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

KEVIN L. MAULE,	)	
	)	Civil Action
Plaintiff	)	No. 04-CV-05933
	)	
vs.	)	
	)	
SUSQUEHANNA REGIONAL POLICE COMMISSION;	)	
EAST DONEGAL TOWNSHIP;	)	
EAST DONEGAL TOWNSHIP SUPERVISORS;	)	
MARIETTA BOROUGH;	)	
MARIETTA BOROUGH COUNCIL;	)	
CONOY TOWNSHIP;	)	
CONOY TOWNSHIP SUPERVISORS;	)	
OLIVER C. OVERLANDER, II;	)	
ROBERT STRICKLAND;	)	
ALLEN ESBENSHADE;	)	
DENNIS DRAGER;	)	
LORI NAU;	)	
STEPHEN MOHR and	)	
SAMUEL WIGGINS,	)	
	)	
Defendants	)	

O R D E R

NOW, this 27th day of September, 2007, upon consideration of Defendants' Joint Motion to Dismiss Complaint, which motion was filed on behalf of all defendants except Samuel Wiggins on February 8, 2006;[1] upon consideration of Defendant Samuel Wiggin's Motion to Dismiss Plaintiff's Amended Complaint, which motion was filed February 8, 2006;[2] upon consideration of Defendants' Amended Joint Motion to Dismiss Complaint, which

[1] Plaintiff's Response in Opposition to Defendants' Joint Motion to Dismiss was filed February 22, 2006.

[2] On February 22, 2006 Plaintiff's Response in Opposition to Defendant Samuel Wiggin's Motion to Dismiss Plaintiff's Amended Complaint was filed.

motion was filed September 29, 2006;[3] upon consideration of the briefs of the parties; and for the reasons expressed in the accompanying Opinion,

IT IS ORDERED that defendants' motions to dismiss are granted.

IT IS FURTHER ORDERED that Count I of plaintiffs' Amended Complaint relating to claims pursuant to 42 U.S.C. § 1983 alleging violations of procedural and substantive due process under the Fourteenth Amendment of the United States Constitution and for First Amendment retaliation is dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

IT IS FURTHER ORDERED that the remaining claims (Counts II through IV) against all defendants are dismissed for lack of subject matter jurisdiction without prejudice to bring these claims in Pennsylvania state court.

IT IS FURTHER ORDERED that plaintiff's Amended Complaint filed January 25, 2006 is dismissed.

IT IS FURTHER ORDERED that Plaintiff's Motion to Strike Defendants' Amended Motion to Dismiss and Plaintiff's Further Response in Opposition to the Defendants' Motions to Dismiss is dismissed as moot.

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[3] On October 16, 2006 Plaintiff's Motion to Strike Defendants' Amended Motion to Dismiss and Plaintiff's Further Response in Opposition to the Defendants' Motions to Dismiss was filed.

IT IS FURTHER ORDERED that the Clerk of Court shall mark this case closed for statistical purposes.

BY THE COURT:

/s/ James Knoll Gardner
James Knoll Gardner
United States District Judge

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LORI NAU;	)	
STEPHEN MOHR and	)	
SAMUEL WIGGINS,	)	
	)	
Defendants	)	

* * *

APPEARANCES:

NINA B. SHAPIRO, ESQUIRE
On behalf of Plaintiff

CHRISTOPHER P. GERBER, ESQUIRE
On behalf of Defendants Susquehanna Regional Police Commission; East Donegal Township; East Donegal Township Supervisors; Marietta Borough; Conoy Township; Cony Township Supervisors; Oliver C. Overlander, II; Robert Strickland; Allen Esbenshade; Dennis Drager; Lori Nau; and Stephen Mohr

WENDI D. BARISH, ESQUIRE
On behalf of Defendants Marietta Borough; Marietta Borough Council; Oliver C. Overlander, II; Lori Nau; and Samuel Wiggins

*   *   *

<u>O P I N I O N</u>

JAMES KNOLL GARDNER,
United States District Judge

This matter is before the court on Defendants' Joint Motion to Dismiss Complaint, which motion was filed on behalf of all defendants except Samuel Wiggins on February 8, 2006;[4] Defendant Samuel Wiggins' Motion to Dismiss Plaintiff's Amended Complaint, which motion was filed February 8, 2006;[5] and Defendants' Amended Joint Motion to Dismiss Complaint, which motion was filed September 29, 2006.[6]

For the following reasons, I grant defendants' motions to dismiss this matter pursuant to Federal Rule of Civil Procedure 12(b)(6). In addition, I dismiss as moot Plaintiff's Motion to Strike Defendants' Amended Motion to Dismiss and Plaintiff's Further Response in Opposition to the Defendants' Motions to Dismiss.

Specifically, I grant defendants' motions and amended motions to dismiss plaintiff's federal claims contained in Count I. I conclude that plaintiff has not averred sufficient facts to survive a motion to dismiss for failure to state a claim

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[4] Plaintiff's Response in Opposition to Defendants' Joint Motion to Dismiss was filed February 22, 2006.

[5] On February 22, 2006 Plaintiff's Response in Opposition to Defendant Samuel Wiggins' Motion to Dismiss Plaintiff's Amended Complaint was filed.

[6] On October 16, 2006 Plaintiff's Motion to Strike Defendants' Amended Motion to Dismiss and Plaintiff's Further Response in Opposition to the Defendants' Motions to Dismiss was filed.

upon which relief can be granted on his claims pursuant to 42 U.S.C. § 1983 based upon deprivation of due process rights, both substantive and procedural due process (liberty and property interests), including denial of a name-clearing hearing and his claim for First Amendment retaliation.

Moreover, I have dismissed all of plaintiff's federal claims, and there does not appear to be subject matter jurisdiction over plaintiff's pendent state law claims under diversity jurisdiction.[7] Therefore, I dismiss plaintiff's entire Amended Complaint without prejudice to bring his state law claims in Pennsylvania state court.

