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

EDWARD CHRISTIE, et al.	:	CIVIL ACTION
v.	:	
BOROUGH OF FOLCROFT, et al.	:	NO. 04-5944

LESLIE MCLEAN	:	CIVIL ACTION
v.	:	
BOROUGH OF FOLCROFT, et al.	:	NO. 04-5972

MEMORANDUM AND ORDER

McLaughlin, J. September 27, 2005

These two cases have been consolidated for purposes of pretrial discovery. In both, employees of the Borough of Folcroft ("Folcroft") Police Department ("Department") allege that their rights were violated when they were subjected to audio and video surveillance in their workplace, and when false reports were made to the media about them.

In Christie, several male employees of the Department are suing Folcroft, Joseph Zito, Anthony Truscello, Kathleen Kelly and Forsythe Confidential Investigations, d/b/a FCI, Ltd. ("FCI"). All defendants have filed motions to dismiss. In McLean, one female employee of the Department is suing Folcroft, Zito, Truscello, and FCI. Folcroft, Zito and Truscello have filed motions to dismiss.

The Court will grant Folcroft's motion to dismiss McLean's state law tort claims in Counts VII and X of her complaint. In all other respects, the motions to dismiss of all defendants are denied.

I. Facts

The facts in both complaints are similar and consistent, and the Court will discuss them together.[1]

All plaintiffs are employed by the Department. Edward Christie is the police chief. William Bair, Eugene Boyle, Chris Eiserman, John Glick, Anthony Lerro, Dominic Squillace, and Dan White are police officers. Robert Ruskowski and William Wiseley are police corporals. The Christie plaintiffs have been employed by the Department at all times relevant to this case. Leslie McLean is the only female police officer in the Department. She was hired on or about February 17, 2004.

[1]In considering a motion to dismiss under Fed. R. Civ. P. 12(b)(6), all of the factual allegations contained in the complaint must be taken as true and all reasonable inferences must be drawn in the light most favorable to the non-moving party. Bowley v. City of Uniontown Police Dept., 404 F.3d 783, 786 (3d Cir. 2005). A court may grant a motion to dismiss for failure to state a claim only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Gordon v. Wawa, Inc. 388 F.3d 78, 80-81 (3d Cir. 2004).

The plaintiffs have sued Folcroft and Folcroft officials. The officials occupied different roles within Folcroft. Kelly, who is a defendant only in Christie, was the president of the Folcroft borough council. Zito was the public safety chairman, an elected member of the Folcroft borough council. Truscello was the borough manager of Folcroft, and was appointed by the Folcroft borough council. The plaintiffs have also sued FCI, the company that allegedly installed surveillance equipment in the Department.

The plaintiffs claim that the defendants violated their rights through hidden video and audio surveillance in the plaintiffs' workplace and false reports to the media about the plaintiffs' work habits. McLean also claims that some of the defendants' actions were motivated by her gender.

The surveillance described by the plaintiffs took place within various areas of the Department. The Department includes an area marked "police-only" called the squad room. The squad room contains two areas. In one area, police officers' desks are located and interviews occur. In another area separated by a partition, there is a locker room. Those inside the locker room are not visible to those in the other area of the squad room. Officers routinely change into and out of uniform in the locker room. After McLean was hired, she and the male officers formed

an agreement to inform each other when a member of the opposite sex was using the locker room.

When Christie learned of suspicious activity in the Department building during 2003 and 2004, he hired a private investigator, Gregory Auld, to conduct a sweep of the Department. Auld found hidden cameras and devices capable of intercepting wire communications in the hallway, squad room, and evidence room of the Department. In May of 2004, Folcroft installed new lighting in the squad room and locker room. The plaintiffs believe this lighting contained more cameras. Later in May, Folcroft, Zito and Truscello ordered the officers to be fitted for new uniforms in the locker room.

On or about May 18, 2004, Zito arrived at the Department carrying a large bag, and met with Truscello. Zito entered a room that Truscello controlled intending to remove videotapes from the hidden cameras described above. Delaware County executives executed a search warrant leading to the discovery of the cameras in the lights two days later.

Throughout the course of the surveillance, Zito and Truscello instructed FCI to bill Folcroft in small increments so that payment would not require full disclosure to or agreement of the council or the public. After the discovery of the additional cameras, Zito and Truscello published information to the public and news media. They accused the plaintiffs of neglecting their

duties by failing to respond to citizen calls and sleeping on the job.

II. Claims

The plaintiffs have made several federal and state claims. The original Christie complaint contained ten counts. Counts II and III were withdrawn in the First Amended Complaint.[2] The remaining counts are (I) 42 U.S.C. § 1983 (2005), based on violations of the Fourth and Fourteenth Amendments to the United States Constitution; (IV) invasion of privacy - false light; (V) defamation per se; (VI) invasion of privacy - intrusion into seclusion; (VII) 18 U.S.C. § 2510 et seq. (2005) ("Federal Wiretap Act") and 18 Pa. Cons. Stat. § 5701 et seq. (2005) ("State Wiretap Act"); (VIII) civil conspiracy; (IX) § 1983 conspiracy, based on violations of the Fourth and Fourteenth Amendments to the United States Constitution; and (X) Pennsylvania Constitution due process protections. All counts are brought against Zito and Truscello. Counts I, VII, IX and X are brought against Folcroft. Counts I, VI, VII, VIII and IX are brought against Kelly. Counts VI, VII, VIII and IX are brought against FCI.

