

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

DOMENICK DeMURO,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
PHILADELPHIA HOUSING	:	
AUTHORITY, et al.,	:	
Defendants.	:	NO. 98-3137
 Newcomer, J.		 December , 1998

**M E M O R A N D U M**

Presently before the Court is Defendants' Motion to Dismiss Count's III-VI of Plaintiff's Complaint and to Dismiss Plaintiff's Claim for punitive damages, plaintiff's response thereto, and defendants' reply thereto. For the reasons that follow, said Motion will be granted in part and denied in part.

I. Background<sup>1</sup>

The Philadelphia Housing Authority ("PHA") is organized under the laws of the Commonwealth of Pennsylvania, and exists to develop, acquire, lease, and operate low rent housing programs. The PHA receives its funding from the Department of Housing and Urban Development ("HUD"), as well as from the Commonwealth of Pennsylvania.

Plaintiff Domenick DeMuro, who received his job through political patronage, began his career at PHA as a laborer in 1981 and was promoted five times over the course of his fifteen year career with the PHA. He was terminated in June of 1996. Immediately prior to his discharge, DeMuro was a Housing

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<sup>1</sup>The facts are taken from plaintiff's complaint, and accepted as true for purposes of this motion.

Rehabilitation Supervisor, responsible for supervising a crew of inspectors who conducted Housing Quality Standard ("HQS") inspections of PHA housing units, including scattered and conventional sites. DeMuro was allegedly instructed by defendant Dennis Kirkland ("Kirkland") to "stop failing so many units" because he was "making us look bad". When DeMuro asked who "us" was, he was allegedly told that "us" was defendant John White ("White"), and that it [presumably plaintiff's failing of housing units] could "hurt HUD money" and "hurt John later when he runs." Plaintiff believed at the time, and continues to believe that the latter statement refers to Mr. Whites' mayoral candidacy.

In or during February, 1996, the PHA Office of Inspector General ("OIG") commenced a criminal investigation into the inspections conducted by DeMuro and his team, allegedly at the suggestion or behest of defendants White and/or Kirkland (or some individual still unknown) in furtherance of PHA's institutional tolerance of substandard, inadequate and unsafe housing, and the nearly universal desire at the PHA to suppress reports of the same. Plaintiff avers that the investigation was inaccurate, improper, and relied in part on intimidation and coercion. The OIG investigation concluded that DeMuro had falsely reported housing units in need of rehabilitation, and that DeMuro willfully falsified documents, which DeMuro vehemently denies. Following the investigation, in late June, 1996, Mr. DeMuro was discharged from his employment, and advised that the conduct for which he had been fired had violated criminal law, but that he was not going to be charged criminally, just discharged.

Plaintiff believes that this threat of prosecution was merely to deter Mr. DeMuro from protesting his firing and filing a civil suit.

Plaintiff, an active member of the Democratic party who was at the time of his discharge a Democratic Committeeman and Judge of Elections for the 39th Ward of Philadelphia for over 25 years, believes in essence that his firing is a result of both his continued performance of his job properly by reporting substandard housing units, and as a result of his alignment with a faction of the Democratic party which opposes White's mayoral candidacy. Members of this faction of the party supported both his initial application to the PHA, and his continued employment there.

Plaintiff brings the instant suit against his former employer, the Philadelphia Housing Authority, Executive Director of the PHA John F. White, Jr. in his individual and official capacity, and Deputy Director of Conventional Sites of PHA Dennis Kirkland also in his individual and official capacity. The Complaint alleges six counts: I) Violation of the right to free speech under the First Amendment pursuant to 42 U.S.C. § 1983; II) political association violation under the First Amendment pursuant to 42 U.S.C. § 1983; III) violation of the Pennsylvania Whistleblower statute; IV) civil conspiracy under Pennsylvania law; V) wrongful discharge; and VI) intentional infliction of emotional distress.

In the instant motion, defendants have moved to dismiss counts III-VI as follows: count III as to all because it is time

barred; counts V and VI against the PHA against all because of PHA's immunity under the Political Subdivision Tort Claims Act and Pennsylvania Workers' Compensation Act, and because of plaintiff's failure to allege sufficient facts in support of these torts; and Count IV against the PHA and White and Kirkland in their official capacities because of immunity. Defendants have also moved to strike DeMuro's claim for punitive damages.