JURISDICTION AND VENUE

Jurisdiction in this case is based upon federal question jurisdiction pursuant to 28 U.S.C. § 1331. The court has supplemental jurisdiction over plaintiffs' pendent state law claims. See 28 U.S.C. § 1367. Venue is proper pursuant to 28 U.S.C. § 1391(b) because the events giving rise to plaintiff's claims allegedly occurred in Lancaster County, Pennsylvania, which is located within this judicial district.

PROCEDURAL HISTORY

On December 20, 2004 plaintiff Kevin Maule filed a four-Count Complaint alleging violations of 42 U.S.C. § 1983

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[7] See 28 U.S.C. § 1332.

(Count I); Wrongful Termination (Count II); Breach of Contract (Count III); and Tortious/Intentional Interference with contract (Count IV).

On May 5, 2005 defendants Susquehanna Regional Police Commission, East Donegal Township, East Donegal Township Supervisors, Marietta Borough, Marietta Borough Council, Conoy Township, Conoy Township Supervisors, Oliver C. Overlander, II, Robert Strickland, Allen Esbenshade, Dennis Drager, Lori Nau and Stephen Mohr filed a joint motion to dismiss. On that same day, defendant Samuel Wiggins filed his motion to dismiss. On June 7, 2005 plaintiff filed two separate responses to the two motions to dismiss.

On January 17, 2006 Plaintiff's Motion for Leave to Amend Pleadings was filed. By my Order dated January 19, 2006 I granted plaintiff's motion to file an Amended Complaint.

On January 25, 2006 plaintiff filed an Amended Complaint asserting the same four causes of action that he pleaded in the original Complaint. In his Amended Complaint, plaintiff provided additional specificity and added additional constitutional violations in support of his Section 1983 cause of action.

Specifically, plaintiff's Amended Complaint appears to allege a claim pursuant to 42 U.S.C. § 1983 based upon deprivation of due process rights, both substantive and

procedural due process (liberty and property interests) (presumably pursuant to the Fourteenth Amendment); denial of a name-clearing hearing; and First Amendment retaliation. All of these claims are included in Count I.

Count II alleges a Pennsylvania state cause of action for wrongful discharge. Count III alleges a state cause of action for breach of contract, including a claim of breach of the duty of good faith and fair dealing and alleged misrepresentation. Finally, Count IV alleges a state cause of action for tortious/intentional interference with contractual relations.

On February 8, 2006 Defendants' Joint Motion to Dismiss Complaint and Defendant Samuel Wiggins' Motion to Dismiss Plaintiff's Amended Complaint were each filed. On February 22, 2006 plaintiff responded separately to each motion to dismiss. On May 4, 2006 I conducted oral argument on the two motions to dismiss. After oral argument, I took both matters under advisement.

On September 13, 2006, based upon a letter dated September 11, 2006 from Christopher P. Gerber, Esquire, counsel for all defendants except defendant Samuel Wiggins, I issued an Order permitting defendants until September 29, 2006 to file an amended motion to dismiss to specifically address the May 30, 2006 decision of the United States Supreme Court in Garcetti v. Ceballos, __ U.S. __, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006) and

the July 26, 2006 decision of the United States Court of Appeals for the Third Circuit in Hill v. Borough of Kutztown, 455 F.3d 225 (3d Cir. 2006).

In attorney Gerber's letter, defendants contended that the Garcetti and Hill decisions are dispositive of plaintiff's claim for First Amendment retaliation. However, neither the Defendants' Joint Motion to Dismiss Complaint, which motion was filed on February 8, 2006, nor Defendant Samuel Wiggins' Motion to Dismiss Plaintiff's Amended Complaint, which motion was filed February 8, 2006, sought to dismiss plaintiff's First Amendment retaliation claim. Thus, because of new, and possibly controlling case law from both the United States Supreme Court and the Third Circuit, I granted defendants leave amend their previously filed motions to dismiss.

In footnote 1 of my September 13, 2006 Order I stated:

> It is the sense of this Order that defendants shall not reassert or reargue issues already presented to the court. Rather, defendants are permitted to file an amended motion to dismiss on the limited issue of plaintiff's First Amendment retaliation claim. However, the parties are granted leave to discuss the applicability of the Garcetti and Hill decisions to any other issue already presented.

Defendants' Amended Joint Motion to Dismiss Complaint was filed on September 29, 2006. A review of defendants' amended motion to dismiss made it clear that my directive not to reassert or reargue the previously submitted issues was violated.

Moreover, the joint motion appeared to raise additional issues not previously raised. Thus, by my Order dated and filed December 1, 2006 I granted in part, and denied in part, plaintiff's motion to strike defendants' amended motion to dismiss. Specifically, I struck all portions of Defendants' Amended Joint Motion to Dismiss Plaintiff's Amended Complaint except those arguments regarding plaintiff's First Amendment retaliation claim.

On December 1, 2006 I conducted a second oral argument to address the amended motion to dismiss plaintiff's First Amendment retaliation claim. After oral argument I took this matter under advisement. I now address both defendants' two original motions to dismiss plaintiff's Amended Complaint and their amended motion to dismiss.

STANDARD OF REVIEW

A claim may be dismissed under Federal Rule of Civil Procedure 12(b)(6) for "failure to state a claim upon which relief can be granted". A 12(b)(6) motion requires the court to examine the sufficiency of the complaint. Conley v. Gibson, 355 U.S. 41, 45, 78 S.Ct. 99, 102, 2 L.Ed.2d 80, 84 (1957) (abrogated in other respects by Bell Atlantic Corporation v. Twombly, ___ U.S. ___, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

Ordinarily, a court's review of a motion to dismiss is limited to the contents of the complaint, including any attached exhibits. See Kulwicki v. Dawson, 969 F.2d 1454, 1462 (3d Cir. 1992). However, evidence beyond a complaint which the court may consider in deciding a 12(b)(6) motion to dismiss includes public records (including court files, orders, records and letters of official actions or decisions of government agencies and administrative bodies), documents essential to plaintiff's claim which are attached to defendant's motion, and items appearing in the record of the case. Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, n.1 and n.2 (3d Cir. 1995).

