

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

BARBARA SHULSKI-MATTHEW : CIVIL ACTION
: :
v. : :
: :
REP. EUGENE MCGILL : NO. 05-2332

ORDER AND OPINION

JACOB P. HART
UNITED STATES MAGISTRATE JUDGE

DATE: December 21, 2005

I. Introduction

In this action, Barbara Shulski-Matthew (“Shulski”) claims she was fired by State Representative Eugene McGill for supporting the campaign of a candidate for a local council seat who was not endorsed by the Republican Party, and because she took steps toward reporting campaign finance abuses by McGill to the State Ethics Committee. She has sued McGill under 42 U.S.C. § 1983, for violation of her First Amendment rights of association and political expression, and under the Pennsylvania Whistleblower Law, 42 PA. C.S.A. § 1421, *et seq.*

Originally, Shulski named as a second defendant the Republican Caucus of the Pennsylvania House of Representatives. However, she later stipulated to the dismissal of this defendant. Stipulation of Dismissal of September 21, 2005, docketed as Document 19 in this case.

McGill has now filed a motion for summary judgment in which he seeks dismissal of both counts. As explained below, I will grant his motion with respect to the § 1983 claim, and order the remaining claim dismissed for lack of federal subject matter jurisdiction.

II. Factual and Procedural Background

Eugene McGill is a state representative for the 151st Legislative District in the Pennsylvania House of Representatives. Complaint at ¶ 7. He maintains an office in Harrisburg, and one in Horsham, which is in his home district. Deposition of Eugene McGill, attached to Plaintiff's Response as Exhibit 2, at 13. McGill's Horsham office is staffed by one full-time worker, and two part-time workers. Id.

Between December 1, 1994, and her termination on March 31, 2005, Barbara Shulski was the only full-time Legislative Assistant in McGill's Horsham office. Id.; Plaintiff's Memorandum of Law at p. 1. Her paychecks were issued by the Commonwealth of Pennsylvania. Deposition of Barbara Shulski, attached to Plaintiff's Response as Exhibit 1 at 87.

It is undisputed that Shulski's job duties included scheduling, opening the mail, answering the phone, drafting letters, working on grants, and dealing with constituent concerns, which might involve assisting the constituent with paperwork, or contacting state departments, such as the Department of Transportation. Complaint at ¶ 9; Shulski Deposition at 121-22; McGill's Statement of Material facts at ¶ 15.

During the time she worked for McGill, Shulski also served as a committeewoman for the Montgomery County Republican Committee and as a ward leader for the Horsham Republican Committee. Complaint at ¶ 11. Her duties as a Horsham committeewoman included "contacting potential supporters, fundraising, and trying to secure support and votes for the Horsham Republican Party and Republican Candidates." Complaint at ¶ 12.

In February and early March, 2005, Shulski's sister, Debra Shulski, sought the endorsement of the Horsham Republican Party for reelection as a Commissioner for the Township of Horsham. Complaint at ¶ 13; Deposition of Debra Shulski, attached to Plaintiff's Response as Exhibit 5, at 10, 14. Shulski assisted her sister by contacting other Horsham Republican Committee members. Complaint at ¶ 14.

Debra Shulski did not obtain the Republic Party endorsement, but decided, nevertheless, to run in the party primary. Complaint at ¶ 16. March 23, 2005, was the last day to withdraw from the ballot, but Debra Shulski did not do so. Complaint at ¶ 17.

The parties agree that on March 24, 2005, McGill confronted Shulski about the fact that her sister was running against the Republic Party's endorsed candidate. Complaint at ¶ 18; McGill Deposition at 60-61. McGee told Shulski that because of her involvement with her sister's campaign, Republican Party committee people would avoid his office because they would not feel that they could trust Shulski. Id. According to Shulski, McGill told her that he was holding her responsible for her sister's decision not to withdraw, because she "masterminded" it. Complaint at ¶ 18. As Shulski remembers it, McGill then yelled at her to "get out of [his] office." Complaint at ¶ 18. McGill recalls telling Shulski: "Get out of here and do some work." McGill Deposition at 61.

