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

MICHAEL TOBIN, JR. and	:	
MICHAEL TOBIN, III	:	**No. 3:00CV783**
	:	
v.	:	
	:	
OFFICER MICHAEL BADAMO,	:	
NEW CASTLE TOWNSHIP,	:	**(Judge Munley)**
NEW CASTLE TOWNSHIP POLICE	:	
DEPARTMENT,	:	
MICHAEL O. SKRINCOSKY, individually	:	
and JOSEPH R. SKROBAK, individually	:	

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MEMORANDUM

Before the court for disposition is the defendants' motion to dismiss the plaintiffs' civil rights complaint pursuant to Federal Rule of Civil Procedure 12(b)6. The plaintiffs are Michael Tobin III (hereinafter "Supervisor Tobin"), who during the relevant time frame was a member of the New Castle Township Board of Supervisors and Michael Tobin, Jr., his father. The defendants are Newcastle Township, a municipal corporation located in Schuylkill County, Pennsylvania; New Castle Police Department; Officer Michael Badamo, of the New Castle Police Department; Michael O. Skrincosky and Joseph R. Skrobak, both of whom were also members of the Board of Supervisors of New Castle Township at the relevant times. The parties have briefed their respective positions, and the matter is thus ripe for disposition.

Background

The facts as alleged in plaintiffs' complaint are as follows: Plaintiff Supervisor Tobin

and Defendants Skrincosky and Skrobak all served together on the New Castle Township Board of Supervisors. Defendant Badamo was hired as a part-time police officer for New Castle Township in February 1999. Subsequently, the acting police chief resigned, leaving no one to supervise the day to day activities of the police department.

Defendants Skrincosky and Skrobak had developed feelings of animosity toward Supervisor Tobin and began to work against him in his efforts to better the township, in particular, his attempts to address the concerns and problems involving the police department and Defendant Badamo. They intentionally and maliciously prevented the hiring of any supervisory officer because of their desire to undermine the authority of Supervisor Tobin.

Supervisor Tobin attempted to oversee the police department until such time as an acting police chief could be hired. The defendant supervisors undermined his attempts and even instructed Badamo to ignore and disobey his orders. Supervisor Tobin discovered that Badamo had been terminated from other employers because of unprofessional conduct. Defendant Badamo became more hostile toward Supervisor Tobin and expressed his hostility openly and publicly. The Board of Supervisors still failed to suspend and/or terminate Defendant Badamo.

On September 29, 1999, a confrontation occurred between Supervisor Tobin and Badamo. Supervisor Tobin tried to obtain Badamo's compliance with his instructions regarding police work. Badamo began to violently argue with him and told him that he would not follow his orders and that he was upset with him because he refused to promote

him (Badamo) to Chief of Police. After the confrontation, Badamo informed the defendant supervisors about it, and they all conspired together to have Supervisor Tobin arrested on false charges. The supervisors knew the charges were false but agreed and directed Officer Badamo to arrest Supervisor Tobin.[1]

Prior to the arrest, the defendants notified the local television news department about it, including when and where it would occur. After the arrest, Badamo made false statements about Supervisor Tobin to the newspaper, which published them.

Further, Badamo asserted that Supervisor Tobin's father threatened his life and, and therefore Badamo arrested him. Once again, Badamo notified the television news of the time and place of the arrest and made false statements about it to the newspaper.

At the preliminary hearing, all charges against the plaintiffs were dropped. Subsequently, the plaintiffs filed the instant civil rights complaint wherein the following causes of action are pled: Count I, Violation of 42 U.S.C. Section 1983 Substantive Due Process; Count II, Arrest Without Probable Cause and Malicious Prosecution Under the Fourth Amendment; Count III, Violation of First Amendment; Count IV, Libel and Slander; Count V, False Imprisonment; Count VI, Malicious Prosecution; and Count VII, Punitive Damages. Plaintiffs seek economic damages, compensatory damages, punitive damages, attorney fees and costs. In response to the complaint, defendants filed the instant motion to dismiss New Castle Township and its police department as defendants. They also seek the

[1]In the alternative, the plaintiffs allege that the supervisors should have known that Badamo was motivated by personal animosity and was fabricating the charges.

dismissal of Counts I, III, and VII. We shall address each separately.