## II. Motion to Dismiss Standard

Defendants seek dismissal of plaintiff's action pursuant to Federal Rule of Civil Procedure 12(b)(6). Under Rule 12(b)(6), a court should dismiss a claim for failure to state a cause of action only if it appears to a certainty that no relief could be granted under any set of facts which could be proved. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). Because granting such a motion results in a determination on the merits at such an early stage of a plaintiff's case, the district court "must take all the well pleaded allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the pleadings, the plaintiff may be entitled to relief." Colburn v. Upper Darby Township, 838 F.2d 663, 664-65 (3d Cir. 1988), cert. denied, 489 U.S. 1065 (1989) (quoting Estate of Bailey by Oare v. County of York, 768 F.2d 503, 506 (3d Cir. 1985)).

## III. Discussion

### A. Count III

Count III of plaintiff's complaint alleges that he was discharged in violation of the Pennsylvania Whistleblower Law, 43

P.S. §§ 1421-1428. Defendants move the Court to dismiss this count because they claim it is time barred. Section 1424 (a) provides:

**Civil action.-** A person who alleges a violation of this act may bring a civil action in a court of competent jurisdiction for appropriate relief or damages, or both, within 180 days after the occurrence of the alleged violation.

Plaintiff was discharged in June of 1996, with a review hearing held in August of 1996. This action was filed on June 17, 1998, well beyond the 180 day limit in the statute. Plaintiff argues that, while the above is true, defendants were on notice of this lawsuit because a complaint was initiated against them (among others) on November 6, 1996 in the Philadelphia Court of Common Pleas. Although this prior suit was ultimately dismissed without prejudice after removal to federal court on February 3, 1997, plaintiff argues, without citation to any authority, that the first lawsuit should serve as sufficient notice to the defendants.

As an initial matter, the Court notes that the prior complaint relied on by plaintiff to have allegedly provided notice to the defendants makes no mention of the Pennsylvania Whistleblower statute.<sup>2</sup> The Court fails to see how the plaintiff can argue that the defendants should have been on notice that a

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<sup>2</sup>The plaintiff provided a copy of the complaint as Exhibit "A" to his brief.

complaint would be forthcoming alleging a violation of a particular statute eighteen months hence because a previous complaint was filed when that statute was not referenced in the first complaint.

More fundamentally, however, the Court also fails to see how the plaintiff can ask the Court to look at a statute that has a clear 180 day limitations period, and toll that statute by eighteen months on a "notice theory" without providing any authority in support of this position, particularly when there is clear authority construing this limitation narrowly, which was cited in defendants brief in support of their motion. See e.g. Plemmons v. The Pennsylvania Mfr.'s Ass'n Ins. Co., 1991 U.S. Dist. LEXIS 5176 (E.D. Pa., Apr. 13, 1991)(granting 12(b)(6) motion and dismissing Whistleblower claim on the basis of the 180 day statute of limitations, noting that there is no authority in case law or relevant statutes to excuse a failure to file within the limitations period); Perry v. Tiaoga County, 649 A.2d 186 (Pa. Commw. 1994)(holding that a public employee's Whistleblower claim was time barred because it was not brought within 180 days)

Plaintiff's claim, and his arguments in support thereof, merit no further discussion. Count III of plaintiff's complaint will be dismissed because it is barred by the 180 day limitations period.

B. Count VI

Defendants next argue that plaintiff's intentional infliction of emotional distress claim ("IIED") (count VI) should be dismissed against all defendants because plaintiff has failed

to allege outrageous conduct on the part of the defendants. Pennsylvania courts recognize the tort of IIED, but they have found the action to lie in only a limited number of cases. Thus, in order for plaintiff to recover under this theory of liability, the defendants must have acted in a manner "so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized society." Salerno v. Philadelphia Newspapers, Inc., 377 Pa. Super. 83, 91, 546 A.2d 1168, 1172 (1988) (citations and internal quotations omitted). Further, the Third Circuit interpreting Pennsylvania law has emphasized that ". . . it is extremely rare to find conduct in the employment context that will rise to the level of outrageousness necessary to provide a basis for recovery for the tort of intentional infliction of emotional distress." Andrews v. City of Philadelphia, 895 F.2d at 1469, 1487 (3d Cir. 1990)(quoting Cox v. Keystone Carbon Co., 861 F.2d 390, 395 (3d Cir. 1988). In fact, the only circumstances under which this tort is recognized in the employment context is for allegations of sexual harassment plus retaliation for refusing sexual advances by an employer. Id. at 1487.

