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

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|---|---|---|
| PATRICK M. MURPHY, | : | CIVIL ACTION |
| | : | |
| Plaintiff, | : | NO. 04-3618 |
| | : | |
| | : | |
| v. | : | |
| | : | |
| RICHARD ORLOFF, PATRICIA KELLER, STEVEN TAMBURRI, AND RICHLAND TOWNSHIP, | : | |
| | : | |
| Defendants. | : | |

**MEMORANDUM**

BUCKWALTER, S.J. December 13, 2004

Presently before the Court is Defendants' Motion to Dismiss Plaintiff's Complaint Pursuant to Fed.R.Civ.P. 12(b)(6). In response to Defendants' Motion to Dismiss, Plaintiff submitted a Memorandum of Law Contra Defendants' Motion to Dismiss Plaintiff's Complaint Pursuant to FRCP 12(b)(6). For the reasons discussed below, Defendants' Motion to Dismiss is denied.

## I. BACKGROUND

On or around July 30, 2004, Plaintiff filed a Complaint in this Court alleging deprivation of his First Amendment rights. In addition, Plaintiff asserted two state law causes of action, Defamation and Civil Conspiracy, against Defendants Richard Orloff, Patricia Keller and Steven Tamburri. Defendants joined in filing the instant Motion to Dismiss.

## II. STANDARD OF REVIEW

A motion to dismiss pursuant to Rule 12(b)(6) is granted where the plaintiff fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). This motion "may be granted only if, accepting all well-pleaded allegations in the complaint as true, and viewing them in the light most favorable to plaintiff, plaintiff is not entitled to relief." Maio v. Aetna, Inc., 221 F.3d 472, 482 (3d Cir. 2000). While the Court must accept all factual allegations in the complaint as true, it "need not accept as true 'unsupported conclusions and unwarranted inferences.'" Doug Grant, Inc. v. Greate Bay Casino Corp., 232 F.3d 173, 183-84 (3d Cir. 2000) (citing City of Pittsburgh v. West Penn Power Co., 147 F.3d 256, 263 n.13 (3d Cir. 1998)). In a 12(b)(6) motion, the defendant bears the burden of persuading the Court that no claim has been stated. Gould Electronics, Inc. v. United States, 220 F.3d 169, 178 (3d Cir. 2000).

## III. DISCUSSION

### A. Deprivation of First Amendment Rights

Plaintiff asserted a violation of his First Amendment rights based on the Defendants' termination of his employment due to engaging in protected activity. (Compl. at 2-3). Defendants' moved to have this claim dismissed on the basis that Plaintiff was a "policymaking" employee and, therefore, they were permitted to discharge him for his political affiliation. (Defs' Brief at 2).

Generally, "[the] First Amendment protects an employee who speaks out on a matter of public concern, so long as the employee's interests outweigh the government's interest in efficient operations. At the same time, public officials may be able to terminate a

policymaking employee on the basis of political affiliation and conduct, regardless of freedom of association rights." Curinga v. City of Clairton, 357 F.3d 305, 309 (3d Cir. 2004). The United States Supreme Court first upheld the dismissal of a policymaking employee based upon political association in Elrod v. Burns, 427 U.S. 347 (1976); the United States Supreme Court revisited the matter four years later in Branti v. Finkel, 445 U.S. 507 (1980). In determining whether an employee is a "policymaker," the Branti court held that "the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." Curinga, 357 F.3d at 310 (citing Branti, 445 U.S. at 518).

Although the Defendants' properly state that the law permits the discharge of a policymaking employee based upon his/her political affiliation, Defendants failed to apply the correct standard to establish whether Plaintiff was a policymaking employee under the law. Defendants set forth only the statutory description of Plaintiff's position, that being he "shall be responsible for the planning, administration and operation of the local organization [of emergency management] subject to the direction and control of the executive officer or governing body." (Defs' Brief at 3 (citing 35 Pa.C.S. § 7502(a))). Defendants did not provide information sufficient to establish that party affiliation is appropriate requirement for effectively performing these duties. As such, Defendants' Motion to Dismiss Plaintiff's cause of action asserting deprivation of First Amendment rights is denied.

**B. State Law Claims of Defamation and Civil Conspiracy**

Plaintiff claimed that Defendants Orloff, Keller and Tamburri " publicly defamed [him], presenting him in a false light as a deceptive and dishonest person who was devoid of good judgment and analytic skills and accusing [him] of being a demagogue." (Compl. at 4). Plaintiff further claimed that the above Defendants "unlawfully planned and acted together to destroy [his] reputation and to present him in a false light as a way to retaliate against [him] seeking to create an excuse for further action in planning to unlawfully retaliate against the plaintiff for exercising his First Amendment rights in violation of Pennsylvania tort law." (Compl. at 5). Defendants' move to dismiss these claims on the basis that they are entitled to high government official immunity. (Defs' Brief at 4).

