

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

SCOTT R. WINFREE,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
TOKAI FINANCIAL SERVICES, INC., HARRISS A.	:	NO. 99-2970
BUTLER III, TREDYFFRIN TOWNSHIP, HAROLD	:	
M. DUTTER JR., and LES NERI,	:	
Defendants.	:	

Memorandum and Order

YOHN, J.

March 1, 2000

Scott Winfree (“plaintiff”) was questioned by Harold M. Dutter, Jr. (“Dutter”), and Les Neri (“Neri”), officers for Tredyffrin Township (“Tredyffrin”), about embezzlement of funds from plaintiff’s employer, Tokai Financial Services (“Tokai”). Shortly thereafter, plaintiff was suspended from work. He was then terminated in a letter signed by Harriss A. Butler III (“Butler”), Tokai’s Vice President of Human Resources.

Plaintiff filed this action alleging that defendants violated his federal constitutional and statutory rights as well as his state law rights. Dutter, Neri, and Tredyffrin (“township defendants”) have filed a motion pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss the complaint for failure to state a claim. Butler and Tokai (“corporate defendants”) also have filed a Rule 12(b)(6) motion to dismiss the complaint in part. The motions will be treated together in this memorandum and the following order.

The complaint enumerates six claims. For the reasons that follow, each motion will be granted in part and denied in part.

BACKGROUND

Plaintiff is an African-American male who was hired by Tokai on March 7, 1994. *See* Complaint ¶¶ 10-11 (Doc. No. 1). Most recently, plaintiff worked for Tokai as an Accounts Payable Administrator, producing checks to pay the accounts payable. *See id.* ¶ 16. At a time unstated, blank checks were stolen from plaintiff's section, with which funds in excess of \$1,000,000 were embezzled from Tokai. *See id.* ¶¶ 17-22.

On May 21, 1998, plaintiff arrived early at work as requested by "his superiors." *See id.* ¶ 24. His superiors then, "in league with Dutter and Neri," interrogated, accused, and arrested plaintiff for theft. *See id.* ¶ 25. Dutter and Neri continued to imprison plaintiff, and to accuse and to demean plaintiff because of his race. *See id.* ¶ 26. Plaintiff begged to be released, asserted his innocence, and "begged to be permitted to take a polygraph." *See id.* ¶ 28. All told, plaintiff was seized "for over three hours." *See id.* ¶ 52.

On May 21, 1998, corporate defendants suspended plaintiff from work with pay. *See id.* ¶ 29. On May 28, 1998, plaintiff took a polygraph examination. *See id.* ¶ 30. Based on the test, plaintiff could "be eliminated as a suspect in the thefts in question from [Tokai]." *See id.* The results were "immediately reported" to Tokai, but not to plaintiff. *See id.* ¶ 31. By letter dated June 16, 1998, Butler informed plaintiff that he was terminated "effective immediately for failure to comply with the policies and procedures relating to your position in the Accounting

Department.” *See id.* Ex. A.

Plaintiff filed a complaint in six counts, as follows: Count I alleges a violation of 42 U.S.C. § 1981; Count II alleges a violation of plaintiff’s “right to liberty, right to be free from seizure, and his right to his employment, in violation of the Fourteenth Amendment to the Constitution and 42 U.S.C. § 1983”; Count III alleges a violation of Title VII; Count IV alleges a violation of the Pennsylvania Human Relations Act, 43 Pa. C.S.A. § 955; Count V alleges the tort of false imprisonment; and Count VI alleges the tort of defamation. Tredyffrin, Dutter and Neri filed a motion to dismiss the action. Tokai and Butler filed a partial motion to dismiss the action. Each motion seeks dismissal pursuant to Rule 12(b)(6). I will consider them together.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) permits a court to dismiss all or part of an action for “failure to state a claim upon which relief can be granted.” *See* Fed. R. Civ. P. 12(b)(6). In ruling on a Rule 12(b)(6) motion, the court must accept as true all well-pleaded allegations of fact, and any reasonable inferences that may be drawn therefrom, in the plaintiff’s complaint and must determine whether “under any reasonable reading of the pleadings, the plaintiff may be entitled to relief.” *Nami v. Fauver*, 82 F.3d 63, 65 (3d Cir.1996) (citations omitted). “The complaint will be deemed to have alleged sufficient facts if it adequately put the defendant on notice of the essential elements of the plaintiff’s cause of action.” *Nami*, 82 F.3d at 65.

Although the court must construe the complaint in the light most favorable to the plaintiff, it need not accept as true legal conclusions or unwarranted factual inferences. *See*

Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Claims should be dismissed under Rule 12(b)(6) only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of [its] claim which would entitle [it] to relief." *Id.*; *Nami*, 82 F.3d at 65.

