common law theories of publication of private information, false light invasion of privacy, breach of contract, negligent and/or intentional interference with existing contractual relationship, negligent and/or intentional misrepresentation and conspiracy. As previously noted, Defendants initially sought to dismiss Plaintiff's First Amended Complaint via Rule 12(b)(1) and 12(b)(6) motions on the grounds that they did not have the requisite number of employees to sustain the federal causes of action or the claim asserted under the Pennsylvania Human Relations Act and that the plaintiff's pleadings otherwise failed to state causes of action on which relief could be granted. By order dated December 22, 2005, we converted the motion to a Rule

56 motion and gave the parties until February 6, 2006 to take discovery on the issue of whether the individually named defendants were Plaintiff's supervisors and whether the Office of Housing and Community Development was Plaintiff's *de facto* employer. Discovery on this issue has now been completed and the motion is ripe for disposition.

Standards Governing Rule 12(b)(6) and Rule 56 Motions

It has long been the rule that 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. Alston v. Parker, 363 F.3d 229, 233 (3d Cir. 2004); Klein v. General Nutrition Companies, Inc.,

186 F.3d 338, 342 (3d Cir. 1999)(internal quotations omitted). It should be noted that courts are not required to credit bald assertions or legal conclusions improperly alleged in the complaint and legal conclusions draped in the guise of factual allegations may not benefit from the presumption of truthfulness. In re Rockefeller, 311 F.3d at 216. A court may, however, look beyond the complaint to extrinsic documents when the plaintiff's claims are based on those documents. GSC Partners, CDO Fund v. Washington, 368 F.3d 228, 236 (3d Cir. 2004); In re Burlington Coat Factory Securities Litigation, 114 F.3d 1410, 1426. See Also, Angstadt v. Midd-West School District, 377 F.3d 338, 342 (3d Cir. 2004).

The principles for consideration of Rule 56 motions are similar but not identical. Summary judgment is appropriate where, viewing the record in the light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Michaels v. New Jersey, 222 F.3d 118, 121 (3d Cir. 2000); Jones v. School District of Philadelphia, 198 F.3d 403, 409 (3d Cir. 1999). Indeed, the standards to be applied by district courts in ruling on motions for summary judgment are clearly set forth in Fed.R.Civ.P. 56(c), which states, in pertinent part:

"...The judgment sought shall be rendered forthwith 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. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

Under this rule, a court is compelled to look beyond the bare allegations of the pleadings to determine if they have sufficient factual support to warrant their consideration at trial. Liberty Lobby, Inc. v. Dow Jones & Co., 838 F.2d 1287 (D.C.Cir. 1988), cert. denied, 488 U.S. 825, 109 S.Ct. 75, 102 L.Ed.2d 51 (1988); Aries Realty, Inc. v. AGS Columbia Associates, 751 F.Supp. 444 (S.D.N.Y. 1990). In considering a summary judgment motion, the court must view the facts in the light most favorable to the non-moving party and all reasonable inferences from the facts must be drawn in favor of that party as well. Troy Chemical Corp. v. Teamsters Union Local No. 408, 37 F.3d 123, 126 (3rd Cir. 1994); Williams v. Borough of West Chester, 891 F.2d 458, 460 (3rd Cir. 1989); U.S. v. Kensington Hospital, 760 F.Supp. 1120 (E.D.Pa. 1991). In so doing, the court must be mindful that "material" facts are those facts that might affect the outcome of the suit under the substantive law governing the claims made. An issue of fact is "genuine" only "if the evidence is such that a reasonable jury could return a verdict for the non-moving party" in light of the burdens of proof required by substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 252, 106 S.Ct. 2505, 2510, 2512, 91 L.Ed.2d 202 (1986); The

Philadelphia Musical Society, Local 77 v. American Federation of Musicians of the United States and Canada, 812 F.Supp. 509, 514 (E.D.Pa. 1992). Thus, a non-moving party has created a genuine issue of material fact if it has provided sufficient evidence to allow a jury to find in its favor at trial. Gleason v. Norwest Mortgage, Inc., 243 F.3d 130, 138 (3d Cir. 2001).

Discussion

A. Plaintiff's Claims Under Title VII, §1981a and the PHRA

As discussed, Plaintiff claims that the defendants' actions had the effect of harassing, discriminating and retaliating against her on the basis of her sex and her religion (Catholic) in violation of Title VII, Section 1981a and the PHRA.

