

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

ROBERT G. MOCHAN	:	CIVIL ACTION
	:	
v.	:	NO. 06-cv-05385
	:	
THE ARC OF MONTGOMERY COUNTY, <u>et al.</u>	:	

MEMORANDUM AND ORDER

Kauffman, J.

March 2, 2007

Plaintiff Robert G. Mochan (“Plaintiff”) brings this action for violations of 42 U.S.C. § 1983 (“§ 1983”) (Count One) and the Pennsylvania Whistleblower Act (Count Two) against Defendants The Arc of Montgomery County (“the Arc”), MARC Advocacy Services (“MARC”), and Paul Stengle (“Stengle”) (collectively, “Defendants”). Defendants have moved to dismiss both counts of the Complaint and Plaintiff has moved for leave to file an amended complaint. For the reasons that follow, Defendants’ Motion to Dismiss will be granted, and Plaintiff’s Motion to Amend will be denied.

I. BACKGROUND

Accepting as true the allegations of the Complaint, as the Court must at this stage of the proceedings, the pertinent facts are as follows: In February 1996, Plaintiff began working as Director of Advocacy for the Arc and MARC, both private, non-profit organizations dedicated to assisting individuals with developmental disabilities. Complaint ¶¶ 8-10, 14. During Plaintiff’s employment, he worked under the direct supervision of Stengle. Id. ¶ 16. In February 2006, Stengle instructed him to learn “how to obtain money from the Governor’s Capital Budget.” Id. ¶ 17. Plaintiff contacted the Governor’s Budget Office, spoke with Richard Dreher, and informed

him that the Arc was considering purchasing and constructing a new property. Dreher asked Plaintiff whether the builder was paying prevailing wages pursuant to the Davis-Beacon Act, 40 U.S.C. § 276, et seq. Id. ¶¶ 18-21. When Plaintiff replied that prevailing wages were not being paid, Dreher informed him that the Arc cannot use public funds, including those obtained through the Governor's Capital Budget, to purchase the property. Id. ¶¶ 21-23. Plaintiff immediately informed Stengle about his conversation with Dreher, and requested that Stengle contact Dreher to discuss the matter. Id. ¶ 24. However, Stengle responded that "Dreher was probably just some bureaucrat who would hold up the grant." Id. ¶ 25. After learning that Stengle was about to make a large deposit of public funds to purchase the property, Plaintiff again demanded that he contact Dreher. Stengle then stated that The Arc's attorney had spoken with Dreher and had "worked things out." Id. ¶¶ 26-27. Skeptical, Plaintiff continued to raise his concerns to Stengle. Id. ¶ 29.

On June 20, 2006, Plaintiff attended a senior staff meeting, during which he shared a number of concerns with Stengle regarding low staff morale and a prevailing fear that complaining would lead to retaliation and termination. Id. ¶¶ 31-32. On July 3, 2006, Plaintiff submitted a written grievance to the personnel committee in which he discussed his reports to Stengle about the prevailing wage issue, and complained that he was retaliated against for raising his concerns. Id. ¶ 36. On July 7, 2006, Stengle sent a letter to Plaintiff informing him that his employment was terminated. The letter stated, in pertinent part: "Your challenges ... have gone beyond legitimate expression of a concern and have potentially interfered with MARC's ability to obtain and preserve funding for an important project." Id. ¶¶ 39-41.

II. LEGAL STANDARD

When deciding a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court may look only to the facts alleged in the complaint and its attachments. Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994). The Court must accept as true all well-pleaded allegations of the complaint and view them in the light most favorable to the plaintiff. Angelastro v. Prudential-Bache Sec., Inc., 764 F.2d 939, 944 (3d Cir. 1985). A Rule 12(b)(6) motion will be granted only when it is certain that no relief could be granted under any set of facts that could be proved by the plaintiff. Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988).

III. ANALYSIS

A. The § 1983 Claim

A plaintiff seeking relief under § 1983 must show that he has been deprived of a right secured by the Constitution and laws of the United States and that the defendant was acting under color of state law. Harvey v. Plains Tp. Police Dept., 421 F.3d 185, 189 (3d Cir. 2005) (citations omitted).¹ Therefore, the primary issue before the Court is whether Defendants were acting under color of state law at the time Plaintiff was terminated, and whether they may be appropriately characterized as state actors for purposes of § 1983 liability.