Except as provided in Federal Rule of Civil Procedure 9, a complaint is sufficient if it complies with Rule 8(a)(2). That rule requires only "a short and plain statement of the claim showing that the pleader is entitled to relief" in order to give the defendant fair notice of what the claim is and the grounds upon which it rests. Twombly, ___ U.S. at ___, 127 S.Ct. at 1964, 167 L.Ed.2d at 940.

Additionally, in determining the sufficiency of a complaint, the court must accept as true all well-pled factual allegations and draw all reasonable inferences therefrom in the light most favorable to the non-moving party. Worldcom, Inc. v. Graphnet, Inc., 343 F.3d 651, 653 (3d Cir. 2003). Nevertheless, a court need not credit "bald assertions" or "legal conclusions"

when deciding a motion to dismiss. In re Burlington Coat Factory Securities Litigation, 114 F.3d 1410, 1429-1430 (3d Cir. 1997).

In considering whether the complaint survives a motion to dismiss, both the District Court and the Court of Appeals review whether it "contain[s] either direct or inferential allegations respecting all the material elements necessary to sustain recovery under *some* viable legal theory." Twombly, ___ U.S. at ___, 127 S.Ct. at 1969, 167 L.Ed.2d at 944 (quoting Car Carriers, Inc. v. Ford Motor Company, 745 F.2d 1101, 1106 (7th Cir. 1984) (emphasis in original).

FACTS

Based upon the averments in plaintiff's Amended Complaint, which I must accept as true under the foregoing standard of review, the pertinent facts are as follows. Plaintiff Kevin L. Maule worked for 25 years as a police officer, that last 16 years as a police officer for the West Hempfield Police Department in Lancaster County, Pennsylvania.[8] On December 21, 2001 plaintiff and defendant Susquehanna Regional Police Commission entered into a written employment agreement for plaintiff to assume the position of Chief of Police.[9] Plaintiff avers that the agreement was for a term of three years.[10]

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[8] Amended Complaint, paragraph 26.

[9] Amended Complaint, paragraph 31.

[10] Amended Complaint, paragraph 66.

In August 2002 plaintiff received a complaint from a subordinate officer that defendant Samuel Wiggins had accosted the uniformed and on-duty officer with profane language and threatening gestures.[11] Because Mr. Wiggins was a public official, who served as a councilman for Marietta Borough, plaintiff referred the matter to the Pennsylvania State Police for an objective, external investigation.[12] As a result of the investigation by the Pennsylvania State Police, Mr. Wiggins was charged with criminal conduct.[13]

Thereafter, plaintiff contends that he was retaliated against by defendants, collectively, because he reported defendant Wiggins to the State Police for an external investigation.[14] Specifically, plaintiff asserts that his direction and control of the Susquehanna Regional Police Department was obstructed,[15] his authority to direct and control the police department was removed,[16] his competence was

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[11] Amended Complaint, paragraph 33.

[12] Amended Complaint, paragraph 34.

[13] Amended Complaint, paragraph 35.

[14] Amended Complaint, paragraph 36.

[15] Amended Complaint, paragraph 37.

[16] Amended Complaint, paragraph 38.

questioned[17] and he was falsely accused of poor performance and inability to perform his job.[18]

Plaintiff asserts that defendant Oliver C. Overlander, II, the Mayor of Marietta Borough, and Chairperson of defendant Susquehanna Regional Police Commission demanded plaintiff's resignation and threatened that he would ruin plaintiff's reputation and opportunity for future employment prospects.[19] Plaintiff did not resign.[20] Plaintiff was subsequently notified that his employment contract was being terminated effective December 31, 2002.[21]

Plaintiff was not afforded a "name clearing" hearing or a statement of the charge that warranted termination.[22] Plaintiff asserts that defendants acted jointly, wilfully and with the intent to harm plaintiff and that plaintiff suffered harm and losses.[23]

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[17] Amended Complaint, paragraph 39.

[18] Amended Complaint, paragraph 40.

[19] Amended Complaint, paragraph 41.

[20] Amended Complaint, paragraph 42.

[21] Amended Complaint, paragraph 42.

[22] Amended Complaint, paragraph 43.

[23] Amended Complaint, paragraphs 44 and 45.

DISCUSSION

Section 1983 Claims

"Section 1983 imposes civil liability upon any person who, acting under the color of state law, deprives another individual of any rights, privileges, or immunities secured by the Constitution or the laws of the United States." Shuman ex rel. Shertzer v. Penn Manor School District, 422 F.3d 141, 146 (3d Cir. 2005). Section 1983 does not create substantive rights. Rather, it provides a remedy for the violation of federal Constitutional or statutory rights. Gruenke v. Seip, 225 F.3d 290, 298 (3d Cir. 2000).

To establish valid claims pursuant to section 1983, plaintiff must demonstrate that defendants, while acting under color of state law, deprived or denied him of a right secured by the Constitution or the laws of the United States. Marks v. Borough of Hatboro, 51 F.3d 1137, 1141 (3d Cir. 1995).

Plaintiff may bring suit pursuant to section 1983 against local municipalities and their governing bodies for monetary, declaratory or injunctive relief. This relief is available "where the action that is alleged to be unconstitutional implements or executes a policy statement ordinance, regulation, decision or custom whether officially adopted or informally through the government body's offices and/or official decision-making channels." Schlichter v.