Shulski testified at her deposition that she believed it was true that the fact that her sister was opposing the Republican candidate interfered with McGill's ability to be an effective state representative. Shulski Deposition at 136. She testified that she agreed with McGill's statement to her that the committee people would not trust his office because she was working for Debra Shulski. Id. at 137- 38.

McGill called Shulski into his office on the following Monday, March 28, 2005.

Complaint at ¶ 19-20. Shulski claims that he told her to resign as a committeewoman, and that if she didn't, he would "go after [her] personally." Id. McGill told Shulski that her "career was over" and that she would never get another job locally or with the state. Id.

McGill admits only that he told Shulski on March 28, 2005, to resign as a committeewoman "because she was no longer legally qualified to hold the position." Answer at ¶ 19. Apparently, Shulski no longer lived in Horsham. Shulski Deposition at 144.

On March 30, 2005, Shulski was told by Jennifer Williams, McGill's assistant in Harrisburg, that she should no longer do McGill's scheduling. Official Complaint, attached as Exhibit O to McGill's Motion; Deposition of Jennifer Williams, attached as Exhibit 4 to Plaintiff's Response, at 36-37. Either in that call, or another call on the same day, Shulski told Williams that she planned to get a lawyer and sue McGill for harassment because he had yelled at her about her sister's campaign. Williams Deposition at 16-17.

At noon on March 30, Shulski drove to a notary's office to sign a State Ethics Commission complaint form. Shulski Deposition at 60. While driving, Shulski called Theresa Boyer, the supervisor for the floor on which McGill's Harrisburg office is located. Shulski Deposition at 60-61. Shulski testified at her deposition that she told Boyer that she was probably going to file a complaint with the State Ethics Commission. Id.

According to Boyer, she had several conversations with Shulski that day. Deposition of Theresa Boyer, attached as Exhibit 3 to Shulski's Response, at 22. Boyer testified at her deposition that, in the first call, Shulski said McGill had threatened to fire her because of her sister's candidacy. Boyer Deposition at 20-21. In a subsequent conversation, Shulski asked for Boyer's help in contacting Bernie Runk, an assistant director of human resources for the House

of Representatives, to seek advice about filing an Ethics Commission complaint. Id. at 23-24. Boyer also testified that, in a third phone call, Shulski told Boyer she was filing a lawsuit, and said: “you are the only person I’ve spoken to, if this gets out at all I’m going to sue your ass.” Id. at 25-26.

Shulski also left several messages on Boyer’s home answering machine on the evening of the 30th. Shulski Deposition at 73. In one message, made “a little after seven” in the evening, Shulski remarked: “I figure when I’m terminated tomorrow, I should get a massage.” Id. at 107.

According to Shulski, the Ethics Commission complaint she planned to file would not just address McGill’s treatment of her, but would also accuse McGill of violating campaign finance laws by using state funds to run his and other political campaigns over the ten year period she had worked for him. Complaint at ¶¶ 10, 24.

Shulski never actually filed a complaint with the Ethics Commission. Shulski Deposition at 55. However, at 12:27 a.m., she e-mailed a formal complaint to Bernie Runk, of the human relations department, who had not returned her phone call. E-mail of March 31, 2005, attached as Exhibit P to McGill’s motion. In it, she complained of McGill’s treatment of her with respect to her sister’s political campaign. Id. When Shulski came to work on March 31, 2005, McGill informed her that her employment was terminated because she had threatened fellow employees. Complaint at ¶ 24.

In his motion for summary judgment, McGill maintains (among other arguments) that he cannot be sued under § 1983 because he is not a “person” within the meaning of the statute. He denies that he fired Shulski for political reasons. He also argues, however, that even if Shulski’s allegations as to why she was fired were correct, the § 1983 action against him in his individual

capacity must be dismissed because he would be entitled to qualified immunity from suit.

Because I will grant summary judgment in his favor on these grounds, I will not reach his other arguments.

III. Legal Standard for Summary Judgment

Summary judgment is warranted where the pleadings and discovery, as well as any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. Pr. 56. The moving party has the burden of demonstrating the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). In response, the non-moving party must adduce more than a mere scintilla of evidence in its favor, and cannot simply reassert factually unsupported allegations contained in its pleadings. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986); Celotex Corp. v. Catrett, supra at 325; Williams v. Borough of West Chester, 891 F.2d 458, 460 (3d Cir. 1989).