DISCUSSION

I. VIOLATION OF § 1981

Section 1981 provides:

(a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) [T]he term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

See 42 U.S.C. § 1981 (1994).

Plaintiff's § 1981 claim is that "deprivation of plaintiff's constitutional rights by the defendants was substantially motivated by plaintiff's race in falsely accusing him of embezzlement from Tokai and by terminating his employment." *See* Compl. ¶ 43. The claim is asserted against all defendants, and its viability will be explained as to each defendant.

A. Tredyffrin Township

Plaintiff alleges that Tredyffrin is liable for the acts of its officers. “[A] municipality is subject to direct liability only where ‘execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury.’” *Parkway Garage, Inc. v. City of Philadelphia*, 5 F.3d 685, 692 (3d Cir. 1993) (quoting *Monell v. Department of Soc. Svcs.*, 436 U.S. 658, 694 (1978)). A municipality also may be liable for its failure to train or discipline officers if the municipality “was deliberately indifferent to the rights of persons with whom [its officers] came into contact.” *See Bonenberger v. Plymouth Twp.*, 132 F.3d 20, 25 (3d Cir. 1997 (citing *City of Canton v. Harris*, 489 U.S. 378, 385 (1989))). Deliberate indifference is shown only where a plaintiff demonstrates supervisory knowledge of the particular offense, or of a prior pattern of similar offenses, and inaction under circumstances which could indicate approval thereof. *See Bonenberger*, 132 F.3d at 25.¹

¹ There is a conflict among the Courts of Appeals as to whether a municipality, as a state actor, may be sued directly under § 1981. *See Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 731 (1989) (holding, prior to the 1991 amendments adding § 1981(b) & (c), that § 1983 provides the exclusive cause of action against municipalities for damages caused by violations of § 1981 rights), *and compare Dennis v. County of Fairfax*, 55 F.3d 151, 156 n.1 (4th Cir. 1995) (stating that amendments to § 1981 did not change the law that state actors could only be sued for § 1981 violations under § 1983 and its causation requirements), *with Federation of African Amer. Contractors v. City of Oakland*, 96 F.3d 1204, 1214-15 (9th Cir. 1996) (holding that § 1981, as amended in 1991, creates a cause of action against state actors independent from that in § 1983 but subject to causation requirements). The Third Circuit has not answered this question. *See Jones v. School Dist. of Philadelphia*, No. 98-2154, 99 U.S. Appeals Lexis 32193, at *31-32 (3d Cir. Dec. 10, 1999); *Hopp v. Pittsburgh*, 194 F.3d 434, 440 (3d Cir. 1999). For two reasons, neither do I.

First, even the Ninth Circuit, despite finding that § 1981 supports an independent cause of action, concluded that municipal liability still was subject to the “policy or custom requirement”

Here, no facts are alleged that would support municipal liability. There is no averment that Dutter and Neri acted pursuant to a policy or custom of Tredyffrin in accusing plaintiff of a crime based on race. There is no accusation that Tredyffrin was deliberately indifferent to this alleged offense or a pattern of similar offenses. Simply put, there is no allegation which even permits an inference of municipal custom, policy or indifference to race-based criminal investigation. Therefore, I will grant the motion to dismiss Count I as to Tredyffrin.

B. Officers Dutter and Neri

Plaintiff alleges that Dutter and Neri accused plaintiff of embezzlement on the basis of his race, detained plaintiff for several hours while they interrogated him about the embezzlement, ignored his requests to terminate the interrogation, and “demeaned plaintiff with racial epithets.” *See* Compl. ¶ 26.

Plaintiff sues Dutter and Neri in their official capacities. *See* Compl. ¶ 33. A judgment against a public official in their official capacity renders the government for which they work

of *Monell*, 436 U.S. at 694, and *Jett*, 491 U.S. at 735-36. *See Federation of African American Contractors*, 96 F.3d at 1214-15. Moreover, courts in this district agree that the § 1983 causation requirements apply to § 1981 actions against municipalities. *See, e.g., McHenry v. Pennsylvania State Sys. of Higher Educ.*, 50 F. Supp. 2d 401, 415-16 (E.D. Pa. 1999) (holding that § 1983 is exclusive source of remedy against state actor for § 1981 violation); *Meachum v. Temple University*, 42 F. Supp. 2d 533, 539-40 & n.7 (E.D. Pa. 1999) (applying § 1983 causation standards without deciding exclusivity question); *Stinson v. Pennsylvania State Police*, No. 98-1706, 1998 U.S. District Lexis 17649, at *8 n.3 (E.D. Pa. Nov. 2, 1998); *Poli v. SEPTA*, No. 97-6766, 1998 U.S. Dist. Lexis 9935, at *35-39 (E.D. Pa. July 7, 1998); *Brady v. Cheltenham Twp.*, No. 97-4655, 1998 U.S. Dist. Lexis 4519, at *10-11 & n.15 (E.D. Pa. Apr. 9, 1998). Second, the parties do not dispute the proposition. Therefore, I will assume without deciding that municipal liability under § 1981 is subject to the causation requirements of § 1983 actions.