Limerick Township, 2005 WL 984197 at *3 (E.D.Pa. Apr. 26, 2005) (Joyner, J.) (citing Monell v. New York City Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

In this case, plaintiff's Amended Complaint[24] appears to allege a section 1983 claim based upon deprivation of due process rights, both procedural and substantive due process (property and liberty interests) (presumably pursuant to the Fourteenth Amendment, although not actually stated) and of First Amendment rights (retaliation for plaintiff referring criminal charges against defendant Wiggins to the Pennsylvania State Police). I address plaintiff's section 1983 claims in that order (procedural due process, substantive due process and First Amendment retaliation).

Procedural Due Process

To state a claim pursuant to section 1983 for deprivation of procedural due process rights, plaintiff is

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[24] In the Introduction section of his Amended Complaint, plaintiff asserts "This action is brought by Kevin L. Maule to redress deprivation of his rights in contravention of 42 U.S.C. section 1983, and wrongful discharge and breach of contract and intentional/tortious interference with contract. The four individual counts of the Amended Complaint are not separately headed. However, paragraphs 54 and 55 (contained under the heading "Count I") mention section 1983 by name. Moreover, paragraph 56 (also under the heading "Count I") states "Defendants denied Plaintiff his rights guaranteed by the Constitution and Federal Law, including rights guaranteed by the 1st Amendment and the 14th Amendment."

In addition, plaintiff alleges that he was retaliated against in paragraph 51 (Count I) and paragraph 59 (Count II). I read plaintiff's retaliation claim as one brought as a claim for First Amendment retaliation, which would be properly addressed under Count I. Thus, I treat paragraph 59 as an averment under Count I of the Amended Complaint.

required to allege that (1) he was deprived of an individual interest that is encompassed within the Fourteenth Amendment's protection of life, liberty or property, and (2) the procedures available to him did not provide due process of law. Alvin v. Suzuki, 227 F.3d 107, 116 (3d Cir. 2000).

Plaintiff raises two procedural due process claims. First, plaintiff alleges a property-based procedural due process claim, arguing that he was fired, he was not "provided a hearing and/or statement of the charge that warranted termination."[25] Second, plaintiff alleges a so called "stigma-plus" or liberty-based procedural due process claim arguing that defendants collectively defamed him in the course of firing him and that he was not "afforded a 'name-clearing' hearing".[26]

Property Interest in Employment

"To have a property interest in a job...a person must have more than a unilateral expectation of continued employment; rather, [he] must have a legitimate entitlement to such continued employment." Elmore v. Cleary, 399 F.3d 279, 282 (3d Cir. 2005). Whether plaintiff has a legitimate entitlement to, hence, a property interest in, his government employment is a question answered by state law. Cooley v. Pennsylvania Housing Finance Agency, 830 F.2d 469, 471 (3d Cir. 1987).

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[25] Amended Complaint, paragraph 43.

[26] Amended Complaint, paragraph 50.

In this case, defendants allege that plaintiff's Amended Complaint fails to set forth a claim for violation of due process rights because plaintiff does not have a protected property interest in his position as police chief.

Specifically, defendants assert that plaintiff was only a probationary police officer. Defendants agree that the general rule in Pennsylvania is that full-time municipal police officers enjoy a protected property interest in their position, together with a concomitant right to procedural due process when their employment is terminated. However, defendants assert that plaintiff was a probationary police officer, thus, he was not entitled to pre-termination notice or a hearing.

Defendants rely on section 812 of the Pennsylvania Police Tenure Act[27] (governing township police departments) and the provisions of the employment contract between the parties for the proposition that plaintiff was a probationary police officer because he had not completed the initial one-year period of service. Furthermore, unless the terms of a police officer's probationary period specifically grant him other avenues of redress, the employment relationship is strictly at-will and terminable by either side for the duration of the probationary period.

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[27] Act of June 15, 1951, P.L. 586, sec. 2, as amended, 53 P.S. § 812.

Next, defendants assert that even if the employment contract between plaintiff and Susquehanna Regional Police Commission was for a period of three years, defendant Susquehanna lacked the authority to guarantee a definite term of employment to plaintiff under Pennsylvania law. A municipality, or in this case, the Susquehanna Regional Police Commission, must have specific statutory authority to alter the at-will status of a public employee, and any such contract created by a municipality, whether express or otherwise, is invalid and unenforceable without such explicit statutory authority. Thus, defendant argues that the employment contract with plaintiff does not create a property interest in employment.

Plaintiff contends that the employment contract between the parties provides that he could only be discharged for cause. He asserts that his contract was for a term of three years. Plaintiff argues that the Police Tenure Act does not apply to this case and that his alleged probationary status does not effect his right to bring Section 1983 claims.

Rather, plaintiff claims that section 46190 of the Pennsylvania Borough Code[28] applies to this case. Plaintiff contends that under that section, removal of a police officer may only be for cause, even during a probationary period, and that a

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[28] Act of February 1, 1966, P.L. (1965) 1656, No. 581, sec. 1190, as amended, 53 P.S. § 46190.

written statement of any charges made against a person so employed shall be furnished to him within five days.

In Pipkin v. Pennsylvania State Police, 548 Pa. 1, 6, 693 A.2d 190, 192 (Pa. 1997), the Supreme Court of Pennsylvania stated that "[a] governmental employee only has a personal or property right in his employment where he can establish a legitimate expectation of continued employment through either a contract or statute."

In this case, plaintiff asserts that he has a property right by either statute or contract. To the contrary, defendants contend that plaintiff is explicitly barred from asserting a property right by statute. For the following reasons, I agree with plaintiff in part, and defendants in part, and determine that plaintiff has no protected property interest in his position as police chief.

Plaintiff contends that he has a property right in his position as Police Chief of the Susquehanna Regional Police Department based upon section 46190 of the Pennsylvania Borough Code. I disagree.

Section 46190 provides in pertinent part, "No person employed in any police or fire force of any borough shall be suspended, removed or reduced in rank" except for a number of enumerated reasons which imply that a police officer may only be

suspended, removed or reduced in rank for cause.