When ruling on a summary judgment motion, the court must construe the evidence and any reasonable inferences drawn from it in favor of the non-moving party. Anderson v. Liberty Lobby, supra at 255; Tiggs Corp. v. Dow Corning Corp., 822 F.2d 358 , 361 (3d Cir. 1987). Nevertheless, Rule 56 “mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” Celotex Corp. v. Catrett, supra, at 323.

IV. Discussion

A. McGill Cannot Be Sued Under § 1983 In His Official Capacity

McGill cannot be sued in his official capacity under 42 U.S.C. § 1983. That statute permits relief against “every *person*” acting under color of state law who deprives another of rights, privileges, or immunities secured by federal law. Neither states nor state officials sued in their official capacities for money damages are “persons” within the meaning of § 1983. Will v. Michigan Department of State Police, 491 U.S. 58, 69 (1989); Evancho v. Fisher, 423 F.3d 347, 350 (3d Cir. 2005).

In her response to this motion, Shulski argues that McGill need not be dismissed in his official capacity because she has requested reinstatement as well as monetary damages. However, this is untrue. In her complaint, Shulski repeatedly “demands judgment ... in an amount in excess of \$50,000, plus interest and costs and reasonable attorney’s fees as may be allowed by law.” Complaint, following ¶¶ 32, 39 and 44. She nowhere mentions reinstatement or any other form of non-monetary relief.

Moreover, at her deposition, this interchange occurred between Shulski and her own attorney:

ATTORNEY: Ms. Shulski, it’s correct that you’re not seeking reinstatement with Representative McGill; am I correct?

SHULSKI: That’s correct.

ATTORNEY: Would you be interested in a position with any other Republican Caucus members?

SHULSKI: I certainly would entertain that.

Shulski Deposition Excerpt, attached to Shulski’s Response as Exhibit 1 at pp. 186-187.

It could scarcely be clearer that Shulski never intended to seek any form of non-monetary relief which McGill had the power to grant her. As noted, the Republican Caucus is no longer a party in this action. McGill could not be ordered by the Court to obtain for Shulski a position with another Republican Caucus member. Accordingly, McGill must be dismissed in his official capacity from Shulski's § 1983 claim.

B. Qualified Immunity: McGill Cannot Be Sued In His Individual Capacity

1. The Legal Standard for Qualified Immunity

A government official such as McGill is entitled to assert a defense of qualified immunity against liability in the performance of discretionary functions. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Even mistaken judgments are protected, as long as they do not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Id.; Gilles v. Davis, 427 F.3d 197, 203 (3d Cir. 2005).

In the context of a § 1983 action, a court will determine whether an official violated a clearly established right by first asking whether a plaintiff has asserted a violation of a constitutional right at all. McLaughlin v. Watson, 271 F.3d 556, 571 (3d Cir. 2001). If the plaintiff has done this, the court must next determine whether the right was "clearly established." Id.

The United States Supreme Court has explained the "clearly established" standard as follows:

The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful ... but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. 635, 640 (1987).

In applying this standard, the Court of Appeals for the Third Circuit has required some – though not precise – factual correspondence between the precedent and the official’s actions, but it has also demanded that officials relate established law to analogous factual settings. People of Three Mile Island v. Nuclear Regulatory Commissioners, 747 F.2d 139, 144-5 (3d Cir. 1984). The Three Mile Island court explained: “While we cannot expect executive officials to anticipate the evolution of constitutional law, neither can we be faithful to the purposes of immunity by permitting such officials one liability-free violation of a constitutional or statutory requirement.”

Id.

2. Shulski’s First Amendment Rights Are Not Well-Established

a. Elrod and Branti

Shulski has undoubtedly asserted a violation of a constitutional right. Assuming Shulski’s factual allegations to be correct, as I must in considering a motion for summary judgment, she had a First Amendment right to political expression and association. Perry v. Sindermann, 408 U.S. 595 (1972); and see Boyle v. County of Allegheny, 139 F.3d 386, 397 (3d Cir. 1998) (“The question of whether an employee falls within the Elrod/Branti exception [as explained below] is generally one of fact”).

