

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

MARY HITNER,	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	
	:	
HAROLD M. HALLMAN, III, et al.,	:	No. 07-596
Defendants.	:	

MEMORANDUM AND ORDER

Schiller, J.

July 25, 2007

Plaintiff Mary Hitner brings this action under 42 U.S.C. § 1983 against Defendants Harold Hallman, William Cracas, Linda Glaum, Norman Long, and West Pikeland Township alleging violations of her rights under the First, Fifth, and Fourteenth Amendments. Presently before the Court is Defendants’ motion to dismiss for failure to state a claim. For the following reasons, Defendants’ motion is granted in part and denied in part. Specifically, Defendants’ motion is denied as to Plaintiff’s First Amendment claim and as to Defendant Norman Long. In all other respects, Defendants’ motion is granted.¹

I. BACKGROUND

Plaintiff alleges that, in the summer of 2002, Defendants discontinued their payroll service

¹ The Court allowed Plaintiff to file two responses to Defendants’ motion to dismiss. Neither of those responses, however, discussed the pertinent legal issues or relevant precedent in any detail. Moreover, portions of Plaintiff’s original memorandum had apparently been lifted completely from filings in other actions. For example, that memorandum noted that “Defendants seems [sic] to have difficulty in understanding that not only was there constructive but retaliatory discipline of the Plaintiff . . . done in retaliation for *his* outspokenness on behalf of *herself* and other *Black* employees.” (Pl.’s Reply Mem. in Opp’n to Defs.’ Mot. to Dismiss at 10 (emphasis added).) Plaintiff is a woman whose race is not mentioned in the Amended Complaint. Moreover, she complains about Defendants’ accounting practices, not mistreatment of Black employees.

provided by an independent contractor and instead assigned Plaintiff, the Township Treasurer, to run the payroll in-house. (Am. Compl. ¶ 19.) Plaintiff began experiencing difficulties in securing Defendants' compliance with accepted accounting procedures pertaining to Township business. (*Id.* ¶ 20.) According to Plaintiff, as a result of her refusal to sanction the accounting malfeasance, Defendants created a hostile working environment and eventually conspired to terminate her position. (*Id.* ¶¶ 30-32.)

On February 13, 2007, Plaintiff filed a Complaint against Defendants raising claims under Pennsylvania's whistle blower statute and 42 U.S.C. § 1983. Defendants filed their first motion to dismiss on April 11, 2007. Plaintiff amended her Complaint in mid-May 2007, dropping her state law claim. Defendants filed the instant motion to dismiss Plaintiff's Amended Complaint on May 22, 2007, asserting that Plaintiff fails to state a claim for which relief can be granted.

II. STANDARD OF REVIEW

In reviewing a motion to dismiss for failure to state a claim, a district court must accept as true all well-pleaded allegations and draw all reasonable inferences in favor of the non-moving party. *See Bd. of Trs. of Bricklayers and Allied Craftsmen Local 6 of N.J. Welfare Fund v. Wettlin Assocs., Inc.*, 237 F.3d 270, 272 (3d Cir. 2001). “[The] [f]actual allegations [in a complaint] must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true.” *In re Hypodermic Prods. Antitrust Litig.*, Civ. A. No. 05-1602, 2007 WL 1959224, at *5 (D.N.J. June 29, 2007) (*quoting Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1959 (2007)). To survive a motion to dismiss, a complaint must include “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp.*, 127 S. Ct. at 1974.

III. DISCUSSION

A. Plaintiff Fails to State a Fourteenth Amendment Claim

1. Procedural Due Process Claim

Plaintiff asserts that Defendants violated her procedural due process rights by terminating her employment as Township Treasurer. (Am. Compl. ¶ 51; Pl.’s Am. Reply Mem. in Opp’n to Defs.’ Mot. to Dismiss at 5.) Because Plaintiff does not have a property interest in her job, this claim must be dismissed.

“The fourteenth amendment prohibits state deprivations of life, liberty, or property without due process of law.” *Robb v. City of Phila.*, 733 F.2d 286, 292 (3d Cir. 1984). To state a procedural due process claim, a plaintiff must establish that: (1) the interest at stake is encompassed within the Fourteenth Amendment’s protections for life, liberty, or property; and (2) due process was not provided before the plaintiff was deprived of such interest. *See id.* The Third Circuit has recently reiterated that “[t]o have a property interest in a job . . . a person must have more than a unilateral expectation of continued employment; rather, she must have a legitimate entitlement to such continued employment.” *Hill v. Borough of Kutztown*, 455 F.3d 225, 234 (3d Cir. 2006) (*quoting Elmore v. Cleary*, 399 F.3d 279, 282 (3d Cir. 2005)). Whether a person has a legitimate entitlement in a government job is a question of state law. *Id.* As the Township Treasurer in the Second Class township of West Pikeland, Plaintiff served at the pleasure of the Township Board of Supervisors. 53 PA. CONS. STAT. ANN. § 65701 (2007); *see also Marburger v. Upper Hanover Twp.*, 225 F. Supp. 2d 503, 508-509 (E.D. Pa. 2002). Because she was an at-will employee, Plaintiff did not have a legitimate entitlement to continued employment. *Hill*, 455 F.3d at 234 (*citing Elmore*, 399 F.3d at 282). Plaintiff was not deprived of a property interest encompassed within the Fourteenth