Defendants, in turn, contend that they are entitled to judgment as a matter of law on those claims because the Whitman Council does not employ a sufficient number of employees to render it an "employer" within the meaning of either of those Acts.² Indeed, Title VII defines an "employer" as:

"...a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding

² The great weight of authority holds that §1981a does not create an independent cause of action, but only serves to expand the field of remedies for plaintiffs in Title VII suits. Pollard v. Wawa Food Market, 366 F.Supp.2d 247, 251 (E.D.Pa. 2005); Rotteveel v. Lockheed Martin Corp., Civ. A. No. 01-6969, 2003 U.S. Dist. LEXIS 12329 at *10 (E.D. Pa. July 15, 2003); Singh v. Wal-Mart Stores, Inc., Civ. A. No. 98-1613, 1999 U.S. Dist. LEXIS 8531 at *21-*22 (E.D.Pa. June 10, 1999); Presutti v. Felton Brush Co., 927 F.Supp. 545, 550 (D.N.H. 1995); Swartzbaugh v. State Farm Insurance Co., 924 F.Supp. 932, 934 (E.D. Mo. 1995). Accordingly, relief under Section 1981a may only be afforded if Plaintiff's Title VII claim is permitted to go forward.

calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service ... or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954...

42 U.S.C. §2000e(b).

Under the PHRA, an "employer" is defined in the following manner:

The term "employer" includes the Commonwealth or any political subdivision or board, department, commission or school district thereof and any person employing four or more persons within the Commonwealth, but except as hereinafter provided, does not include religious, fraternal, charitable or sectarian corporations or associations, except such corporations or associations supported, in whole or in part, by governmental appropriations. The term "employer" with respect to discriminatory practices based on race, color, age, sex, national origin or non-job related handicap or disability, includes religious, fraternal, charitable and sectarian corporations and associations employing four or more persons within the Commonwealth.

43 P.S. §954(b). The record in this matter reflects that the Whitman Council itself had no more than three employees during the relevant time frame. Plaintiff, however, asserts that as the Whitman Council is funded by and many of its operations and activities are regulated by the Philadelphia OHCD, OHCD is in actuality also her employer.

The precise contours of an employment relationship can only be established by a careful factual inquiry and thus a plaintiff's status as an employee under Title VII can be

determined only upon careful analysis of the myriad facts surrounding the employment relationship in question. Graves v. Lowery, 117 F.3d 723, 729 (3d Cir. 1997), citing NLRB v. Browning-Ferris Indus. Of Penn., 691 F.2d 1117, 1121 (3d Cir. 1982); Magnuson v. Peak Tech. Servs., Inc., 808 F.Supp. 500, 510 (E.D.Va. 1992) and Miller v. Advanced Studies, 635 F.Supp. 1196 (N.D. Ill. 1986). For example, a "single employer" relationship exists where two nominally separate entities are actually part of a single integrated enterprise so that, for all purposes, there is in fact only a "single employer." LaFata v. Raytheon Co., No. 04-1560, 147 Fed. Appx. 258, 262, 2005 U.S. App. LEXIS 16952 (3d Cir. Aug. 12, 2005). The question in the "single employer" situation then, is whether the two nominally independent enterprises in reality constitute only one integrated enterprise. Id.

In the Third Circuit, single employer treatment is appropriate: (1) when a company has split itself into separate entities for the purpose of evading Title VII; (2) when a parent company directed a subsidiary's discriminatory acts; and (3) where two or more entities' affairs are so interconnected that they collectively caused the alleged discriminatory employment practice. Nesbit v. Gears Unlimited, Inc., 347 F.3d 72, 85-86 (3d Cir. 2003); EEOC v. Foodcrafters Distribution Co., 2006 U.S.

Dist. LEXIS 11426 at *42-*45 (D.N.J. Feb. 24, 2006).³ Although courts should consider financial entanglement in determining when substantively to consolidate two entities, the focus of the inquiry for Title VII purposes should be on the degree of operational entanglement --whether operations of the companies are so united that nominal employees of one company are treated interchangeably with those of another. Nesbit, 357 F.3d at 87. Relevant operational factors include (1) the degree of unity between the entities with respect to ownership, management, (both directors and officers), and business functions (e.g., hiring and personnel matters), (2) whether they present themselves as a single company such that third parties dealt with them as one unit, (3) whether a parent company covers the salaries, expenses,

³ It should be noted that prior to the Third Circuit's decision in Nesbit, a number of courts in this circuit had borrowed the four-part "single employer" or "integrated-enterprise" test formulated for application to the National Labor Relations Act in NLRB v. Browning-Ferris Indus., Inc., *supra.*, for use in Title VII actions. Under that test, the following four factors are assessed to ascertain whether multiple entities are so interrelated that they could be treated as one employer: (1) the functional integration of operations, (2) centralized control of labor relations, (3) common management and (4) common ownership. See, e.g., Battistone v. Sam Jon Corporation, No. 00-CV-5196, 2002 U.S. Dist. LEXIS 19399 at *16 (E.D.Pa. Oct. 4, 2002) citing, *inter alia*, Podsobinski v. Roizman, Civ. A. No. 97-4976, 1998 U.S. Dist. LEXIS 1743 (E.D.Pa. Feb. 13, 1998), Daliessio v. DePuy, Inc., No. 96-5295, 1998 U.S. Dist. LEXIS 605 (E.D.Pa. Jan. 23, 1998) and Zarnoski v. Hearst Bus. Communications, Inc., No. 95-3854, 1996 U.S. Dist. LEXIS 181 (E.D.Pa. Jan. 11, 1996). The Court in Nesbit, however, specifically rejected the use of that test in Title VII actions because the NLRA and Title VII ask whether entities are a single enterprise for different reasons and because "the NLRA's policy goals point in a different direction than Title VII's." Nesbit, 347 F.3d at 85. ("As discussed, a significant purpose of the fifteen-employee minimum in the Title VII context is to spare small companies the considerable expense of complying with the statute's many-nuanced requirements...This goal suggests that the fifteen-employee minimum should be strictly construed. By contrast, the NLRB's jurisdiction was intended to be expansive, suggesting a more lenient test for labor cases...Thus we deem there is little reason to refer to the NLRB's test in deciding whether two entities should together be considered an 'employer' for Title VII purposes..." Id.(citations omitted)).