Shulski’s case is complicated at the second stage of the McLaughlin inquiry, however, by the fact that not every government employee has these First Amendment rights. In Elrod v. Burns, 427 U.S. 346 (1976), the United States Supreme Court considered the constitutionality of “patronage dismissals” where a newly elected Sheriff discharged a number of employees solely because they were not associated with his political party.

The Elrod court recognized that First Amendment rights could at times be subordinated to ensure the effective implementation of a representative government. Nevertheless, it also recognized that patronage could act as an “impediment to the associational and speech freedoms which are essential to a meaningful system of democratic government.” 427 U.S. at 370. Stating that “at bottom we are required to engage in the resolution of conflicting interests under the First Amendment,” the Court decided that the conflict could best be resolved by “limiting patronage dismissals to policymaking positions.” 427 U.S. at 371-2.

Fourteen years later, in Branti v. Finkel, 518 U.S. 507 (1989), the Supreme Court decided that a new Democratic Public Defender could not discharge two Assistant Public Defenders merely because they were Republicans. The plaintiffs were not in policymaking positions, but the Branti court explained that this was not the sole relevant criterion:

In sum, 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.

Id. at 518.

Although both Elrod and Branti concerned party affiliation, they also apply in other cases involving the dismissal of government employees for political reasons. In Curinga v. City of Clairton, 357 F.3d 305 (3d Cir. 2004), the Court of Appeals for the Third Circuit decided that Democratic city council members could discharge a city manager, who was also a Democrat, on the basis that he had spoken out against the Democratic Party’s endorsed city council candidates during a primary election.

The Curinga court explained its application of the Elrod/Branti standard:

[I]dentical party affiliation does not necessarily ensure the subordinate's loyal adherence to the superior's policies. Primary election fights can be famously brutal, sometimes more so than contests in the general election, and animosity between candidates is likely to result. ... Recognizing this, other courts of appeals have broadened the definition of "political affiliation" to include commonality of political purpose, partisan activity, and political support.

357 F.3d at 307.

Thus, if Shulski is entitled to protection under Elrod and Branti, McGill violated her First Amendment rights. However, if political affiliation "is an appropriate requirement for the effective performance of her job," Shulski could not freely exercise her First Amendment rights, and McGill could rightfully terminate her for political reasons.

To decide whether McGill is entitled to qualified immunity, I do not need to decide whether or not Shulski had a right to First Amendment expression under Elrod and Branti. Instead, I must assume that she had this right, and decide whether that right was well-established. For two reasons, both discussed at greater length below, I conclude that, at the time of Shulski's termination, it was not well established that a person doing her job duties had First Amendment protection from politically motivated discharge.

First, the decision whether a government employee may exercise her First Amendment rights is so intensely fact-specific that there are nearly as many articulated Elrod/Branti tests in the Third Circuit as there are Elrod/Branti cases. Secondly, setting aside the standard to be used and looking solely at the facts of Elrod/Branti cases, it is still not possible to make a conclusive factual determination as to whether Shulski is entitled to protection. I cannot conclude that the

contours of Shulski’s rights were so clear that McGill – if he fired her for political reasons¹ – must have understood that what he did violated those rights. Anderson v. Creighton, *supra*.

b. The Standard for Elrod/Branti Protection

As a starting point, the Court of Appeals for the Third Circuit has said that it views firings for political reasons to be a “narrow exception” to the Constitutional rights granted by the First Amendment. Burns v. County of Cambria, 971 F.2d 1015, 1924 (3d Cir. 1991). The burden is on the defendant to demonstrate that political affiliation furthered some government end in the least restrictive way possible. *Id.* at 1021, *citing* Elrod at 470 U.S. 360-63. However, the mechanism for demonstrating this is not well-defined.²

In Boyle v. County of Allegheny, 139 F.3d 386 (3d Cir. 1998), the Court of Appeals catalogued a number of standards previously employed:

