

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

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

MEMORANDUM

BUCKWALTER, S. J.

July 20, 2006

Presently before the Court is Plaintiff's Partial Motion for Summary Judgment (Docket No. 25), Defendants' Motion for Summary Judgment (Docket No. 26) and Plaintiff's Reply (Docket No. 30). For the reasons set forth below, Plaintiff's Motion is denied and Defendants' Motion is granted in part and denied in part.

I. FACTUAL AND PROCEDURAL HISTORY

In May 2003, Defendant Keller offered Plaintiff the position of Emergency Management Coordinator ("EMC") for Richland Township, Pennsylvania.¹ Plaintiff immediately agreed to fill the position and his appointment was confirmed on June 9, 2003 by Defendants Richard Orloff, Steven Tamburri, and Patricia Keller, members of the Richland

1. Plaintiff declined any compensation for this position. The Court does not believe that this fact is relevant to the outcome of this case. See *Versarge v. City of Clinton*, 984 F.2d 1359, 1364-69 (3d Cir. 1993) (applying the First Amendment analysis for public employees in the context of the expulsion of a volunteer fireman from a volunteer fire department).

Township Board of Supervisors (collectively referred to as “Defendant Supervisors”).² As the EMC, Plaintiff’s responsibilities included recommending the steps Richland Township should take with respect to emergency planning and constructing an emergency management plan for state approval.

Plaintiff attended several meetings during his tenure as the EMC. Most significantly, however, Plaintiff attended the Board of Supervisors meeting for Milford Township, a neighboring town of Richland Township on June 23, 2003. The meeting focused on Milford Township’s controversial irradiator facility. Although the content of what Plaintiff said at the Milford Township meeting is in dispute, it is undisputed that Plaintiff spoke at the meeting as the Richland Township EMC and not as a private citizen.

On July 28, 2003, Plaintiff signed a nominating petition for Mike Zowniriw, a Green Party candidate. Plaintiff’s signing of the petition assisted Zowniriw in getting his name on the ballot to run against Defendant Keller in the next Board of Supervisors election in Richland Township. Several days later, Defendant Tamburri received a telephone call from Doug Wilhelm, the Quakertown Fire Chief. Wilhem informed Defendant Tamburri that he received an anonymous complaint regarding Plaintiff. According to the complainant, while speaking at the June 23, 2003 Milford Township Meeting, Plaintiff indicated that Richland

2. Defendants argue that even though Defendant Keller’s recommendation of Plaintiff as EMC to Governor Rendell was approved by the Board of Supervisors on June 9, 2003, Plaintiff was never actually the EMC because they withdrew their recommendation before Governor Rendell’s appointment became official. Nonetheless, to establish that the Defendant Supervisors responded with retaliation, Plaintiff may demonstrate that the “retaliatory conduct was sufficient to deter a person of ordinary firmness from exercising his First Amendment rights.” See Konopka v. Borough of Wyoming, 383 F. Supp. 2d 666, 681 (M.D. Pa. 2005) (quoting Allah v. Seiverling, 229 F.3d 220, 225 (3d Cir. 2000) (noting that the defendants’ action of placing the plaintiffs lower on promotion ranking lists in retaliation for the exercise of their First Amendment free speech rights was sufficiently adverse to state a retaliation claim). Without addressing whether the power to terminate Plaintiff rests with the Defendant Supervisors or Governor Rendell, the Court finds that the withdrawal of Plaintiff’s recommendation by Defendant Supervisors constitutes sufficient retaliatory conduct for purposes of Plaintiff’s First Amendment claim.

Township would not respond to an emergency involving the irradiator. Wilhelm also informed Defendant Tamburri that several members of the Emergency Management Committee had problems working with Plaintiff.

On August 12, 2003, Plaintiff received an e-mail from Defendant Orloff requesting Plaintiff's resignation as EMC for two reasons. First, Defendant Orloff alleged that Plaintiff "totally demagogued the irradiator issue" and that Plaintiff did not have "the authority to dictate who would and would not respond to which emergency" at the Milford irradiator. (Pl.'s Mot. Partial Summ. J. Ex. B.) Defendant Orloff also stated that appointment of Plaintiff as the EMC of Richland Township "was never intended to provide [Plaintiff] with a pulpit with which to mount a campaign to unseat the Supervisors who appointed [Plaintiff], . . . [Plaintiff] signed and apparently circulated a petition for a candidate that wants to unseat [Defendant] Keller." Id. Defendant Orloff closed his e-mail by stating that "[Defendant Supervisors] are an inclusive Board, . . . it was at least my hope . . . that [Plaintiff] would work with us and not against us at the township level." Id.