Amendment's protections, and, accordingly, she cannot state a procedural due process claim.²

2. *Substantive Due Process Claim*

Defendants' motion to dismiss is also granted with regard to any substantive due process claim alleged by Plaintiff. A public employee like the Plaintiff has no substantive due process right to continued employment. *Hill*, 455 F.3d at 235 n.12 (quoting *Nicholas v. Pa. State Univ.*, 227 F.3d 133, 139-40 (3d Cir. 2000)).

3. *Equal Protection Claim*

In her Amended Complaint Plaintiff fails to assert that she was treated differently from similarly situated employees, as required to state an equal protection claim pursuant to 42 U.S.C. § 1983. *See Andrews v. City of Phila.*, 895 F.2d 1469, 1478 (3d Cir. 1990) (citing *Batson v. Kentucky*, 476 U.S. 79, 93 (1986)). Accordingly, Defendants' motion to dismiss Plaintiff's equal protection claim is granted.

B. Plaintiff Fails to State a Fifth Amendment Claim

Plaintiff also appears to base her claims on the Fifth Amendment's due process guarantee. As Defendants correctly point out, any such claims fail here because Fifth Amendment civil rights claims may be asserted solely against federal actors. *See Citizens for Health v. Leavitt*, 428 F.3d 167, 178 n.11 (3d Cir. 2005).

C. First Amendment Retaliation Claim

Plaintiff asserts that Defendants violated her First Amendment rights by retaliating against

² Defendants also argue that Plaintiff failed to identify any possible liberty interest at stake. The Amended Complaint is entirely devoid of the allegations necessary to support a procedural due process claim stemming from a liberty interest. (Defs.' Reply Brief in Supp. of Mot. to Dismiss at 2); *See Schlicter v. Limerick Twp.*, Civ. A. No. 04-4229, 2005 WL 984197, at *8 (E.D. Pa. Apr. 26, 2005) (citations omitted).

her in response to her complaints and objections regarding their failure to use generally accepted accounting procedures in connection with Township business. “A public employee’s statement is a protected activity when (1) in making it, the employee spoke as a citizen, (2) the statement involved a matter of public concern, and (3) the government employer did not have ‘an adequate justification for treating the employee differently from any other member of the general public’” *Hill*, 455 F.3d at 241-42 (quoting *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1958 (2006)). When public employees make statements pursuant to their official duties they are not speaking as “citizens” for First Amendment purposes. *Id.*

The Court is uncertain whether Plaintiff will succeed in establishing that she was acting as a citizen when she voiced her complaints regarding Defendants’ purported accounting improprieties. However, reading the Amended Complaint liberally and drawing all reasonable inferences in her favor, the Court finds that Plaintiff has sufficiently alleged a cause of action under the First Amendment. *See Hill*, 455 F.3d at 242-43 (reversing district court’s decision to grant defendant’s motion to dismiss First Amendment retaliation claim where it was unclear from the complaint whether plaintiff was acting within or outside the scope of his employment).

IV. CONCLUSION

For the foregoing reasons, the Court grants Defendants’ motion to dismiss all of Plaintiff’s claims with the exception of her claim under the First Amendment.³

³ Defendants also argue that Norman Long should be dismissed from this case because he lacked the statutory authority to terminate Plaintiff. The Court declines Defendants’ invitation to remove Defendant Long from the litigation at this time. *See Hill*, 455 F.3d at 240 (noting that a “supervisor who lacks the power to terminate a subordinate’s employment may nonetheless abuse his power with respect to that subordinate”)

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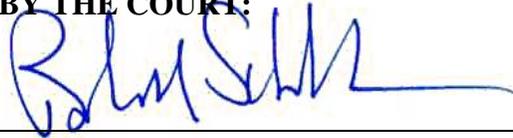
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Plaintiff,	:	CIVIL ACTION
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ORDER

AND NOW, this 25th day of **July 2007**, upon consideration of Defendants' Motion to Dismiss, Plaintiff's responses thereto, Defendant's reply thereon, and for the foregoing reasons, it is hereby **ORDERED** that Defendants' motion (Document No. 9) is **GRANTED in part** and **DENIED in part** as follows:

1. Defendants' motion is **GRANTED** as to Plaintiff's claims pursuant to the Fourteenth and Fifth Amendments.
2. Defendants' motion is **DENIED** as to Plaintiff's First Amendment claim.

BY THE COURT:



Berle M. Schiller, J.