

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

CEDRIC McMILLIAN	:	CIVIL ACTION
	:	No. 99-2949
v.	:	
	:	
PHILADELPHIA NEWSPAPERS, INC., et al.	:	

O'Neill, J.

August , 1999

MEMORANDUM

Plaintiff Cedric McMillian, a former school bus driver for the School District of Philadelphia, brings this action against the City of Philadelphia Police Department; the School District of Philadelphia; and the Philadelphia Newspapers, Inc., owner of the Philadelphia Daily News, and several Daily News reporters. Presently before the Court is the motion of the City of Philadelphia to dismiss all of the state law claims against it on the basis of governmental immunity. For the reasons set forth below, the motion will be granted.

BACKGROUND

The allegations are as follows.¹ Plaintiff served as a school bus driver for the School District of Philadelphia as an employee of Robinson Bus Service, a contractor of the School District. On March 10, 1998, plaintiff was assigned to a long route of nearly two hours or more that served approximately 30 eleven- to thirteen-year-olds. The route was known as one on which the children could be unruly and even violent, and the School District ordinarily supplied a “bus matron” to preserve order on the bus. On that particular afternoon, however, the School District failed to supply a bus matron and the children began misbehaving soon after the bus left the school. Plaintiff was unable to get the children under control. Plaintiff flagged down a police officer traveling in the opposite direction for assistance and the officer stated that he would turn his car around and help, but he did not. Plaintiff also radioed many times to the School District and to the police for help, but no help came for over an hour. During this period, plaintiff was threatened and assaulted by the children. (See Compl. ¶¶ 11-23.)

When the police and school officials finally responded and pulled the bus over, they failed to investigate what had happened. Instead, and despite having no evidence that

¹ In considering defendant’s Rule 12(b)(6) motion, I accept as true the well-pleaded factual allegations in the complaint and construe them in the light most favorable to plaintiff. Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d Cir. 1993). I am not required to accept allegations that amount to mere legal conclusions or “bald assertions” without any factual support. See, e.g., id.; Morse v. Lower Merion School Dist., 132 F.3d 902, 906 (3d Cir. 1997). I may grant the motion only if I determine that plaintiff may not prevail under any set of facts that may be proven consistent with his allegations. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). “The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.” In re Burlington Coat Factory Litigation, 114 F.3d 1410, 1420 (3d Cir. 1997), quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

plaintiff had been using drugs or alcohol, the School District Supervisor at the scene ordered the police to arrest plaintiff for driving under the influence (DUI), and the police did so. The City of Philadelphia then held a news conference in which officials stated that plaintiff had been arrested for DUI. The Daily News subsequently reported that plaintiff took the students on a “drug crazed, ninety minute ride home” and that the bus was a “runaway.” These reports were published and republished locally, nationally, and even internationally. (See Compl. ¶¶ 24-32.) Defendants failed to publicize the facts that plaintiff had tried at length to get help before his arrest, had been abused by the students, and took drug tests after his arrest showing that he had no drugs or alcohol in his system. (See Compl. ¶¶ 50-53, 56.) As a result of defendants’ false and distorted reports, plaintiff was accused of being in violation of the substance abuse policies of his employer and of the state’s requirements for commercial drivers. He was also subjected to widespread, on-going public ridicule and suffered severe harm to his professional and personal reputation and severe emotional distress.

Plaintiff has asserted a federal civil rights claim under 42 U.S.C. § 1983 against the City of Philadelphia (“the City”) based on the allegations that he was defamed and illegally arrested by City employees (i.e., police officers). Plaintiff has also asserted claims for tortious interference with contract and for violation of his rights under the state constitution, Article I, §§ 1, 26, and 28, against the City. Plaintiff asserts state tort claims for defamation and “interference with prospective economic advantage” against all the defendants. As to

each claim, plaintiff seeks compensatory and punitive damages.

1. The State Tort Claims

The City moves for dismissal of all the state law claims asserted against it.² The City argues that these claims sound in intentional torts from which it is immune under Pennsylvania’s Political Subdivision Tort Claims Act (“Tort Claims Act” or “Act”), 42 Pa. C.S.A. §§ 8541-42. To the extent plaintiff’s claims sound in negligence, the City further argues, they are not within the specific, limited categories of negligent acts for which the City may be held liable under the Tort Claims Act. In response, plaintiff appears to concede that the City cannot be held liable for the intentional torts of its employees, but argues that his allegations sound in negligence. He identifies as alleged negligent conduct by the police (1) the failure of the police officer he flagged down to help him; (2) his subsequent arrest; and (3) the allegedly defamatory statements made by the police about the arrest.

