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

STEPHEN M. DEMYUN,	:	
Plaintiff	:	**No. 3:00cv155**
	:	
v.	:	
	:	**(Judge Munley)**
PENNSYLVANIA DEPARTMENT OF CORRECTIONS, SCI-MAHANOY; MICHAEL R. YOURON; MARTIN L. DRAGOVICH AND THOMAS P. KOWALSKY,	:	
Defendants	:	

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MEMORANDUM

Before the court for disposition is the motion for summary judgment filed jointly by all the defendants in this employment discrimination case. The plaintiff is Stephen M. Demyun, formerly an employee of Defendant Pennsylvania Department of Corrections, State Correctional Institute-Mahanoy, (hereinafter "SCI-Mahanoy"); Michael R. Youron, plaintiff's immediate supervisor; Martin L. Dragovich, superintendent of SCI-Mahanoy; and Thomas P. Kowalsky, the personnel director of SCI-Mahanoy. Having been fully briefed, the motion is ripe for disposition.

Background

The facts as alleged by the plaintiff in his complaint are as follows:

Plaintiff was hired by Defendant Pennsylvania Department of Corrections as a psychologist in November 1993. He originally worked at the State Correctional Institution at

Smithfield. Approximately fifteen months after being hired, he was transferred to SCI-Mahanoy.

During the Spring of 1996, he publicly opposed religious/racial discrimination perpetrated against another psychologist by Defendant Youron. In the same year, he opposed racial discrimination against an inmate. He claims that he was the subject of harassment due to these actions and brought a six count discrimination action.

In his complaint, the plaintiff asserts the following causes of action: Count I, violation of First, Fourth, Fifth and Fourteenth Amendments; Count II, violation of 42 U.S.C. §§ 1983, 1984, 1985, 1986 and 1988; Count III, Conspiracy; Count IV, violation of Title VII of the Civil Rights Act of 1964; Count V, violation of the Pennsylvania Human Relations Act; Count VI, Intentional Infliction of Emotional Distress. Defendants have moved for summary judgment averring that: 1) the Eleventh Amendment bars all claims against the Pennsylvania Department of Corrections except for the Title VII claim and the damages claims against the three officials of the Commonwealth in their official capacities; 2) individual employees cannot be held liable under the Title VII claim; 3) plaintiff has failed to allege violations of rights secured under the Fourth, Fifth and Fourteenth Amendment (Count I); 4) the plaintiff did not adequately plead his conspiracy claims; and 5) the officials are immune from liability as to the pendent state law tort claims.[1]

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[1]In their brief in support of summary judgment the defendants concede that sufficient evidence has been presented to allow the following claims to proceed: the Title VII claim against the Pennsylvania Department of Corrections and the First Amendment claims against the individual defendants in their individual-as opposed to official-capacities. Brief in Support of Defendants'

Standard of review

Granting summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. See Knabe v. Boury, 114 F.3d 407, 410 n.4 (3d Cir. 1997) (citing Fed.R.Civ.P. 56(c)). "[T]his standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) (emphasis in original).

In considering a motion for summary judgment, the court must examine the facts in the light most favorable to the party opposing the motion. International Raw Materials, Ltd. v. Stauffer Chemical Co., 898 F.2d 946, 949 (3d Cir. 1990). The burden is on the moving party to demonstrate that the evidence is such that a reasonable jury could not return a verdict for the non-moving party. Anderson, 477 U.S. at 248 (1986). A fact is material when it might affect the outcome of the suit under the governing law. Id. Where the non-moving party will bear the burden of proof at trial, the party moving for summary judgment may meet its burden by showing that the evidentiary materials of record, if reduced to admissible evidence, would be insufficient to carry the non-movant's burden of proof at trial. Celotex v. Catrett, 477 U.S. 317, 322 (1986). Once the moving party satisfies its burden, the burden

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Motion for Summary Judgment at 2.

shifts to the nonmoving party, who must go beyond its pleadings, and designate specific facts by the use of affidavits, depositions, admissions, or answers to interrogatories showing that there is a genuine issue for trial. Id. at 324.

Discussion

The claims that are being challenged by the defendants can be broken down into four general categories: constitutional claims; conspiracy claims; statutory claims; and tort claims. We shall address them accordingly.

I. Constitutional claims

Count I of the plaintiff's complaint asserts violations of the First, Fourth, Fifth and Fourteenth Amendments of the United States Constitution. Count II involves violation of 42 U.S.C. §§ 1983, 1984, 1985, 1986, and 1988. These two counts, however, are inextricably inter-related. Under the law, 42 U.S.C. § 1983 (hereinafter "section 1983 ") provides a cause of action for individuals who have had their constitutional rights violated by someone acting under color of state law. In the instant case, the defendants are alleged to be state actors. Therefore, to recover for violations of constitutional rights, the plaintiff must sue under section 1983.[2]

Plaintiff contends that the defendant has not challenged the claims under the First,

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[2]Plaintiff also sues under 42 U.S.C. §§ 1984, 1985, 1986 and 1988. A portion of section 1984 has been deemed unconstitutional, and the remainder has been repealed. Therefore, plaintiff has no valid cause of action under this statutory section. Sections 1985 and 1986 shall be discussed below. Section 1988 deals with issues such as attorneys fees in cases brought to vindicate civil rights and need not be discussed further.

