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

MAX WEISMAN	:	CIVIL ACTION
	:	
vs.	:	
	:	NO. 04-CV-4719
BUCKINGHAM TOWNSHIP,	:	
BUCKINGHAM TOWNSHIP BOARD OF	:	
SUPERVISORS, RAYMOND STEPNOSKI,	:	
HENRY ROWAN, and JANET FRENCH	:	

MEMORANDUM AND ORDER

JOYNER, J. **June 14, 2005**

By way of the motion now pending before this Court, Defendants move for the dismissal of Counts I, VI, VII, VIII and IX of Plaintiff's Amended Complaint. For the reasons discussed below, the motion shall be granted in part.

Factual Background

Plaintiff, Max Weisman, first became employed by Defendant Buckingham Township in September, 1998 as the Finance Director. In November, 1999, Plaintiff was appointed by the Buckingham Township Board of Supervisors to the position of Interim Township Manager and then in February, 2000 was offered the position of Township Manager.[1] (Amended Complaint, ¶s18-21). Between February and June, 2000, when he presented them with proposed

[1] Plaintiff further avers that between November, 1999 and July, 2000, he was employed as both the Township's Manager and its Finance Director. (Amended Complaint, ¶20).

written employment and severance agreements covering his salary, vacation time and other benefits, Plaintiff negotiated the terms of his employment as Township Manager with the Supervisors. Although Defendants never actually signed the proposed written agreements, Plaintiff alleges that they did implement the terms proposed therein and continued to assure him that the written contracts would be signed in due course. (Am. Compl., ¶s 22-29).

Mr. Weisman has been suffering from depression since he was a teenager and, in or about November, 1997, was diagnosed as suffering from bi-polar disorder, panic disorder and major depression. (Am. Compl., ¶14). To the best of Plaintiff's knowledge, however, no one at the Township knew that he suffered from these conditions, as he was able to perform the essential functions of his jobs with the Township except during acute and temporary episodes. (Am. Compl., ¶s16, 33). In March, 2001, Plaintiff required an extended leave to donate a kidney to a relative. At that time and pursuant to what Plaintiff alleges was "an unwritten but regularly implemented policy, practice and/or custom of the Township," he was advanced two weeks of sick leave so that he would not have a lapse in salary while he was out. (Am. Compl., ¶s31-32).

On December 2, 2002, Plaintiff left work around lunchtime because of symptoms related to his depressive illness and, after seeing his doctor on December 4, began intensive treatment in a

partial hospitalization program on December 6, 2002.[2] On December 12, 2002, Defendant Raymond Stepnoski, the then-Chairman of the Board of Supervisors, sent Plaintiff a letter giving formal notice that the township was treating his absence from work as being covered under the Family Medical Leave Act, effective December 2, 2002 and that he was a "key employee" within the meaning of the FMLA. (Am. Compl., ¶37). On December 20, 2002, Plaintiff was paid for all of his accrued sick, personal and vacation time and was thus not advanced two weeks of sick leave as he had been in March, 2001. When Plaintiff asked Ms. Cozza why he had not been advanced sick leave, she informed him that although she had done the paperwork to advance him the leave, Mr. Stepnoski had directed her not to do so. (Am. Compl., ¶s38-39).

Although Plaintiff had initially advised Township Human Resources Director Dana Cozza that he was suffering from pneumonia and it was pneumonia which was referenced in Mr. Stepnoski's December 12th letter, on December 30, 2002, Mr. Weisman disclosed the true nature of his illness to Ms. Cozza through a letter accompanying his completed medical forms and requesting that the information be kept confidential. (Am.

[2] Plaintiff's Amended Complaint actually avers that his treatment commenced on December 6, 2004. However, given that all of the other time frames referenced in the amended complaint are to the year 2002, we assume that the reference to 2004 in paragraph 35 is a typographical error.

Compl., ¶s36, 40). In that same letter, Plaintiff also informed Defendants that he was disabled and requested accommodations due to his disability and that he be paid according to the disability provisions in his employment contract. While acknowledging that they had been made aware of Mr. Weisman's disability, the defendants did not offer to engage in any interactive process and did not pay Plaintiff any disability benefits. (Am. Comp., ¶s40-43). Thereafter, in January, 2003, several local newspapers published articles indicating that Plaintiff was on an extended leave of absence and that Mr. Stepnoski was "running the Township." Plaintiff also began hearing from other people who had either done business with the township or were otherwise associated with the township that they had heard rumors concerning his specific illness. (Am. Compl., ¶s44-46). At the February 12, 2003 meeting of the Township Board of Supervisors, Mr. Stepnoski resigned from his position as Chairman of the Board and was then appointed by the remaining Supervisors to the paid position of "Interim Township Manager." (Am. Compl., ¶s55-56).