Plaintiff concedes that IIED is not a common claim in the context of employment disputes, but suggests that Banyas v. Lower Bucks Hospital, 437 A.2d 1236 (Pa. Super. 1981) supports his IIED claim. In Banyas, the plaintiff was blamed for the death of a patient at the hospital by the hospital's employees who intentionally fabricated records to suggest that the plaintiff

had killed the patient, ultimately leading to criminal charges, including for homicide. What plaintiff fails to point out, however, is that Mr. Banyas was not a hospital employee. This case therefore lends no support to the idea that IIED applies in an employment context other than in certain sexual harassment situations. Accordingly, the Court finds that IIED does not apply in this employment context, and therefore plaintiff's claim for IIED will be dismissed for failure to state a claim for which relief can be granted.

C. Counts IV and V

1. Immunity Arguments

Defendants next argue that the claims of wrongful discharge (count V) and civil conspiracy (count IV) should be dismissed against the PHA and White and Kirkland in their official capacity because of sovereign immunity under the Political Subdivision Tort Claims Act ("PSTCA").<sup>3</sup> The PHA is a "Commonwealth agency" under the PSTCA and is therefore entitled to assert the defense of sovereign immunity. Byard v. Philadelphia Hous. Auth., 629 A.2d 283 (Pa. Commw. 1998). Under section 11 of Article I of the Pennsylvania Constitution, it is the declared intent of the General Assembly that the Commonwealth, and its officials and employees acting within the scope of their duties, shall continue to enjoy sovereign and official immunity and remain immune from suit except as the General Assembly shall specifically waive immunity. 1 Pa. C.S.A. § 2310. In 42 Pa. C.S.A. § 8521, which

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<sup>3</sup>Defendants also claimed that the IIED claim should be dismissed for the same reasons, but the Court never reached that argument because it disposed of the claim on the merits.

addresses sovereign immunity, waiver of immunity is expressly withheld, except as provided in that subchapter. Exceptions are provided in § 8522. That section states that the General Assembly waives sovereign immunity "as a bar to an action against Commonwealth parties<sup>4</sup>, for damages arising out of a negligent act . . . ." The section goes on to enumerate nine negligent acts which may impose liability, none of which apply to the instant case. 42 Pa. C.S.A. § 8522.

As the allegations in the complaint are intentional torts which do not fall into any of the enumerated exceptions, the PHA is immune from suit under the doctrine of sovereign immunity. Further, the plain language of 42 Pa.C.S.A. 8522 (a) says that sovereign immunity applies to commonwealth parties, which by definition includes an employee of a Commonwealth agency. As such, defendants White and Kirkland are immune from suit in their official capacity. See Shoop v. Dauphin County, 766 F.Supp 1327, 1334 (M.D.Pa. 1991)(holding that under the clear language of the statute, Commonwealth employees and officials are entitled to immunity). Accordingly, neither the PHA nor White and Kirkland in their official capacities can be sued for wrongful discharge or civil conspiracy.<sup>5</sup>

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<sup>4</sup>A "Commonwealth party" is defined in 42 Pa.C.S.A. § 8501 as "[a] Commonwealth agency and any employee thereof, but only with respect to an act within the scope of his office or employment."

<sup>5</sup>After identifying the PHA as a "commonwealth agency" immune from suit under the doctrine of sovereign immunity, the defendant, and in response the plaintiff, curiously and erroneously focus the entirety of their remaining arguments on 42 Pa C.S.A. § 8541 et seq., which discusses governmental immunity, not sovereign immunity. Governmental immunity applies to local agencies of government, not Commonwealth agencies. Although courts have

## 2. White and Kirkland in Their Individual Capacity<sup>6</sup>

Defendants argue that White and Kirkland cannot be sued in their individual capacities for wrongful discharge because such a claim is not available against individual employees in Pennsylvania. In support of this argument, defendants cite Hrosik v. Latrobe Steel Co., 1995 U.S. Dist. Lexis 21866 (W.D. Pa.). In Hrosik, the district court held that a wrongful discharge claim only exists against an employee's employer, and because the plaintiff did not allege that the individual defendants were his employer, the court dismissed the claim. Id. at 17.