liable. See *Kentucky v. Graham*, 473 U.S. 159, 166 & n.12 (1985); *Brandon v. Holt*, 469 U.S. 464, 471-72 (1985); *Satterfield v. Borough of Schuylkill Haven*, 12 F. Supp. 2d 423, 432 (E.D. Pa. 1998). Because local governments may be sued directly, official capacity suits are unnecessary. See *Kentucky v. Graham*, 473 U.S. at 166; *Mancini v. Lester*, 630 F.2d 990, 991 n.3 (3d Cir. 1980); *Satterfield*, 12 F. Supp. 2d at 432. Because a suit against Dutter and Neri in their official capacities is effectively a suit against Tredyffrin, and because there are no allegations in the complaint sufficient to support direct liability of Tredyffrin, Count I will be dismissed as to Dutter and Neri insofar as it is against them in their official capacities.

Plaintiff also sues Dutter and Neri in their individual capacities. If a police officer falsely accuses and falsely arrests a citizen on the basis of race, courts in this circuit have found that the citizen may state a cause of action for denial of the “equal benefits of the law” under § 1981. See, e.g., *Hall v. Pennsylvania State Police*, 570 F.2d 86, 91 (3d Cir. 1978) (holding that complaint of race-based criminal investigation stated a claim for denial of “full and equal benefit of . . . laws and proceedings for the security of persons”); *Mahone v. Waddle*, 564 F.2d 1018, 1028 (3d Cir. 1977) (finding that an allegation of arrest without probable cause and conviction by perjured testimony stated such a claim); *Conway v. City of Philadelphia*, No. 96-8112, 1997 U.S. Dist. Lexis 3095, at *10 (E.D. Pa. Mar. 20, 1997) (holding that false arrest and prosecution based on race stated such a claim). Plaintiff alleges sufficiently that, because of his race, he was accused of a crime and detained for several hours without probable cause. Thus, I will deny defendants’ Rule 12(b)(6) motion as to officers Dutter and Neri in their individual capacities.

C. Tokai Financial Services

Plaintiff has alleged that he is an African-American male who was qualified to perform his job but was terminated from employment on the basis of his race and was replaced by an employee not within his protected class. *See* Compl. ¶ 10-15. Plaintiff further alleges that corporate defendant's explanation for termination is pretextual because there are no policies or procedures which he violated. *See id.* ¶ 32. Plaintiff has pleaded facts which, if proven, state a § 1981 claim of race-based discrimination in employment under § 1981. *See Stewart v. Rutgers*, 120 F.3d 426, 432 (3d Cir. 1997) (applying *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) framework to § 1981 action). Therefore, I will deny the motion to dismiss Count I as to Tokai.

D. Harriss Butler

Plaintiff has alleged that Butler suspended him with pay on May 21, 1998, and notified him by letter dated June 16, 1998, that he was terminated. *See* Compl. ¶¶ 15 & 29. Because Butler took part in the termination, plaintiff has stated a sufficient claim of race-based discrimination in employment against Butler. *See Kohn v. Lemmon Co.*, No. 97-3675, 1998 U.S. Dist. Lexis 1737, at **14-15 (E.D. Pa. Feb. 19, 1998) (explaining that personal liability may be proper if supervisor "authorized, directed or participated in the alleged discriminatory conduct") (citation omitted); *see also Stewart* 120 F.3d at 432. Therefore, I will deny the motion to dismiss Count I as to Butler.

II. VIOLATION OF § 1983

Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

See 42 U.S.C. § 1983 (1994).

Plaintiff alleges that each defendant “deprived plaintiff of his right to liberty, his right to be free from seizure, and his right to his employment.” Compl. ¶ 45. Plaintiff states a claim under § 1983 only if he demonstrates that he was deprived of a federally protected interest by a person acting under color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988); *Abbott v. Latshaw*, 164 F.3d 141, 146 (3d Cir. 1998).

A. Tredyffrin Township

A municipality may only be liable for violation of rights secured by the Constitution and laws of the United States where the violation is the consequence of a custom or policy of the municipality, including the deliberate indifference to known violations of citizens’ rights. *See supra*, Part I.A. A municipality may not be vicariously liable for the acts of its agents or employees. *See Monell*, 436 U.S. at 674.

