

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

DEBORAH SCOTT : CIVIL ACTION
: :
v. : :
: :
ROBERT YATES, Individually :
and in his Official Capacity :
as Director of Adult :
Probation; JAMES HARKINS, :
Individually and in his :
Official Capacity as Director :
of Accountability and :
Integrity; and, CITY OF :
PHILADELPHIA : No. 00-5024

MEMORANDUM ORDER

This action arises out of plaintiff's termination from her employment as a clerk-typist in the Philadelphia Adult Probation Department ("Probation Department"). Presently before the court is the motion of defendants Robert Yates and James Harkins to dismiss. The pertinent facts as alleged by plaintiff are as follows.

Plaintiff was hired by the City of Philadelphia ("City") in 1971 as a Clerk-Typist I. She later transferred to the Probation Department as a Clerk-Typist II. To accommodate an unspecified physical condition, plaintiff requested an ergonomic chair. Defendants Yates and Harkins requested that plaintiff sign a release for medical records and asked her to submit to an independent medical examination. Citing concerns for privacy, the plaintiff refused to sign the release form but did agree to

submit to an examination.¹ Defendants denied plaintiff's request for the ergonomic chair due to cost and her refusal to sign the medical release.

Following the denial of her request, plaintiff filed a charge of discrimination against the First Judicial District with the Pennsylvania Human Relations Commission ("PHRC") and the Equal Employment Opportunity Commission ("EEOC").² Two days later, plaintiff signed a medical release. Defendants, however, refused to accept the release.

After plaintiff filed the initial charge of discrimination, defendants Harkins and Yates subjected her to unwarranted scrutiny and criticism at work and initiated an investigation into a medical leave previously authorized under FMLA.³ Plaintiff also alleges that her supervisor received a negative performance evaluation for his failure to take disciplinary action against her. Defendants also refused to give plaintiff access to computer training afforded to similarly

¹ The examining physician was unable to determine whether the chair was needed without reviewing plaintiff's medical records.

² Plaintiff initially claimed that she was employed by the First Judicial District. In an amended complaint, she now states the City was her employer. This may reflect her subsequent awareness that the First Judicial District is not subject to suit under § 1983.

³ The investigation was purportedly based on an unwritten work rule requiring plaintiff to sign a medical release form.

situated secretaries. The lack of adequate computer training resulted in criticism of plaintiff's performance at a time she was subjected to increased production demands by defendant Yates.

Shortly thereafter, plaintiff was suspended from her employment for thirty days. When she returned, the defendants continued to subject plaintiff to close scrutiny. Defendants terminated plaintiff three weeks after her return for purported abuse of sick leave policy. In a subsequent hearing for unemployment compensation benefits, defendants claimed that plaintiff was discharged for refusing to sign a medical release form.

Plaintiff asserts claims against defendant Yates, individually and as Supervisor of Clerk-Typists of the Probation Department, and defendant Harkins, individually and as Director of Accountability and Integrity of the Probation Department, under 42 U.S.C. § 1983 for retaliation for her exercise of the First Amendment right to speech and under the PHRA, 43 Pa. C.S.A. § 955(d), for retaliating against her for filing a discrimination charge with the PHRC. She also asserts a claim against defendants Yates and Harkins for conspiring to deprive her of her First Amendment right to speech in violation of 42 U.S.C. § 1985(3). Plaintiff seeks to hold the City liable for these alleged violations on the ground that the City failed adequately to train and supervise the individual defendants regarding

impermissible employment discrimination and that their retaliation amounted to a policy, practice or custom of the City which deprived plaintiff of her rights.

Dismissal for failure to state a claim is appropriate when it clearly appears that plaintiff can prove no set of facts to support a claim which would entitle her to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Robb v. Philadelphia, 733 F.2d 286, 290 (3d Cir. 1984). Such a motion tests the legal sufficiency of a claim accepting the veracity of the claimant's allegations. See Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990); Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987). A court may also consider matters of public record. See Churchill v. Star Enter., 183 F.3d 184, 190 n.5 (3d Cir. 1999). A court, however, need not credit conclusory allegations or legal conclusions in deciding a motion to dismiss. See General Motors Corp. v. New A.C. Chevrolet, Inc., 263 F.3d 296, 333 (3d Cir. 2001); Morse v. Lower Merion School Dist., 132 F.3d 902, 906 (3d Cir. 1997). A claim may be dismissed when the facts alleged and the reasonable inferences therefrom are legally insufficient to support the relief sought. See Pennsylvania ex rel. Zimmerman v. PepsiCo., Inc., 836 F.2d 173, 179 (3d Cir. 1988).