[2]All counts will be referred to using their original numbers.

The McLean complaint contains twelve counts. Count I was withdrawn as to Zito and Truscello and Count II was withdrawn in its entirety in McLean's opposition to the motions to dismiss. The remaining counts are (I) 42 U.S.C. §2000e et seq. (2005) ("Title VII") - sexually hostile work environment; (III) § 1983 based on violations of the Fourth and Fourteenth Amendments to the United States Constitution; (IV) 42 U.S.C. § 1985 (2005) - conspiracy to violate the Fourth and Fourteenth Amendments to the United States Constitution; (V) 42 U.S.C. § 1986 (2005) - failure to prevent conspiracy to violate the Fourth and Fourteenth Amendments to the United States Constitution; (VI) missing;[3] (VII) negligent infliction of emotional distress; (VIII) defamation; (IX) invasion of privacy - false light; (X) invasion of privacy - intrusion into seclusion; (XI) State Wiretap Act; and (XII) Federal Wiretap Act. Counts III, IV, VII, VIII, IX, X, XI, and XII are brought against Zito and Truscello. Counts I, III, IV, V, VII, X, XI, and XII are brought against Folcroft. Counts IV, VII, X, XI, and XII are brought against FCI.

III. The Motions to Dismiss

The defendants have moved to dismiss on several grounds. First, the defendants other than Folcroft have raised

[3]All counts will be referred to using their numbers from the complaint regardless of this missing count.

certain immunity defenses. Zito and Truscello argue that the Fourth Amendment-based § 1983 and invasion of privacy - false light claims against them in both complaints should be dismissed because they are entitled to absolute legislative immunity from liability for their legislative acts. Kelly makes the same argument with respect to all of the claims against her in Christie. Zito and Truscello (with respect to the Fourteenth Amendment-based § 1983 claims), Kelly (with respect to all claims) and FCI (with respect to all claims) argue that the complaints should be dismissed because they are protected by qualified immunity. Zito and Truscello also claim that they are entitled to high public official immunity with respect to the plaintiffs' state law claims.

Second, there are the defenses asserted only by Folcroft. Like the above defendants, Folcroft asserts an immunity defense. It argues that McLean's claims of negligent infliction of emotional distress and invasion of privacy - intrusion into seclusion should be dismissed because Folcroft is immune from suit for state law tort claims under the Pennsylvania Political Subdivision Tort Claims Act, 42 Pa. Cons. Stat. Ann. § 8541 (2005)("Tort Claims Act"). Folcroft's next argument is that McLean's § 1983 claim against it should be dismissed because it alleges no policy or custom that caused a constitutional violation. Folcroft also argues that the Christie plaintiffs' §

1983 conspiracy claims should be dismissed as insufficiently alleged or alternatively, under the doctrine of intracorporate immunity. Finally, Folcroft raises defenses to McLean's claims relating to gender discrimination. Folcroft argues that because McLean was hired after the alleged acts by Folcroft took place, these acts could not have been based upon her gender. Similarly, Folcroft argues that McLean's § 1985 conspiracy and § 1986 failure to prevent conspiracy claims must be dismissed because there was no gender discrimination against McLean.

Several other defenses relate at least in part to the plaintiffs' § 1983 claims. Folcroft, Zito, Truscello, and FCI argue that the plaintiffs had no reasonable expectation of privacy in their workplace. They argue that such an expectation is essential to the plaintiffs' Fourth Amendment-based § 1983 claims, as well as their claims of invasion of privacy and violation of the Wiretap Acts. Folcroft, Zito, Truscello, and Kelly also move to dismiss the plaintiffs' Fourteenth Amendment-based § 1983 claims. They argue that the plaintiffs cannot satisfy the applicable stigma-plus test to prove that they were deprived of a liberty interest in reputation. In its motion to dismiss in Christie, FCI argues that it is not a state actor under any of the applicable tests and therefore cannot be sued under § 1983. This defense must be analyzed with respect to the § 1983 conspiracy claim made against FCI.

Folcroft, Zito, Truscello, and FCI also raise defenses to the plaintiffs' claims under the State and Federal Wiretap Acts. They argue that they cannot be liable under the Federal Wiretap Act because the plaintiffs only allege that they procured others to violate the Act, and the Act no longer allows for procurement liability. They also argue that both Acts require actual interception, but that the plaintiffs have alleged only the installation of devices capable of interception.

Kelly argues that the Christie complaint does not allege any facts implicating her. She argues that all claims against her must therefore be dismissed.

Finally, Folcroft, Zito and Truscello argue that the Pennsylvania Constitution provides no private right of action for damages. They argue that the Christie plaintiffs' claims for damages under the Pennsylvania Constitution must therefore be dismissed.