Plaintiff alleges that by speaking with Stengle and the Arc's personnel committee regarding the proper use of government funds, he engaged in a constitutionally-protected activity. He further alleges that this protected activity was a "substantial and motivating factor in

¹ The "color of state law" prerequisite to § 1983 liability is, in most contexts, identical to the "state action" requirement under the Fourteenth Amendment. Groman v. Township of Manalapan, 47 F.3d 628, 639 (3d Cir. 1995).

Defendants’ retaliatory action of terminating [his] employment,” and that Defendants had a “policy, practice and custom” of retaliating against employees who spoke critically of the organization on issues of public concern. See Complaint ¶¶ 43-46. Such conduct, Plaintiff avers, violates § 1983’s prohibition against retaliation for exercise of freedom of speech and the right to petition the government for redress of grievances. See id.²

After Defendants filed their Motion to Dismiss the Complaint, Plaintiff sought leave to amend his Complaint to include the following:

¶ 8 - Upon information and belief, The Arc is actively involved with Pennsylvania legislators in enacting or opposing legislation that assists or harms the disabled community in Pennsylvania, the Arc participates on committees created by the Pennsylvania legislature to examine certain issues regarding Pennsylvania’s disabled community, The Arc is regulated, in whole and/or in part, by the Commonwealth of Pennsylvania and the Arc provides services to the disabled community that the Commonwealth of Pennsylvania is required to provide.

¶ 10 - Advocates are trained to assist families on a variety of issues including decisions on education, vocation and residential living. Although advocates are not attorneys and cannot offer legal advice, they can offer a wide range of resources that include the necessary tools to become one’s own advocate. MARC provides services in the following categories: individual advocacy for children, individual advocacy for adults, systems advocacy, vocational advocacy, educations [sic] advocacy, training and information, individual empowerment, strategic planning and facilitation of parent-support groups. Upon information and belief, MARC is actively involved with Pennsylvania legislators in enacting or opposing legislation that assists or harms the disabled community in Pennsylvania, MARC participates on committees created by the Pennsylvania legislature to examine certain issues regarding Pennsylvania’s disabled community, MARC is regulated, in whole and/or in part, by the Commonwealth of Pennsylvania and MARC provides services to the disabled community that the Commonwealth of Pennsylvania is required to provide.

¶ 11 - Upon information and belief, the ARC and MARC receive approximately 90% of their funding from and/or through the Commonwealth of Pennsylvania.

² 42 U.S.C. § 1983 provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

¶ 14 - At all relevant times and in all their actions, defendants were acting under the color of state law.

¶ 24 - The statutory prevailing wage requirements under the aforementioned statutes were clearly established and Stengle knew or should have known about those statutory obligations.

Defendants urge the Court to dismiss Plaintiff's Complaint and deny leave to amend because the proposed amendments fail to remedy the fatal deficiencies of the original Complaint.³ In support of their Motion, Defendants argue that they are not state actors and were not acting under the color of state law when they terminated Plaintiff. See Defendants' Memorandum of Law in Support of Their Motion to Dismiss Plaintiff's Complaint (hereinafter, "Motion to Dismiss") at 2, 5-6. Defendants further contend that none of the allegations contained in the proposed amended complaint – that the Arc and MARC are actively involved with Pennsylvania legislators in enacting or opposing legislation, that they are regulated, in whole or in part, by the Commonwealth of Pennsylvania, and that approximately 90% of their funding is obtained through the state – suffices to transform Defendants into state actors subject to suit under § 1983.