53 P.S. § 46190.

Here, plaintiff was not employed by a borough. Rather, he was employed by defendant Susquehanna Regional Police Commission, a body that was established to provide police services and protection to Marietta Borough, East Donegal Township and Conoy Township. Thus, because plaintiff was not an employee of any particular "borough", I conclude that section 46190 is inapplicable.

Similarly, defendants contend that plaintiff was a probationary employee, and thus is covered by section 812 of the Pennsylvania Police Tenure Act. Section 812 provides in pertinent part:

> No person employed as a regular full time police officer in any police department of any township of the second class, or any borough or township of the first class...with the exception of policemen appointed for a probationary period of one year or less, shall be suspended, removed or reduced in rank....

53 P.S. § 812 (1) through (5). Furthermore, the statute sets forth several enumerated reasons all implying that removal, suspension or reduction in rank may only occur for just cause. Id.

Plaintiff disputes that he was a probationary employee. I conclude that a determination whether plaintiff was a probationary employee is unnecessary because section 812 is

inapplicable to this case, just as section 46190 is inapplicable. Plaintiff was the Police Chief of the Susquehanna Regional Police Department. He was not an employee of Marietta Borough, East Donegal Township or Conoy Township. Rather, he was an employee of the Susquehanna Regional Police Commission, a municipal police commission created by Marietta Borough, East Donegal Township and Conoy Township.

Plaintiff's written contract is entitled "Employment Agreement Between the Susquehanna Regional Police Commission and its Chief."[29] Moreover, paragraph 1(A) of the employment agreement states that "[t]he Commission hereby employs the Chief...." Because it is clear that plaintiff was employed by the commission, not a borough or township, I conclude that section 812 is inapplicable to this case.

In addition, after careful review, although Pennsylvania has codes regulating state, city, township and borough police officers[30], I conclude that the Pennsylvania Legislature has not enacted legislation regulating police

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[29] Exhibit B attached to the motion and memorandum of defendant Samuel Wiggins filed February 8, 2006. Documents essential to plaintiff's claim which are attached to defendant's motion are appropriate for review on a Rule 12(b)(6) motion to dismiss. Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, n.1 and n.2 (3d Cir. 1995).

[30] For example, see Pennsylvania Administrative Code of 1929 (State Police), Act of April 9, 1929, P.L. 177, art. II, sec. 205, as amended, 71 P.S. § 65; Pennsylvania Second Class City Code, Act of March 20, 1990, P.L. 78, No. 17, sec. 4, as amended, 53 P.S. § 23539.1; Pennsylvania Police Tenure Act (townships), Act of June 15, 1951, P.L. 586, sec. 2, as amended, 53 P.S. § 812; and Pennsylvania Borough Code, Act of February 1, 1966, P.L. (1965) 1656, No. 581, sec. 1190, as amended, 53 P.S. § 46190.

officers of a regional police department as it has for borough, township, city and state police officers. It is not for this court to act as a super legislature to fill in such a gap in the statutory scheme.

At-Will Employment

As a general rule, municipal employees in Pennsylvania are at-will employees. Stumpp v. Stroudsburg Municipal Authority, 540 Pa. 391, 658 A.2d 333 (1995). Therefore, municipal employees accept employment subject to the possibility of summary removal by the municipal employer for any reason or no reason at all. Ballas v. City of Reading, 2001 U.S.Dist. LEXIS 657 (E.D.Pa. Jan. 25, 2001) (Padova, J.); Scott v. Philadelphia Parking Authority, 402 Pa. 151, 166 A.2d 278 (1961). Accordingly, absent a legislatively authorized contractual provision to the contrary, Pipkin, supra, plaintiff is an at-will employee.

Plaintiff contends that his contract with the Susquehanna Regional Police Commission is for a term of three years. This argument fails because the Commission does not have the power to enter into contracts, express or implied, written or oral, which contract away the right of summary dismissal absent express enabling legislation. Stumpp, supra; Scott, supra. "Tenure in public employment, in the sense of having a claim to employment which precludes dismissal on a summary basis is, where

it exists, a matter of legislative grace." Scott, 402 Pa. at 154, 166 A.2d at 281.

In this case, there is no indication that the Pennsylvania Legislature enacted legislation that permits the Susquehanna Regional Police Commission to circumvent the general rule. Moreover, I conclude that Plaintiff's Response in Opposition to Defendants' Joint Motion to Dismiss concedes that the Commission was not empowered to grant tenure in plaintiff's position as Police Chief.

Specifically, plaintiff's response citing Stumpp, supra, states: "The Courts have held that Commonwealth authorities and agencies do not have the power to enter contracts of employment that contract away the right of summary dismissal since the power to confer tenure must be expressly set forth in the enabling legislation."

Accordingly, because none of the parties have directed the court to any legislation which specifically permits the Susquehanna Regional Police Commission to grant plaintiff's tenure in his position as police chief, I conclude that he was an at-will employee.

Even if I am incorrect about the power of the Commission to contract for tenure with plaintiff, a reading of the contract makes clear that plaintiff, contrary to his assertion that he entered into a three year contract, could be

dismissed without cause after one year. Section 2(A) of the employment agreement states as follows:

> A. **Initial and Optional Term**- The term of this agreement shall begin on January 1, 2002, and shall continue in full force and effect until December 31, 2002 unless sooner terminated as herein provided or until such later date as the parties may agree is to be the extended ending date; provided, however, that the Commission, in its sole discretion, shall have the option to automatically renew this agreement on the same terms and conditions contained herein for an additional two year period beginning January 1, 2003 and ending December 31, 2004 by giving the Chief written notice of such intention by at least November 1, 2002.