or losses of its subsidiary, and (4) whether one entity does business exclusively with the other. Id.; Daniel v. City of Harrisburg, No. 1:05-2126, 2006 U.S. Dist. LEXIS 18529 at *10 (M.D.Pa. March 6, 2006); Fishman v. La-Z-Boy Furniture Galleries of Paramus, Inc., No. 04-749, 2005 U.S. Dist. LEXIS 18088 at *21 (D.N.J. Aug. 17, 2005).

In applying the foregoing test and considering the relevant operational factors delineated above, we cannot find that the Whitman Council and the City of Philadelphia's Office of Housing and Community Development are so inter-related as to constitute one entity for Title VII purposes. For one, there is absolutely no evidence whatsoever on this record that OHCD and Whitman Council were ever at one time a single entity or that they split for the express purpose of evading Title VII. There is likewise no evidence that OHCD directed Whitman Council's allegedly discriminatory actions or that they collectively caused the alleged discriminatory employment practice at issue. At most, the record reflects that while Plaintiff sent two letters to OHCD reporting what she believed to be the inappropriate treatment which she had received from the Whitman Board, OHCD never responded directly to her but instead referred her complaints to Mr. Blackburn for handling. (Defendants' Exhibit 17). The record also evinces that Defendant Blackburn contacted OHCD on behalf of Whitman Council to confirm that Whitman had "broad

authority in dealing with personnel matters" and that Belinda Mayo, the Director of OHCD's Neighborhood Programs confirmed that the Whitman Board in fact had this broad authority in dealing with personnel matters and that the decision of the Board in all personnel matters is final. However, Ms. Mayo cautioned that despite this authority, "it is very important that the Board follows not only its own procedures, but also insures that its actions are not a violation of fair labor practices and do not violate laws governing the employer/employee relationship." (See Exhibit 15 to Defendants' Exhibits in Support of Motion to Dismiss/Motion for Summary Judgment). Thus we conclude that single employer treatment is inappropriate here.

Likewise, our examination of the operational factors results in a finding that although OHCD covers the salaries, expenses and/or losses of the Whitman Council in that Whitman's operations are nearly 100% funded by OHCD, that is the only factor supported by the evidence presented here. Indeed, there does not appear to be any degree of unity between the two entities in so far as their Boards of Directors or management is concerned and while OHCD does indeed provide the funding for Whitman, as is clear from a review of Whitman's articles of incorporation and bylaws, Whitman is a non-profit corporation within the meaning of Section 501(c)(3) of the Internal Revenue Code in which OHCD does not have any ownership interest. As is further clear from the NAC

contract between OHCD and Whitman, Whitman is designated an independent contractor and is not to represent itself as being a part of OHCD or its agent. Although the NAC contract does outline the personnel policies to be followed by Whitman, Whitman has complete discretion in the hiring, termination and discipline of its employees. (Defendants' Exhibits 10, 11; Mayo Dep., pp. 11-12, 17-22). There is no evidence that Whitman exclusively does business with OHCD and no evidence that either Whitman or OHCD holds themselves out to the public at large as being a single entity. For all of these reasons, we find that the plaintiff is employed only by Whitman itself and that Whitman is not an "employer" within the contemplation of either Title VII or the PHRA. Judgment is therefore properly entered in favor of the defendants as a matter of law on Counts I, II and III of Plaintiff's First Amended Complaint.

B. Plaintiff's Claim under the Pennsylvania Whistleblower Law, 43 P.S. §1421, et. seq.

Plaintiff next alleges in Count IV of the First Amended Complaint that the defendants retaliated against her when she "reported wrongdoing to the appropriate authorities."

The Pennsylvania Whistleblower Law 43 P.S. §1421, et. seq. makes it unlawful for a public employer to:

"...discharge, threaten or otherwise discriminate or retaliate against an employee regarding the employee's compensation, terms, conditions, location or privileges of employment 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."

