

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

STEVEN R. KRENZEL,	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	NO. 00-CV-4782
	:	
SOUTHEASTERN PENNSYLVANIA	:	
TRANSPORTATION AUTHORITY,	:	
JOHN LEARY, PATRICK NOWAKOWSKI,	:	
and JOHN DOE,	:	
	:	
Defendants.	:	

MEMORANDUM

BUCKWALTER, J.

January 12, 2001

Presently before this Court is a Motion to Dismiss on behalf of defendants, Southeastern Pennsylvania Transportation Authority (“SEPTA”), John Leary (“Leary”) and Patrick Nowakowski (“Nowakowski”) (collectively “Defendants” and Leary and Nowakowski are sometimes referred to collectively as “Individual Defendants”).

Plaintiff Steven Krenzel brought this suit under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (“Section 1983”); the First and Fourteenth Amendments to the U.S. Constitution; the Pennsylvania Whistleblower Act, 43 P.S. §§ 1421, *et seq.* (the “Whistleblower Act”); and the Pennsylvania Metropolitan Transportation Authorities Act, 74 Pa.C.S. §§ 1701, *et seq.* (the “Enabling Act”) alleging that he was unlawfully terminated from his job and is entitled to injunctive and monetary relief such as reinstatement, compensatory and punitive damages. For the reasons set forth below, Defendants’ Motion to Dismiss will be granted in part and denied in part.

I. BACKGROUND

Plaintiff was an employee of SEPTA where he oversaw elevator maintenance until August 21, 2000 when he was discharged for gross negligence. This misconduct allegedly arose in conjunction with litigation where SEPTA was held liable for serious injury to a child when an escalator malfunctioned (hereafter "Hall" case). In 1994 and 1996, Plaintiff had written internal memoranda to SEPTA indicating that these same escalators required better maintenance. These memos were produced at the Hall trial and contributed to the jury's decision to hold SEPTA liable and to make a substantial award for the Halls. Moreover, Plaintiff alleges that SEPTA did not initially ask him to produce his memoranda for discovery in this litigation and that when SEPTA did produce the documents they were altered. These discovery practices were among those that prompted a contempt of court proceeding following the Hall case and that ultimately led to a fine against SEPTA.

SEPTA cites these incidents and Plaintiff's alleged mishandling of the investigation immediately following the Hall accident as examples of Plaintiff's gross negligence and hence the just cause for his termination.

SEPTA notified Plaintiff by memorandum on May 30, 2000 that it had initiated discharge proceedings against him. On August 14, 2000, Nowakowski held an informal termination hearing. Plaintiff requested the presence of his attorney and a non-lawyer designee. Both requests were denied. Plaintiff was discharged on August 21, 2000.

Plaintiff appropriately sought a post-termination hearing and the case was assigned to Judge Louis G. Hill for review. However, on October 30, 2000, Judge Hill indicated by letter that he would not be able to conduct the hearing and the responsibility would be

reassigned. According to a letter dated November 16, 2000, another judge was assigned to this matter. The Court is not aware of any additional proceedings.

II. LEGAL STANDARD

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides that, in response to a pleading, a defense of "failure to state a claim upon which relief can be granted" may be raised by motion. Fed. R. Civ. P. 12(b)(6). In considering a motion to dismiss under Rule 12(b)(6), a court must take all well pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. See Jenkins v. McKeithen, 395 U.S. 411, 421 (1969). The court must only consider those facts alleged in the complaint in considering such a motion. See ALA v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994). The plaintiff must provide sufficient information to outline the elements of the claim, or to allow inferences to be drawn that these elements exist. Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d. Cir. 1993). A complaint should be dismissed if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

III. DISCUSSION

A. Count I: Section 1983 Due Process Claim

1. SEPTA Liability

Plaintiff does not allege a viable due process claim. In his complaint he alleges that the pre-termination proceedings, specifically the informal pre-termination hearing, violated his due process rights. Due process demands that a government employee with a property

interest in his job¹ receive at least an informal pre-termination hearing coupled with the possibility of a post-termination hearing before he can be properly discharged. See Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 544-7 (1985). More specifically, the pre-termination hearing must merely place Plaintiff on notice and afford him the opportunity to respond. See Id. at 544-7.

Plaintiff does not allege that SEPTA failed to place him on notice or that he was denied the opportunity to respond to the dismissal charges. Instead, Plaintiff asserts in his complaint that the “procedure used by Defendants leading up to the termination of Plaintiff’s employment ... specifically the denial of an opportunity to be represented by counsel...” violates due process. The right to be represented by counsel and the right to have a witness present are not constitutionally protected rights in this context. Id. Therefore, Defendants did not fail to provide Plaintiff with due process in the pre-termination proceedings.

In Plaintiff’s responses to Defendants’ motion to dismiss, Plaintiff also argues that the alleged delay in receiving a post-termination hearing violates his due process rights and renders the pre-termination hearing insufficient to afford him due process. However, as this allegation was not made in the complaint, it is not properly before the Court at this time. Moreover, this allegation does not affect the adequacy of the pre-termination hearing because Loudermill only requires that a the post-termination hearing could be available to Plaintiff. Therefore, Plaintiff’s claim is insufficient to support a claim for a due process violation.