The complaint is devoid of any factual allegation concerning a custom, policy, or deliberate indifference to race-based criminal investigation or arrest. No claim is stated upon

which relief may be granted. Accordingly, I will grant the motion to dismiss Count II as to Tredyffrin.

B. Officers Dutter and Neri

Plaintiff has alleged that despite his request to be released, Dutter and Neri detained, demeaned and accused plaintiff of embezzlement without cause and on the basis of his race. *See* Compl. ¶¶ 26-28.

A suit against Dutter and Neri in their official capacities is a suit against Tredyffrin. *See supra*, Part I.B. Because Tredyffrin may not be directly liable under the allegations of the complaint, neither may it be so for the conduct of Dutter and Neri. Thus, as against Dutter and Neri in their official capacities, I will dismiss Count II.

Insofar as Count II is against Dutter and Neri in their individual capacities, it does state a claim on which relief may be granted. Persons act “under color of state law” if they are state actors for whom the state is responsible or if they exercise “power ‘possessed by virtue of state law and made possible only because the wrongdoer is clothed with authority of state law.’” *See Abbott*, 164 F.3d at 146 (quoting *West*, 487 U.S. at 49) (citation omitted)). Generally, police officers are state actors acting under color of state law. *See Abbott*, 164 F.3d at 146.

Plaintiff must also demonstrate the deprivation of a federally protected right or interest. *See Abbott*, 164 F.3d at 146.

Plaintiff’s complaint states a claim for unreasonable seizure in violation of the Fourth and Fourteenth Amendments. The protections of the Fourth Amendment have been incorporated

against the states by the Fourteenth Amendment. *See Mapp v. Ohio*, 367 U.S. 643, 655 (1981); *Karnes v. Skrutski*, 62 F.3d 485, 488 (3d Cir. 1995). The Fourth Amendment protects citizens from unreasonable seizures by the government. *See California v. Hodari D.*, 499 U.S. 621, 624 (1989). A seizure is a restraint of liberty by show of force or authority. *See Florida v. Bostick*, 501 U.S. 429, 434 (1991). A seizure occurs when a reasonable person in the position of the plaintiff would not feel free to decline a request of a government agent or to terminate an encounter with a government agent. *See Bostick*, 501 U.S. at 436; *INS v. Delgado*, 466 U.S. 210, 218 (1985).

Plaintiff has alleged that Dutter and Neri accused him of a crime because of his race, demeaned him with racial epithets, and denied his requests to leave. *See Compl.* ¶¶ 26-28. In the light most favorable to the plaintiff, these allegations demonstrate facts which, if proved, could support a finding that plaintiff had submitted to a show of authority and thus had been seized within the meaning of the Fourth Amendment. *See Hodari D.*, 499 U.S. at 626; *Bostick*, 501 U.S. at 437.

Only unreasonable seizures are impermissible. *See United States v. Sharpe*, 470 U.S. 675, 682 (1985); *Skinner v. Railway Labor Execs. Ass'n*, 489 U.S. 602, 619 (1989). The reasonableness of a seizure depends on the circumstances and nature of the seizure. *See Skinner*, 489 U.S. at 619; *Baker v. Monroe Twp.*, 50 F.3d 1186, 1192 (3d Cir. 1995).

Police officers are permitted a limited seizure for investigatory purposes where they have a reasonable suspicion based on objective facts that “criminal activity may be afoot.” *See Sharpe*, 470 U.S. at 682; *Terry v. Ohio*, 392 U.S. 1, 30 (1968); *United States v. Kithcart*, 134 F.3d 529, 532 (3d Cir. 1998). Such an investigatory stop should last only as long as necessary

for the officers to “diligently pursue a means of investigation that was likely to confirm or dispel their suspicions quickly.” *See Sharpe*, 470 U.S. at 686. An investigatory stop of extended duration or scope may become a de facto arrest. *See Sharpe*, 470 U.S. at 683-87. Such a de facto arrest is a Fourth Amendment seizure. *See Hodari D.*, 499 U.S. at 624. A de facto, warrantless arrest is permissible if, when made, “the officers had probable cause to make it.” *See Beck v. Ohio* 379 U.S. 89, 91 (1964); *Kithcart*, 134 F.3d at 531.