In Leshko v. Servis, 423 F.3d 337, 340 (3d Cir. 2005), the Third Circuit held that state action cases may be divided into two categories: (1) cases challenging an activity that is "significantly encouraged by the state or in which the state acts as a joint participant"; and (2) cases involving an actor that is "controlled by the state, performs a function delegated by the state, or is entwined with government policies or management." Id. In the first category,

³ A district court may deny leave to amend a complaint when amendment would be futile. Deily v. Waste Management of Allentown, 55 Fed. Appx. 605, 609 (3d Cir. 2003); Oran v. Stafford, 226 F.3d 275, 291 (3d Cir. 2000). An amendment is futile if the amended complaint cannot withstand a motion to dismiss for failure to state a claim upon which relief can be granted. See Dimeo v. Max, 433 F. Supp. 2d 523, 532 (E.D. Pa. 2006); Farmland Dairies, LLC v. Passaic Valley Sewerage Com'rs, 2006 WL 3833477, at *5 (D.N.J. Dec. 29, 2006).

determining state action “requires tracing the activity to its source to see if that source fairly can be said to be the state. The question is whether the fingerprints of the state are on the activity itself.” Id. In the second category, private action may be characterized as state action if the private actor “is so integrally related to the state that it is fair to impute to the state responsibility for the action. The question here is whether the state so identifies with the individual (or entity) who took the challenged action that we deem the state’s fingerprints to have been on the action.” Id.; see also Irons v. Transcor America, Inc., 2006 WL 1805548, at *1 (E.D. Pa. June 28, 2006).⁴

The first prong of the Leshko test requires the Court to inquire whether the challenged activity – Plaintiff’s termination – was “significantly encouraged” by the state or whether the state jointly participated in it. Upon review of the original Complaint as well as the proposed amendments, it is evident that there are no allegations that the state forced, encouraged or jointly participated in Plaintiff’s termination. Indeed, there is no suggestion that the state had any influence whatsoever on decisions regarding the hiring or firing of employees of the Arc and MARC. The allegation that the Arc and MARC had a “policy, practice and custom” of retaliating against employees who criticize the organization is insufficient to attribute responsibility to the state or transform a personnel decision by a private institution into state

⁴ Traditionally, there have been four tests for ascertaining whether a private entity is liable under § 1983, namely, the “public function” test, the “state compulsion” test, the “nexus” test, and the “joint action” or “symbiotic relationship” test. See Lugar v. Edmondson Oil Co., 457 U.S. 922, 939 (1983); Groman v. Township of Manalapan, 47 F.3d 628, 639 (3d Cir. 1995). While Leshko appears to depart somewhat from the traditional analysis, the substance of the inquiry remains the same: is the state responsible for the conduct of which plaintiff complains. See Brentwood Academy v. Tennessee Secondary School Athletic Ass'n, 531 U.S. 288, 295 (2001).

action. See Rendell-Baker v. Kohn, 457 U.S. 830, 841-42 (1982) (“Decisions to discharge the petitioners were not compelled or even influenced by any state regulation”); Cornish v. Correctional Serv. Corp., 402 F.3d 545, 550-51 (5th Cir. 2005); Graham v. City of Philadelphia, 2002 WL 1608230, at *5 (E.D. Pa. July 17, 2002).

As part of its inquiry, the Leshko Court also examined whether the private entity whose actions were challenged was delegated a function that was “traditionally and exclusively” within the province of the state. Leshko, 423 F.3d at 341. This inquiry sets forth a rigorous standard that is rarely met. See Graham, 2002 WL 1608230 at *6 (“while many functions have been traditionally performed by governments, very few have been exclusively reserved to the state”) (citations omitted). In Graham, the plaintiff sought redress from his former employer, a non-profit social service agency which provided support service to people affected by the HIV virus, for alleged § 1983 violations stemming from his termination after he had been critical of the health care provided to prison inmates. The Court refused to find that the defendant organization performed an exclusively governmental function or that control or management of the organization’s workforce is a function exclusively performed by the state. Id. See also Rendell-Baker, 457 U.S. at 842 (holding that privately-operated school for maladjusted high school students, while serving the public, did not perform a task within the exclusive province of the state). Similarly, in the case at bar, the provision of support services to the disabled community, while a public function, cannot be said to be the “exclusive prerogative of the state.” Id. (citations omitted).