On February 14, 2003, Plaintiff dual filed complaints with the Pennsylvania Human Relations Commission and the Equal Employment Opportunity Commission against the defendants for their refusal/failure to provide him with rights and benefits to which he was entitled and alleging violations of the Pennsylvania Human Relations Act, the Americans with Disabilities Act and the

Family Medical Leave Act. (Am. Compl., ¶48). On February 28, 2003, Defendant Henry Rowan, Vice-Chairman of the Township Board of Supervisors sent Plaintiff a letter terminating him from his position effective March 1, 2003 because his FMLA leave had expired on February 24, 2003. (Am. Compl., ¶s50-51). On July 15, 2004, Plaintiff received Notice of his Right to Sue from the EEOC. He received Notice of his Right to Sue from the PHRC on September 24, 2004. (Exhibit "A" to Amended Complaint). Mr. Weisman then filed this lawsuit on October 7, 2004, against all of the defendants for violations of the Family Medical Leave Act, 29 U.S.C. §2601, *et. seq.*, the Americans with Disabilities Act, 42 U.S.C. §12101, *et. seq.*, the Pennsylvania Human Relations Act, 43 P.S. §951, *et. seq.,* the Sunshine Act, 65 Pa.C.S. §701, *et. seq.*, the Second Class Township Code, 53 P.S. §65101, *et. seq.*, and for invasion of privacy and breach of contract and/or promissory estoppel and against Defendant Stepnoski only for tortious interference with contractual relationship. As noted, Defendants now move to dismiss the plaintiff's claims under the FMLA (Count I) and the Sunshine Act (Count IX) and for invasion of privacy, breach of contract/promissory estoppel and his claim against Mr. Stepnoski for tortious interference.

Standards Applicable to Motions to Dismiss

It has long been the rule that in considering motions to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), the district courts

must "accept as true the factual allegations in the complaint and all reasonable inferences that can be drawn therefrom." Allah v. Seiverling, 229 F.3d 220, 223 (3d Cir. 2000)(internal quotations omitted). See Also: Ford v. Schering-Plough Corp., 145 F.3d 601, 604 (3d Cir. 1998). A motion to dismiss may only be granted where the allegations fail to state any claim upon which relief may be granted. See, Morse v. Lower Merion School District, 132 F.3d 902, 906 (3d Cir. 1997). The inquiry is not whether plaintiffs will ultimately prevail in a trial on the merits, but whether they should be afforded an opportunity to offer evidence in support of their claims. In re Rockefeller Center Properties, Inc., 311 F.3d 198, 215 (3d Cir. 2002). Dismissal is warranted only "if it is certain that no relief can be granted under any set of facts which could be proved." Klein v. General Nutrition Companies, Inc., 186 F.3d 338, 342 (3d Cir. 1999)(internal quotations omitted). It should be noted that courts are not required to credit bald assertions or legal conclusions improperly alleged in the complaint and legal conclusions draped in the guise of factual allegations may not benefit from the presumption of truthfulness. In re Rockefeller, 311 F.3d at 216. A court may, however, look beyond the complaint to extrinsic documents when the plaintiff's claims are based on those documents. GSC Partners, CDO Fund v. Washington, 368 F.3d 228, 236 (3d Cir. 2004); In re Burlington Coat Factory Securities

Litigation, 114 F.3d 1410, 1426. See Also, Angstadt v. Midd-West School District, 377 F.3d 338, 342 (3d Cir. 2004).