IV. Discussion

A. Immunity Defenses of the Individual Defendants

The defendants other than Folcroft argue that they are immune from liability for various claims. The Court concludes that their absolute legislative immunity, qualified immunity, and high public official immunity defenses are premature. The

alleged facts do not establish that the defendants are entitled to such immunity.

1. Absolute Legislative Immunity

Kelly, Zito and Truscello argue that the complaints should be dismissed because they are immune from suit under the doctrine of absolute legislative immunity. They must satisfy their burden of proving that their acts were both substantively and procedurally legislative to succeed with this defense. Because it is not clear that the defendants were engaged in legislative activities, their motions to dismiss on this ground are denied.

Absolute legislative immunity protects federal, state and local officials from § 1983 and other suits for their legislative activities. Bogan v. Scott-Harris, 523 U.S. 44, 49 (1998); Tenney v. Brandhove, 341 U.S. 367, 372 (1951); Aitchison v. Raffiani, 708 F.2d 96, 99 (3d Cir. 1983)(applying this doctrine to members of a municipal council acting in a legislative capacity).[4] Legislative activities are those "actions taken 'in the sphere of legitimate legislative activity.'" Bogan, 523 U.S. at 54 (quoting Tenney, 341 U.S. at 376). A defendant retains the burden of proving that he is

[4] The defense is available both to legislative officials and non-legislative officials performing legislative functions. Bogan, 523 U.S. at 55.

entitled to legislative immunity. Harlow v. Fitzgerald, 457 U.S. 800, 812 (1982).

In Ryan v. Burlington County, 889 F.2d 1286, 1290-91 (3d Cir. 1989), the court held that to be in the sphere of legitimate legislative activity, an act of a local government official must be both substantively and procedurally legislative. Ryan has been applied to local government legislative immunity defenses in this jurisdiction. See Carver v. Foerster, 102 F.3d 96, 100 (3d Cir. 1996); Leipziger v. Twp. of Falls, 2001 U.S. Dist. LEXIS 1048, at *22-*23 (E.D. Pa. Feb. 1, 2001); Brison v. Tester, 1994 U.S. Dist. LEXIS 18193, at *84-*85 (E.D. Pa. Dec. 21, 1994).[5]

Substantively legislative acts involve "policy-making decision[s] of a general scope," or "line-drawing." Ryan, 889 F.2d at 1291. Investigations into governmental inefficiency can be substantively legislative. Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 504 (1975); Watkins v. United States, 354 U.S. 178, 187 (1957); Tenney, 341 U.S. at 377.

Courts will not inquire into the purpose, motive or intent behind legislative acts. Bogan, 523 U.S. at 54; Tenney,

[5]Zito and Truscello argue in their reply brief that the Ryan test applies only to legislators "during the lawmaking process, not during the investigative process." (Zito & Truscello Reply Br. pg. 1). The defendants have not persuaded the Court at this point in time that there is a separate test in "investigative immunity" cases. (Zito & Truscello Reply Br. pg. 2).

341 U.S. at 377. The court in Gov't of Virgin Islands v. Lee, 775 F.2d 514, 517, 524 (3d Cir. 1985), held, however, that consideration of motive is appropriate to determine if an act "was a legislative act at all" as opposed to a "non-legislative" act "misrepresented as legislative."

To be procedurally legislative, an act must come about through established, constitutionally permissible legislative procedures. Ryan, 889 F.2d at 1291. In the investigation cases, the United States Supreme Court gave weight to the formal, permissible procedures which effectuated the investigations. Eastland, 421 U.S. at 506; Watkins, 354 U.S. at 201; Tenney, 341 U.S. at 377. Although legislative investigations can be carried out through informal methods, only those within the scope of a legislator's authority are procedurally sound. Lee, 775 F.2d at 517, 524.

Kelly, Zito and Truscello were affiliated with the local government to varying degrees. They have argued that they were investigating the inefficiency of Folcroft's police department, though the plaintiffs have not alleged this in the complaints. It is not clear from the complaints whether these defendants were making a legislative investigation.

Even if the investigation was substantively legislative, the procedures used to authorize and conduct the investigation are unknown. It is unclear whether the defendants

were authorized by the council, a committee, or any resolution to make their investigation. The furtive billing methods alleged by the plaintiffs may indicate that the defendants subverted proper procedures. (Christie Compl. ¶ 49; McLean Compl. ¶ 30).

The defendants may ultimately satisfy their burden and establish that their activities were both substantively and procedurally legislative. The record at this stage, however, is too sparse to support that conclusion.

2. Qualified Immunity

The individual defendants argue that even if they are not entitled to absolute legislative immunity, they are entitled to qualified immunity. The Court is not able to make a decision on qualified immunity at this stage. The defendants may reassert the argument after discovery.

3. High Public Official Immunity

Zito and Truscello argue that the plaintiffs' state law claims should be dismissed under the doctrine of high public official immunity. Because the elements of this defense are not made out in the complaints, their motions on this ground are denied.