Plaintiff has alleged that Dutter and Neri accused and detained him on the basis of his race and that they said as much. He has alleged that he begged to be released and that he was detained for “several hours.” He further alleged that he protested his innocence and expressed a willingness to submit to a polygraph examination. If these facts and reasonable inferences therefrom are proved, a jury could find that the officers exceeded the scope and duration necessary to dispel or confirm suspicions of criminal activity afoot and also that probable cause was lacking to arrest plaintiff. Thus, plaintiff’s complaint states a claim against Dutter and Neri as individuals for unreasonable seizure in violation of plaintiff’s Fourth and Fourteenth Amendment rights. Therefore, I will deny the motion to dismiss Count II as to Dutter and Neri in their personal capacities.

C. Tokai Financial Services

Tokai may be liable under § 1983 for a violation of plaintiff’s rights only if it is shown that Tokai was acting under color of state law. *See West*, 487 U.S. at 48; *Abbott v. Latshaw*, 164 F.3d at 146. In *Abbott*, the Third Circuit held that the plaintiff stated a claim for deprivation of

property without due process against a private citizen who hired a constable to seize property and who accompanied the constable during the seizure. *See Abbott*, 164 F.3d at 147-48. The complaint stated that the constable acted “at the instance and request of” the private defendant and “depicted joint action by” the constable and private defendant. *See id.* at 148.

This complaint is distinguishable from *Abbott*. Here, plaintiff alleges only that his “superiors at Tokai, in league with Dutter and Neri, willfully aided and abetted the investigation of the embezzlement, by arresting plaintiff.” *See* Compl. ¶ 25. Unlike the complaint in *Abbott*, plaintiff does not allege the instigator of the relationship, the place of seizure, mutual presence at any time, or agreement between Dutter and Neri and anyone at Tokai. The complaint is comprised only of conclusory allegations, which need not be accepted as true.

Moreover, the complaint says only that plaintiff’s “superiors” were “in league with Dutter and Neri.” A private employer may not be held vicariously liable under § 1983 for the acts of its employees. *See Sanders v. Sears, Roebuck & Co.*, 984 F.2d 972, 975-76 (8th Cir. 1993) (holding that private employer was not vicariously liable for conduct of security guard); *Rojas v. Alexander’s Dept. Store*, 924 F.2d 406, 408 (2d Cir. 1990) (same); *Hargrove v. City of Philadelphia*, No. 93-5760, 1995 U.S. Dist. Lexis 14367, at *9 (E.D. Pa. Oct. 4, 1995) (holding private University not vicariously liable for security officers conduct); *Messa v. Foley*, No. 92-1887, 1993 U.S. Dist. Lexis 4519 (E.D. Pa. Apr. 9, 1993). Plaintiff has failed to plead any policy, custom, or decision by a policy-maker which would be attributable to Tokai. Because Tokai was not acting under color of state law, and because no custom, policy or deliberate indifference is alleged, I will grant the motion to dismiss Count II as to Tokai.

D. Harriss Butler

Plaintiff must allege that a defendant was personally involved in the deprivation of plaintiff's rights in order to state a claim for relief under § 1983. *See Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1294 (3d Cir. 1997). Plaintiff alleges only that Butler suspended him and signed a letter terminating his employment. *See* Compl. ¶¶ 15 & 29. There is no allegation that Butler conspired with Dutter and Neri to take any action toward plaintiff. There is no allegation that Butler accused or arrested plaintiff in any fashion. Nor has plaintiff alleged a legitimate claim of entitlement to employment which is of constitutional magnitude. *See Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Webber v. Boeing Vertol*, No. 87-2072, 1987 U.S. Dist. Lexis 5932 (E.D. Pa. July 6, 1987). Plaintiff alleges no facts which if proved would state a claim against Butler for infringement of any protected right under § 1983. Thus, I will grant the motion to dismiss Count II as to Butler.

III. TITLE VII

Count III was brought only against the corporate defendants and alleges race-based discrimination in the terms and conditions of employment in violation of Title VII. Corporate defendants moved to dismiss Count III as to Butler, and plaintiff has consented to do so. *See* Pl.'s Mem. of Law in Opp'n to Defs.' Mot. at Part IV (Doc. 10). Therefore, I will grant the motion to dismiss Count III as to Butler.

IV. VIOLATION OF THE PENNSYLVANIA HUMAN RELATIONS ACT

Plaintiff brought Count IV against Butler and Tokai for violation of state rights secured by the Pennsylvania Human Relations Act, 43 Pa. C.S.A. § 955. Defendant objected that Butler is not an employer within the meaning of the statute. *See* Defs.' Mot. to Dismiss at 10-11 (Doc. No. 5). Plaintiff did not respond. Pursuant to Local Rule of Civil Procedure 7.1(c), a motion to dismiss may be granted in the absence of a timely response. *See* E.D. Pa. Loc. R. Civ. P. 7.1(c). Because the claim concerns the scope of a state law and because plaintiff has not pursued the claim, I will grant defendants' motion to dismiss Count IV as to Butler without answering the question whether it could properly be maintained if pursued.