With certain specified exceptions, the Tort Claims Act immunizes “local agencies”

² Plaintiff’s pleadings and brief indicate his belief that the City of Philadelphia is responsible and potentially liable for the conduct of School District employees. The City, however, maintains that it and the School District are independent “for purposes of litigation” and that the City has appeared in this action only on behalf of the Police Department. (See City’s Brief at notes 2-3.) Different counsel has, in fact, entered an appearance for the School District.

If plaintiff really intends to maintain that the City of Philadelphia is legally responsible for the actions of School District employees, then he may file a supplemental brief and the Court will reconsider the question. Otherwise, the Court will proceed on the assumption that the School District and the City are separate legal entities and that only the School District can be called to answer for the conduct of School District employees. Thus, in assessing the viability of the claims against the City for purposes of deciding the instant motion, I will consider only the alleged conduct of police officers and other City employees, and not that of School District employees.

from liability for “any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person.” 42 Pa. C.S.A. § 8541. A local agency will be liable for an injury caused by it or its employees only if (1) the injurious conduct would have given rise to liability under common or statutory law but for governmental immunity and (2) the injury was caused by the negligent acts of the local agency or of an employee acting within the scope of his or her office or duties with respect to certain specific categories. Id. at § 8542. These categories are the operation of motor vehicles; the care, custody and control of real property, personal property, and animals; and the maintenance of utility service facilities, streets, trees, street lighting, traffic controls, and sidewalks. § 8542(b). “Negligent acts” for which a local agency may be held responsible do not include acts by an employee that constitute a “crime, actual fraud, actual malice, or willful misconduct”; only the offending employees themselves may be held liable for such conduct. See §§ 8542(a)(2); 8550. It is well-established that the City is a “local agency” within the meaning of these provisions. See Weirerman v. City of Philadelphia, 785 F. Supp. 1174, 1178 (E.D. Pa. 1992), citing Walsh v. City of Philadelphia, 585 A.2d 445, 450 (Pa. 1991).

Despite his protests to the contrary, plaintiff’s factual allegations seem to sound in willful or at least knowing misconduct by police officers and/or other unidentified employees of the City, as do the legal claims he asserts for “Malicious Defamation,” “Tortious Interference with Contract,” and “Interference With Prospective Economic Advantage.” (See

Compl., Counts I, II, and V.) The City is clearly immunized from liability for damages for any such claims under § 8541. Compare, e.g., Agresta v. City of Philadelphia, 694 F. Supp. 117, 123 (E.D. Pa. 1988) (City immunized from arrestee’s claims of false arrest, malicious prosecution, and intentional infliction of emotional distress because such claims were intentional torts involving “actual malice” or “wilful misconduct”); Five Star Parking v. Philadelphia Parking Authority, 662 F. Supp. 1053 (E.D. Pa. 1986) (claims of defamation and tortious interference with business relationships against municipal parking authority barred by the Tort Claims Act).

Even if plaintiff’s allegations are construed to sound in negligence, however, clearly none of the alleged conduct falls within the categories set forth in § 8542. The only category that plaintiff identifies as being applicable is that concerning negligent operation of motor vehicles “in the possession or control of the local agency.” § 8542(b)(1). Plaintiff does not allege, however, that he was harmed by the negligent operation of a vehicle by a police officer or other City employee. He complains that City employees (specifically, police officers) failed to come to his aid, unjustifiably arrested him, issued defamatory statements about him to the press, and failed to publicize exculpatory facts. None of this conduct is even remotely related to the operation of a motor vehicle by a City employee or to any of the other specified categories of § 8542. Accordingly, any state law claims against the City of Philadelphia based on these allegations must be dismissed as barred by the City’s immunity under § 8541.