Denton v. Silver Stream Nursing and Rehabilitation Center, 739 A.2d 571, 575 (Pa. Super. 1999); 43 P.S. §1423(a). It should be noted that the Whistleblower Law is not primarily designed to punish an employer for harboring retaliatory motives, but is rather a remedial measure intended to "enhance openness in government and compel the government's compliance with the law by protecting those who inform authorities of wrongdoing."

O'Rourke v. Pennsylvania Department of Corrections, 566 Pa. 161, 175, 778 A.2d 1194, 1202 (2001) quoting Davis v. Ector County, 40 F.3d 777, 785 (5th Cir. 1994)(articulating purpose of similar Texas whistleblower law).

As a threshold matter, the Whistleblower Law applies only to public employees who are discharged or otherwise discriminated or retaliated against by governmental entities. Halsted v. Motorcycle Safety Foundation, Inc., 71 F.Supp.2d 464, 471 (E.D.Pa. 1999) citing, *inter alia*, Clark v. Modern Group, Inc., 9 F.3d 321, 326, n.4 (3d Cir. 1993) and Holewinski v. Children's Hospital of Pittsburgh, 437 Pa. Super. 174, 649 A.2d 712, 715 (1994). Indeed, the statute defines an "employer" to be:

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. Under that same statute, an "employee" is "[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." Although Defendants argue that Plaintiff does not allege that she is a governmental employee or that Whitman is a governmental employer, the complaint does aver that Whitman is a federally funded Neighborhood Advisory Council that receives funds from Housing and Urban Development through the Office of Housing and Community Development of the City of Philadelphia and that Plaintiff is the Executive Director of Whitman Council. (First Am. Compl., ¶s1-2). We find that these averments are sufficient to bring the plaintiff and the defendants within the confines of the Whistleblower Act.

However, Defendants also seek dismissal of plaintiff's Whistleblower claims on the grounds that the amended complaint fails to state any facts with regard to how Plaintiff made a "good faith report" to the "appropriate authority" of an "instance of wrongdoing or waste." Again, the plain intent of the Whistleblower Law is to protect from retaliation employees who make good-faith efforts to alert authorities to governmental waste and wrongdoing. Caprina v. Lycoming County Housing Authority, 177 F.Supp.2d 303, 329 (M.D.Pa. 2001), citing Podgurski v. Pennsylvania State University, 722 A.2d 730, 732 (Pa.Super. 1998). Thus, in order for an employee to succeed on a claim under the Law, he must show not only that he filed a good faith report of wrongdoing or waste, he must also establish by

concrete facts and circumstances that the report led to some retaliatory action against him. Id., citing Lutz v. Springettsbury Township, 667 A.2d 251, 253 (Pa. Cmwlth. 1995) and Gray v. Hafer, 168 Pa. Cmwlth. 613, 651 A.2d 221, 225 (1994). See Also, Cavicchia v. Philadelphia Housing Authority, No. 03-CV-0116, 2003 U.S. Dist. LEXIS 20311 at *46 (E.D.Pa. Nov. 7, 2003), citing Golashevsky v. Department of Environmental Protection, 554 Pa. 157, 720 A.2d 757, 759 (1998) ("Two requirements must be met for a plaintiff to prove a prima facie case of retaliatory termination and receive protection under the Whistleblower Statute: (1) wrongdoing; and (2) a causal connection between the report of wrongdoing and dismissal.")

Turning to the definitions section of the Act, 43 P.S. §1422, we note that an "appropriate authority" is:

A Federal, State or local government body, agency or organization having jurisdiction over criminal law enforcement, regulatory violations, professional conduct or ethics, or waste; or a member, officer, agent, representative or supervisory employee of the body, agency or organization. The term includes, but is not limited to, the Office of Attorney General, the Department of the Auditor General, the Treasury Department, the General Assembly and committees of the General Assembly having the power and duty to investigate criminal law enforcement, regulatory violations, professional conduct or ethics, or waste.

"Wrongdoing" is:

A violation which is not of a merely technical or minimal nature of a Federal or State statute or regulation, of a political subdivision ordinance or regulation or of a code of conduct or ethics designed to protect the interest of the public or the employer.

And finally, a "good faith report" is:

A report of conduct defined in this act as wrongdoing or waste which is made without malice or consideration of personal benefit and which the person making the report has reasonable cause to believe is true.

As observed by the Commonwealth Court in Gray, supra.,

Within the definition of 'wrongdoing,' there is a requirement that the violation of the law or regulation be one that is designed to protect the interest of the public or employer. While the definition uses the phrase 'to protect the interest of the public,' and that could be interpreted to apply to any statute or ordinance as used in the context of retaliation taken by an employer because of an employee's work performance, that requirement means that a statute or regulation is of the type that the employer is charged to enforce for the good of the public or is one dealing with the internal administration of the governmental employer in question.

Gray, 651 A.2d at 224. See Also, Caprina, 177 F.Supp.2d at 330.