High public official immunity exempts high public officials from damage suits arising from statements made or

actions taken within the scope of their authority. Lindner v. Mollan, 677 A.2d 1194, 1195 (Pa. 1996). Application of the doctrine depends upon the nature of an official's duties, the importance of his office and especially whether or not he has policy-making functions. Montgomery v. Philadelphia, 140 A.2d 100, 105 (Pa. 1958); see Jonnet v. Bodick, 244 A.2d 751, 752 (Pa. 1968)(applying the privilege to a township supervisor's denial of a building permit and holding that it is not limited to defamation suits); Osiris Enters. v. Borough of Whitehall, 877 A.2d 560, 567 (Pa. Commw. Ct. 2005)(applying the privilege to borough council members); Suppan v. Kratzer, 660 A.2d 226, 230 (Pa. Commw. Ct. 1995)(applying the privilege to a mayor and borough council president's statements to the press regarding a police officer applicant). The defendants bear the burden of proving that they are entitled to this immunity. Harlow, 457 U.S. at 812.

In this case, whether the absolute privilege applies to Zito and Truscello depends upon (1) whether they were high public officials and (2) whether they were acting within the scope of their authority. Zito, a borough councilman, may have been a high public official. Truscello's role as borough manager, however, is unclear from the alleged facts. It would be premature to conclude that Zito and Truscello were high public officials at this stage.

Even if both defendants were high public officials, it is not clear from the facts whether they were acting within the scope of their authority when they committed the acts about which the plaintiffs complain.[6] It would be premature for the Court to make this determination without knowing more about how their investigation started.

B. Defenses Specific to Folcroft

Folcroft alone asserts the defenses of local agency immunity from McLean's state law tort claims under the Tort Claims Act, failure to establish municipal liability, failure of the § 1983 conspiracy claim on its face or under the doctrine of intracorporate immunity, and failure of McLean's claims relating to gender discrimination. The Court finds that Folcroft is entitled to local agency immunity for McLean's state law tort claims, but that its other defenses fail at this early stage of the litigation.

1. Local Agency Immunity Under the Tort Claims Act

McLean conceded at oral argument that the Tort Claims Act grants a local agency such as Folcroft immunity from state

[6]Contrary to what Zito and Truscello argue in their Supplemental Memorandum, the plaintiffs have alleged that Zito and Truscello acted in both their official and individual capacities. (Christie Compl. ¶ 98; McLean Compl. ¶¶ 11, 12).

law tort claims. The Act applies to McLean's claims of negligent infliction of emotional distress and intrusion into seclusion, and Folcroft is immune from liability for these claims.

2. Municipal Liability

In its motion to dismiss McLean's complaint, Folcroft argues that as a municipality, it can only be held liable under § 1983 if McLean has alleged an injury resulting from the implementation of a policy or custom of the municipality. That principle is correct, but the Court concludes that the plaintiff's allegations of a policy or custom are sufficient to survive Folcroft's motion to dismiss.

Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691 (1978), confirms that "Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort." To establish the existence of a government custom or policy, a plaintiff can show either (1) that a decisionmaker with final authority to establish such a policy in that instance issued an official proclamation, policy or edict or (2) that although not authorized by law, a practice of officials virtually constitutes law because it is permanent and well-settled. Andrews v. City of Philadelphia, 895 F.2d 1469, 1480 (3d Cir. 1990).

The complaint alleges that "beginning in March, 2003 defendants implemented and executed a policy of video and audio taping persons inside the police department without the knowledge or consent of those individuals." (McLean Compl. ¶ 30). It also alleges that "defendants, Truscello and Zito had the authority of defendant, Folcroft to effectuate its policy and custom." (McLean Compl. ¶ 13). These allegations are sufficient at this stage.[7]

3. § 1983 Conspiracy and Intracorporate Immunity

Folcroft argues that the § 1983 conspiracy claim against it in Christie should be dismissed as insufficiently alleged or under the doctrine of intracorporate immunity. The Court concludes that the complaint survives Folcroft's motion to dismiss because the plaintiffs allege facts sufficient to establish a conspiracy that satisfies both of the exceptions to the doctrine of intracorporate immunity.

A § 1983 conspiracy exists when two or more conspirators agree to deprive a plaintiff of a constitutional

[7]At oral argument, Folcroft argued that the plaintiffs' allegations of the arrangement of secretive billing by Zito and Truscello show that these defendants were not acting at the behest of Folcroft. The plaintiffs allege that Zito and Truscello arranged for billing that would conceal their acts from the general public and Folcroft as a whole. This allegation is not inconsistent with the allegation that they were acting according to a custom or policy established by some Folcroft officials.

right under color of law. Abbott v. Latshaw, 164 F.3d 141, 147-48 (3d Cir. 1998); Tarlecki v. Mercy Fitzgerald Hosp., 2002 U.S. Dist. LEXIS 12937, at *18-*19 (E.D. Pa. July 15, 2002). Under the doctrine of intracorporate immunity, a corporation cannot conspire with its own officers acting in an official capacity. Robison v. Canterbury Vill., Inc., 848 F.2d 424, 431 (3d Cir. 1988). Intracorporate immunity does not preclude a conspiracy suit against a corporation and an officer acting in a personal capacity. Id. It also does not preclude a conspiracy suit involving a corporation, an officer, and an independent third party conspirator. Id. These intracorporate immunity principles may apply to claims of § 1983 conspiracy between local officials and their municipalities. Gregory v. Chehi, 843 F.2d 111, 118 n. 4 (3d Cir. 1988); Tarlecki, 2002 U.S. Dist. Lexis, at *19.