Discussion

A. Dismissal of Plaintiff's FMLA Claims.

In enacting the FMLA, Congress explicitly recognized that "there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods." 29 U.S.C. §2601(a)(4). Thus, the FMLA was enacted to provide leave for workers whose personal or medical circumstances necessitate leave in excess of what their employers are willing or able to provide. Victorelli v. Shadyside Hospital, 128 F.3d 184, 186 (3d Cir. 1997), citing 29 C.F.R. §825.101. One of the chief goals of the Act was "to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families,... and to entitle employees to take reasonable leave for medical reasons,... and to accomplish [those] purposes in a manner that accommodates the legitimate interests of employers..." 29 U.S.C. §2601(b)(1)-(3). See Also, Churchill v. Star Enterprises, 183 F.3d 184, 192 (3d Cir. 1999). To accomplish these goals, "...an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period..." 29 U.S.C. §2612(a)(1). Upon return from leave, the employee is entitled "to be restored by the employer to the position of employment held by the employee when the leave

commenced," or "to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment." 29 U.S.C. §2614(a)(1).

In addition to these provisions, the FMLA also prohibits employers from interfering with, restraining or denying an employee's exercise or attempted exercise of his leave rights, from discharging or in any other manner discriminating against an employee for opposing any practice made unlawful by the Act or for filing any charges or instituting any proceedings related to the Act. 29 U.S.C. §2615. Under the FMLA's companion regulations, the employer must communicate with employees regarding their rights under the FMLA, providing individualized notice to employees regarding their FMLA rights and obligations. Fogelman v. Greater Hazleton Health Alliance, 122 Fed. Appx. 581, 587 (3d Cir. Dec. 23, 2004); 29 C.F.R. §825.208(a).

Courts have thus recognized that the FMLA creates two distinct causes of action. Coppa v. American Society for Testing and Materials, Civ. A. No. 04-234, 2005 U.S. Dist. LEXIS 8737 at *4 (E.D.Pa. May 11, 2005); Callison v. City of Philadelphia, Civ. A. No. 03-3008, 2004 U.S. Dist. LEXIS 6770 at *9-*10 (E.D.Pa. March 31, 2004). First, a plaintiff may pursue recovery under an "entitlement" or "interference" theory. This claim arises under 29 U.S.C. §2615(a)(1), which makes it unlawful for an employer "to interfere with, restrain, or deny" an

employee's rights under the FMLA. Bearley v. Friendly Ice Cream Corp., 322 F.Supp.2d 563, 570 (M.D.Pa. 2004); Callison, 2004 U.S. Dist. LEXIS at *10. Under an interference claim, it is the plaintiff's burden to show (1) she is an eligible employee under the FMLA, (2) defendant is an employer subject to the requirements of the FMLA, (3) she was entitled to leave under the FMLA, (4) she gave notice to the defendant of her intention to take FMLA leave, and (5) the defendant denied her the benefits to which she was entitled under the FMLA. Bearley, 322 F.Supp.2d at 571; Parker v. Hahnemann University Hospital, 234 F.Supp.2d 478, 483 (D. N.J. 2002). Interference claims are not about discrimination; the issue is simply whether the employer provided its employee the entitlements set forth in the FMLA such as a twelve week leave or reinstatement after taking a medical leave. Callison, 2004 U.S. Dist. LEXIS at *11, quoting Parker, 234 F.Supp.2d at 485 and Hodgens v. General Dynamics Corporation, 144 F.3d 151, 159 (1st Cir. 1998). An interference claim also arises if an employee can demonstrate that his employer did not advise him of his rights under the FMLA and that this failure to advise rendered him unable to exercise his leave rights in a meaningful way thereby causing injury. Conoshenti v. Public Service Electric & Gas Co., 364 F.3d 135, 143 (3d Cir. 2004).

The second type of recovery under the FMLA is the "retaliation" theory. Retaliation claims are analyzed under the

burden shifting framework of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Coppa, supra. To establish a *prima facie* case of retaliation under the FMLA, a plaintiff must show that (1) she took an FMLA leave, (2) she suffered an adverse employment decision, and (3) the adverse decision was causally related to her leave. Lepore v. LanVision Systems, Inc., 113 Fed. Appx. 449, 453 (3d Cir. Oct. 19, 2004); Helfrich v. Lehigh Valley Hospital, Civ. A. No. 03-5793, 2005 U.S. Dist. LEXIS 4420 at *65 (E.D.Pa. March 22, 2005). After the plaintiff establishes a *prima facie* case of retaliation, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for its adverse employment action. If a legitimate, nondiscriminatory reason is provided, the burden shifts back to plaintiff to establish that the employer's reasons are pretextual. Coppa, 2005 U.S. Dist. LEXIS at *5, citing Baltuskonis v. U.S. Airways, Inc., 60 F.Supp.2d 445, 448 (E.D.Pa. 1999).