These [Elrod/Branti] cases require courts to focus on various factors, including

¹In his response to McGill’s motion, counsel for Shulski suggested that McGill was not entitled to qualified immunity in this case because he had maintained in his deposition that he did not terminate her for political reasons, but rather (as noted above) for threatening a fellow employee. While it is true that most of the cases in which an employee is fired for political activities involve fact patterns where the reason for the discharge is undisputed, this in no way precludes a defendant such as McGill from arguing in the alternative, i.e., “I didn’t fire the plaintiff for her political activity, but even if I did, I had qualified immunity to do so.” This is particularly true in a case where the plaintiff can only win by showing that her political activity *was* the reason for her discharge. The Court of Appeals for the Third Circuit explicitly recognized a defendant’s right to defend in the alternative in Burns v. County of Cambria, 971 F.2d 1015 (3d Cir. 1992). There, after holding that the defendant was not entitled to qualified immunity, the Court wrote: “Of course, our conclusion that as a matter of law Roberts is not entitled to qualified immunity does not prevent Roberts and his co-defendants from raising other defenses at trial They can deny their involvement in the dismissals (the ‘I didn’t do it’ defense ...) or they can claim that the dismissals were justified on other grounds.” *Id.* at 1024 (Internal citations omitted). Our case is simply the flip side of this coin.

²In Burns, the Court of Appeals affirmed the District Court’s refusal to grant a County Commissioner qualified immunity with respect to the politically motivated firings of sheriff’s deputies, stating that a public official cannot obtain an exemptions from Elrod/Branti protection merely by citing a desire for loyalty. *Id.* at 1023. It cited several cases where sheriff’s deputies were held entitled to exercise their First Amendment rights, and concluded: “We see no reason why any reasonable employer would have thought deputy sheriffs, whose work consisted of serving process, transporting prisoners, and guarding courtrooms, could be fired for political reasons.” 971 F.2d at 1024.

whether an employee is a “nonpolicymaking, nonconfidential government employee,” Elrod, 427 U.S. at 375, 96 S. Ct. at 2960 (Stewart, J., concurring), whether a difference in party affiliation would be “highly likely to cause an official to be ineffective in carrying out” the duties of the position, Ness [v. Marshall], 660 F.2d 517 (3d Cir. 1981)] 660 F.2d at 521, whether “the employee has meaningful input into decision making concerning the nature and scope of a major ... program,” Brown [v. Trench], 787 F.2d 167 (3d Cir. 1986)] 787 F.2d at 169-70, or whether the employee “acts as an advisor or formulates plans for the implementation of broad goals,” Zold [v. Township of Mantua], 937 F.2d 633 (3d Cir. 1991)] 937 F.2d at 635; Peters [v. Delaware River Port Auth. of Pa. and N.J.], 16 F.3d 1346, 1349 (3d Cir.), *cert. denied*, 513 U.S. 811 (1994)] 16 F.3d at 1354.

Id. at 396.

The Court of Appeals later recognized that “meaningful input into decision making” was not necessarily determinative: “We have indeed, acknowledged that access to confidential information may support a political affiliation job requirement even in the absence of a decision-making function.” Armour v. County of Beaver, 271 F.3d 417, 432 (3d Cir. 2001), *cert. denied* 535 U.S. 1079 (2002), *citing* Zold v. Township of Mantua, 935 F.2d 633, 638-39 (3d Cir. 1991).

Even more recently, the Court of Appeals said:

We have held that a ‘common thread’ among cases identifying a policy-making or confidential position is that their positions related to the government’s activity *vis-a-vis* the public. That is, these positions entail the formulation or implementation of policies that have a direct impact on the public or the representation of government policies to the public.

Martinez-Sanes v. Turnbull, 318 F.3d 484, 486 (3d Cir. 2003), *quoting* Assaf v. Fields, 178 F.3d 170, 178 (3d Cir. 1999).

Thus, McGill might have come to different conclusions by applying one or the other of the Elrod/Branti factors looked to by the Third Circuit Court of Appeals. The matter is further complicated by a review of the applicable precedent.

c. Factually Similar Cases

Armour, supra, presented a factual scenario quite similar to Shulski's. Delores Armour was a secretary to Bea Schulte, a county commissioner. Armour alleged that she was dismissed for assisting a Democrat who was running for a local judgeship against the Democratic candidate supported by Schulte and the local party establishment. 271 F.3d at 419. Her duties were primarily clerical, although she did at times assist constituents without the commissioner's involvement or attend political events with her. Id. at 421-425.