The plaintiffs allege that "cameras were place[d] by the Borough and its agents, servants, and/or employees during the year 2003." (Christie Compl. ¶ 33). They allege that in doing so, "all defendants acting by agreement and in concert with one another, in their individual and/or official capacities, intended to and in fact did carry out a chain of events that ultimately violated Plaintiffs' Fourth and Fourteenth Amendment rights." (Christie Compl. ¶ 98). Some combination, then, has been alleged.

If the doctrine of intracorporate immunity applies to § 1983 conspiracy claims, Folcroft will only be liable for such a combination if it conspired either 1) with its officers acting in their individual capacity or 2) with an independent third party. The plaintiffs allege that FCI was involved in the conspiracy at the behest of the other defendants, who they allege "acting alone or in concert, in their individual and official capacities, instructed defendant FCI to bill the borough" in a furtive manner. (Christie Compl. ¶ 51). Even if intracorporate immunity applies to the plaintiffs' § 1983 conspiracy claims, the plaintiffs' allegations satisfy both of the above exceptions to the doctrine.

4. Defenses Relating to Gender Discrimination

To prevail on her claims under Title VII, § 1985 and § 1986, McLean must allege discrimination based upon her gender. Folcroft argues that she has failed to do so. The Court concludes that McLean's allegations are sufficient to state a claim for gender discrimination.

a. McLean's Hostile Work Environment Claim Under Title VII

In Count I of her complaint, McLean sues Folcroft for violations of Title VII causing a sexually hostile work environment. Folcroft argues in its motion that the actions upon

which McLean bases her motion to dismiss began before she was hired and could not have been based upon her gender.

Although McLean alleges that some video and audio taping occurred before she became employed by the Department, she also alleges that "at some time after [she] was hired by the police department defendants, Borough of Folcroft, Truscello and/or Zito contacted FCI and requested that an additional camera be installed in the police dressing room." (McLean Compl. ¶ 31). This added monitoring of the officers in a changing area once a female joined the force is sufficient to defeat a motion to dismiss on the issue of whether the actions were taken because of her gender.

b. §§ 1985 and 1986 Conspiracy

Folcroft argues that because McLean's gender discrimination claim fails, her claims for conspiracy under § 1985 and failure to prevent conspiracy under § 1986 should be dismissed. A conspiracy to engage in gender discrimination falls within § 1985. Carchman v. Korman Corp., 594 F.2d 354, 356 (3d Cir. 1979). A cause of action under § 1986 depends upon the validity of the underlying § 1985 claim. Clark v. Clabaugh, 20 F.3d 1290, 1295 n. 5 (3d Cir. 1994). Because the Court finds McLean's allegations of gender discrimination sufficient, it also

finds that her § 1985 and § 1986 claims survive Folcroft's motion to dismiss.

C. Other Defenses Relating to the Plaintiffs' § 1983 Claims

The defendants have made other arguments that relate to the plaintiffs' § 1983 claims. At this stage, the Court concludes that the plaintiffs have alleged that they had a reasonable expectation of privacy in their workplace. The plaintiffs' claims of Fourth Amendment-based § 1983 violations, invasion of privacy, and violation of the Wiretap Acts survive on this ground. In addition, the Court finds that the complaint states a claim for a deprivation of a liberty interest in reputation. Finally, the Court finds that the plaintiffs have alleged that FCI conspired with Folcroft, and is a state actor subject to § 1983 conspiracy liability.

1. Reasonable Expectation of Privacy

The plaintiffs' claims for violations of the Fourth Amendment through § 1983, Intrusion into Seclusion and violations of the State and Federal Wiretap Acts survive the defendants' motions to dismiss because the plaintiffs may have had a reasonable expectation of privacy in their workplace.

To succeed with the above-mentioned claims, the plaintiffs must show that they had a reasonable expectation of

privacy in the squad and locker rooms. Kline v. Sec. Guards, Inc., 386 F.3d 246, 257 (3d Cir. 2004); Wilcher v. City of Wilmington, 139 F.3d 366, 374 (3d Cir. 1998); Kelleher v. City of Reading, 2001 U.S. Dist. LEXIS 14958, at *15 (E.D. Pa. Sept. 24, 2001); Gross v. Taylor, 1997 U.S. Dist. LEXIS 11657, at *9 (E.D. Pa. Aug. 5, 1997). A reasonable expectation of privacy requires both an actual, subjective expectation of privacy and one that society recognizes as reasonable. Smith v. Maryland, 442 U.S. 735, 740 (1979).

Although public employees have some reasonable expectation of privacy at work, the expectations of employees in highly regulated areas such as law enforcement are diminished. Wilcher, 139 F.3d at 374. Safety concerns associated with an industry and well-known to prospective employees can also diminish their expectations of privacy. Id. In areas where there are regular intrusions into the privacy of officers, it is less reasonable for them to expect privacy. See Ascolese v. Se. Pennsylvania Transp. Auth., 902 F. Supp. 533, 550 (E.D. Pa. 1995). In Ascolese, another Judge of this Court analogized the medical testing of the plaintiff police officer with "the communal undress of locker rooms" in a student athlete setting, and found no reasonable expectation of privacy. Id. (internal quotations omitted).