Although Count IV of the First Amended Complaint in this case summarily alleges only that "Defendants violated the provisions of the Pennsylvania Whistleblower Law ...in that defendants retaliated against plaintiff when she reported wrongdoing to the appropriate authorities," it appears that the gravamen of Plaintiff's Whistleblower claim is her alleged complaints to OHCD regarding the defendants' investigation into her private relationship with Mr. Sharp and the written personal questions which Defendants demanded that she answer or face termination. (First Am. Compl., ¶s22-28, 42).

Even giving Plaintiff the benefit of the doubt that OHCD is an "appropriate authority" within the meaning of the statute, we

cannot find that Plaintiff has alleged the facts necessary to enable this Court to find that her complaint concerned "wrongdoing" or that her complaint resulted in an adverse employment action against her within the contemplation of the Whistleblower Law. To be sure, to constitute wrongdoing, the statute requires that the matter complained of be one which concerns the violation of a law or regulation that is designed to benefit or protect the general public and which the employer is charged with implementing or enforcing or which involves the internal administration of the governmental employer. While we would certainly agree with the plaintiff that questioning her regarding matters of a purely personal and intimate nature is inappropriate, it does not rise to the level of wrongdoing within the meaning of the Whistleblower Law.

Furthermore, we find that the elements of retaliation and causal connection are also missing here. For one, it appears that Plaintiff *first* suffered the alleged retaliatory actions and *then* complained to OHCD *about* those actions. There is thus nothing to suggest that Plaintiff suffered the alleged harassment and retaliation *as the result of* her having complained. Although Plaintiff alleges that "[a]fter one of those complaints, Plaintiff subsequently received a personal letter from Mr. Lewandowski on his law firm's letterhead, which plaintiff felt was an attempt to intimidate her," she provides no details

whatsoever of what the letter said. (First Am. Compl., ¶29). Additionally, although Ms. Sharp was purportedly threatened with termination if she failed and/or refused to answer the written questions and if she failed to sign a waiver/release of the Whitman Board, she also avers that she eventually did answer the questions and that despite having been advised by Mr. Sullivan that the answers were vague and despite her refusal to sign any waiver, she received a \$1,000 pay raise and continues to be employed by the Whitman Council to this day.

Finally, we likewise cannot find that plaintiff has pled that she made a "good faith report." Indeed, while there is nothing to suggest that Plaintiff's complaints were made maliciously, it does appear that Plaintiff made them in an effort to realize a personal benefit, *to wit*, to put an end to the Whitman Council's questioning and investigation into her personal affairs. For all of these reasons, we find that the plaintiff has failed to allege a claim entitling her to relief under Pennsylvania's Whistleblower law and hence Count IV of the First Amended Complaint will also be dismissed.

C. Plaintiff's Remaining State Law Claims.

In addition, at Counts V-IX of her First Amended Complaint, Ms. Degiovanni Sharp brings claims for what appears to be invasion of privacy, breach of contract, negligent and/or intentional interference with existing contractual relations,

misrepresentation and conspiracy. Defendants again argue that the complaint fails to plead causes of action on which relief can be granted under any of these state law theories.

1. Invasion of Privacy

It is clear that Pennsylvania recognizes the tort of invasion of privacy. Vogel v. W.T. Grant Co., 458 Pa. 124, 126, 327 A.2d 133 (1974). The action for invasion of privacy is actually comprised of four analytically distinct torts: 1) intrusion upon seclusion, 2) appropriation of name or likeness, 3) publicity given to private life, and 4) publicity placing a person in false light. Marks v. Bell Telephone Co., 460 Pa. 73, 85-86, 331 A.2d 424, 430 (1975) citing Vogel, 458 Pa. at 129, 327 A.2d at 136. In Pennsylvania, most of the decisions dealing with invasions of privacy have involved either publicity given to private facts or the appropriation of one's likeness. Id.; Restatement (Second) of Torts §§652A-652D.

In this case, it appears that Plaintiff is endeavoring to state a claim under Sections 652D and 652E of the Second Restatement of Torts. Section 652D states:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that

(a) would be highly offensive to a reasonable person, and

(b) is not of legitimate concern to the public.

Thus, the elements of the tort are: (1) publicity, given to (2) private facts, (3) which would be highly offensive to a reasonable person and (4) are not of legitimate concern to the public. Harris by Harris v. Easton Publishing Co., 335 Pa. Super. 141, 154, 483 A.2d 1377, 1384 (1984). "Publicity" means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge. Vogel, 458 Pa. at 131-132, 327 A.2d at 137. Disclosure to only one person is insufficient. Harris, 335 Pa. Super. at 155, 483 A.2d at 1384.

A "private fact" is one that has not already been made public, as liability cannot be based upon that which the plaintiff himself leaves open to the public eye or when the publicity given involves facts with which the recipient is already familiar. Id., citing Restatement (Second) of Torts §652D, Comment B. Moreover, in determining whether a reasonable person of ordinary sensibilities would find such publicity highly offensive, the customs of the time and place, occupation of the plaintiff and habits of his neighbors and fellow citizens are material. Id., citing Restatement (Second) of Torts §652D, Comment C and Aquino v. Bulletin Company, 190 Pa. Super. 528, 154 A.2d 422 (1959).