The Court is not bound by Hrosik, and upon an independent

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recognized similarities between the two, and rely on cases in one area when confronted with a similar problem in the other, (Downing v. Philadelphia Hous. Auth., 610 A.2d 535 (Pa. Commw. 1992), they are distinct. See Walker v. Philadelphia Hous. Auth., 631 A.2d 1117 (Pa. Commw. 1993)(holding that a trial court erred in declaring the PHA a local agency entitled to governmental immunity when it is a Commonwealth agency entitled to sovereign immunity).

The parties wasted much effort arguing whether or not immunity has been abrogated for White and Kirkland in their official capacities as a result of section 42 Pa.C.S.A. § 8550. Under § 8550, the immunity provision does not apply if the injury caused by the local agency or employee constitutes “a crime, actual fraud, actual malice or willful misconduct.” 42 Pa. Cons. Stat. Ann. § 8550. As the parties should have realized, this section applies only in the context of governmental immunity, and not to those who possess sovereign immunity. This distinction, although clear from the organization and wording of the statute, has also been emphasized in caselaw. In Shoop, the district court quoted Yakowicz v. McDermott, 548 A.2d 1330 (Pa. Commw. 1989), which stated, “[w]e note that the immunity defense provided by the General Assembly to local agencies and their employees in 42 Pa.C.S. §§ 8541-8564 is lost to local agency employees where their actions constitute a ‘crime, ... or willful misconduct’ .... The General assembly has *not* included an such abrogation of the immunity provided to Commonwealth agency employees.” Yakowicz at 1334 n.5, Shoop, at 1334 (emphasis in original).

<sup>6</sup>Defendants have only moved for dismissal of the wrongful discharge claim, and not the civil conspiracy claim against White and Kirkland in their individual capacities.

review<sup>7</sup> of the cases cited by Hrosik, the Court is not convinced that it rests upon a sound foundation. In support of the proposition that a wrongful discharge claim exists only against an employee's employer, the district court in Hrosik cites two cases, Yetter v. Ward Trucking Corp., 585 A.2d 1022 (Pa. Super. 1991), and Leslie v. The Philadelphia 1976 Bicentennial Corp., 332 F.Supp. 83 (E.D. Pa. 1971). Neither of these cases supports this proposition.

Yetter is a case where a wrongful discharge action was dismissed against an employer, the Ward Trucking Company, because the complaint failed to state a claim for wrongful discharge under Pennsylvania law. There is no discussion about the liability of individual employees. In Leslie, the district court found that, in discussing the liability of corporate officers in their individual capacities, they cannot be held liable unless it is alleged that they acted towards the plaintiff in an individual capacity and not in their corporate capacities, no discussion of Pennsylvania law on wrongful discharge takes place in the opinion. A review of all of the dozens of cases that subsequently cite these two cases reveals that only Hrosik cites them for the above proposition. As the Court believes that the cases do not say what Hrosik suggests they say, the Court declines to apply Hrosik to the instant case.

Aside from Hrosik, the defendants have cited no cases in support of their assertion that under Pennsylvania law a wrongful

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<sup>7</sup>The plaintiff does not put forth any of these arguments, but as both parties should be well aware of by now, the Court does not blindly accept arguments of counsel on a particular point.

discharge claim exists only against an employer, and the Court has been unable to locate any as well. Accordingly, Hrosik does not provide an argument to dismiss the wrongful discharge claim against the defendants in their individual capacity.

In the alternative, defendant's argue that, to the extent plaintiff's wrongful discharge claim is based upon a violation of the Pennsylvania Whistleblower Act, this claim is preempted, citing Freeman v. McKellar, 795 F.Supp. 733 (E.D.Pa. 1992)(dismissing a plaintiff's claim for wrongful discharge where the plaintiff has an appropriate remedy under the Whistleblower Act.) The Court agrees.