In this case, it appears that the plaintiff is endeavoring to state an "interference" claim in that he contends that he is an "eligible employee," the defendant township is an "employer" and that he had a "serious health condition" within the meaning of the FMLA. (Am. Compl., ¶s66-67). Although Plaintiff avers that he did not request FMLA leave, by letter dated December 12, 2002, Defendants notified him that it was designating his absence

from work commencing December 2, 2002 as covered under the FMLA. Plaintiff further avers that Defendants interfered with and/or violated his rights under the FMLA by failing to provide him with adequate notice of his rights under the FMLA or notice that fully complied with 29 C.F.R. §825.301(b)(1) because they failed to provide (1) notice and/or information as to the right under the policies, practices and customs of the Township to allow employees to substitute paid leave for the FMLA leave and the right to have the FMLA leave commence only after paid leaves were exhausted; and (2) notice of or information of his right to take leave intermittently or on a reduced leave schedule. (Am. Compl., ¶73). Plaintiff alleges that his FMLA rights were further violated by virtue of Defendants' notification (1) that he needed a fitness for duty certificate, (as the Township did not have a uniformly applied policy) and (2) that he was a "key" employee. (Am. Compl., ¶s 74-75).

Under 29 C.F.R. §825.208(a), "[i]n all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee as provided in this section." 29 C.F.R. §825.301 provides the following in relevant part with respect to employer notification:

> (a)(1) If an FMLA-covered employer has any eligible employees and has any written guidance to employees concerning employee benefits or leave rights, such as in an employee handbook, information concerning FMLA entitlements

and employee obligations under the FMLA must be included in the handbook or other document. For example, if an employer provides an employee handbook to all employees that describes the employer's policies regarding leave, wages, attendance, and similar matters, the handbook must incorporate information on FMLA rights and responsibilities and the employer's policies regarding the FMLA...

(2) If such an employer does not have written policies, manuals or handbooks describing employee benefits and leave provisions, the employer shall provide written guidance to an employee concerning all the employee's rights and obligations under the FMLA. This notice shall be provided to employees each time notice is given pursuant to paragraph (b) and in accordance with the provisions of that paragraph...

(b)(1) The employer shall also provide the employee with written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. The written notice must be provided to the employee in a language in which the employee is literate...Such specific notice must include, as appropriate:

> (i) that the leave will be counted against the employee's annual FMLA leave entitlement;
>
> (ii) any requirements for the employee to furnish medical certification of a serious health condition and the consequences of failing to do so;
>
> (iii) the employee's right to substitute paid leave and whether the employer will require the substitution of paid leave and the conditions related to any substitution;
>
> (iv) any requirement for the employee to make any premium payments to maintain health benefits and the arrangements for making such payments, and the possible consequences of failure to make such payments on a timely basis (i.e., the circumstances under which coverage may lapse);
>
> (v) any requirement for the employee to present a fitness-for-duty certificate to be restored to employment;

> (vi) the employee's status as a "key employee" and the potential consequence that restoration may be denied following FMLA leave, explaining the conditions required for such denial;
>
> (vii) the employee's right to restoration to the same or an equivalent job upon return from leave; and
>
> (viii) the employee's potential liability for payment of health insurance premiums paid by the employer during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave.
>
> (2) The specific notice may include other information–e.g., whether the employer will require periodic reports of the employee's status and intent to return to work, but is not required to do so...
>
> (c) Except as provided in this subparagraph, the written notice required by paragraph (b) (and by subparagraph (a)(2) where applicable) must be provided to the employee no less often than the first time in each six-month period that an employee gives notice of the need for FMLA leave (if FMLA leave is taken during the six-month period). The notice shall be given within a reasonable time after notice of the need for leave is given by the employee–-within one or two business days if feasible. If leave has already begun, the notice shall be mailed to the employee's address of record.....

In reviewing the December 12, 2002 notification letter, we find no merit to the plaintiff's contention that his FMLA rights were violated by Defendants' "key employee" designation. Rather, it appears that the Township was merely complying with the requirements of the two foregoing regulations. However, under Section 2614(a)(4), "[a]s a condition of restoration under paragraph (1) for an employee who has taken leave...the employer may have a uniformly applied practice or policy that requires each such employee to receive certification from the health care

provider of the employee that the employee is able to resume work..." As Plaintiff alleges that the defendant township did not have such a uniform policy, we find he has sufficiently pled a cause of action under the FMLA to withstand the instant motion to dismiss.