When Plaintiff refused to resign, Defendant Supervisors held a special meeting on September 2, 2003 and terminated Plaintiff from his position as EMC. Plaintiff then filed a three count complaint against Defendant Richland Township and Defendant Supervisors. The first count alleges a violation of Plaintiff's civil rights under the First Amendment against all Defendants. The second and third counts allege "false light and defamation" and civil conspiracy against Defendant Supervisors.

II. DISCUSSION

A. First Amendment Claim

Plaintiff's First Amendment claim alleges that Defendants terminated Plaintiff from his position as EMC because Plaintiff signed a nominating petition for Green Party candidate, Mike Zowniriw. By assisting Zowniriw in getting his name on the ballot, Plaintiff enabled Zowniriw to run against Defendant Keller in the next Richland Township Board of Supervisors election. First Amendment retaliation claims for a public employee are governed by a burden-shifting analysis. See generally Pickering v. Bd. of Ed., 391 U.S. 563 (1968) (describing the burden-shifting analysis). As a threshold issue, the Court must determine, as a matter of law, whether Plaintiff engaged in conduct or speech that is protected by the First Amendment. Curinga v. City of Clairton, 357 F.3d 305, 310 (3d Cir. 2004); see also, Azzaro v. County of Allegheny, 110 F.3d 968, 975 (3d Cir. 1997) (noting that whether speech is protected is a question of law appropriate for the court to decide on summary judgment). The plaintiff then has the initial burden of showing that his constitutionally protected conduct was a "substantial" or "motivating factor" in the alleged retaliatory action. Curinga, 357 F.3d at 306. Once the plaintiff satisfies this burden, the burden shifts to the defendant to show, by a preponderance of the evidence, that he or she would have taken the adverse action even if the employee had not engaged in the protected conduct. Id.

1. Plaintiff's conduct is protected under the First Amendment

The Court begins by determining whether Plaintiff, by signing a nominating petition, engaged in conduct that is protected by the First Amendment. "To be protected, the [conduct] must be on a matter of public concern *and* the employee's interest in expressing

[him]self on this matter must not be outweighed by any injury the speech could cause to ‘the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.’” Connick v. Myers, 461 U.S. 138, 142 (1983) (quoting Pickering, 391 U.S. at 568 (1968) (emphasis added)).

Defendants concede that Plaintiff’s signing of the petition is a matter of public concern. (Defs.’ Mot. Summ. J. 23) (“Arguably, signing the petition is an exercise of the [P]laintiff’s First Amendment rights as relating to a matter of political concern . . . and the [D]efendants accept it is such for purposes of this motion”) (citation omitted)). See also Curinga, 357 F.3d at 312 (citing Brady v. Fort Bend County, 145 F.3d 691, 706-707 (5th Cir. 1998) (stating that campaigning for a political candidate relates to a matter of public concern)).

Defendants argue, however, that their interests as a public employer outweigh Plaintiff’s interest in signing the petition. The Court can consider several factors in determining whether the interests of Defendants outweigh those of Plaintiff. These factors include whether the conduct: “(1) impaired discipline by superiors, (2) impaired harmony among co-workers, (3) had a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, (4) impeded the performance of the [employee’s] duties, or (5) interfered with the regular operation of the enterprise.” Stump v. Richland Twp., No. 02-6995, 2005 U.S. Dist. LEXIS 13994, at *18 (E.D. Pa. July 12, 2005) (citing Rankin v. McPherson, 483 U.S. 378, 388 (1987)). Defendants allege that Plaintiff’s signing of the petition impaired workplace harmony and had a detrimental impact on the close working relationship between the EMC and the Board of Supervisors for which personal loyalty and confidence are necessary.