The District Court for the Western District of Pennsylvania granted summary judgment to the commissioner and other defendants, calling Armour a "conduit between the Democratic constituents" and the commissioner. Id. at 426. A three-member panel of the Court of Appeals, including a District Court judge sitting by designation, reversed the District Court's decision, noting that Armour did not claim to be a "policymaker," but ruling that factual issues remained as to whether Armour's responsibilities were "confidential." Id. at 433, n. 6.

Nevertheless, the third member of the panel, the Honorable Anthony J. Scirica dissented.

He wrote:

Given the sensitive correspondence, resolutions, telephone messages, and partisan material arriving in the commissioner's office each day, Commissioner Schulte needed a loyal lieutenant. If Armour's political loyalties diverged from her employer's, it would appear that she should not be constitutionally protected against dismissal from her confidential post.

Id. at 435.

Unfortunately this case, so close to Shulski's on its facts, does not provide any guidance as to how the legal question of qualified immunity is resolved where factual issues remain as to the confidential nature of a plaintiff's position.³ However, it shows that the status of an individual with job duties similar to Shulski's may be unclear enough to warrant submitting the question to a jury.

In another similar case, Gordon v. Griffith, 88 F. Supp. 2d 38 (E.D.N.Y. 2000), a state legislator dismissed his legislative assistant for making a speech against police brutality following several scandals involving the police department. Gordon, like Shulski, was independently active in her political party. She claimed that the state legislator said to her: "Who do you think you are? I don't care if you are a district leader. You went against the 75th Precinct and the officers there. They are my friends. You are insubordinate." Id. at 41.

In this case, the termination was upheld. After a thorough discussion of the roots of the republican form of government, the District Court for the Eastern District of New York concluded that Gordon was not protected by Elrod and Branti:

Because positions as legislative assistants are inherently political, considerations of loyalty to the views and agenda of the elected legislator are relevant in staffing. When it authorized these positions, the [State] Assembly necessarily understood such considerations would factor into staffing decisions. ... [As to Elrod], an effective representative democracy requires more than post-election day shifts in policy ... Particularly in the age of the internet, mass media, and public polling, legislators must maintain a continuing sensitivity to the views, demands, values and concerns of their electorates. To do so requires a continuing and robust dialogue between legislators and their constituents. ... To summarize, legislative aides occupying positions in which their public speech may reasonably be associated with, or mistaken for, that of the legislator's may constitutionally be

³It would appear that the issue of qualified immunity was not raised in Armour. However, in Hicks v. Phipps, 765 F.Supp. 1541 (W.D. Va. 1990), a County Commissioner of Revenue was dismissed on the basis of qualified immunity, even though Hicks, his former secretary/receptionist, was found by the court to be protected by Elrod and Branti. In that case, notwithstanding her boss's dismissal as a defendant, Hicks recovered her job through the entry of a permanent injunction. As explained above, however, injunctive relief is not available to Shulski.

dismissed for their public speech. ... Gordon's legislative job was one in which her public comments could reasonably be understood to reflect the views or, at minimum, the sympathies of Assemblyman Griffith.

Id. at 45, 57-58.

In several other cases, clerical workers were found not to be protected by Elrod and Branti. In Hobler v. Brueher, 325 F.3d 1145 (9th Cir. 2003), the Court of Appeals for the Ninth Circuit found that two secretaries who worked closely with an outgoing prosecutor could be replaced for political reasons by the new prosecutor.

The Hobler court asked whether the secretaries' actual duties and their relationship to the mayor made them "confidential employees in the Branti sense that their political conduct was 'an appropriate requirement for the effective performance of the public official involved'", concluding:

Plainly, it was. Most offices have certain key personnel who aren't policymakers in the Branti sense but who are critical to effective policy implementation, and whose loyalty and confidentiality are necessary. It is hard to run any sort of office without certain employees who work so closely with the outgoing boss that any incoming boss must have the option of picking his or her own people for that position. ... Hobler and Southwell functioned as [the mayor]'s communications conduit to the public and other elected officials like the governor's assistants in the Branti example.