Furthermore, under 29 C.F.R. §825.700(a), "[a]n employer must observe any employment benefits program or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA." Additionally, while the regulations do not specify it, the Third Circuit's decision in Conoshenti, supra.,quoting Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 89-90, 122 S.Ct. 1155, 1161, 152 L.Ed.2d 167 (2002) strongly suggests that an employer's FMLA notice should also include information regarding an employee's options to take medical leave on an intermittent basis. ("Consider, for instance, the right under §2612(b)(1) to take intermittent leave when medically necessary. An employee who undergoes cancer treatments every other week over the course of 12 weeks might want to work during the off weeks, earning a paycheck and saving six weeks for later. If she is not informed that her absence qualifies as FMLA leave–-and if she does not know of her right under the statute to take intermittent leave–-she might take all 12 of her FMLA-guaranteed weeks consecutively and have no leave remaining for some future emergency. In circumstances like

these,...the employer's failure to give the notice could be said to "deny," "restrain," or "interfere with" the employee's exercise of her right to take intermittent leave...) Accordingly, we shall also deny the motion to dismiss that part of the plaintiff's FMLA claim which alleges that Defendants interfered with his FMLA rights because they failed to provide information as to the Township's policies, practices and customs to allow employees to substitute paid leave for FMLA leave and the right to have the FMLA leave commence only after paid leaves were exhausted, and of his right to take intermittent leave. Defendants are of course free to re-assert their arguments in support of dismissal should Plaintiff fail to demonstrate prejudice as a result of these alleged failures.

B. Dismissal of Plaintiff's Invasion of Privacy Claim.

Defendants next move to dismiss Count VI of the amended complaint, which alleges that Plaintiff's constitutionally protected privacy rights were violated by the defendants' purported disclosures of his illness to the public.

The constitutional right to privacy, as recognized by the U.S. Supreme Court, extends to two types of interests. C.N. ex. rel. I.N. v. Ridgewood Board of Education, 319 F.Supp.2d 483, 493 (D.N.J. 2004). One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.

Whalen v. Roe, 429 U.S. 589, 599, 97 S.Ct. 869, 876, 51 L.Ed.2d 64 (1977). Although the full measure of the constitutional protection of the right to privacy has not yet been fully delineated, it has been found to encompass "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education." United States v. Westinghouse Electric Corp., 638 F.2d 570, 577 (3d Cir. 1980), quoting Paul v. Davis, 424 U.S. 693, 713, 96 S.Ct. 1155, 1166, 47 L.Ed.2d 405 (1976). An employee's medical records, which may contain intimate facts of a personal nature, are also well within the ambit of materials entitled to privacy protection. Sterling v. Wayman, 232 F.3d 190, 195 (3d Cir. 2000); Westinghouse, supra. See Also, Gruenke v. Seip, 225 F.3d 290, 302-303 (3d Cir. 2000) and Doe v. SEPTA, 72 F.3d 1133, 1137 (3d Cir. 1995).

Defendants here move to dismiss on the grounds that the plaintiff ostensibly did not specifically allege that his medical records were either available to Defendants or were released to the public by Defendants. Rather, Plaintiff avers only that the defendants "made public and/or caused to be published in the newspaper" that he was "ill." Plaintiff, however, also alleges that the defendants "stated to individuals" that he "was ill and/or suffering from a mental illness. (Am. Compl., ¶114) Furthermore, in that portion of the Amended Complaint captioned "Facts Underlying Causes of Action," Mr. Weisman also alleges

that (1) he disclosed the true nature of his illness to the township's human resources director in a letter and via his completed medical forms, (2) that the township defendants acknowledged having been made aware of his specific disability in a letter from Mr. Stepnoski dated January 13, 2003 and (3) that other people who were associated with or did business with the township told him that they had heard rumors and/or were made aware of his specific illness. (Am. Compl., ¶s 40, 41, 43-45).

