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

LINDA KELLEHER	)	
	)	Civil Action
v.	)	
	)	No. 01-3386
CITY OF READING, ET AL.	)	

MEMORANDUM

Padova, J. **September , 2001**

Plaintiff Linda Kelleher ("Kelleher") is the clerk of the City Council for Reading, Pennsylvania. Kelleher brings suit against the City of Reading ("City"), Mayor Joseph Eppihimer ("Eppihimer"), the Mayor's assistant Kevin Cramsey ("Cramsey"), and City Councilman Jeffrey Waltman ("Waltman") for various actions related to the publication of allegedly private e-mails and disciplinary actions taken against her. Plaintiff brings claims pursuant to 42 U.S.C. § 1983, 42 U.S.C. § 1985(3), the Pennsylvania state constitution, and Pennsylvania common law.

Defendants move to dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons that follow, the Court grants in part and denies in part said Motion. Specifically, the Court dismisses Counts 5, 6, 7, and 8. Count 9 is dismissed as to Defendants Eppihimer and Waltman. Counts 1, 2, 3, and 4, may go forward. Count 9 may go forward as to Defendant Cramsey only.

I. Legal Standard

A claim may be dismissed under Federal Rule of Civil Procedure 12(b)(6) only if the plaintiff can prove no set of facts in support of the claim that would entitle her to relief. ALA, Inc. v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994). The reviewing court must consider only those facts alleged in the complaint and accept all of the allegations as true. Id.

II. Discussion

A. § 1983-First Amendment claims (Counts 1 and 2)

In Counts 1 and 2, Plaintiff asserts a § 1983 claim pursuant to the First Amendment. Count 1 is brought against the City and the individual defendants in their official capacities. Count 2 is brought against the individual defendants in their individual capacities. Plaintiff alleges that Defendants retaliated against her for her position regarding an ordinance to abolish the Reading Area Water Authority, and for her role in setting up a public information debate on a municipal trash collection referendum. Compl. ¶¶ 14-15, 22-24. The retaliation alleged includes spreading rumors, refusing to issue a parking pass, refusing to allow a pay increase, publicizing private e-mail communications, and publicizing other allegedly private information. Defendants argue that Counts 1 and 2 should be dismissed because none of the retaliatory conduct complained of has caused Plaintiff to suffer a deprivation of a constitutional right.

To maintain a claim under § 1983, the Plaintiff must establish a deprivation of a federally protected right. Parratt v. Taylor, 541 U.S. 527, 535 (1981). In this case, Plaintiff alleges a deprivation of her free speech rights under the First Amendment. In a First Amendment retaliation case, the alleged retaliatory action itself does not have to infringe on a federally protected right independent of the First Amendment. See Perry v. Sinderman, 408 U.S. 593, 596-98 (1972) ("[E]ven though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, . . . [the government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests . . . his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited."). "[T]he First Amendment . . . protects from . . . even an act of retaliation as trivial as failing to hold a birthday party for a public employee . . . when intended to punish her for exercising her free speech rights." Rutan v. Republican Party of Illinois, 497 U.S. 62, 76 n.8 (1990). With respect to the Defendants' failure to promote, a public employer may not retaliate against an employee for engaging in constitutionally protected conduct even in the absence of an established property right to the employment. Mt. Healthy Board of

Education v. Doyle, 429 U.S. 274, 283 (1977) ("Even though [plaintiff] could have been discharged for no reason whatever, and had no constitutional right to a hearing prior to the decision not to rehire him, he may nonetheless establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms.") Therefore, the fact that the alleged retaliation itself may not rise to the level of the deprivation of a federally protected right does not defeat Plaintiff's claim of First Amendment retaliation under § 1983. The Court denies the motion to dismiss Counts 1 and 2.

B. §1983-conspiracy claims (Counts 3 and 4):

In Counts 3 and 4 of the Complaint, Plaintiff asserts a claim pursuant to 42 U.S.C. § 1983 alleging that Defendants conspired to interfere with her First Amendment right to free speech. Defendants contend that these claims must be dismissed for the same reasons that the § 1983 claims in Counts 1 and 2 should be dismissed. As explained above, the First Amendment is the constitutional right implicated, and Plaintiff's pleadings are sufficient to maintain the § 1983 claims. Accordingly, the Court denies the motion to dismiss counts 3 and 4.

C. § 1985(3) claims (Count 5)

In Count 5, Plaintiff asserts a claim pursuant to 42 U.S.C. § 1985(3) alleging that Defendants conspired to interfere with her

First Amendment right to free speech. Section 1985(3) provides in relevant part as follows:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(3) (1994).