Defendants have argued that Count IV should be dismissed as to Tokai to the extent that it seeks punitive damages. Plaintiff has agreed. Therefore, I will grant the motion to dismiss count IV insofar as it seeks punitive damages from Tokai.

V. TORT OF FALSE IMPRISONMENT

To state a claim for false imprisonment in Pennsylvania, a plaintiff must allege that he was harmed because defendant detained him unlawfully. *See Renk v. City of Pittsburgh*, 641 A.2d 289, 293 (Pa. 1994). Plaintiff has alleged that he was falsely arrested and imprisoned for several hours by all defendants.

A. Tredyffrin Township

Under the Political Subdivision Tort Claims Act, municipalities are immune from damages due to injuries to persons or property caused by their agencies or employees. *See* 42 Pa. C.S.A. § 8541. Municipal immunity is waived under § 8542 to the extent the agency would otherwise be liable for a narrow subset of negligent acts by its agents or employees. *See* 42 Pa. C.S.A. §8542. The tort of false imprisonment is not one of the negligent acts for which immunity is waived *See id.* Consequently, I will grant the motion to dismiss Count V as to Tredyffrin.

B. Officers Dutter and Neri

Plaintiff has alleged that despite the fact that he “begged to be released,” Dutter and Neri, with an FBI Agent present, accused him of a crime and interrogated him for several hours without cause and because of his race.

In the context of a police arrest, false arrest is false imprisonment. *See Walker v. Spiller*, 54 F. Supp. 2d 421, 427 (E.D. Pa. 1999). The key inquiry in such circumstances is whether the officers had probable cause to detain the plaintiff. *See id.*; *Gatter v. Zappile*, 67 F. Supp. 2d 515, 519 (E.D. Pa. 1999). Plaintiff alleges that he was imprisoned without cause and that the officers did not respond when he “begged to be released.” In the light most favorable to plaintiff and in the light of reasonable inferences to be drawn from that allegation, plaintiff has averred sufficient facts to survive a Rule 12(b)(6) motion to dismiss the claim. I will deny the motion to dismiss

Count V as to Dutter and Neri in their personal capacities. Because Tredyffrin is immune from suit for damages sought in this count, I will grant the motion to dismiss Count V as to Dutter and Neri in their official capacities.

C. Tokai Financial Services

In Count V, plaintiff alleges that Tokai is liable to him for the state law tort of false imprisonment. In response, Tokai asserts that the Pennsylvania Workmen’s Compensation Act (“PWCA”) provides the exclusive remedy against an employer for injuries occurring within the course and scope of employment. *See* 77 Pa. C.S.A. § 481(c); *Poyser v. Newman*, 522 A.2d 548, 550 (Pa. 1987). Tokai argues that this is true even as to intentional torts. *See Poyser*, 522 A.2d at 551. Plaintiff does not dispute this general proposition. Instead, plaintiff argues that there is an exception to the exclusivity of the remedy where the “injury is caused by the act of a third person intended to injure the employe because of reasons personal to him, and not directed against him as an employe or because of his employment.” *See* 77 Pa. C.S.A. § 411(1); *Vosburg v. Connelly*, 591 A.2d 1128, 1130-31 (Pa. Super. Ct. 1991).

The Third Circuit has discerned in the PWCA “a broad intent to pre-empt common law torts ‘in matters arguably connected with work-related injuries.’” *See Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 160 (3d Cir. 1999) (citation omitted). The *Durham* court noted that other courts had permitted actions “where the injury arose from harassment ‘personal in nature and not part of the proper employer-employee relationship.’” *See id.* at 160. In *Durham*, the court noted that the sexual harassment of the plaintiff was arguably directed at her as an employee because it

arose out of her success in employment. *See id.* The Third Circuit predicted that Pennsylvania courts would find that the PWCA pre-empted common law torts for sexual harassment because it is an understood problem in the workplace. *See id.* at 160 n.16.

Racial harassment is no less an understood problem. In this matter, the only factual averments surrounding plaintiff's imprisonment allege race-based animus in investigating an employee for theft from the workplace. These allegations both are "arguably directed at plaintiff as an employee" and demonstrate that plaintiff was treated as he was on the basis of class characteristics, not personal animus. *See Hicks v. Arthur*, 843 F. Supp. 949, 958 (E.D. Pa. 1994) (granting motion to dismiss tort claim as barred by PWCA where allegations demonstrated race-based animus and not personal animus). *But see Price v. PECO*, 790 F. Supp. 97, 100 (E.D. Pa. 1992) (denying motion to dismiss because sexual harassment is not within scope of employment). Because employer liability for injuries suffered by workers in the course and scope of employment is preempted by the PWCA, I will grant the motion to dismiss Count V as to Tokai.