Movants contend that the Probation Department is part of the unified state judiciary and thus part of the Commonwealth government. They correctly note that pursuant to the Eleventh

Amendment, federal courts do not have jurisdiction to entertain claims for retrospective damages against states or state officials acting in their official capacities unless the state has waived sovereign immunity or it has been abrogated by Congress. Edelman v. Jordan, 415 U.S. 651, 678 (1974); Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 99 n.8 (1984). Pennsylvania has not consented to suit in federal court. 42 U.S.C. § 8521(b); Laskaris v. Thornburgh, 661 F.2d 23, 25 (3d Cir. 1981), cert. denied, 469 U.S. 886 (1984). Congress, in enacting 42 U.S.C. § 1983, did not abrogate Eleventh Amendment immunity. Quern v. Jordan, 440 U.S. 332, 340 (1979). Movants contend that as state officials, they thus may not be sued under § 1983 herein in their official capacities.

The moving defendants at the pertinent time were supervisory officials of the Probation Department which is indisputably a department of the Criminal Trial Division of the First Judicial District of Pennsylvania.⁴

The Pennsylvania Constitution provides:

The judicial power of the Commonwealth shall be vested in a unified judicial system consisting of the Supreme Court, the Superior Court, the Commonwealth Court, courts of common pleas, community courts, municipal and traffic courts in the City of Philadelphia, and such

⁴ The Probation Department is managed by a Chief Probation Officer (currently two co-Chiefs) who, along with subordinate staff, is appointed by the Administrative Judge of the Trial Division and reports to the Court Administrator.

other courts as may be provided by law and justices of the peace. All courts and justices of the peace and their jurisdiction shall be in this unified judicial system."

Pa. Const. art. V, § 1. The counties are required by state law to provide goods, services, and accommodations for the courts within their judicial districts, and must pay the salaries of judges and support personnel. See 42 Pa. C.S.A. §§ 3544, 3722.⁵ Nevertheless, all agencies of the unified state judicial system are part of the Commonwealth government and thus are state rather than local agencies. See Callahan v. City of Philadelphia, 207 F.3d 668, 672 (3d Cir. 1999) (holding Warrant Division of First Judicial District is part of unified state judicial system and distinct from City).⁶

The relevant inquiry is not whether an agency is funded locally, but whether it is "independent of the Commonwealth" and "can be regarded as having significant autonomy from the Pennsylvania Supreme Court." Id. at 673. Plaintiff has suggested no basis on which one could reasonably hold that the

⁵ In the last reported fiscal year, the City provided \$8.1 million to fund the Probation Department. The Commonwealth provided \$5.1 million.

⁶ That the City may have been treated as an employer for unemployment compensation purposes would not change the character of the Probation Department or its relationship to the Commonwealth. As the party responsible for securing salaries and benefits, the City would logically be accorded standing in an administrative proceeding involving a claim for benefits.

Probation Department, but not the Warrant Division, of the First Judicial District is a City agency.

As officials of the Probation Department, movants may not be sued under § 1983 in their official capacities.

Defendants next contend that the § 1983 claims against them as individuals should also be dismissed because plaintiff's speech was not protected as a matter of law. To sustain a First Amendment retaliation claim under § 1983, a plaintiff must show that the speech in question was protected and that it was a substantial or motivating factor in the alleged retaliatory action. A defendant may still defeat such a claim by showing that the same action would have been taken even in the absence of the protected activity. See Watters v. City of Philadelphia, 55 F.3d 886, 892 (3d Cir. 1995).

Determining whether a public employee's speech involves a matter of public concern is a question of law for the court. See Connick v. Myers, 461 U.S. 138, 148 n.7 (1983); Versarge v. Township of Clinton, N.J., 984 F.2d 1359, 1364 (3d Cir. 1993). In the public employment context, speech is protected when it appears from an examination of the content, form and context that it relates to a matter of public concern and the speaker's interest in such speech is not outweighed by the government's interest in effective and efficient operation. See Connick, 461 U.S. at 146-48; Swineford v. Snyder County Pa., 15 F.3d 1258,

1271 (3d Cir. 1994). See also Azzaro v. County of Allegheny, 110 F.3d 968, 975 (3d Cir. 1997); Feldman v. Philadelphia Housing Auth., 43 F.3d 823, 829 (3d Cir. 1995).

Defendants contend that plaintiff's speech did not involve a matter of public concern. Plaintiff alleges that she complained to the PHRC and EEOC about disability discrimination by her employer.⁷ Speech disclosing wrongdoing by public officers or criticizing their official actions and decisions is protected. See Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 413 (1979) (complaints about discrimination by school board); Swineford, 15 F.3d at 1271-72 (allegation of malfeasance by public official); Czurlanis v. Albanese, 721 F.2d 98, 104 (3d Cir. 1983) (speech regarding whether public officials were properly performing their responsibilities falls "squarely within the core public speech delineated in Connick"). See also O'Donnell v. Yanchulis, 875 F.2d 1059, 1061 (3d Cir. 1989).

A formal complaint of conduct prohibited by law to public agencies with responsibility for enforcing that law is speech which relates to a matter of public concern. Defendants do not contend that plaintiff's interest in such speech was

⁷ Plaintiff has not attached to or described the substance of her administrative charge in her amended complaint. From the substance and chronology of what she does allege, however, the most, if not only, logical inference is that she charged her employer had refused to provide a reasonable accommodation for her unspecified disability.

outweighed by a governmental interest in effective operation and in any event, such does not clearly appear from the pleadings.