Analysis of this issue is fact-specific. In Thompson v. Johnson County Cmty. College, 930 F. Supp. 501, 507 (D. Kan. 1996), a court held, in deciding a summary judgment motion, that employees did not have a reasonable expectation of privacy in a security personnel locker room because it was not enclosed, activities within it could be viewed by anyone walking through, and it doubled as a storage room. In Brambrinck v. City of Philadelphia, 1994 U.S. Dist. LEXIS 16538, at *27-*28 (E.D. Pa. Nov. 16, 1994), another Judge of this Court found that police officers had no reasonable expectation of privacy in their lockers because a directive issued by the police department informed them that their lockers would be periodically inspected by their supervisors.

The Court cannot decide, based on the allegations of the complaints, that the plaintiffs had no expectation of privacy as to any areas in which the plaintiffs were allegedly subjected to surveillance.

2. Liberty Interest in Reputation/Stigma-Plus

The plaintiffs base their § 1983 claims in part on violations of the Fourteenth Amendment by the defendants. They claim that the defendants deprived them of a reputational liberty

interest when they reported to the media.[8] All of the defendants other than FCI argue that the plaintiffs fail to allege any Fourteenth Amendment violation which would entitle them to relief. The Court finds that the plaintiffs' complaints survive the defendants' motions to dismiss on this ground.

Courts analyze reputational due process claims under the "stigma-plus" test stemming from Paul v. Davis, 424 U.S. 693, 701 (1976). See Ersek v. Twp. of Springfield, 102 F.3d 79, 83, n.5 (3d Cir. 1996)(applying the Paul test).[9] "[A]n individual has a protectible interest in reputation." Ersek, 102 F.3d at 83. "[T]o make out a claim for a violation of a liberty interest in reputation a plaintiff must show a stigma to his reputation plus some concomitant infringement of a protected right or

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[8]Kelly mistakenly defends against a claim of equal protection that no plaintiff in Christie raises. The only Fourteenth Amendment claim asserted by the plaintiffs is a due process claim based upon the deprivation of a liberty interest in reputation.

[9]The plaintiffs cite to the case of R. v. Commonwealth of Pennsylvania, 636 A.2d 142, 149 (Pa. 1994), and argue that because reputation is a protected liberty interest under the Pennsylvania Constitution, Paul's holding is inapplicable to acts occurring in Pennsylvania. Town of Castle Rock v. Gonzales, 125 S. Ct. 2796, 2803-04 (2005), clarifies that though the underlying rights in Fourteenth Amendment analysis are state law-based, federal constitutional law determines whether they rise to the level of legitimate interests under the Fourteenth Amendment. In addition, Boyanowski v. Capital Area Intermediate Unit, 215 F.3d 396, 401 (3d Cir. 2000), was decided after R. and was based upon acts that occurred in Pennsylvania, and it applied Paul. In Gross, 1997 U.S. Dist. LEXIS, at *38, n. 7, another Judge of this Court noted that courts in this district have regularly rejected arguments identical to the plaintiffs' argument here.

interest. . . . What satisfies that "plus," however, is uncertain." Id. at n. 5.

To constitute a stigma in the first place, the statements published by the government must injure reputation and be "substantially and materially false." Ersek, 102 F.3d at 83-84 (holding that false reports that a golf pro of a public course was under investigation for criminal activities were stigmatizing). Another Judge of this Court has held that statements about employee insubordination and tardiness are not stigmatizing. James v. Valley Twp., 1998 U.S. Dist. LEXIS 41, at *14 (E.D. Pa. Jan. 6, 1998). In James, the Court cited cases from other jurisdictions holding that statements that employees engaged in minor violations at work were not stigmatizing. Id.

Beyond this, the "plus" is uncertain. The general definition is the showing of "a change or extinguishment of a right or status guaranteed by state law or the Constitution" that is "concomitant" or "conjoined" with the stigmatizing statements. Clark v. Twp. of Falls, 890 F.2d 611, 618-20 (3d Cir. 1989). Often, the plus involves the termination of employment. Graham v. City of Philadelphia, 402 F.3d 139, 142 n. 2 (3d Cir. 2005). It is not clear whether "something less than a property interest" or "a demotion in rank, in contrast to an actual termination or discharge, is a sufficient plus." Ersek, 102 F.3d at 83, n. 5. A vague prediction of future, intangible employment problems is

generally not concrete enough. Siegert v. Gilley, 500 U.S. 226, 234 (1991); Paul, 424 U.S. at 701. The Court has found no case considering the situation of a prior deprivation of non-proprietary Fourth Amendment rights as the plus factor.

According to the complaints, the defendants' statements were false, but it is not clear whether they were stigmatizing. (Christie Compl. ¶ 43; McLean Compl. ¶¶ 1, 50). The plaintiffs have alleged that the accusations affect their business reputations and prospects for future employment. (Christie Compl. ¶ 58; McLean Compl. ¶ 68). More facts on this issue are necessary. Assuming the statements were stigmatizing, there is still the plus factor to consider.