Finally, the common law has long recognized that the public

has a proper interest in learning about many matters. When the subject-matter of the publicity is of legitimate public concern, such as matters of the kind customarily regarded as "news," there is no invasion of privacy. Culver v. Port Allegany Reporter Argus, 409 Pa. Super. 401, 404, 598 A.2d 54, 56 (1991).

The tort of false light invasion of privacy involves "publicity that unreasonably places the other in a false light before the public." Keim v. County of Bucks, 275 F.Supp.2d 628, 637 (E.D.Pa. 2003) citing Rush v. Philadelphia Newspapers, Inc., 732 A.2d 648, 654 (Pa. Super. 1999). Section 652E of the Second Restatement of Torts delineates the tort of false light invasion of privacy as:

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if

(a) the false light in which the other was placed would be highly offensive to a reasonable person, and

(b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

See, Williams v. University of the Sciences, No. 02-7085, 2004 U.S. Dist. LEXIS 21799 at *6-*7 (E.D.Pa. Oct. 27, 2004); Curran v. Children's Service Center, 396 Pa. Super. 29, 39, 578 A.2d 8, 12 (1990). The tort applies only "when defendant knows that the plaintiff, as a reasonable man, would be justified in the eyes of the community in feeling seriously offended and aggrieved by the

publicity." Lin v. Rohm and Haas, Co., 293 F.Supp.2d 505, 522 (E.D.Pa. 2003), citing Curran, supra. See also, Martin v. Municipal Publications, 510 F.Supp. 255, 259 (E.D.Pa. 1981).

Stated otherwise, a cause of action for invasion of privacy will be found where a major misrepresentation of a person's character, history, activities or beliefs is made that could reasonably be expected to cause a reasonable man to take serious offense. Keim, supra.

In this case, although she does not specify what false and fabricated statements she is referring to in Count V of her First Amended Complaint, Ms. DeGionvanni Sharp does allege that Defendant Blackburn called the Director of Neighborhood Coordination for OHCD and claimed that Plaintiff was having an affair with a priest and that he thereafter "proceeded to question community members, church authorities and otherwise spread rumor and innuendo." (First Am. Compl., ¶s19-20). The complaint further alleges that the defendants called an emergency board meeting to discuss Plaintiff's employment, that at that board meeting they agreed to appropriate \$2,000 of funding to undertake an investigation into the full nature of her relationship with past and present board members and that several weeks after her marriage to the former board member and Catholic priest, Plaintiff and her new husband were confronted by people wearing badges and t-shirts mocking them at a church reunion.

While we cannot find that these averments sufficiently allege "a major misrepresentation of Plaintiff's character, history, activities or beliefs that could reasonably be expected to cause a reasonable man to take serious offense," we do find them to be sufficient to plead a cause of action upon which relief could plausibly be granted for invasion of privacy under the publication of private facts theory. Indeed, we find that the issue of whether the plaintiff did or did not have an intimate relationship with a former board member who happened to be a Catholic priest is truly a private matter in which we can discern no legitimate public interest, the publication of which would be highly offensive to any reasonable person or anyone in the position of the plaintiff or her now-husband. So saying, Count V shall be permitted to stand but only to the extent that it pleads a claim for improper publication of private facts.

2. Breach of Contract

Count VI of the First Amended Complaint charges that "[t]here was a contract between plaintiff and Whitman Council, Inc., ...[which] contained promises and contractual terms that Whitman would not discriminate in any way against anyone including plaintiff and would observe all federal and state anti-discrimination laws." (First Am. Compl., ¶s72-73). Defendants suggest that Plaintiff may be mistakenly thinking that Whitman Council's employment policies and procedures handbook constitute

a contract of employment and they likewise move to dismiss this claim pursuant to Rule 12(b)(6). (See, p. 31 of Defendants' Brief in Support of Motion to Dismiss Plaintiff's Amended Complaint).

Under Pennsylvania law, provisions in a handbook or manual can constitute a unilateral offer of employment which the employee accepts by the continuing performance of his or her duties. Bauer v. Pottsville Area Emergency Medical Services, Inc., 2000 Pa. Super. 252, 758 A.2d 1265, 1269 (2000) citing, *inter alia*, Luteran v. Loral Fairchild Corp., 455 Pa. Super. 364, 688 A.2d 211, 214-215 (1997). See Also, DeFiore v. PPG Industries, Inc., No. 2:05-1469, 2006 U.S. Dist. LEXIS 7818 at *5 (W.D.Pa. March 1, 2006)(same). However, an employment manual or other workplace rules would be deemed a binding contract only where the benefit was extended at the time of hire and where there is evidence by which a reasonable person would conclude that the employer intended to be bound by its terms. Garcia v. Matthews, No. 02-3318, 66 Fed. Appx. 339, 2003 U.S. App. LEXIS 7967 (April 25, 2003). Pennsylvania law also clearly requires that a plaintiff seeking to proceed with a breach of contract action must establish (1) the existence of a contract, including its essential terms (2) breach of a duty imposed by the contract and (3) resultant damages. Sampathachar v. Federal Kemper Life Assurance Co., No. 05-3433, 2006 U.S. App. LEXIS 14979 at *6 (3d Cir. June 16, 2006); Ware v. Rodale Press, 322 F.3d 218, 225 (3d

Cir. 2003).