The Court finds that Defendants have not sufficiently demonstrated that Plaintiff's conduct impaired workplace harmony. Arguably, Plaintiff's signing of the petition negatively impacted Plaintiff's relationship with Defendant Supervisors. For example, Defendant Keller stated in her deposition, that she "was hurt" and "felt betrayed" by Plaintiff. (Defs.' Mot. Summ. J. 24.) Other Defendants regarded Plaintiff's signing of the petition as "beneath contempt," "treasonous," "dishonest" and "backstabbing." Id. at 26. Yet, the Court finds that Defendants have not presented any evidence, other than Plaintiff's signing of the petition, to suggest that Plaintiff engaged in disruptive activity nor did anything to disrupt the administration of the Board of Supervisors. Cf. Connick, 461 U.S. at 151-152 (noting the potential for disruption when a public employee personally confronted his immediate supervisor); Stump, 2005 U.S. LEXIS 13994, at *20 (noting that the plaintiff threatened to publicly disclose allegations with respect to zoning and development processes in his township if his personal demands were not met). Additionally, the Quakertown Fire Chief, Doug Wilhelm, the person who reported the anonymous complaint to Defendant Tamburri about Plaintiff's alleged comments regarding emergencies at the Milford irradiator, described Plaintiff as "professional." (Pl.'s Reply 5.)

Defendants have also failed to demonstrate that a close working relationship for which personal loyalty and confidence are necessary existed between Plaintiff and Defendant Supervisors. As noted above, Plaintiff's conduct arguably had a negative impact on his relationship with Defendant Supervisors. Yet, Defendants have not presented sufficient evidence that personal loyalty and confidence were necessary for Plaintiff's position as EMC. While Defendant Supervisors relied on Plaintiff for developing an emergency management plan and recommending the steps the Township should take in the event of an emergency, Plaintiff did not

have the authority to implement these recommendations without the approval of the Board of Supervisors. Cf. Curinga, 357 F.3d at 313 (noting that the plaintiff occupied the most sensitive high-level policy making position in his town); Sprague v. Fitzpatrick, 546 F.2d 560 (1976), cert. denied, 431 U.S. 937 (1977) (concluding that a close working relationship for which personal loyalty and confidence were necessary existed because the First District Attorney who functioned as an alter ego of the District Attorney). In fact, Plaintiff's own job description reveals that he is "subject to the direction and control of the executive officer or governing body." 35 Pa. C.S. § 7502(a). Additionally, when asked by a reporter what the responsibilities of the EMC included, Defendant Tamburri responded "not much" and that the EMC "coordinates, in the loosest sense, the activities of the Township, not the activities of the police and fire emergency responders." Steve Wartenburg, Former Richland Emergency Coordinator Files Lawsuit; He Says He was Fired because He Backed Green Party Candidate, THE MORNING CALL, Aug. 4, 2004, at B1.

Balancing these interests against the strong interest Plaintiff has in participating in the electoral process by signing a nominating petition for the Green Party, the Court concludes that Plaintiff's conduct is protected under the First Amendment.

2. Remaining factors

The Court finds that there are genuine issues of material fact as to whether Plaintiff's signing of the petition was a substantial or motivating factor for his termination as EMC. Accordingly, Plaintiff's Motion for Partial Summary Judgment is denied. The Court also finds that there are genuine issues of material fact as to whether Plaintiff's termination would have taken place in the absence of his signing of the petition. Accordingly, Defendants' Motion for Summary Judgment on this claim is denied.

B. State Law Claims

1. Defamation and False Light Claims

Plaintiff alleges claims for defamation and false light. Plaintiff's claims rest on various statements published in newspaper articles discussing his termination and misuse of his employee cell phone and statements recorded in the minutes from the Richland Township Board of Supervisors meeting on September 2, 2003. Defendants argue that they are entitled to absolute immunity as high government officials against these state law claims (Defs.' Mot. Summ. J. 20.)

Pennsylvania's doctrine of absolute privilege for high public officials "exempts a high public official from all civil suits for damages arising out of false defamatory statements and even from statements or actions motivated by malice, provided the statements are made . . . in the course of the official's duties." Matson v. Margiotti, 88 A.2d 892, 895 (Pa. 1952). "Although traditionally applied to defamation cases, the doctrine . . . has also been applied to cases of false light." McErlean v. Borough of Darby, 157 F. Supp. 2d 441, 446 (E.D. Pa. 2001).