A Section 1985(3) conspiracy claim must be pled with factual specificity. Robinson v. McCorkle, 462 F.2d 111, 113-14 (3d Cir.), cert. denied, 409 U.S. 1042 (1972). Plaintiff must plead the following elements: (1) a conspiracy; (2) for the purpose of depriving any person or class of person of equal protection of the laws or equal privileges and immunities; (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States." United Bhd. of Carpenters & Joiners of America, Local 610, AFL-CIO v. Scott, 463 U.S. 825, 829 (1983); Barnes Found. v. Township of Lower Merion, 242 F.3d 151, 162 (3d

Cir. 2001). To satisfy the second element, Plaintiff must allege that the Defendants were motivated by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus. . . ." Griffin v. Breckinridge, 403 U.S. 88, 102 (1971).

Plaintiff has not alleged the existence of a racial or otherwise class-based invidiously discriminatory animus, and in fact argues that such animus is not required.[1] The failure to plead racial or otherwise class-based, invidiously discriminatory animus is fatal to a claim under § 1985(3). Davis v. Township of Hillside, 190 F.3d 167, 171 (3d Cir. 1999) ("Because plaintiff does not allege that the officers colluded with the requisite 'racial, or . . . otherwise class-based, invidiously discriminatory animus,' . . . the district court correctly dismissed the claim.") (citations omitted). Count 5, therefore, fails to state a claim upon which relief may be granted. Accordingly, the Court dismisses Count 5.

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[1]Plaintiff relies on two cases for the proposition that a § 1985(3) claim may proceed in the absence of the allegation of a racial or otherwise invidiously discriminatory animus. In neither case, however, was the court faced with this issue. See Suppan v. Dadonna, Civil Action No.95-5181, 1996 U.S. Dist. LEXIS 15219, at *3 (E.D. Pa. Oct. 15, 1996) (seeking partial summary judgment for failure to promote on the ground that no such promotions had been made during defendants' tenure), rev'd and remanded, 203 F.3d 228 (3d Cir. 2000), and O'Connor v. Barnes, 97-CV-1489 (LEK/DNH), 1998 U.S. Dist. LEXIS 3386, at *1 (N.D.N.Y. Mar. 18, 1998) (seeking dismissal for failure to establish municipal liability). Furthermore, in Suppan, the Plaintiffs' § 1985(3) claim did involve allegations of equal protection violations as well as First Amendment violations. Suppan, 1996 U.S. Dist. LEXIS 15219, at *2.

D. Right to privacy claims under the Pennsylvania Constitution (Counts 6 and 7)

In Counts 6 and 7, Plaintiff brings claims for violations of her right to privacy under the Pennsylvania state constitution. Pa. Const. art. 1, § 7. The Supreme Court of Pennsylvania has not ruled on the issue of whether there is a private cause of action under this section of the Pennsylvania Constitution. However, the federal courts in this Circuit that have considered the issue have concluded that there is no such private cause of action for damages under the Pennsylvania Constitution. Dooley v. City of Philadelphia, 153 F. Supp. 2d 628, 663 (E.D. Pa. 2001); Sabatini v. Reinstein, Civil Action No. 99-2393, 1999 U.S. Dist. LEXIS 12820, at *6 (E.D. Pa. Aug. 18, 1999); Holder v. City of Allentown, Civil Action No. 91-240, 1994 U.S. Dist. LEXIS 7220, at *11 (E.D. Pa. May 19, 1994); Lees v. West Greene Sch. Dist., 632 F. Supp. 1327, 1335 (W.D. Pa. 1986); Pendrell v. Chatham Coll., 386 F. Supp. 341, 344 (W.D. Pa. 1974). This Court concurs with those federal courts that have considered the issue and therefore dismisses Counts 6 and 7.

E. Invasion of privacy claims (Counts 8 and 9)

In Counts 8 and 9, Plaintiff asserts claims for invasion of privacy relating to the publication of various e-mails, as well as the publication of information regarding disciplinary proceedings brought against her. Plaintiff alleges that the Defendants printed, copied, and distributed the e-mails. Plaintiff also alleges that Defendants improperly reported to the press

disciplinary actions taken against her. Count 8 asserts these claims against the City and the individual defendants in their official capacities. Count 9 asserts the claims against the individual defendants in their individual capacities. Defendants claim that the counts should be dismissed as to all the defendants because Plaintiff had no reasonable expectation of privacy as to her e-mail. Defendants also contend that the Tort Claims Act bars the suit against the City and all the individual defendants in their official capacities. Mayor Eppihimer and Councilman Walter further assert that they are protected from suit by high official immunity. The Court will consider each of these arguments in turn.

1. Tort Claims Act (Count 8)

The Tort Claims Act provides that "no local agency shall be liable 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. Cons. Stat. § 8541. The City of Reading is entitled to dismissal on Count 8 because the suit against it is barred by the Political Subdivision Tort Claims Act. Ballas v. City of Reading, Civ.A.No.00-CV-2943, 2001 WL 73737, at *10 (E.D. Pa. Jan. 26, 2001).