1. This requirement is not disputed in these proceedings.

2. Individual Defendants' Liability

Plaintiff contends that Individual Defendants are liable under § 1983 for due process violations. Defendants respond that they are protected by qualified immunity and the claims against them should be dismissed. The Court agrees with the Defendants but finds for them on different grounds.

A critical prong in evaluating qualified immunity is the existence of an underlying due process violation. As the Court dismissed all due process violations alleged in the complaint *supra*, further analysis of the argument for qualified immunity is unnecessary. The claims against Individual Defendants in Count I should be dismissed.

B. Count I: Section 1983 Retaliation Claim

Plaintiff alleges that his termination resulted in part from the impact of two internal memorandum that he wrote in 1994 and 1996. Defendants challenge this claim on the grounds that the authoring of these documents was too remote to establish a causal link between these memoranda and his termination. Remoteness has not been circumscribed with such precision as to require dismissal of this claim, and the question of whether a causal link between the actual writing of the memoranda and the termination should not be decided without allowing for discovery. Therefore, the motion to dismiss this claim is denied and the retaliation claim may proceed on the grounds that Plaintiff's internal memoranda from 1994 and 1996 motivated his dismissal.

The same analysis applies to liability of Individual Defendants. Discovery is required before their liability for this claim can be evaluated.

Plaintiff also alleges a retaliation claim on the grounds that his dismissal resulted from the testimony and document production in the Hall matter. Defendants do not challenge this claim in their motion to dismiss and it is also may proceed for further litigation.

C. Count II: Whistleblower Act Claim

Plaintiff asserts a claim under the Pennsylvania Whistleblower Act on two grounds. First, Plaintiff argues that his testimony at the contempt hearings constituted a report to an appropriate authority regarding waste or wrongdoing by his employer. This Court disagrees.

Plaintiff did not make a “report” under the statute because he did not initiate the disclosure of information that was damaging to SEPTA and that allegedly prompted his termination. Although not explicitly required by the statute, employee initiative has been inferred by other courts in this circuit and I follow their lead. See, e.g., Rankin v. City of Philadelphia, 963 F.Supp. 463, 476 (E.D. Pa. 1997) (citing Lutz v. Springettsbury Township, 667 A.2d 251, 254 (Pa. Commw. Ct. 1995) to illustrate the court’s reluctance to find a “report” where it was not initiated by the employee).

As the court conducting the contempt hearing required Plaintiff to testify and placed him under oath for the purpose of compelling his honest testimony, Plaintiff exercised no independent initiative in making the allegedly damaging disclosures and therefore did not provide a report as required by the statute. This claim fails as to the testimony offered at the contempt hearing.

Plaintiff’s second ground for asserting a claim under this act is that his memoranda, when consulted in the Hall litigation, constituted whistleblowing. However, as discussed *supra* with respect to the retaliation claim, the act of writing the memoranda did not

prompt his termination. Instead, the impact of those documents came in a different context. Again as Plaintiff lacked initiative in producing the memoranda for the Hall case, a claim under the Whistleblower Act is inappropriate. So, Count II should be dismissed with prejudice in its entirety as to all Defendants.

D. Count III: Enabling Act Claim

Plaintiff asserts a claim for injunctive relief, specifically for reinstatement, under the authority of the Enabling Act. However, this Act does not create an independent cause of action under which Plaintiff can sue. Moreover, this claim is moot as SEPTA reinstated Plaintiff and provided Plaintiff with the injunctive relief he sought. Therefore, this Count is dismissed with prejudice.

E. Counts I and III: Punitive Damages against Individual Defendants

Plaintiff asserts that he is entitled to punitive damages from Individual Defendants under Counts I and III. As the due process claim in Count I and the entire claim in Count III have been dismissed by this Court, only the retaliation claim in Count I must be addressed. Plaintiff alleges sufficient facts in his complaint to justify discovery as to possible punitive damages with regard to Individual Defendants. So, this claim may proceed and the motion to dismiss a request for punitive damages is denied.

IV. CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss is GRANTED in part and DENIED in part.

An appropriate order follows.

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

STEVEN R. KRENZEL,	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	NO. 00-CV-4782
	:	
SOUTHEASTERN PENNSYLVANIA	:	
TRANSPORTATION AUTHORITY,	:	
JOHN LEARY, PATRICK NOWAKOWSKI,	:	
and JOHN DOE,	:	
	:	
Defendants.	:	

ORDER

AND NOW, this 12th day of January, 2001, upon consideration of Defendants' Motion to Dismiss (Docket No. 3), Plaintiff's responses thereto (Docket Nos. 5, 6, 8) and Defendants' Reply (Docket No. 10), it is hereby ORDERED that Defendants' motion is GRANTED in part and DENIED in part.

More specifically, it is ORDERED that,

1. The Motion to Dismiss the § 1983 due process claims in Count I is GRANTED as to all defendants.
2. The Motion to Dismiss the § 1983 retaliation claim in Count I is DENIED as to all defendants.
3. The Motion to Dismiss Count II is GRANTED in its entirety.
4. The Motion to Dismiss Count III is GRANTED in its entirety.

5. The Motion to Dismiss the claim for punitive damages under Count III and the due process claim under Count I is GRANTED. The Motion to Dismiss a claim for punitive damages under the § 1983 retaliation claim of Count I is DENIED as to Individual Defendants.

BY THE COURT:

RONALD L. BUCKWALTER, J.