D. Harriss Butler

There is no allegation that Butler played any role in the detainment of plaintiff or even that he aided and abetted the township defendants in detaining plaintiff. No allegation or inference therefrom, if proved, would support liability of Butler. Therefore, I will grant the motion to dismiss Count V as to Butler.

VI. TORT OF DEFAMATION

In Pennsylvania, defamation is proved by showing: 1) a defamatory communication; 2) about the plaintiff; 3) published by defendant to a third party; 4) who understands that the defamatory meaning pertains to plaintiff; thus 5) causing harm to the plaintiff. *See* 42 Pa. C.S.A. § 8343; *Mansmann v. Tuman*, 970 F. Supp. 389, 396 (E.D. Pa. 1997); *Miketic v. Baron*, 675 A.2d 324, 327 (Pa. Super. Ct. 1996). Plaintiff alleges that his termination was understood by others to mean that he had embezzled funds from Tokai.

A. Tredyffrin Township

As explained in Part V.A, *supra*, Tredyffrin is immune from damage claims for injuries caused by its agents or employees for all but a narrow subset of negligent acts or omissions. *See* 42 Pa. C.S.A. §§ 8541-42. Defamation is not an injury as to which immunity is waived. *See* § 8542. Therefore, I will grant the motion to dismiss Count VI as to Tredyffrin.

B. Officers Dutter and Neri

Plaintiff says that his termination was the publication of a defamatory statement. Dutter and Neri did not terminate plaintiff's employment, nor could they. Moreover, there is no allegation that Dutter or Neri made any statements to anyone other than plaintiff. Further, the complaint alleges that the exculpatory results of a polygraph test were sent "immediately" to

Tokai. Because plaintiff has not alleged that Dutter and/or Neri made any defamatory statement, much less published such to a third party, I will grant the motion to dismiss Count VI as to Dutter and Neri.

C. Tokai Financial Services and Harriss Butler

Plaintiff alleges that his termination was the publication of a defamatory statement. Defendant argues that plaintiff relies only on the fact of termination as proof of publication. Neither party addresses the question whether the act of terminating an employee alone may be sufficient to show publication of a defamatory statement.² Because neither party has addressed that question, because the question concerns the scope of state law, and because resolution of the question would benefit from fuller factual and legal development, I will offer no conclusion. Instead, I will deny the motion to dismiss Count VI as to Tokai and Butler.

² Case law suggests that mere conduct may rise to publication of a defamatory statement. *See, e.g., Bennet v. Norban*, 151 A.2d 476, 478 (Pa. 1959) (holding that, under circumstances, act of seizure and search in public place was publication of defamatory communication); *Berg v. Consolidated Freightways, Inc.*, 421 A.2d 831, 834 (Pa. Super. Ct. 1980) (suggesting in dicta that termination of employee for theft without verbal communication could support a claim for defamation). Nonetheless, I find no case holding that termination alone may constitute publication. Moreover, there are cases suggesting that plaintiff must demonstrate that defendant is responsible for the third-party's understanding that the theft and termination are related. *See, e.g., Jones v. Johnson & Johnson*, No. 94-7473, 1997 U.S. Dist. Lexis 13050, at *26 (E.D. Pa. Aug. 22, 1997) (granting summary judgment in absence of evidence that rumors surrounding employee dismissal originated with the defendant); *Jackson v. J.C. Penney Co.*, 616 F. Supp. 233, 235 (E.D. Pa. 1985) (holding that fact that employees knew of termination for theft was not a result of communication by defendant); *Smith v. Greyhound*, 614 F. Supp. 558, 562-63 (W.D. Pa. 1984) (holding that mere fact that people knew of termination for theft did not prove publication by defendant).

Defendants argue also that they are not liable for publication of a defamatory statement because they possess a privilege to publish such statements in letters of termination to employees.³ An absolute privilege immunizes a defendant from liability regardless of motive or situation. *See Miketic*, 675 A.2d at 327. An absolute privilege may be abused, however, by communication to unauthorized parties. *See id.* A conditional privilege also is available for a defamatory statement if made “on a proper occasion, from a proper motive, in a proper manner, and based upon reasonable cause.” *See id.* at 329. A conditional privilege may be abused by a statement made with improper motive, among other things. *See id.*

Defendant notes that in Pennsylvania, statements in a letter of termination given only to the terminated employee are absolutely privileged against a claim of defamation. *See Yetter v. Ward Trading*, 585 A.2d 1022, 1024 (Pa. Super. Ct. 1991); *Strange v. Nationwide Mutual Ins. Co.*, 867 F. Supp. 1209, 1221 (E.D. Pa. 1994). In this action, however, the publication alleged is not that of content in a letter of termination but rather the act of termination itself. Defendant does not address the question of what privilege applies to the actual dismissal. Because resolution of the question would benefit from fuller factual development and legal argument, I will deny the motion to dismiss Count VI as to Butler and Tokai without prejudice to the right of defendants to raise the issues on a motion for summary judgment.