Defendants also claim that the individuals in their official capacities are also entitled to immunity under the Tort Claims Act. The Court agrees. In a suit against a government official in his official capacity, "the real party in interest . . . is the

governmental entity and not the named official. . . ." Smith v. School Dist. of Philadelphia, 112 F. Supp. 2d 417, 424 (E.D. Pa. 2000) (citing Hafer v. Melo, 502 U.S. 21, 25 (1991)). In this case, then, where the suit itself is barred against the city by the operation of the Tort Claims Act, the suit is also barred against the participating officials in their official capacities.[2] Smith, 112 F. Supp. 2d at 425. Therefore, the Court dismisses Count 8 in its entirety.

2. High official immunity (Count 9)

Defendants Eppihimer and Waltman assert that they are entitled to absolute immunity from suit. Pennsylvania common law recognizes the doctrine of absolute immunity for "high public officials." Smith, 112 F. Supp. 2d. at 425. This doctrine was first articulated in the context of defamation suits based on statements from officials in the course of their official duties and within the scope of their authority. Id. However, the doctrine also extends outside of the context of defamation. Ballas v. City of Reading, Civil Action No. 00-CV-2943, 2001 U.S. Dist. LEXIS 657, at *33-35 (E.D. Pa. Jan. 25, 2001) (retaliatory discharge, loss of

[2]The Court's consideration of the Tort Claims Act here is limited to Count 8, against the individual defendants in their official capacities. As Plaintiff points out, the Tort Claims Act does not apply to acts constituting a crime, actual fraud, actual malice or willful misconduct. 42 Pa. Cons. Stat. Ann. §§ 8545, 8550 (West 2000); Katzenmoyer v. City of Reading, Civil Action No.00-5574, 2001 U.S. Dist. LEXIS 6644, at *24 (E.D. Pa. May 21, 2001); Ballas v. City of Reading, Civil Action No.00-2943, 2001 U.S. Dist. LEXIS 657, at *32-33 (E.D. Pa. Jan. 25, 2001).

consortium); Smith, 112 F. Supp. 2d 417, 425-26 (invasion of privacy, intentional infliction of emotional distress); Holt v. Northwest Pa. Training P'ship Consortium, Inc., 694 A.2d 1134, 1140 (Pa. Commw. Ct. 1997) (tortious interference with employment contract). The doctrine of absolute privilege applies to mayors of municipalities. Ballas v. City of Reading, 2001 U.S. Dist. LEXIS 657, at *33-35 (citing Lindner v. Mollan, 677 A.2d 1194, 1199 (Pa. 1996)). An official's status as a high public official for purposes of absolute immunity is determined on a case-by-case basis, and depends on "the nature of his duties, the importance of his office, and particularly whether or not he has policy-making functions." Lindner, 677 A.2d at 1198. In addition to mayors, courts have found a wide variety of positions to be high public officials including township supervisors, mayors, city architects, attorney generals, revenue commissioners, city comptrollers, and district attorneys. See Lindner, 677 A.2d at 1199 (listing cases). At least one court has also held that a councilman is entitled to absolute immunity as a high public official.[3] Satterfield v. Borough of Schuylkill Haven, 12 F. Supp. 2d 423, 442 (E.D. Pa. 1998). The Court concludes that the alleged actions were within the scope of public duties, because they related to actions taken against the Plaintiff by the executive council. Therefore, high

[3]Plaintiff does not address whether the high official immunity may apply to Waltman, and instead argues that the legislative immunity does not apply.

official immunity operates to shield both Mayor Eppihimer and Councilman Waltman, and the Court dismisses Count 9 against those defendants.

3. Suit against Cramsey in his individual capacity

a. Intrusion upon seclusion

The only remaining question is whether Count 9 may persist against Cramsey, the Mayor's assistant, in his individual capacity. Pennsylvania law provides four theories on which a claim of invasion of privacy can be based: (1) intrusion upon seclusion; (2) appropriation of name and likeness; (3) publicity given to private life; and (4) publicity placing a person in false light. Smith, 112 F. Supp. 2d at 434. Plaintiff's claim proceeds on the "intrusion upon seclusion" and "publicity given to private life" theories. The Court will discuss each theory in turn.