Under the second part of the Leshko test, the Court must examine the relationship between the Arc/MARC and the Commonwealth to determine if the two are “so integrally

related” that it would be fair to impute to the state responsibility for Plaintiff’s termination. In support of his contention that Defendants are state actors, Plaintiff alleges that the Arc and MARC (1) are actively involved with Pennsylvania legislators in enacting or opposing legislation that assists or harms the disabled community in Pennsylvania; (2) participate on committees created by the Pennsylvania legislature to examine certain issues regarding Pennsylvania’s disabled community; (3) are regulated, in whole or in part, by the Commonwealth; (4) provide services to the disabled community that the Commonwealth is required to provide; and (5) receive 90% of their funding from or through the Commonwealth.⁵

The question of whether heavy state regulation and public funding suffices to transform a private entity into a state actor has been addressed by a number of courts in this and other jurisdictions. In Rendell-Baker, teachers had been discharged from a private school for maladjusted high school students after they opposed policies of the board of directors. The school received approximately 90% of its funding from public sources and was heavily state-regulated. In a civil action against the school pursuant to § 1983, the Supreme Court concluded that the decision to terminate the teachers did not constitute state action. In so holding, the Court noted that “in contrast to the extensive regulation of the school generally, the various regulators showed relatively little interest in the school’s personnel matters.” 457 U.S. at 841-42. See also Graham, 2002 WL 1608230, at *5 (holding that private, non-profit social service agency that provided support services to people affected by HIV was not acting

⁵ Plaintiff does not allege how Stengle, in his individual capacity, might be considered a state actor. Therefore, a finding that the Arc and MARC were not acting under state law when Plaintiff was terminated would preclude a finding of liability on Stengle’s part.

under the color of state law when it terminated its employee because the state was not involved in the hiring, firing or evaluation of its employees, even though it was publicly-funded and regulated).

Neither Plaintiff's original nor his proposed Amended Complaint allege that Defendants' decision to terminate him was in any way condoned, encouraged or sanctioned by the state. Plaintiff's allegation that the Arc and MARC were heavily funded and regulated by the state, even if true, does not give rise to the inference that the state is so pervasively intertwined with Defendants or had "so far insinuated itself into the position of interdependence with [the Defendants] that the relationship of the two [had become] symbiotic." Kulick v. Pocono Downs Racing Ass'n, Inc., 816 F.2d 895, 896 (3d Cir. 1987) (citing Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961)). Likewise, Plaintiff's allegation that the Arc and MARC worked actively with legislators to promote legislation that would assist the disabled or that they participated on committees created by the Pennsylvania legislature to examine certain issues regarding Pennsylvania's disabled community, does not alter the analysis. Moreover, Plaintiff has made no allegation that the state was in any way involved in the day-to-day management or administration of the Arc and MARC or in the termination of its employees.

B. The State Law Claim

In addition to the § 1983 claim, Plaintiff has alleged violations of the Pennsylvania Whistleblower Act. Defendants urge the Court to decline supplemental jurisdiction if the § 1983 claim is dismissed. A district court may decline to exercise supplemental jurisdiction if it has dismissed all claims over which it has original jurisdiction. See E.E.O.C. v. Creative

Playthings, Ltd., 375 F. Supp. 2d 427, 432 (E.D. Pa. 2005). The Third Circuit has instructed that “[i]f it appears that the federal claim is subject to dismissal ... the court should ordinarily refrain from exercising [supplemental] jurisdiction in the absence of extraordinary circumstances.” Tully v. Mott Supermarkets, Inc., 540 F.2d 187, 196 (3d Cir.1976), cited in Tallely v. Halpern ex rel. Estate of Winderman, 2005 WL 2002611, at *5 (E.D. Pa. Aug. 16, 2005).

IV. CONCLUSION

For the foregoing reasons, Defendants’ Motion to Dismiss will be granted and Plaintiff’s Motion for Leave to Amend will be denied. An appropriate Order follows.

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ORDER

AND NOW, this 2nd day of March, 2007, upon consideration of Defendants' Motion to Dismiss (docket no. 5), and all responses thereto, and for the reasons stated in the accompanying Memorandum, it is **ORDERED** that the Motion is **GRANTED**. It is **FURTHER ORDERED** that Plaintiff's Motion for Leave to file an Amended Complaint (docket no. 6) is **DENIED**.

BY THE COURT:

/s/ Bruce W. Kauffman
BRUCE W. KAUFFMAN, J.