Under Pennsylvania law, an at-will employee<sup>8</sup> may have a an action for wrongful discharge if "he was terminated in violation of a significant, clearly mandated public policy." Freeman v. McKellar, 795 F.Supp 733, 741 (E.D.Pa. 1992)(citations omitted). "This is an exception to the general rule that employers may terminate at-will employees at any time for any reason, and is very narrowly construed." Id.(Citations omitted). Regarding this exception, however, "[i]t is well-settled that the courts will not entertain a separate common law action for wrongful discharge where specific statutory remedies are available." Jaques v.Akzo Int'l Salt Inc., 619 A.2d 748, 753 (Pa. Super. 1993)(citations omitted).

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<sup>8</sup>It has not been established whether or not the plaintiff is an at-will employee or not. Implicit in defendant's argument, and reliance on Freeman v. McKellar, 795 F.Supp. 733 (E.D.Pa. 1992) is that the plaintiff is an at-will employee. Nothing in plaintiff's brief or pleadings suggests otherwise. Plaintiff's pleadings are consistent with pleading the elements of wrongful discharge, namely that he was discharged in violation of "a clear mandate of public policy." (Compl. ¶ 64). As such, the court assumes that the parties have impliedly stated that the plaintiff was an at-will employee.

"It is the existence of the remedy, not the success of the statutory claim, which determines preemption." Id. Accordingly, since the plaintiff had the Whistleblower Act as a remedy to him, he may not base his wrongful discharge claim in violation of public policy on the Whistleblower Act. This still leaves the First Amendment and 42 U.S.C. § 1983 to serve as a policy basis for plaintiff's wrongful discharge claims against White and Kirkland in their individual capacities.

D. Punitive Damages

Finally, the defendants argue that plaintiff's claims for punitive damages in counts I and II<sup>9</sup> against PHA and White and Kirkland in their official capacities should be stricken from the complaint. Defendants argue that punitive damages are not available against a municipal entity in a § 1983 action, citing City of Newport v. Fact Concerts, Inc., 453 U.S. 247 and Bolden v. SEPTA, 953 F.2d 807, 811 (3d Cir. 1991). They also argue that it is violative of Pennsylvania public policy under Curran v. Philadelphia Hous. Auth., 1997 U.S. Dist. LEXIS 13813 (E.D. Pa.).

Plaintiff counters, as he often has throughout the course of his brief, by citing cases that in no way have a bearing on the issues at hand. He cites Smith v. Wade, 461 U.S. 30, 56 (1983) for the proposition that a jury may be permitted to assess punitive damages ... "when the defendant's conduct is shown to be motivated by evil motive or intent or when it invokes reckless or careless indifference to the federally protected rights of others." Id. at

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<sup>9</sup>Violations of free speech and political association.

56. True as this statement may be, it is utterly irrelevant to the issue at bar. Smith v. Wade is a suit by a prisoner against prison guards, sued in their individual capacities, assessing the viability of a claim for punitive damages against guards who possess qualified immunity. It does not refute, nor does it address, even under the most strained reading, the arguments put forth by the defendants. Plaintiff's reliance on Feld v. Merriam, 485 A.2d 742 (Pa. 1984) is similarly misplaced.

After reviewing the briefs of the parties, the cases cited, and conducting independent research, it is clear that the law in this area is well-settled. Under City of Newport v Fact Concerts, Inc., Bolden v. SEPTA, and their progeny, punitive damages in Section 1983 actions are not available against the PHA, as a Commonwealth agency entitled to sovereign immunity. Furthermore, consistent with the immunity analysis earlier in the opinion, punitive damages are not available against White and Kirkland in their official capacities either.

#### IV. Conclusion

In conclusion, the Court determines that counts III and VI of plaintiff's complaint should be dismissed against the defendants in all of their capacities, counts IV and V should be dismissed against the PHA and against White and Kirkland in their official capacities, and the claim for punitive damages should be stricken from the complaint. As a result of this opinion, all that remains in the complaint is counts I and II against all defendants, and counts IV and V against White and Kirkland in their individual capacities.

An appropriate Order follows.

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Clarence C. Newcomer, J.