Notwithstanding the provision above, plaintiff contends that he could only be fired for cause pursuant to the provisions of section 15. Section 15 of the employment contract provides:

> 15. **Discipline and Termination of Employment**-During the term of this agreement, the Chief may be dismissed (and this contract terminated), suspended (with or without wages), or reprimanded by a majority of the members of the Commission in its sole discretion on any or all of the following grounds:
>
> > A. Intentional violation of any order or policy of the Commission.
> >
> > B. Violation of any law that would constitute any degree of felony or any misdemeanor of the first or second degree.
> >
> > C. Physical or mental disability rendering the Chief unable to perform his duties.
> >
> > D. Intoxication while on duty.

> E. Illegal use of a controlled substance at any time.
>
> F. Gross negligence.
>
> G. Wilful misconduct.
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> H. Dishonesty.
>
> I. Fraud.
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> J. Embezzlement.
>
> K. Act of insubordination against any member of the Commission.
>
> L. Falsification of records, reports, or information of any nature.
>
> M. Unsatisfactory work performance.
>
> N. Performing unauthorized personal work during duty hours.
>
> O. Breach of any provision of this agreement. And
>
> P. Any other just cause.

A review of section 2A of the employment agreement read in conjunction with section 15 leads to the following conclusions about the employment agreement. First, plaintiff's contract was for a term of one year (January 1, 2002 until December 31, 2002). Second, in the event that the parties agreed to extend their relationship, they were free to do so. Third, defendant Susquehanna Regional Police Commission was empowered, in its sole discretion, to extend the agreement under the same terms for an additional two years, if it gave plaintiff notice of the

extension by November 1, 2002. Accordingly, the agreement is not for a term of three years as asserted by plaintiff.

In addition, review of paragraph 15 leaves two possible interpretations. First, that plaintiff could only be dismissed during the term of the contract (January 1, 2002 until December 31, 2002) for the reasons set forth in section 15 A-P of the employment agreement. There is nothing in section 15 of the agreement that implicates the necessity of any procedural due process. Rather, the language of the agreement is clear that plaintiff could be fired, suspended or reprimanded "by a majority of the members of the Commission in its sole discretion". Thus, one reasonable reading of the agreement is that plaintiff had no right to any process.

Another reasonable reading of the agreement is that section 15, subsection P suggests that plaintiff's firing required just cause during the term of his contract. Even if this were true, subsection P does not require just cause for termination at the conclusion of the one year term. Stated another way, even if defendant Susquehanna Regional Police Commission required just cause to terminate plaintiff during the one year term of the contract, it needed no cause to terminate him at the end of the term because the contract was over, absent further agreement of the parties or the Commission's unilateral extension of the agreement for an additional two years.

Hence, because defendant Commission terminated the agreement, as was its right, at the end of the initial one-year term, plaintiff possessed no contractual right that afforded him a legitimate expectation of continued employment. Elmore, 399 F.3d at 282. Moreover, without an expectation of continued employment, plaintiff was not deprived of any individual interest encompassed within the Fourteenth Amendment's protection of property. Thus, there were no due process procedures required to be afforded him. Alvin, 227 F.3d at 116.

Accordingly, defendants' motions to dismiss plaintiff's procedural due process claim based upon a property interest is dismissed.

Liberty Interest in Reputation

In his second procedural due process claim, plaintiff alleges a so-called "stigma-plus" or liberty-based procedural due process claim arguing that defendants collectively defamed him in the course of firing him and that he was not "afforded a 'name-clearing' hearing".

In Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct 507, 27 L.Ed.2d 515 (1971) the United States Supreme Court held that an individual has a protectable interest in reputation where a person's good name, reputation, honor or integrity is implicated by what the government is doing to him. 400 U.S. at 437, 91 S.Ct at 510, 27 L.Ed.2d at 519.

However, reputation alone is not an interest protected by the due process clause. Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976). "Rather, to make out a due process claim for deprivation of a liberty interest in reputation, a plaintiff must show a stigma to his reputation plus deprivation of some additional right or interest." Hill v. Borough of Kutztown, 455 F.3d 225, 236 (3d Cir. 2006)(citations omitted).

In the public employment context, the "stigma-plus" test is applied such that when an employer "creates and disseminates a false and defamatory impression about the employee in connection with his termination," the employer deprives the employee of a protected liberty interest. Codd v. Velger, 429 U.S. 624, 628, 97 S.Ct. 882, 884, 51 L.Ed.2d 92, 97 (1977). The stigma is the creation and dissemination of the false and defamatory impression; the plus is the termination. Hill, supra.

In order to satisfy the stigma prong, plaintiff must allege that the alleged stigmatizing statement or statements were (1) made publically, Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976) and (2) were false. Codd, supra. "Statements merely indicating the employee's improper or inadequate performance, incompetence, or neglect of duty are not sufficiently serious to trigger the liberty interest protected by

the Constitution." Wojcik v. Massachusettes State Lottery Commission, 300 F.3d 92, 103 (1st Cir. 2002).

Defendants assert that plaintiff has not pled that he has been foreclosed from future employment opportunities. In addition, defendants assert that plaintiff has not pled that he asked for, or was denied, a name-clearing hearing. Rather, all plaintiff avers is that "plaintiff was not afforded a 'name-clearing' hearing."[31]

Defendants assert that plaintiff has not pled that a liberty interest has been violated. Defendants rely on the recent decision of my colleague, District Judge J. Curtis Joyner, in Schlichter v. Limerick Township, U.S.Dist. LEXIS 7287 (E.D.Pa. Apr. 26, 2005) for the test that must be employed to determine whether a deprivation of liberty interests has occurred.

In his response to defendants' amended joint motion to dismiss, plaintiff contends that he is not required to allege that he requested a name-clearing hearing.[32] Furthermore, plaintiff attaches a newspaper article as Exhibit B[33] to his

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[31] Amended Complaint at paragraph 50.

[32] Plaintiff's Memorandum in Support of Motion to Strike Defendants' Amended Motion to Dismiss and In Support of Plaintiff's Further Response in Opposition to the Defendants' Motions to Dismiss, page 3.