Fifth or Fourteenth amendments. We disagree. To the extent that the defendants challenge the section 1983 cause of action, they are also challenging the First, Fifth and Fourteenth Amendment allegations. Moreover, as discussed more fully below, the defendants do challenge the due process allegations, which are violations of the Fourteenth Amendment, or possibly the Fifth Amendment.

1. Eleventh Amendment

First, we will examine the defendants' claim that the Eleventh Amendment provides them with immunity from suit. Pursuant to the Eleventh Amendment to the United States Constitution: "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against any one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. The United States Supreme Court has consistently interpreted the Eleventh Amendment to preclude suits against a state in federal court by citizens of that state or any other state. Edelman v. Jordan, 415 U.S. 651, 662 (1974). For example, the Supreme Court has deemed it clear that "in the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment." Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 100 (1983).

In addition to precluding suit against a state, the Eleventh Amendment bars federal court suits against state agencies and departments that have no existence apart from the state. Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 280 (1977); Laskaris v

Thornburgh, 661 F.2d 23, 25 (3d Cir. 1981). Clearly, SCI-Mahanoy is such an agency or department. Under Pennsylvania law, the Department of Corrections is an "administrative department" charged with the obligation to perform "administrative work of this Commonwealth." Pa.Stat.Ann. tit. 71, § 61 (Purdon Supp. 1987);[3] see also Manning v. Pennsylvania Bureau of Correction, et al., 559 F. Supp. 220, 221 (M.D. Pa. 1983) (finding that the Pennsylvania Bureau of Corrections is an arm of the state and thus protected by the Eleventh Amendment). Therefore, the Eleventh Amendment generally bars the plaintiff from proceeding against SCI-Mahanoy in federal court.

The United States Supreme Court has held that this immunity does apply specifically to section 1983 claims. See Alabama v. Pugh, 438 U.S. 781, 782 (1978). Therefore, judgment will be entered on the section 1983 claims in favor of the state defendants.

Our conclusion, disposes of the First, Fourth, Fifth, and Fourteenth Amendment claims against the Pennsylvania Department of Corrections, SCI-Mahanoy and the defendants in their official capacities. The claims only remain against the defendants in their individual capacities. The defendants contend, however, that judgment should be granted in their favor on the Fourth, Fifth and Fourteenth Amendment claims. We agree.

2. Fourth Amendment

In his brief in opposition to the motion for summary judgment plaintiff describes the Fourth Amendment claim as follows:

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[3]The SCI-Mahanoy office, is a sub-unit of the Pennsylvania Department of Corrections.

> In his Affidavit (Exhibit EEE Pargraph 8), the Plaintiff alleges that on February 3, 1998, he was assaulted by the Defendant Youron who seized reports from him and fled. Without a doubt this was a seizure of the Plaintiff's work product by means of force. Youron physically attacked the Plaintiff in order to wrest the paperwork from him. The seizure took place in Plaintiff's office, wherein he had a right to privacy. Subsequently, the Fourth Amendment was violated in this particular instance by the conduct of Youron not only because of the improper use of force, but also the seizure which occurred.

Plaintiff's Brief in Oppo. To Defendants' Motion for Summary Judgment at 14.

Plaintiff cites absolutely no legal authority for his assertion that the above-cited facts effected a Fourth Amendment violation, and we find that the facts he has alleged cannot support such a claim. Plaintiff alleges that his supervisor came into his office at work and "seized" his work product from him. This type of action is certainly not the sort of seizure contemplated by the Fourth Amendment. See e.g., Graham v. Conner, 490 U.S. 386, 396-97 (1989). Accordingly, judgment shall be entered in favor of the defendants on this cause of action

3. Due Process--Fourteenth/Fifth Amendment

Plaintiff also raises a due process claim against the defendants. Defendants claim that no due process violation can be found because he was a union class employee, who was covered by a contract providing both a grievance procedure and a process to arbitrate disagreements with his employer through the union. In such cases, due process is satisfied. The defendants have accurately stated the law in this area. See Dykes v. SEPTA, 68 F.3d 1564, 1571 (3d Cir. 1995) cert. denied, 517 U.S. 1142 (1996). Plaintiff did not brief this

issue, therefore we assume that it is conceded. See L.R. 7.6 ("Any respondent who fails to comply with this rule [regarding the submission of opposition briefs] shall be deemed not to oppose such motion.")