Defendants also move for dismissal of plaintiff's § 1985(3) claim. To sustain a cognizable § 1985(3) claim, a plaintiff must show a conspiracy for the purpose of depriving a person or class of persons of equal protection of the laws or equal privileges and immunities, and an act in furtherance of the conspiracy whereby a party is injured in his person or property or is deprived of a right or privilege of a citizen of the United States. See United Brotherhood of Carpenters & Joiners v. Scott, 463 U.S. 825, 829 (1983); Ridgewood Bd. of Educ. v. N.E. ex rel. M.E., 172 F.3d 238, 253-54 (3d Cir. 1999).

Defendants contend that the amended complaint is devoid of sufficiently specific factual allegations of a conspiracy between the defendants to deprive plaintiff of her right of speech, and that plaintiff has not in any event alleged a conspiracy motivated by racial or class based discriminatory animus designed to deprive her of equal protection of the laws.

Plaintiff has alleged that defendants Yates and Harkins "agreed, either expressly or impliedly, to deprive the Plaintiff of her right to free speech, more specifically her right to complain about treatment accorded her" and that in furtherance of this agreement, suspended her and terminated her employment. This is sufficient to satisfy the liberal federal pleading

requirements of Fed. R. Civ. P. 8. Plaintiff, however, has not alleged a conspiracy motivated by racial or class based discriminatory animus.

Section 1985(3) prohibits only conspiracies predicated on "racial, or perhaps otherwise class-based, invidiously discriminatory animus." Ridgewood 172, F.3d at 253 (quoting Griffin v. Breckenridge, 403 U.S. 88, 102 (1971)). Plaintiff alleges that defendants were motivated by her conduct, that is her speaking out in a manner critical of them. Even engaging as a member of a group in conduct disfavored by a defendant does not confer class status for purposes of § 1985(3). See Bray v. Alexandria Women's health Clinic, 506 U.S. 263, 269 (1993); Childree v. UAP/GA AG Chem., Inc., 92 F.3d 1140, 1147 (11th Cir. 1996). Even if one were to recast plaintiff's pleading to suggest a conspiracy motivated by her claimed disability, all persons with any disability do not constitute a cognizable class within the meaning of § 1985(3).

The Third Circuit has expressly declined to decide whether persons with handicaps or disabilities, other than mental retardation, are a protected class under § 1985(3). See Lake v. Arnold, 112 F.3d at 686 & n.5. See also Ridgewood, 172 F.3d at 254. Other courts which confronted the question have concluded that handicapped persons generally are not a cognizable class for

purposes of § 1985(3). See D'Amato v. Wisconsin Gas Co., 760 F.2d 1474, 1486 (7th Cir. 1985); Wilhelm v. Continental Title Co., 720 F.2d 1173, 1177 (10th Cir. 1983); Moreno v. Com. of Pennsylvania, 1991 WL 46472, *8 (E.D. Pa. Apr. 1, 1991). See also Story v. Green, 978 F.2d 60, 64 (2d Cir. 1992) (disabled do not constitute suspect or quasi-suspect class for purposes of equal protection). Even when § 1985(3) has been read expansively, the focus is on "discrete and insular minorities who have traditionally borne the brunt of prejudice in our society" and because of an immutable trait have been subject to "pervasive discrimination." Lake 112 F.3d at 687-88.

Plaintiff has nowhere described what her physical disability is. One may only reasonably infer, however, that it is a condition which is accommodated by an ergonomically designed chair.⁸ There are innumerable persons with back aches and other muscular-skeletal pains which are eased by use of a comfortable or contoured chair. There is absolutely no suggestion or basis for concluding that they have borne the brunt of prejudice in our society or been subjected to pervasive discrimination.⁹

⁸ An "ergonomic" chair is one designed to provide the most efficient and safe interaction with people. See Webster's Third New International Dictionary 771 (1993).

⁹ Once § 1985(3) is read beyond its historical context and extended to other than racial classes, the court would have little hesitation in applying it to persons with types of handicaps who, like the mentally retarded, have been subject to marked prejudice and discrimination including those who are blind, deaf, mute, disfigured or non-ambulatory.

Plaintiff has set forth absolutely no basis on which one could reasonably infer she has a handicap of a type which would place her in a class that qualifies for protection under § 1985(3) without contorting the statute and trivializing those who may.

ACCORDINGLY, this day of December 2001, upon consideration of the Motion of defendants Yates and Harkins to Dismiss (Doc. #16) and plaintiff's response thereto, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** as to plaintiff's claims against these defendants in their official capacity and as to plaintiff's claims pursuant to 42 U.S.C. § 1985(3); and, is **DENIED** as to plaintiff's claims against these defendants in their individual capacity pursuant to 42 U.S.C. § 1983.

BY THE COURT:

JAY C. WALDMAN, J.