Given that under Fed.R.Civ.P. 8(a), a plaintiff need only provide "...a short and plain statement of the claim showing that the pleader is entitled to relief," we find that these averments, taken altogether, are adequate to plead a claim for invasion of privacy.[3]

We likewise find unavailing the defendants' argument that they are entitled to dismissal on the basis of qualified immunity. Qualified immunity protects governmental officials performing discretionary functions "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). A right is clearly established if its outlines are

[3] Of course in order to avoid summary judgment, it remains incumbent upon the plaintiff to amass evidence as to precisely what information was disseminated by the defendants, how it was disseminated and to whom.

sufficiently clear that a reasonable officer would understand that his actions violate the right. Sterling, 232 F.3d at 193, citing Kornegay v. Cottingham, 120 F.3d 392, 396 (3d Cir. 1997). If a violation exists, the immunity question focuses on whether the law is established to the extent that "the unlawfulness of the action would have been apparent to a reasonable official." Id., quoting Assaf v. Fields, 178 F.3d 170, 174 (3d Cir. 1999). Thus, while a plaintiff need not show that the very action in question has previously been held unlawful, he needs to show that in light of preexisting law, the unlawfulness was apparent. Shea v. Smith, 966 F.2d 127, 130 (3d Cir. 1992).

In this case, as is apparent from Whalen v. Roe, supra., the law was clearly established at least as of 1977 that public disclosure and/or dissemination of an individual's medical records, in the absence of a compelling competing interest on the part of the state, constituted an unlawful violation of one's constitutionally protected right to privacy. Accepting the plaintiff's averments as true that "one or more of the individual defendants made public and/or caused to be published in the newspaper that [he] was ill...and/or suffering from a mental illness...," we find that qualified immunity would not be available to the individual defendants here, given the clearly established law on this issue. The motion to dismiss Count VI of the Amended Complaint is therefore denied.

C. Dismissal of Plaintiff's Breach of Contract and Tortious Interference with Contract Claims.

Defendants next move for the dismissal of Plaintiff's breach of contract and tortious interference with contract claims for the reason that the employment contract upon which he bases these claims was never signed.

Evidence of mutual assent to employ and be employed which contains all the elements of a contract may be construed as a binding contract of employment though not reduced to writing. George W. Kistler, Inc. v. O'Brien, 464 Pa. 475, 347 A.2d 311, 315 (1975). Thus, in Pennsylvania it is possible for the parties to bind themselves orally even when contemplating a later written contract, provided that the parties have manifested mutual intent to do so and there is agreement on all aspects of the employment relationship. Overseas Strategic Consulting, Ltd. v. Larkins, Civ. A. No. 01-4115, 2001 U.S. Dist. LEXIS 16390 at *12 (E.D.Pa. Oct. 10, 2001). Generally, to support a claim for breach of contract under Pennsylvania law, a plaintiff must allege: 1) the existence of a contract, including its essential terms; 2) a breach of a duty imposed by the contract; and 3) resultant damages. Ware v. Rodale Press, Inc., 322 F.3d 218, 225 (3d Cir. 2003); Pittsburgh Construction Co. v. Griffith, 834 A.2d 572, 580 (Pa.Super. 2003); Koken v. Steinberg, 825 A.2d 723, 729 (Pa.Cmwlth. 2003).

Under Pennsylvania law, a cause of action for tortious

interference with contractual relations has the following elements: (1) the existence of a contractual, or prospective contractual relation between the complainant and a third party; (2) purposeful action on the part of the defendant, specifically intended to harm the existing relation, or to prevent a prospective relation from occurring; (3) the absence of privilege or justification on the part of the defendant; and (4) the occasioning of actual legal damage as a result of the defendant's conduct. CGB Occupational Therapy v. RHA Health Services, Inc., 357 F.3d 375, 384 (3d Cir. 2004); Milicic v. Basketball Marketing Co., Inc., 857 A.2d 689, 697 (Pa. Super. 2004).

In application of the foregoing principles to the case at hand, we find that the plaintiff has alleged sufficient facts to plead viable claims for breach of an employment contract and for tortious interference with the terms of that contract on the part of Mr. Stepnoski.