The plaintiffs have alleged that the defendants "tarnish[ed] their business reputations and place[d] a stigma on their ability to continue performing their jobs." (Christie Compl. ¶ 47). They have also alleged that the damage to their reputation from the statements was "closely related to and had a significant nexus to [the defendants'] deprivation of Plaintiffs' Fourth Amendment Rights under the United States Constitution." (Christie Compl. ¶ 60). Whether a violation of Fourth Amendment rights prior to the alleged defamatory statements would be enough is not clear. The Court cannot conclude, based on the allegations of the complaints, that the plaintiffs cannot make out a claim based on a reputational liberty interest.

3. State Action

FCI argues that it is not a state actor and cannot be sued under § 1983. The Christie plaintiffs have alleged only a § 1983 conspiracy claim against FCI, and the Court finds that FCI is a state actor for purposes of this claim.

Because the plaintiffs assert only a § 1983 conspiracy claim against FCI, and not a direct § 1983 claim, the case law regarding direct claims that FCI discusses is irrelevant.[10] It is settled law that "[a]lthough not an agent of the state, a private party who willfully participates in a joint conspiracy with state officials to deprive a person of a constitutional right acts under color of state law for purposes of § 1983" and can be held liable under the statute. Abbott, 164 F.3d at 147-48 (internal quotations omitted). See also Dennis v. Sparks, 449 U.S. 24, 27-28 (1980); Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970); McKeesport Hosp. v. Accreditation Council for Graduate Med. Educ., 24 F.3d 519, 524 (3d Cir. 1994). The facts are sufficient to make out a § 1983 conspiracy claim.

D. State and Federal Wiretap Acts

The defendants make two arguments (in addition to the reasonable expectation of privacy argument) with regard to the

[10]This includes the additional case law cited by FCI at oral argument.

plaintiffs' claims under the Wiretap Acts. The first is the issue of "procurement liability" raised by Zito and Truscello under the federal Act only. The second is the distinction between the installation of devices capable of interception and actual interception raised by Folcroft and FCI under both Acts. The Court finds that the plaintiffs' allegations under the Wiretap Acts are sufficient to state claims.

Prior to 1986, the Federal Wiretap Act allowed for civil liability against "any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use" certain communications. 18 U.S.C. § 2520 (2005). In 1986, the phrase "or procures any other person" was deleted from the statute.[11] Peavy v. WFAA-TV, Inc., 221 F.3d 158, 168 (5th Cir. 2000). In Peavy, the Fifth Circuit relied on this change to hold that a news station that had broadcast information independently and illegally obtained by a neighbor of the plaintiff was not liable to the plaintiff. Id.

The plaintiffs have alleged that Zito and Truscello intercepted communications themselves, and were not mere procurers. In Peavy, the alleged procurer had simply received information from someone else who had independently engaged in illegal wiretapping. Here, in contrast, the defendants "worked

[11]The State Wiretap Act still allows for procurement liability.

alone or in concert . . . to surreptitiously install and finance the installation of the surveillance cameras" and "endeavored to intercept and . . . actually intercepted Plaintiffs' wire, oral and/or electronic communications." (Christie Compl. ¶¶ 49, 86, 90; McLean Compl. ¶¶ 96, 100). Because the plaintiffs have alleged more than mere procurement by Zito and Truscello, their complaint is sufficient to survive a motion to dismiss.

The second Wiretap Act issue involves the distinction between installation and interception. The Wiretap Acts allow claims by people whose communications have been intercepted. § 2510 et seq.; § 5701 et. seq. Evidence of actual interception, and not mere evidence of the installation of devices capable of interception, is required. Gross, 1997 U.S. Dist. LEXIS, at *15.

The plaintiffs allege that their communications were intercepted by the defendants, including Folcroft and FCI. (Christie Compl. ¶¶ 86, 90; McLean Compl. ¶¶ 96, 100). The plaintiffs' Wiretap Acts claims survive the defendants' motions to dismiss.

E. Sufficiency of Facts Concerning Kelly

Kelly argues that the Christie plaintiffs have alleged no acts by her in their complaint. The Court finds that the plaintiffs have alleged sufficient facts against her to survive a motion to dismiss.

Only a "short and plain statement of the claim showing that the pleader is entitled to relief" is required under Fed. R. Civ. P. 8(a)(2). In the cases cited by Kelly, the plaintiffs either failed to allege facts going to the elements of their claims or made only legal conclusions. Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 908 (3d Cir. 1997); Morrison v. Carpenter Tech. Corp., 2005 U.S. Dist. LEXIS 2777, at *2, n. 3 (E.D. Pa. Feb. 22, 2005).

Kelly has argued that the Christie complaint should be dismissed against her because she resigned from her position as borough council president on December 8, 2003. This fact is not in the complaint. Even if it were, the Christie plaintiffs allege that the defendants began recording them in the Department "during the year 2003." (Christie Compl. ¶ 33). They allege that Kelly was involved in wiretap installation, financing and interception, and furtive billing. (Christie Compl. ¶¶ 49, 50, 51). Although the facts about Kelly are sparse, they are sufficient at this early stage.