[33] Exhibit B to the Plaintiff's Memorandum in Support of Motion to Strike Defendants' Amended Motion to Dismiss and In Support of Plaintiff's Further Response in Opposition to the Defendants' Motions to Dismiss is a newspaper article from the December 5 to 12, 2002 edition of the Donegal Ledger.

response to presumably satisfy the publication requirement for his cause of action. Finally, plaintiff contends that pursuant to the decision by the United States Court of Appeals for the Third Circuit in Weston v. Commonwealth of Pennsylvania, 251 F.3d 420 (3d Cir. 2001), he need not plead law or match facts to every element of a legal theory.

Analysis

For the following reasons, I conclude that plaintiff has not stated a claim for deprivation of a liberty interest upon which relief can be granted.

In Schlichter, Judge Joyner held that a viable claim for deprivation of a liberty interest is pled when plaintiff avers that he has suffered (1) an injury to reputation; (2) which causes the deprivation of present or future employment opportunities, known as "stigma-plus"; (3) that plaintiff requested a name-clearing hearing to refute charges against him; and (4) that the request for a name-clearing hearing was denied by the governmental body. 2005 U.S. Dist. LEXIS 7287 at *23-25.

I note that the United States Court of Appeals for the Third Circuit has not directly ruled on the issue of whether plaintiff must request a name-clearing hearing.[34] However, every court in this district that has addressed the issue, together

[34] See Hill, 455 F.3d at 239 n.19; Ersek v. Township of Springfield, 102 F.3d 79, 84 n.8 (3d Cir. 1996).

with the only known circuit courts to address it, have required that plaintiff allege that he requested a name-clearing hearing.[35] In the absence of any definitive holding by the Third Circuit, I find the cases of the Fourth and Fifth Circuits together with the decisions of the Judges of this court persuasive that plaintiff must request a name-clearing hearing.

Regarding plaintiff's claim that he does not have to plead law or match facts to every element of a legal theory, in Bell Atlantic Corporation v. Twombly, the United States Supreme Court stated that in deciding a motion to dismiss under Rule 12(b)(6) plaintiff's Complaint must contain "either direct or inferential allegations respecting all the material elements necessary to sustain recovery under *some* viable legal theory." ___ U.S. at ___, 127 S.Ct. at 1969, 167 L.Ed.2d at 944. Thus, I disagree with plaintiff that he did not need to plead law or facts regarding every element of his cause of action for deprivation of a liberty interest. With this concept in mind, I address plaintiff's allegations concerning his deprivation of liberty interest claim.

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[35] See Quinn v. Shirey, 293 F.3d 315, 325 (4th Cir. 2002); Howze v. City of Austin, 917 F.2d 208 (5th Cir. 1990); Rosenstein v. City of Dallas, 876 F.2d 392, 395 (5th Cir. 1989); Schlichter, supra; Seneca v. New Hope Borough, 2002 U.S. Dist.LEXIS 3360 at *23 (E.D.Pa. Feb. 27, 2002) (Waldman, J.); Puchalski v. School District of Springfield, 161 F.Supp.2d 395, 406 (E.D.Pa. 2001)(Waldman, J.); O'Connell v. County of Northampton, 79 F.Supp.2d 529, 535 (E.D.Pa. 1999)(Robreno, J.); Freeman v. McKellar, 795 F.Supp. 733 (E.D.Pa. 1992)(Waldman, J.).

On the issue of the stigma prong, plaintiff must allege that the alleged stigmatizing statement or statements were (1) made publically, Bishop, supra and (2) the statements were false. Codd, supra. In this regard, plaintiff's Amended Complaint avers that "defendant's falsely accused Plaintiff of poor performance and inability to perform his job as Chief of Police.[36] Moreover, plaintiff alleges that "defendants questioned Plaintiff's competence to direct and control the Susquehanna Regional Police Department."[37] Plaintiff reiterates those statements in paragraph 51.

Finally, plaintiff attempts to show publication by way of Exhibit B attached to his response to the amended joint motion to dismiss. However, the only statement attributed to any of the defendants in the newspaper article is the single sentence "Although the borough says Maule 'lacked leadership,' the police chief says there are other reasons for the decision."

The newspaper article is not attached as an Exhibit to plaintiff's Amended Complaint. Kulwicki, 969 F.2d at 1462. Moreover, it is not a public record (including court files, orders, records and letters of official actions or decisions of government agencies and administrative bodies), a document essential to plaintiff's claim which is attached to defendant's

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[36] Amended Complaint, paragraph 40.

[37] Amended Complaint, paragraph 39.

motion or an item appearing in the record of the case. Oshiver, 38 F.3d at 1380, n.1 and n.2. Thus, it is not properly before the court for my review and I may not consider it.

However, even if I were to consider the article in connection with the factual averments contained in paragraphs 39, 40 and 51 of plaintiff's Amended Complaint, they collectively amount to nothing more than statements merely indicating the plaintiff's improper or inadequate performance, incompetence, or neglect of duty. These types of statements are not "sufficiently serious to trigger the liberty interest protected by the Constitution." Wojcik, 300 F.3d at 103. Thus, I conclude that plaintiff has not sufficiently averred deprivation of a liberty interest.

Moreover, I also conclude that plaintiff's averment in paragraph 50 of the Amended Complaint that "Plaintiff was not afforded a 'name-clearing' hearing" is not sufficient to satisfy the requirement either that plaintiff requested a name-clearing hearing to refute charges against him or that the request for a name-clearing hearing was denied by the governmental body. Schlichter, 2005 U.S.Dist. LEXIS 7287 at *23-25.

As noted above, pursuant to Twombly, plaintiff must aver either direct or inferential allegations respecting all the material elements necessary to sustain recovery. Plaintiff's averment does neither. Plaintiff simply states that he was not

afforded a hearing. That statement indicates neither that he asked for a hearing, nor that he was denied a hearing. Rather, it appears that he did not ask for, and defendants did not volunteer him, a hearing.[38]

Thus, I conclude that plaintiff has not averred deprivation of a liberty interest. Accordingly, I grant defendants' motions to dismiss plaintiff's claim for denial of procedural due process based upon a liberty interest.