2. The State Constitutional Claim

The City moves for dismissal of plaintiff's claim under the Pennsylvania Constitution on grounds that it too is barred by the Tort Claims Act. Neither party has addressed this claim as distinct from the state tort claims. Yet it raises several interesting, difficult questions as to whether violations of the state constitution may support private damages actions in Pennsylvania³ and/or whether a state constitutional claim could be barred by the Tort Claims Act.⁴ I need not decide these questions, however, because it is clear as a

³ Neither the Pennsylvania Supreme Court nor any other Pennsylvania court appears to have directly addressed the question of whether a violation of the state constitution may support a cause of action for damages, whether against a local government entity or any other defendant. The highest courts of many other states have considered the question, with varying results. Some courts have allowed such actions in some circumstances, frequently analogizing to Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) (recognizing action for damages directly under Fourth Amendment against federal officers who conducted illegal search and seizure). See e.g., Binette v. Sabo, 710 A.2d 688 (Conn. 1998) (recognizing private damages action directly under the state's constitution for alleged illegal search and seizure). The courts generally appear to be proceeding cautiously, frequently limiting their holdings to the precise constitutional right or protection at issue. See generally, e.g., id. at 700; cf. Shields v. Gerhart, 658 A.2d 924 (Vt. 1995) (denying direct private cause of action for damages under state constitution for alleged due process and free speech violations on grounds that plaintiff had adequate alternative remedies under state administrative procedures); Kelly Property Dev., Inc. v. Town of Lebanon, 627 A.2d 909 (Conn. 1993) (similar).

⁴ At least one court has held that the Tort Claims Act cannot bar a state constitutional claim, reasoning that, one, the Act is concerned only with tort claims and, two, "it would be peculiar if the legislature could abrogate rights protected by the Constitution." Coffman v. Wilson Police Dept., 739 F. Supp. 257, 266 (E.D. Pa. 1990) (rejecting municipality's argument that the Tort Claims Act barred plaintiff's claims under Article I, §§ 1, 8, and 26 of the Pennsylvania Constitution based on allegations that police failed to properly respond to plaintiff's complaints of abuse by her spouse and of his violations of protective orders, leading to plaintiff's severe injury at his hands). This position seems to beg the question of whether an individual may sue directly under the state constitution for money damages in the first place. Several other courts appear to have reached the opposite conclusion. See Crighton v. Schuylkill County, 882 F. Supp. 411, 416 (E.D. Pa. 1995) (state constitutional claims asserted

threshold matter that plaintiff fails to state a claim for violation of his rights under the state constitution.

Plaintiff invokes §§ 1, 26, and 28 of Article I of the Pennsylvania Constitution.⁵ Section 1 sets forth the “inherent rights of mankind” in language essentially unchanged from that of the Declaration of Rights (Article I) of Pennsylvania’s 1776 state constitution. I find it unlikely, to say the least, that it could be held to support a private cause of action for money damages against government entities under any circumstances, even in the event that other provisions of the state constitution were held to allow such actions. Accord Shields v. Gerhart, 658 A.2d 924 (Vt. 1995) (considering nearly identical provision in Vermont’s

by corrections officers against County based on allegations of a pervasively hostile work environment were barred by the Tort Claims Act because they did not concern negligence falling within the enumerated categories of § 8542), citing Agresta v. Goode, 797 F. Supp. 399, 409 (E.D. Pa. 1992) (assuming arguendo that plaintiff could state legally cognizable claims against the City of Philadelphia for deprivation of her rights under the state constitution resulting from City employees’ alleged conspiracy to deprive plaintiff of wrongful death action, such claims were barred by the Tort Claims Act).

⁵ These sections provide as follows:

§ 1. Inherent rights of mankind

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

§ 26. No discrimination by Commonwealth and its political subdivisions

Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right.

§ 28. Prohibition against denial or abridgment of equality rights because of sex

Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual.

constitution). Sections 26 and 28 prohibit discrimination by the Commonwealth and its political subdivisions and discrimination on the basis of sex, respectively. Even assuming these proscriptions might be enforced by means of actions for money damages against local government entities, there are simply no allegations in plaintiff's complaint to support a claim of discrimination under either § 26 or § 28. Accordingly, plaintiff's state constitutional claims must be dismissed.

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ORDER

AND NOW this day of August, 1999, upon consideration of the motion of defendant City of Philadelphia to dismiss the state law claims against it for failure to state a claim upon which relief can be granted, it is hereby ORDERED that the motion is GRANTED and plaintiff's state law claims against the City are DISMISSED.

THOMAS N. O'NEILL, JR. J.