The Pennsylvania courts have adopted section 652B of the Restatement (Second) of Torts which provides:

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

Restatement (Second) of Torts § 652B (1976); Harris v. Easton Publ'g Co., 483 A.2d 1377, 1383 (Pa. Super. Ct. 1984). The invasion may take various forms including: (a) physical intrusion into a place where the plaintiff has secluded herself; (2) use of the defendant's senses to oversee or overhear the plaintiff's

private affairs; or (3) some other form of investigation into plaintiff's private concerns. Restatement (Second) of Torts § 652B cmt. b (1976); Harris, 483 A.2d at 1383. The defendant is subject to liability under this section only when he has intruded into a private place, or has otherwise invaded a private seclusion that the plaintiff has thrown about her person or affairs. Restatement (Second) of Torts § 652B cmt. c (1976). There is no liability unless the interference with the plaintiff's seclusion is both substantial and highly offensive to the ordinary reasonable person. Id. cmt. d; Borse v. Piece Goods Shop, Inc., 963 F.2d 611, 621 (3d Cir. 1992).

Defendants first contend that Plaintiff had no expectation of privacy with respect to her e-mail communications. Some courts have held that there is no reasonable expectation of privacy in e-mail communications. See Smyth v. Pillsbury Co., 914 F. Supp. 97, 101 (E.D. Pa. 1996) ("[U]nlike urinalysis and personal property searches, we do not find a reasonable expectation of privacy in e-mail communications voluntarily made by an employee to his supervisor over the company e-mail system notwithstanding any assurances that such communications would not be intercepted by management."); see also Commonwealth v. Proetto, 771 A.2d 823, 827, 830-31 (Pa. Super. Ct. 2001) (rejecting criminal defendant's challenge under the Fourth Amendment that e-mail evidence used against him at trial was improper). The Court observes, however,

that Smyth and Proetto do not necessarily foreclose the possibility that an employee might have a reasonable expectation of privacy in certain e-mail communications, depending upon the circumstances of the communication and the configuration of the e-mail system. It is still possible that Plaintiff could prove a set of facts that would demonstrate she had a reasonable expectation of privacy in the e-mail communications. See, e.g., McLaren v. Microsoft Corp., No.05-97-00824-CV, 1999 Tex. App. LEXIS 4103, at *10-12 (Tex. Ct. App. May 28, 1999) (examining the configuration of the company e-mail system to determine if there was an expectation of privacy). Therefore, the Court denies Defendant's Motion to dismiss Count 9.

Furthermore, the Complaint contains allegations of additional activities aside from the disclosure of e-mails. Specifically, Plaintiff alleges that the Defendants "disseminated information about the executive session in which it was decided to suspend her without pay for one week; and/or disseminated information about the Ethics Complaint which had been lodged against her." Compl. ¶ 109. Whether these allegations are sufficient to support the intrusion upon seclusion claim depends on whether Plaintiff had a reasonable expectation of privacy in this information. Plaintiff alleges that the information involved was not part of the public record, and that she therefore had a reasonable expectation of privacy in this

information.[4] The Court concludes that Plaintiff's allegations are sufficient to support an intrusion of seclusion claim based on the alleged non-e-mail communications.

b. Publicity of Private Life

Plaintiff also proceeds on the publicity of private life theory. Section 652D of the Restatement (Second) of Torts 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 published is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.

Restatement (Second) of Torts § 652D; Harris, 483 A.2d at 1384. To state a cause of action, the plaintiff must prove that the defendant (1) publicized (2) private facts (3) that would be highly offensive to a reasonable person, and (4) are not of legitimate concern to the public. Id. The publicity element requires that the matter be communicated "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." Kryeski v. Schott Glass Techs., Inc., 626 A.2d 595, 601 (Pa. Super. Ct. 1993) (quoting Restatement (Second) of Torts § 625E (1976)); Harris, 483 A.2d at 1384. Disclosure of information to only a small number of people is insufficient to constitute publicity. See Kryeski, 626 A.2d at

[4]If, for example, this information was deemed to be part of the public record, then there could be no intrusion upon seclusion for publicizing the information. Restatement (Second) of Torts § 652B cmt. c.

602 (disclosure to two people is insufficient); Harris, 483 A.2d at 1384 (disclosure to one person is insufficient).

To determine if facts are "private facts," the line is drawn "when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern. The limitations, in other words, are those of common decency. . . ." Restatement (Second) of Torts § 652D cmt. h. The Court concludes at this stage that Plaintiff is not precluded from proving a set of facts that would entitle her to relief. Thus, the Court denies the motion to dismiss the tort for "publicity to private life" with respect to all of the alleged activities in Count 9.

An appropriate Order follows.

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ORDER

AND NOW, this day of September, 2001, upon consideration of Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure (Doc. No. 2), and any responses thereto, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** in part and **DENIED** in part. In furtherance thereof, it is specifically ordered that:

1. Counts 5, 6, 7, and 8 are **DISMISSED**.
2. Count 9 is **DISMISSED** as to Defendants Joseph Eppihimer and Jeffrey Waltman.
3. Counts 1, 2, 3, and 4, may go forward.
4. Count 9 may go forward against Defendant Kevin Cramsey only.

BY THE COURT:

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John R. Padova, J.