Id. at 1151-52.

The Hobler court also took note of a case from the Court of Appeals for the Seventh Circuit which explained: "If Rosalynn Carter had been President Carter's secretary, President Reagan would not have had to keep her on as his secretary." Id. at 1153, quoting Judge Posner in Soderbeck v. Burnett County, 752 F.2d 285, 288 (7th Cir. 1985).

The Hobler court also cited Faughender v. City of North Olmstead, 927 F.2d 909 (6th Cir. 1991), where the Court of Appeals for the Sixth Circuit upheld a grant of summary judgment in favor of the defendants, finding that an incoming mayor could dismiss the outgoing mayor's secretary, notwithstanding Elrod and Branti. The Faughender court explained: "It should be clear that policies can only be implemented with the help of staff persons entrusted to carry out certain tasks ... [I]t is clear that the secretary to a mayor cannot be wholly divorced from politically sensitive information." Id. at 915, 916.

Further, in an unpublished opinion, the Court of Appeals for the Sixth Circuit said in Blair v. Meade, 107 F.3d 11 (Table); 1997 WL 66525 (6th Cir. 1997) that a receptionist was not protected by Elrod/Branti:

Although Hamilton did not serve as the private secretary of Gillem, we nonetheless conclude that her position fell within the category of an employee who controlled the lines of communication. ... Hamilton's testimony indicates that she served as the initial contact between the public and defendant, answering telephones and "greeting people off the street." Moreover, her position required her to convey information between individuals within the office ... which would inevitably involve communications regarding policy. In our view, the combination of interaction with the public and access, however limited, to policy determinations leads us to conclude that Hamilton's role as receptionist falls within the "confidential employee" category

Id. at *5.

3. McGill Is Entitled To Assert Qualified Immunity

Relating the established law to the factual setting presented, as required by Three Mile Island, McGill might have reasonably concluded, as the Gordon court did, that the position of legislative aide was inherently political. He might have believed that because Shulski, like the plaintiffs in Hobler, Faughender and Blair, was a "conduit to the public," and "controlled the lines of communications," she could be fired for political reasons.

Whether or not McGill was mistaken is immaterial here. Harlow v. Fitzgerald, *supra*, at 457 U.S. 818. What is important is that the contours of Shulski's rights were not so clear that a reasonable official would necessarily understand that firing her for political reasons violated those rights. In Burns, the relevant precedent established that a sheriff's deputy could not be fired for political reasons. Here, by contrast, given the myriad of Elrod/Branti tests applied by the Third Circuit, and the range of results in similar cases, it cannot be said, as it was in Burns, that "no reasonable employer" in McGill's position would have thought he had the right to act as he did. Accordingly, McGill can assert qualified immunity against liability in his individual capacity. Harlow v. Fitzgerald, *supra*.

V. Conclusion

Since defendant Eugene McGill has shown that he is entitled to be dismissed from Shulski's claim under 42 U.S.C. § 1983 in both his official and individual capacities, I must dismiss Shulski's § 1983 claim in its entirety. The only claim remaining is a pendent state claim under the Pennsylvania Whistleblower Law. As is required in the absence of exceptional considerations, I decline to exercise pendent jurisdiction over this claim. Borough of West Mifflin v. Lancaster, 45 F.3d 780, 788 (3d Cir. 1995). For that reason, I now enter the following:

ORDER

AND NOW, this 21st day of December, 2005, upon consideration of Defendant's Motion for Summary Judgment, docketed in this case as Document No. 26, Plaintiff's response thereto, and Defendant's reply, and following oral argument on the issue of qualified immunity, it is hereby ORDERED that Defendant's Motion is GRANTED. It is further

ORDERED that JUDGMENT IS ENTERED in this case in favor of Defendant on Plaintiff's claim under 42 U.S.C. § 1983. The pendent state claim is DISMISSED for lack of federal jurisdiction. The Clerk of Court is hereby directed to close this case for statistical purposes.

BY THE COURT:

JACOB P. HART
UNITED STATES MAGISTRATE JUDGE