F. Private Right of Action for Damages Under the Pennsylvania Constitution

McLean has withdrawn her claims under the Pennsylvania Constitution; however, the Christie plaintiffs seek damages (and other relief) from Folcroft, Zito and Truscello for violations of the Pennsylvania Constitution.

The state law on this issue is unsettled. Pennsylvania state courts have allowed non-monetary relief under the Pennsylvania Constitution. See Holland Enters., Inc. v. Joka, 439 A.2d 876, 878 (Pa. Commw. Ct. 1982) (involving a mandamus action); Commonwealth v. Nat'l Gettysburg Battlefield Tower, Inc., 311 A.2d 588, 589 (Pa. 1973) (allowing injunctive relief). No binding state case has upheld a claim for monetary damages under the Pennsylvania Constitution.[12]

The federal cases addressing this issue have tended not to allow claims for damages to proceed. See Pollarine v. Boyer, 2005 U.S. Dist. LEXIS 15425, at *7 (E.D. Pa. July 29, 2005); Morris v. Dixon, 2005 U.S. Dist. LEXIS 7059, at *43-*44 (E.D. Pa. Apr. 20, 2005); Kaucher v. County of Bucks, 2005 U.S. Dist. LEXIS 1679, at *32 (E.D. Pa. Feb. 7, 2005); Ryan v. Gen. Mach. Prods., 277 F. Supp. 2d 585, 595 (E.D. Pa. 2003); Dooley v. City of Philadelphia, 153 F. Supp. 2d 628, 663 (E.D. Pa. 2001); Kelleher, 2001 U.S. Dist. LEXIS, at *9; Sabatini v. Reinstein, 1999 U.S. Dist. LEXIS 12820, at *6 (E.D. Pa. Aug. 20, 1999); Lees v. West Greene Sch. Dist., 632 F. Supp. 1327, 1335 (W.D. Pa. 1986). But see Harley v. Schuylkill County, 476 F. Supp. 191, 195 (E.D. Pa.

[12]The plaintiffs cite to Jones v. City of Philadelphia, 68 Pa. D. & C. 4th 47, 49-50 (C.P. Phila. 2004), and indeed this state case may support their position. Even this case, however, may be limited to claims for damages for physical injuries, which are not alleged here. Id.

1979) (allowing claims for damages under the Pennsylvania Constitution to proceed past the motion to dismiss stage, but relying on a case that only involved injunctive relief to reach this conclusion).

The federal courts have also noted that this issue is unsettled. See Morris, 2005 U.S. Dist. LEXIS, at *43; Gremo v. Karlin, 363 F. Supp. 2d 771, 794 (E.D. Pa. 2005); Mulgrew v. Fumo, 2004 U.S. Dist. LEXIS 14654, at *6 (E.D. Pa. July 29, 2004).

This issue involves unsettled questions of state law. Even if the Court granted the motions to dismiss on this issue, the claim under the Pennsylvania Constitution would still proceed because the plaintiffs request both monetary and non-monetary relief. The Court will allow the claim under the Pennsylvania Constitution to proceed at this early stage without prejudice.

An Order follows.

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

EDWARD CHRISTIE, et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
BOROUGH OF FOLCROFT, et al.	:	NO. 04-5944

_____

LESLIE MCLEAN	:	CIVIL ACTION
	:	
v.	:	
	:	
BOROUGH OF FOLCROFT, et al.	:	NO. 04-5972

ORDER

AND NOW, this _____ day of September, 2005, upon consideration of the Motions to Dismiss, the Supplemental Memorandum, the Responses, the Reply Briefs, and after oral argument held on September 16, 2005, in the above cases, IT IS HEREBY ORDERED that:

1. The Motion to Dismiss filed by Defendant Borough of Folcroft (Christie Case No. 04-5944, Docket # 23) is DENIED for the reasons stated in a Memorandum of today's date.

2. The Motion to Dismiss filed by Defendants Anthony Truscello and Joseph Zito (Christie Case No. 04-5944, Docket #25) is DENIED for the reasons stated in a Memorandum of today's date.

3. The Motion to Dismiss filed by Defendant Kathleen Kelly (Christie Case No. 04-5944, Docket #26) is DENIED for the reasons stated in a Memorandum of today's date.

4. The Motion to Dismiss filed by Defendant Forsythe Confidential Investigations, d/b/a FCI, Ltd.(Christie Case No. 04-5944, Docket #27) is DENIED for the reasons stated in a Memorandum of today's date.

5. The Motion to Dismiss filed by Defendant Borough of Folcroft (McLean Case No. 04-5972, Docket #8) is GRANTED IN PART and DENIED IN PART for the reasons stated in a Memorandum of today's date. The Motion is Granted as to Counts VII and X of the Plaintiff’s Complaint. The Motion is Denied as to Counts I, III, IV, V, XI, and XII.

6. The Motion to Dismiss filed by Defendants Anthony Truscello and Joseph Zito (McLean Case No. 5972, Docket #9) is DENIED for the reasons stated in a Memorandum of today's date.

BY THE COURT:

/s/ Mary A. McLaughlin
MARY A. McLAUGHLIN, J.