Substantive Due Process

Plaintiff contends that his substantive due process rights were violated. To prevail on a substantive due process claim challenging a state actor's conduct plaintiff must establish the threshold matter that he has a protected property interest under the Fourteenth Amendment. Nicholas v. Pennsylvania State University, 227 F.3d 133, 139-140 (3d Cir. 2000).

The issue of whether a property interest is protected for purposes of substantive due process is a question that is answered not by state law, but rather by determining whether it is "fundamental" pursuant to the United States Constitution. Hill, 455 F.3d at 235 n.12.

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[38] Furthermore, because defendants did not make any statements which were sufficiently serious to trigger a liberty protection, plaintiff would not have been entitled to a hearing.

In Nicholas, the Third Circuit explicitly held that public employment is not a fundamental right requiring substantive due process. 227 F.3d at 142-143. Thus, in this case, because plaintiff has not asserted a violation of a property interest, plaintiff does not assert a claim for substantive due process. Moreover, to the extent that plaintiff's substantive due process claim was based upon deprivation of a liberty interest based upon reputational injury, it also fails. See Boyanowski v. Capital Area Intermediate Unit, 215 F.3d 396, 399-404 (3d Cir. 2000).

Accordingly, I grant defendants' motions to dismiss plaintiff's substantive due process claim.

First Amendment Retaliation

In order to plead a retaliation claim pursuant to the First Amendment of the United States Constitution, plaintiff must allege that (1) the activity in question is protected by the First Amendment, and (2) that the protected activity was a substantial factor in the alleged retaliatory action. Hill, 455 F.3d at 241.

A public employee's speech is protected by the First Amendment when: (1) in making the statement, 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" as a result of the statement he made. Garcetti v. Ceballos, ___ U.S.___, 126 S.Ct. 1951, 1958, 164 L.Ed.2d 689, 698-699 (2006).

In Garcetti the United States Supreme Court held that a public employee does not speak as a citizen when he makes a statement pursuant to his official duties. ___ U.S. at ___, 126 S.Ct. at 1958-1961, 164 L.Ed.2d at 699-701.

In this case, plaintiff contends that he was fired as Police Chief in retaliation for reporting an incident between one of his officers and defendant Samuel Wiggins, a councilman for Marietta Borough. Specifically, defendant Wiggins is alleged to have accosted the uniformed and on-duty officer of the Susquehanna Regional Police Department with profane language and threatening gestures.[39] Thereafter, plaintiff referred the matter to the Pennsylvania State Police for an external, objective investigation.[40]

Plaintiff avers in his Amended Complaint that "Defendants retaliated against Plaintiff for speaking up and performing his sworn obligations and oath as Chief of Police."[41] Defendants contend that this averment is dispositive of the question whether plaintiff's referral of defendant Wiggins'

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[39] Amended Complaint, paragraph 33.

[40] Amended Complaint, paragraphs 34 and 36.

[41] Amended Complaint, paragraph 52.

criminal matter to the Pennsylvania State Police was done in the course of his official duties. On the contrary, plaintiff contends that the issue of what constitutes plaintiff's official duties is an issue of fact for discovery and trial. I disagree.

Paragraph 52 of the Amended Complaint makes it clear that plaintiff considered his referral of defendant Wiggins to the Pennsylvania State Police to be a part of his official duties. Clearly, plaintiff considered that an investigation by his own department (of an altercation between one of the department's officers and a councilman for one of the municipalities which the police department served) would create a conflict of interest. Plaintiff correctly avers that his "sworn obligations and oath as Chief of Police" would require that such a matter be referred to another law enforcement entity for investigation and prosecution.

Therefore, the speech which plaintiff contends is protected (the referral of the case to the State Police) is within his official duties. Thus, the referral does not qualify as protected speech because plaintiff was not speaking as a citizen when he made this referral, and because, as a matter of law, the referral is not protected speech. Garcetti, supra; Hill, supra.

Accordingly, I grant defendants' joint motion to dismiss plaintiff's First Amendment retaliation claim.

State-Law Claims

Pursuant to a federal court's supplemental jurisdiction, I may entertain state law claims when they are so related to federal claims within the court's original jurisdiction that they form a part of the same case or controversy. 28 U.S.C. § 1367. However, if all federal claims are dismissed before trial, the court should ordinarily dismiss any remaining state law claims as well. Fortuna's Cab Service v. City of Camden, 269 F.Supp.2d 562, 566 (D.N.J. 2003).

In this case, original jurisdiction was based on federal-question jurisdiction pursuant to 28 U.S.C. § 1331. Having determined that all the federal claims against defendants must be dismissed, the only remaining claims sound in state law. I conclude that there is no longer federal question jurisdiction pursuant to 28 U.S.C. § 1331. Moreover, plaintiff does not allege diversity of citizenship between himself and the remaining defendants. Thus, the court does not have jurisdiction pursuant to 28 U.S.C. § 1332.

Accordingly, I decline to exercise supplemental jurisdiction over the remaining state-law claims. Therefore, Counts I through IV are all dismissed.

CONCLUSION

For all the foregoing reasons, I grant defendants' motions to dismiss plaintiff's federal claims brought pursuant to

42 U.S.C. § 1983. In addition, I decline to exercise supplemental jurisdiction over plaintiffs' remaining state law claims without prejudice to bring those claims in Pennsylvania state court. Thus, I dismiss plaintiffs' Amended Complaint. Accordingly, I dismiss as moot Plaintiff's Motion to Strike Defendants' Amended Motion to Dismiss and Plaintiff's Further Response in Opposition to the Defendants' Motion to Dismiss.