In this case, while we find the allegations of the complaint adequate to outline the general terms of the purported contract and the defendants' alleged breach thereof, the complaint is silent as to whether the benefits outlined therein were extended to plaintiff when she was hired. In addition, we frankly cannot conceive how Plaintiff would be able to prove any resultant damages given that she admittedly received a \$1,000 merit raise and continues to be employed by Whitman. Nevertheless, since dismissal is warranted only if it is *certain* that no relief can be granted under any set of facts which could be proved, we shall likewise deny the motion to dismiss as to this claim at this time to permit Plaintiff the opportunity to develop a record on the measures of her damages and into the circumstances surrounding the making of the alleged contract. Defendants are free to revisit this claim by filing a motion for summary judgment following the close of discovery, if it appears appropriate.

3. Interference with Existing Contractual Relationship

In Count VII, Plaintiff alleges that by their actions as discussed above, Defendants Sullivan, Blackburn and Lewandowski negligently and/or intentionally interfered with her existing contractual relationship with Whitman Council.

It is axiomatic that to state a claim for interference with existing contractual relationships under Pennsylvania state law,

a plaintiff must plead the following elements:

(1) the existence of a contractual or prospective contractual relation between the complainant and a third party;

(2) purposeful action on the part of the defendant, specifically intended to harm the existing relation, or to prevent a prospective relation from occurring;

(3) the absence of privilege or justification on the part of the defendant; and

(4) the occasioning of legal damage as a result of the defendant's conduct.

CGB Occupational Therapy v. RHA Health Services, Inc., 357 F.3d 375, 384 (3d Cir. 2004); Interinvest, Inc. v. Bloomberg, L.P., 340 F.3d 144, 168, n.10 (3d Cir. 2003). Thus, a tortious interference claim does not accrue until, at least, the plaintiff suffers injury (i.e., "actual legal damage") as a result of the defendant's conduct. CGB, supra.

It must be emphasized that the tort (interference with contractual relation) is an intentional one: the actor is acting as he does for the purpose of causing harm to the plaintiff; negligent action that interferes with another's ability to contract is not enough. People's Mortgage Co., Inc. v. Federal National Mortgage Association, 856 F.Supp. 910, 935 (E.D.Pa.1994), citing, *inter alia*, Glenn v. Point Park College, 441 Pa. 474, 481, 272 A.2d 895, 899 (1971).

In reviewing Count VII, we find that it too adequately pleads a cause of action for intentional interference with an

existing contractual relation, to wit, the plaintiff's employment with the Whitman Council. To be sure, the gravamen of Plaintiff's complaint is the efforts which Messrs. Blackburn, Lewandowski and Sullivan undertook to have her terminated from her position as the Council's executive director. Thus, notwithstanding that it may be difficult for Plaintiff to prove actual legal damage as a result of the defendants' actions, we shall permit this claim to go forward but again only to the extent that it involves the intentional tort. Plaintiff's claim for negligent interference with contractual relations is dismissed as not cognizable under Pennsylvania law.

4. Misrepresentation

In Count VIII, Plaintiff complains that the defendants negligently and/or intentionally "concealed or otherwise misrepresented certain material facts, including facts involving the true reason for actions defendants were taking in regard to plaintiff's employment and monies spent on investigating plaintiff." (See, e.g., First Am. Compl., ¶88). As noted by the late Judge Waldman in Puchalski v. School District of Springfield, 161 F.Supp.2d 395 (E.D.Pa. 2001):

To sustain a negligent misrepresentation claim, a plaintiff must show a misrepresentation of a material fact; that the representor either knew of the misrepresentation, made the misrepresentation without knowledge of its truth or falsity, or made the representation under circumstances in which he ought to have known of its falsity; that the representor intended the representation to induce plaintiff to act on it; and that he was injured by acting in justifiable

reliance on the misrepresentation. ... To sustain an intentional misrepresentation claim, a plaintiff must show a misrepresentation; a fraudulent utterance; that defendants intended to induce action by him; and that he justifiably relied on the misrepresentation and was injured as a proximate result.