Until recently, Pennsylvania and federal case law conflicted as to whether the doctrine of absolute immunity for high government officials survived the passage of the Pennsylvania Political Subdivision Tort Claim Act ("PSTCA"), 42 Pa. C.S. §§ 8541, et. seq. Factor v. Goode, 612 A.2d 591 (Pa. Commw. 1992), appeal denied, 624 A.2d 112 (Pa. 1993); Lynch v. Borough of Ambler, No. 94-6401, 1996 U.S. Dist. LEXIS 7183 (E.D. Pa. May 29, 1996); see also Murphy v. Orloff, No. 04-3618, 2004 U.S. Dist. LEXIS 25028 (E.D. Pa. Dec. 13, 2004) (declining Defendants' motion to dismiss Plaintiff's state law claims for defamation and false light under the doctrine). Yet, in Heller v. Fulare, No. 05-3687, 2006 U.S. App. LEXIS

16843, at *7, n.2 (3d Cir. July 6, 2006), the Third Circuit held that “to the extent that the doctrine is applied to those designated as ‘high public officials,’ it has indeed survived” the passage of the PSTCA.

In light of the Third Circuit’s recent holding, the Court finds that the doctrine is applicable to this case. First, township supervisors are considered “high government officials.” Jonnet v. Bodick, 244 A.2d 751, 753 (Pa. 1968). Second, even considering the evidence in a light most favorable to Plaintiff, the Court finds that the statements made by Defendant Supervisors were done so in their official capacities as township supervisors and not as private citizens. Cf. McKibben v. Schmotzer, 700 A.2d 484 (Pa. Super. Ct. 1997) (extending the doctrine to statements made in a mayor’s press release issued in her official capacity but, denying the extension of the doctrine to statements made by a mayor after a hearing when the mayor was “no more than a private citizen”). For example, Plaintiff’s appointment and termination as the EMC was the result of the official actions of Defendant Supervisors. Defendant Tamburri was contacted in his official capacity as Supervisor by Doug Wilhelm regarding the alleged representations Plaintiff made concerning emergencies involving the Milford Township irradiator. The alleged representations were addressed by Defendant Supervisors at their formal board meetings and are memorialized in the meeting minutes. Finally, a review of the relevant newspaper articles reveal that Defendant Supervisors were speaking in their official capacities as Supervisors regarding the circumstances surrounding Plaintiff’s termination and alleged misuse of his employee cell phone and not as private citizens. Thus, the Court finds that Defendants are entitled to absolute immunity as high government officials. Accordingly, the Court grants summary judgment in favor of all Defendants on Plaintiff’s claims of defamation and false light.

2. Civil Conspiracy Claims

Though not briefed by either party, the Court will briefly address Plaintiff's civil conspiracy claim. "Liability for civil conspiracy depends on performance of some underlying tortious act, the conspiracy is not independently actionable; rather, it is a means for establishing vicarious liability for the underlying tort." Boyanowski v. Capital Area Intermediate Unit, 215 F.3d 396, 407 (3d Cir. 2000). As noted above, as high government officials performing in their official capacities, Defendant Supervisors are entitled to absolute immunity from Plaintiff's claims of defamation and false light. As a result, there is no underlying tort upon which to base Plaintiff's claim for civil conspiracy. Accordingly, the Court grants summary judgment in favor of all Defendants on the civil conspiracy claim.

III. CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Partial Summary Judgment is denied and Defendants' Motion for Summary Judgment is granted in part and denied in part. An appropriate order follows.

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Plaintiff,	:	
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	:	
RICHARD ORLOFF, PATRICIA KELLER,	:	
STEVEN TAMBURRI and RICHLAND	:	
TOWNSHIP,	:	
Defendants.	:	

ORDER

AND NOW, this 20th day of July, 2006, upon consideration of Plaintiff's Motion for Partial Summary Judgment (Docket No. 25), Defendants' Motion for Summary Judgment (Docket No. 26) and Plaintiff's Reply (Docket No. 30), it is hereby **ORDERED** that Plaintiff's Motion is **DENIED** and Defendants' Motion is **GRANTED IN PART** and **DENIED IN PART**.

With respect to Plaintiff's claim under the First Amendment, Plaintiff's Motion and Defendants' Motion on this claim are **DENIED**.

With respect to Plaintiff's claim of defamation and false light, Defendants' Motion is **GRANTED**.

With respect to Plaintiff's civil conspiracy claim, Defendants' Motion is **GRANTED**.

14A.

TRIAL is scheduled for Monday, December 4, 2006 at 9:30 a.m. in Courtroom

BY THE COURT:

s/ Ronald L. Buckwalter, S. J.
RONALD L. BUCKWALTER, S.J.