To be sure, while it is true that the amended complaint avers that the township never formally executed the proposed written agreements which Plaintiff submitted, there are also allegations that the defendants nevertheless repeatedly verbally assured Plaintiff that the agreement was acceptable and would be signed and implemented the terms of the proposed agreement by paying him the salary he had requested, giving him the use of a township vehicle, paying his dues, subscriptions and continuing

education class expenses, giving him the vacation time he had requested and putting into place a life insurance policy and pension plan for him. Plaintiff further alleges that the defendants breached this agreement and damaged him by, *inter alia,* failing to compensate him for his disability, failing to pay him a lump sum of one-half of his salary upon termination, not allowing him to use his compensatory time off for the hours worked above and beyond regular business hours and failing to pay for health care coverage for him and his family for six months following his termination. (Am. Compl., ¶s119-121, 125-128). Additionally, the amended complaint avers that Defendant Stepnoski, while still the Chairman of the Board of Supervisors acted intentionally and in his own self-interest to have Plaintiff dismissed from his position as Township Manager in order that he could assume the position for himself. As we find that all of these averments, read in the light most favorable to the plaintiff as the non-moving party, are sufficient to plead causes of action for breach of contract and tortious interference with contractual relations, we deny the motion to dismiss Counts VII and VIII.

D. Dismissal of Plaintiff's Claim under the Sunshine Act.

Finally, Defendants also seek dismissal of Count IX of Plaintiff's Amended Complaint, which asserts a claim for relief under the Pennsylvania Sunshine Act, 65 Pa.C.S. §701, *et. seq.* on

the grounds that Plaintiff failed to bring his legal challenge within thirty (30) days.

Specifically, the plaintiff challenges the defendants' decision to designate him a "key employee" and to ultimately terminate him under the Sunshine Act as those decisions were not undertaken at an open public meeting nor were they put to a public vote. In general, the Sunshine Act requires:

> "Official action and deliberations by a quorum of the members of an agency shall take place at a meeting open to the public unless closed under section 707 (relating to exceptions to open meetings), 708 (relating to executive sessions) or 712 (relating to General Assembly meetings covered).

65 Pa.C.S. §704.

In lieu of discussing whether the challenged actions fall within any of the exceptions delineated in sections 707, 708 or 712, Defendants instead look to section 713 in support of their motion for dismissal of Plaintiff's Sunshine Act claim. That section provides:

> A legal challenge under this chapter shall be filed within 30 days from the date of a meeting which is open, or within 30 days from the discovery of any action that occurred at a meeting which was not open at which this chapter was violated, provided that, in the case of a meeting which was not open, no legal challenge may be commenced more than one year from the date of said meeting. The court may enjoin any challenged action until a judicial determination of the legality of the meeting at which the action was adopted is reached. Should the court determine that the meeting did not meet the requirements of this chapter, it may in its discretion find that any or all official actions taken at the meeting shall be invalid. Should the court determine that the meeting met the requirements of this chapter, all official action taken at the meeting shall be fully

effective.

Thus, failure to initiate a legal challenge within the statutory limitations period of Section 713 bars jurisdiction by the trial court. Belitskus v. Hamlin Township, 764 A.2d 669, 670 (Pa.Cmwlth. 2000), *appeal denied*, 565 Pa. 676, 775 A.2d 809 (2001), citing, Lawrence County v. Brenner, 135 Pa.Cmwlth. 619, 582 A.2d 79 (1989), *appeal denied*, 527 Pa. 652, 593 A.2d 423 (1991).

In this case, it is clear from the amended complaint that Mr. Weisman knew that the Township had designated him a "key employee" upon receipt of Mr. Stepnoski's letter of December 12, 2002. He further learned that he had been terminated on or about February 28, 2003. Given that Plaintiff did not institute any legal challenge to the apparent failure of the Township to make these decisions at an open, public meeting until he filed his complaint in this action on October 7, 2004, we find that his Sunshine Act claim is barred as untimely under Section 713. Count IX of the Amended Complaint shall therefore be dismissed with prejudice.

For all of the reasons set forth above, the defendants' motion to dismiss is granted in part and denied in part pursuant to the attached order.

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HENRY ROWAN, and JANET FRENCH	:	

ORDER

AND NOW, this 14th day of June, 2005, upon consideration of Defendants' Motion to Dismiss Plaintiff's Amended Complaint and Plaintiff's Response thereto, it is hereby ORDERED that the Motion is GRANTED IN PART and DENIED IN PART and Count IX and that portion of Count I which alleges violation of Plaintiff's FMLA rights by virtue of Defendants' designation of Plaintiff as a "key employee" are DISMISSED.

In all other respects, the Motion is DENIED.

BY THE COURT:

s/J. Curtis Joyner
J. CURTIS JOYNER, J.