There is a conflict between Pennsylvania case law and Federal case law as to whether the common law immunity for high government officials still exists. Factor v. Goode, 612 A.2d 591 (Pa.Commw. 1992), *appeal denied*, 624 A.2d 112 (Pa. 1993); Weinstein v. Bullick, 827 F.Supp. 1193 (E.D.Pa. 1993); Lynch v. Borough of Ambler, No. CIV.A.94-CV-6401, 1996 WL 283643 (E.D.Pa.May 26, 1996). The conflict surrounds the way the courts have interpreted whether the common law immunity was abrogated by the Pennsylvania Political Subdivision Tort Claim Act ("PSTCA"), 42 Pa.C.S. §§ 8541, et.seq.

The relevant portions of the statute are as follows:

> § 8501. Definitions
>
> "Employee."
>
> Any person who is acting or who has acted on behalf of a government unit whether on a permanent or temporary basis, whether compensated or not and whether within or without the territorial boundaries of the government unit,

> including . . . any elected or appointed officer, member of a governing body or other person designated to act for the government unit.
>
> § 8546. Defense of official immunity.
>
> In any action brought against an employee of a local agency for damages on account of an injury to a person or property based upon claims arising from, or reasonably related to, the office or the performance of the duties or the employee, the employee may assert on his own behalf, or the local agency may assert on his behalf:
> (1) Defenses which are available at common law to the employee.
>
> § 8550. Willful misconduct.
>
> In any action against a local agency or employee thereof for damages on account of an injury caused by the act of the employee in which it is judicially determined that the act of the employee caused the injury and that such act constituted a crime, actual fraud or willful misconduct, the provisions of sections 8545 (relating to official liability generally, 8546 (relating to defense of official immunity), 8548 (relating to indemnity) and 8549 (relating to limitation on damages) shall not apply.

42 Pa.C.S. §§ 8501, 8546, 8550 (West 1998, Supp. 2004).

In Factor, the Pennsylvania Commonwealth Court held that the PSTCA did not abrogate common law immunity for high public officials. Factor, 612 A.2d at 594-95. The Factor court rejected the argument that the term "employee" in Section 8550 referred to high public officials. Id. As such, the court held that Section 8550 could not abrogate high public officials immunity. Id.

The United States District Court for the Eastern District of Pennsylvania has declined to follow the ruling of the Factor court; in direct opposition to the Pennsylvania courts, two decisions by the Eastern District have held that the PSTCA "strips immunity for intentional torts from all employees of local agencies, without making any distinction between those

employees who are 'high public officials' and those who are not." Lynch, 1993 WL 283643, at *4 (citing Weinstein, 827 F.Supp. at 1210).

In reaching its decision, the Weinstein court found that Section 8546(1) of the PSTCA specifically acknowledges the existence of common law defenses and, absent Section 8550, the high public official immunity would still exist. 827 F.Supp at 1207. However, Section 8546 does not stand alone and must be read in conjunction with Section 8550 which removes the defenses provided in Section 8546 when the injury causing conduct constitutes a crime, actual fraud or willful misconduct. Id. Accordingly, the Weinstein court held that the plain language of the statute strips high public officials of their immunity where their conduct constitutes a crime, actual fraud or willful misconduct. Id. Furthermore, the Weinstein court cited to the definition of an employee contained in Section 8501 in rejecting the Factor court's finding that Section 8550 did not apply to high public officials. Id. at 1208.

After a thorough review of the relevant statutes and interpreting case law, this Court joins in the prior decisions of the United States District Court for the Eastern District of Pennsylvania and finds that Section 8550 of the PSTCA abrogated the common law immunity for high public officials for conduct which constitutes a crime, actual fraud or willful misconduct. As such, Defendants' Motion to Dismiss is denied.

## IV. CONCLUSION

For the foregoing reasons, the Court denies Defendants' Motion to Dismiss in regard to all claims. An appropriate Order follows.

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| | : | |
| Defendants. | : | |

**ORDER**

AND NOW, this 13th day of December, 2004, upon consideration of Defendants' Motion to Dismiss Plaintiff's Complaint Pursuant to Fed.R.Civ.P. 12(b)(6), and Plaintiff's Memorandum of Law Contra Defendants' Motion to Dismiss Plaintiff's Complaint Pursuant to FRCP 12(b)(6), it is hereby ORDERED that the Motion to Dismiss (Docket No. 3) is DENIED.

BY THE COURT:

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RONALD L. BUCKWALTER, S.J.