³ Plaintiff in its Opposition to defendants’ motion suggests an alternative theory of defamation: that corporate defendants defamed plaintiff in communicating with township defendants. *See* Doc. No. 10 at Part VI. Even under notice pleading standards, a complaint must provide fair notice. Here, plaintiff articulated a specific claim of defamation based on the injury to his reputation caused by his dismissal. He now suggests a different publication unrelated to any reputational harm averred or statement alleged. It will not be considered in the absence of an amended complaint containing proper factual allegations.

CONCLUSION

Plaintiff has sued Tredyffrin, Officers Dutter and Neri, Tokai Financial Services, and Butler for injuries arising out of an alleged criminal investigation and the subsequent termination of his employment. Each defendant moved to dismiss the complaint in whole or in part. After consideration of the complaint as drafted and the motions, briefs in support thereof, and briefs in opposition thereto, I will grant the motions in part and deny the motions in part.

Because there are no allegations that Tredyffrin caused a deprivation of rights secured under § 1981 and § 1983, I will dismiss Counts I and II as to Tredyffrin. Because Tredyffrin is immune from the tort damage claims in the complaint, I will dismiss Counts V and VI. Consequently, I will grant the motion to dismiss all counts of the complaint as against Tredyffrin Township.

Because liability of officers Dutter and Neri in their official capacities would impermissibly render Tredyffrin liable for damages, all counts will be dismissed as to Dutter and Neri in their official capacities. Because Dutter and Neri did not publish any defamatory statement by terminating plaintiff's employment, I will dismiss Count VI as to Dutter and Neri in their individual capacities. I will deny the motion to dismiss Counts I, II and V as to Dutter and Neri as individuals.

As to Tokai, Count II will be dismissed for lack of any averment of causation and Count V will be dismissed because the Pennsylvania Workmen's Compensation Act provides the exclusive remedy for those injuries. I will deny the motion to dismiss Counts I and VI as to Tokai.

As to Harriss Butler, I will dismiss Counts II and V for lack of any allegation of individual participation. Count III will be dismissed as to Butler by consent and Count IV will be dismissed as to Butler for lack of opposition. I will deny the motion to dismiss Counts I and VI as to Butler.

An appropriate order follows.

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

SCOTT WINFREE,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
TREDYFFRIN TOWNSHIP, HAROLD M. DUTTER,	:	NO. 99-2970
LES NERI, TOKAI FINANCIAL SERVICES, and	:	
HARRISS A. BUTLER, III,	:	
Defendants.	:	

Order

And now, this day of March, 2000, upon consideration of the Motion to Dismiss the Complaint and Memorandum of Law in Support thereof of defendants Tredyffrin Township, Harold Dutter and Les Neri (Doc. No. 6), the Partial Motion to Dismiss the Complaint and Memorandum of Law in Support thereof of defendants Tokai Financial Services and Harriss Butler III (Doc. No. 5), plaintiff's opposition to each of the foregoing (Doc. Nos. 10 & 12), and the defendants' respective Reply Memoranda in support of their motions (Doc. Nos. 11 & 13), it is hereby ORDERED that:

- 1) The motions to dismiss Count I are GRANTED as to Tredyffrin Township and Officers Dutter and Neri in their official capacities and otherwise are DENIED;
- 2) The motions to dismiss Count II are GRANTED as to Tredyffrin Township, Officers Dutter and Neri in their official capacities, Tokai Financial Services, and Harriss Butler and otherwise are DENIED;
- 3) The motion to dismiss Count III is GRANTED as to Harriss Butler;
- 4) The motion to dismiss Count IV is GRANTED in full as to Harriss Butler and is GRANTED insofar as the complaint seeks punitive damages from Tokai Financial

Services;

5) The motions to dismiss Count V are GRANTED as to Tredyffrin Township, Officers Dutter and Neri in their official capacities, Tokai Financial Services, and Harriss Butler and otherwise are DENIED; and

6) The motions to dismiss Count VI are GRANTED as to Tredyffrin Township and Officers Dutter and Neri in all capacities and otherwise are DENIED.

William H. Yohn, Jr., Judge