Standard of review

When a 12(b)6 motion is filed, the sufficiency of a complaint's allegations are tested. The issue is whether the facts alleged in the complaint, if true, support a claim upon which relief can be granted. In deciding a 12(b)6 motion, the court must accept as true all factual allegations in the complaint and give the pleader the benefit of all reasonable inferences that can fairly be drawn therefrom, and view them in the light most favorable to the plaintiff. Morse v. Lower Merion School District, 132 F.3d 902, 906 (3d Cir. 1997).

Discussion

1. Is Defendant New Castle Township Police Department a proper party?

Initially, the defendants claim that Defendant New Castle Township Police Department is not a proper party. Defendants' position is that New Castle Police Department is merely an agency of the township and as such is not a proper party under the law. Plaintiffs contend that they have in fact alleged that the police department is its own corporate entity and can be sued individually–at least until discovery proves it is merely a subdivision of New Castle Township. We are in agreement with the defendants.

The law provides that municipal police department is not a proper party to a section 1983 action because it is merely a subunit of the city and not a separate corporate entity. Johnson v. City of Erie, Pa., 834 F. Supp. 873, 878-79 (W.D.Pa. 1993); see also Korf v. Feldenkreis, 1999 WL 124388 *11 n. 5 (E.D.Pa.) (holding that subunits of cities are not

proper parties to a section 1983 action).

Plaintiffs contend that in the instant case they have asserted that the police department is a separate entity and they should remain a party, at least through discovery. We are unconvinced. We find that the opposite is true, that is, the allegations of the complaint make clear that the police department is a subunit of the township. The township hires the police officers and supervises the department. The underlying claim involves the township's staffing and supervision of the police department, making clear that the police department is not a separate unit. Accordingly, the claims under section 1983 against the defendant police department will be dismissed.

2. Does the complaint fail to state a claim against New Castle Township?

Next, the defendants claim that plaintiffs have failed to allege a proper claim against New Castle Township. Defendants claim that a township can be liable under section 1983 only when a person's constitutional rights are violated through a township's policy, custom or practice. Such a policy, custom or practice has not been alleged in the instant case, and therefore, New Castle Township must be dismissed as a party. We do not agree.

Under the law:

> It is well established that a municipality cannot be held liable under § 1983 for the actions of its employees on a theory of *respondeat superior*. Monell v. Department of Social Servs., 436 U.S. 658, 694, 98 S.Ct. 2018, 2037, 56 L.Ed.2d 611 (1978). Rather, a municipality is subject to direct liability only where "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government

> as an entity is responsible." Id. at 694, 98 S.Ct. at 2037-38. Moreover, to hold the City liable for municipal policy or procedure, "scienter-type evidence must have been adduced with respect to a high-level official determined by the district court, in accordance with local law, to have final policymaking authority in the areas in question." Simmons v. Philadelphia, 947 F.2d 1042, 1063 (3d Cir.1991), cert. denied, - - U.S. - -, 112 S.Ct. 1671, 118 L.Ed.2d 391 (1992).

Parkway Garage, Inc. v. City of Philadelphia, 5 F.3d 685, 692 (3d Cir. 1993).

In the instant case, the plaintiffs have alleged that the final policymaking body, here the Board of Supervisors, or at least two of its members, was in fact aware of the risk of, and participated in, the constitutional deprivations. Therefore, the township will not be dismissed as a party.