Puchalsky, at 404, citing Pacitti v. Macy's, 193 F.3d 766, 778 (3d Cir. 1999); Weisblatt v. Minnesota Mut. Life Ins. Co., 4 F.Supp.2d 371, 377 (E.D.Pa. 1998); Gibbs v. Ernst, 538 Pa. 193, 647 A.2d 882, 890 (1994) and Banks v. Jerome Taylor & Assocs., 700 A.2d 1329, 1333 (Pa. Super. 1997). A misrepresentation is considered to be "material" if the party would not have entered into an agreement or transaction but for the misrepresentation. Eigen v. Textron Lycoming Reciprocating Engine Division, 2005 Pa. Super. 141, 874 A.2d 1179, 1186 (2005); Lind v. Jones, Lang, LaSalle Americas, Inc., 135 F.Supp.2d 616, 620 (E.D.Pa. 2001).

In this case, while Plaintiff conclusorily alleges that the defendants "misrepresented certain material facts, including facts involving the true reason for actions [they] were taking in regard to plaintiff's employment and monies spent on investigating plaintiff," that "[d]efendants intended that by these representations plaintiff would be induced to act," that "[d]efendants knew or should have known of the falsity of the representations and that plaintiff and others would rely on the representations," and that "[d]efendants had a duty to disclose the misrepresentation and failed to exercise reasonable care" resulting in damage to the plaintiff, she fails to aver either

justifiable reliance or what transaction or agreement she was induced to enter because of the defendants' purported misrepresentations. Even after closely scrutinizing the amended complaint and giving Plaintiff the benefit of the broadest interpretation possible, we simply cannot discern that Plaintiff was coerced into entering any such transaction or undertaking any action as the result of the defendants' having allegedly misrepresented the true reason for their investigation into her employment. Accordingly, Count VIII of the first amended complaint must also be dismissed.

5. Conspiracy

Finally, Count IX of the first amended complaint seeks to recover damages from the defendants under the state law theory of civil conspiracy. Of course, in order to state a cause of action for civil conspiracy under Pennsylvania law, a complaint must allege the existence of all elements necessary to such a cause of action. Burnside v. Abbott Laboratories, 351 Pa. Super. 264, 277, 505 A.2d 973, 980 (1985). Thus, it is incumbent upon the plaintiff to plead and prove that "two or more persons combined or agreed with intent to do an unlawful act or to do an otherwise lawful act by unlawful means." Rutherford v. Presbyterian-University Hospital, 417 Pa. Super. 316, 612 A.2d 500, 507 (1992) quoting Thompson Coal Co. v. Pike Coal Co., 488 Pa. 198, 211, 412 A.2d 466, 472 (1979). Furthermore, a conspiracy is not

actionable until "some overt act is done in pursuance of a common purpose or design...and actual legal damage results." Id., quoting Baker v. Rangos, 229 Pa. Super. 333, 351, 324 A.2d 498, 506 (1974). See Also, Puchalski, 161 F.Supp.2d at 410.

Here, Ms. DeGiovanni-Sharp contends that the defendants' actions "were a conscious, intentional and concerted effort to gain from misleading OHCD and the Whitman community despite defendants' knowledge that such would cause economic harm," and that "[b]eginning at least as early as 2004, the defendants reached a common agreement and engaged in a conspiracy to commit unlawful or tortious acts, or to use unlawful or tortious means to commit acts not themselves illegal, and did commit those acts or use those means as described herein, in furtherance of the common agreement and conspiracy." Although these averments are extremely vague, in reviewing them in conjunction with all of the other factual allegations contained in the complaint, we can extrapolate that the plaintiff is trying to allege that the defendants conspired to unlawfully discriminate against her. Once again, in light of the liberal pleading requirements of the Federal Rules of Civil Procedure and given that we cannot say with absolute certainty that the plaintiff will not be able to make out a cause of action under this theory, we shall permit this claim to survive. The motion to dismiss Count IX is denied.

For all of the reasons set forth above, the defendants'

motion to dismiss is granted in part and denied in part. An order follows.

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

JANET M. DEGIOVANNI SHARP	:	CIVIL ACTION
	:	
vs.	:	
	:	NO. 05-CV-4297
WHITMAN COUNCIL, INC.,	:	
ROBERT C. BLACKBURN,	:	
HENRY LEWANDOWSKI and	:	
MICHAEL SULLIVAN	:	

ORDER

AND NOW, this 3rd day of August, 2006, upon consideration of Defendants' Motion to Dismiss and/or for Summary Judgment and Plaintiff's Response thereto, it is hereby ORDERED that the Motion for Summary Judgment is GRANTED and Judgment in favor of Defendants and against Plaintiff is hereby entered as a matter of law on Counts I, II and III of the Plaintiff's First Amended Complaint.

IT IS FURTHER ORDERED that Defendants' Motion to Dismiss is GRANTED IN PART and DENIED IN PART and Counts IV and VIII of the First Amended Complaint are DISMISSED with prejudice as are those portions of Counts V and VII which endeavor to state claims for false light invasion of privacy and negligent interference with contractual relations.

IT IS STILL FURTHER ORDERED that Defendants shall file their Answer to the remaining Counts of the First Amended Complaint within fifteen (15) days of the entry date of this Order.

BY THE COURT:

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