3. Does Count I fail to state a claim for substantive due process?

According to the defendants, Count I of the plaintiff's complaint fails to state a claim upon which relief can be granted. Count I claims a section 1983 substantive due process violation regarding: 1) the plaintiffs' right to be free from false arrest and arrest without just cause and 2) defamation.

In their brief in support of the motion to dismiss, the defendants briefed the issue of substantive due process with regard to malicious prosecution, false arrest or false imprisonment. Defendants correctly asserted that such claims cannot be the basis of a claim for a violation of substantive due process. See Merkle v. Upper Dublin School Dist., 211 F.3d 782, 792 (3d Cir. 2000) (citing Albright v. Oliver, 510 U.S. 266 (1994)).

Apparently, conceding this point, the plaintiffs did not brief the issue of substantive

due process and malicious prosecution. Rather, plaintiffs contend that "he"[2] was defamed by the defendants by the public arrest which they knew to be unlawful. They further argue that a proper cause of action for substantive due process is alleged where a plaintiff alleges that his reputation was harmed while he was being deprived of another constitutional right. In the instant case, the arrest was in retaliation for his exercise of his First Amendment rights. Accordingly, plaintiffs argue that they have alleged another constitutional violation which resulted in damage to his reputation and they may proceed under a substantive due process claim.

Defendants contend that for defamation to be the basis for a section 1983 claim, it must occur in the course of, or be accompanied by, a change or extinguishment of a right or status guaranteed by state law or the Constitution and this has not been properly alleged by the plaintiff. After a careful review of the matter, we find that the law does not recognize a cause of action for substantive due process based on defamation or harm to reputation.

The United States District Court for the Eastern District of Pennsylvania has held as follows:

> That a right to one's reputation is recognized in the state constitution does not confer federal substantive due process protection. See Puricelli v. Borough of Morrisville, 820 F.Supp. 908, 914 (E.D.Pa.1993), aff'd, 26 F.3d 123 (3d Cir.1993), cert. denied, 513 U.S. 930, 115 S.Ct. 321, 130 L.Ed.2d 282 (1994). Federal substantive due process rights are created by the U.S.

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[2]Plaintiffs refer to only one "plaintiff" and use the singular pronoun to refer to him in the brief, however, we read it as referring to both plaintiffs as that is the manner in which the complaint is written. See Compl. para. 37-42.

> Constitution and federal substantive due process protection is accorded only to fundamental interests derived from the federal Constitution. Ewing, 474 U.S. at 229, 106 S.Ct. at 515 (Powell, J. concurring); Nilson v. Layton City, 45 F.3d 369, 372 (10th Cir.1995); Kraushaar v. Flanigan, 45 F.3d 1040, 1047 (7th Cir.1995) (rights accorded substantive due process protection are those implicating fundamental principles of liberty and justice); Mangels v. Pena, 789 F.2d 836, 839 (10th Cir.1986). [FN12] That a state has created a liberty interest in reputation would at most implicate procedural due process rights. Kraushaar, 45 F.3d at 1047; Puricelli, 820 F.Supp. at 915. As noted, however, even when accompanied by other tangible injury such as loss of employment, federal due process requires no more than a timely opportunity to clear one's name. [Footnote omitted]

Austin v. Neal, 933 F. Supp. 444, 456 (E.D.Pa. 1996), affirmed 116 F.3d 467 (3d Cir. 1997)(table).

We are in agreement with Austin, and find that no substantive due process claim can exist for defamation or injury to one's reputation.[3] Consequently, Count I of plaintiffs' complaint will be dismissed.

4. Does Count III fail to state a claim for a First Amendment violation?

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[3]Even if plaintiffs had pled that the defendants violated procedural due process rights, it is likely that it would have also been dismissed. In a case regarding procedural due process and defamation, the plaintiff must allege not only an injury to his reputation, but another infringement of a protected right or interest. This element is termed "reputation-plus". Ersk v. Township of Springfield, 102 F.3d 79, 83 (3d Cir. 1996). The "plus" is not clearly defined in the law but is usually something such as a loss of a job or demotion. Id. The facts as alleged by the complaint do not establish any "plus" sufficient to satisfy this element. Moreover, the law provides that the remedy in a procedural due process claim that has allegedly injured reputation is a name clearing hearing. Id. at 83-84 (stating that when a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential). In the instant case, it would seem that the plaintiffs' names were cleared at the preliminary hearing where the charges were dropped. Therefore, it is highly questionable whether the plaintiff has pled a procedural due process violation. We need not address this issue fully, however, as the complaint styles the claim as substantive due process.

Next, the defendants contend that Count III of the complaint fails to state a claim for a First Amendment violation. Initially, we note that the complaint does not allege that Plaintiff Michael Tobin, Jr. engaged in protected speech and the brief of the plaintiffs makes clear that they are proceeding on this count only as it pertains to Supervisor Tobin. The plaintiffs' position is that because the plaintiff spoke out regarding the running of the police department, the defendants became angered and conspired to have him arrested on false charges in retaliation for speaking out.

Both parties brief this issue as if it were an employment retaliation claim. The instant case, however, simply is not an employment situation. Therefore, we find the arguments of counsel of both parties to be unpersuasive. We find, however, that under the law, a plaintiff may have a valid claim where it is alleged that he was retaliated against and maliciously prosecuted for his valid exercise of his right to freedom of speech. See, e.g., Merkle, 211 F.3d at 798, Losch v. Borough of Parkesburg, Pa., 736 F.2d 903, 910 (3d Cir. 1984). When viewed in the light most favorable to the plaintiffs, the complaint does sufficiently allege a cause of action for violation of first amendment rights of freedom of speech. Accordingly, plaintiffs' Count III will not be dismissed.

5. Punitive damages

Lastly, the defendants contend that the punitive damages are not available against the municipal defendants, and thus the claim for punitive damages should be dismissed. We are in partial agreement.

The law provides that municipalities are immune from punitive damages under section 1983. City of Newport v. Fact Concerts, Inc., 453 U.S. 247 , 266 (1981); Gares v. Willingboro Twp., 90 F.3d 720, 729 (3d Cir. 1996). Moreover, under Pennsylvania law the municipality is also immune from punitive damages, Township of Bensalem v. Press, 501 A.2d 331, 338 (1985) (holding that municipalities are not liable for punitive damages).

However, several of the defendants are being sued in their individual capacities, and the defendants have not cited any law or raised the contention that they are not liable for punitive damages in this capacity. See Motion to Dismiss, ¶ 63 (Punitive damages challenged only as to the municipality and the defendants in their official capacities). Accordingly, the punitive damage claim, will not be dismissed to the extent that it applies to the defendants being sued in their individual capacities.

Conclusion

In conclusion we are in agreement with a portion of the defendants' motion to dismiss. We find that the complaint fails to state a claim against the New Castle Township Police Department, Count I of the complaint fails to state a claim for substantive due process violation; and the punitive damages claim against the municipality is improper. An appropriate order follows.

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OFFICER MICHAEL BADAMO,	:	
NEW CASTLE TOWNSHIP,	:	**(Judge Munley)**
NEW CASTLE TOWNSHIP POLICE	:	
DEPARTMENT,	:	
MICHAEL O. SKRINCOSKY, individually	:	
and JOSEPH R. SKROBAK, individually	:	

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ORDER

AND NOW, to wit, this 20th day of December 2000 the defendants' motion to dismiss [9-1] is **GRANTED**, in part, as follows:

1. New Castle Township Police Department is **DISMISSED** as a party;

2. Count I of the complaint dealing with substantive due process is **DISMISSED**; and
3. The claim for punitive damages against the municipality is **DISMISSED**;

In all other respects, the motion to dismiss is **DENIED**.

BY THE COURT:

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JUDGE JAMES M. MUNLEY
United States District Court

Filed: 12/20/00