Plaintiff has sued under both the Fifth and Fourteenth Amendments, both of which deal with due process. Our above analysis applies to the due process requirements of the Fourteenth Amendment because the defendants are state actors. The Fifth Amendment applies to the federal government denying a person due process of the law. Local 1498, Am. Federation of Government Emp. v. American Federation of Government Emp., AFL/CIO, 522 F.2d 486, 492 (3d Cir. 1975). No claims have been made against the federal government, and therefore, an action under the Fifth Amendment is completely without merit.

With respect to the section 1983/constitutional claims, the only remaining claim is the allegation that the individual defendants in their individual capacities violated the First Amendment.

II. Statutory claims

Plaintiff has also sued the defendants for employment discrimination under Title VII of the Civil Rights Act of 1964 (hereinafter "Title VII") and the Pennsylvania Human Relations Act (hereinafter "PHRA"). As noted above, Eleventh Amendment immunity generally applies when a state is sued by a private party. However, Congress can abrogate Eleventh Amendment immunity without state consent, and it has done so with regard to Title

VII of the Civil Rights Act of 1964. See generally Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); see also Shawer v. Indiana Univ. of Pa., 602 F.2d 1161 (3d Cir. 1979). Accordingly, the defendants have conceded that immunity does not apply to the Title VII claims, and those claims shall remain in the lawsuit.

On the other hand, the PHRA claims against the state defendants must be dismissed because the Eleventh Amendment provides them immunity from suit, and a plaintiff can never pursue a PHRA claim against Pennsylvania or its agencies in federal court. Williams v. Pennsylvania State Police-Bureau of Liquor Control Enforcement, 108 F. Supp.2d 460, 465 (E.D. Pa. 2000); Dill v. Commonwealth of Pennsylvania, 3 F. Supp.2d 583, 587-88 (E.D. Pa. 1998); and Fitzpatrick v. Commonwealth of Pennsylvania Dep't of Transp., 40 F. Supp.2d 631, 635 (E.D. Pa. 1999). In fact, a Pennsylvania statute explicitly states that the Commonwealth does not intend to allow federal courts to hear PHRA claims brought against it. See 42 Pa.Cons.Stat.Ann. § 8521 (b) ("Nothing contained in this subchapter shall be construed to waive the immunity of the Commonwealth from suit in Federal courts guaranteed by the Eleventh Amendment to the Constitution of the United States.") Accordingly, judgment shall be granted to the Pennsylvania DOC and the individual defendants in their official capacities with regard to the PHRA claims.

Plaintiff further attempts to hold Defendants Youron, Dragovich and Kowalsky liable in their individual capacities under the Title VII claim. The law provides, however, that individual employees, who were not the actual employer cannot be held liable under Title

VII. Dici v. Commonwealth of Pennsylvania, 91 F.3d 542, 552 (3d Cir. 1996); Dill, 3 F. Supp.2d at 585-86. Accordingly, judgment shall be entered in favor of the defendants on the Title VII claim against the individual defendants in their individual capacities.

The PHRA is generally applied in accordance with Title VII. Id. However, the PHRA goes beyond Title VII in imposing liability not only upon employers but also on employees. The PHRA forbids "any person, employer, employment agency, labor organization or employee, to aid, abet, incite, compel or coerce" improper conduct. Id. (citing 43 Pa.Cons.Stat.Ann. § 955(e)). In the instant case, the individual defendants are employees, and the question is whether they aided, abetted, incited, compelled or coerced the alleged unlawful discriminatory practices. According to the complaint, the individual defendants did indeed participate in the discriminatory conduct. Hence, the claims against the individual defendants in their individual capacities under the PHRA shall remain in the case. See Irizarry v. Commonwealth of Pennsylvania, Dept. of Transp., 1999 WL 269917, *4-5 (E.D. Pa. 1999).

3. Tort claims

The above-analysis with regard to the Eleventh Amendment immunity also applies to bar the plaintiff's two state-law tort claims, wrongful discharge and intentional infliction of emotional distress, from being pursued in federal court against the state defendants. See Bates v. Hess, 1994 WL 854963 (M.D. Pa. 1994).

Defendants next claim that the defendants are immune from suit in their individual

capacities with respect to the two tort claims. The law in Pennsylvania provides that Commonwealth parties are immune to the imposition of liability for actions within the scope of their duties except as the General Assembly waives that immunity. 42 Pa.Cons.Stat.Ann. § 8522. A "Commonwealth party" is defined as: "[a] Commonwealth agency and any employees thereof, but only with respect to an act within the scope of his office or employment." 42 Pa.Cons.Stat.Ann. § 8501. With respect to all the allegations of the plaintiff's complaint, the defendants were acting within the scope of their employment. We must, therefore, determine whether any of the exceptions to immunity apply.

The law provides nine exceptions to immunity, and they all relate to negligence. Those exceptions are: 1) vehicle liability; 2) medical professional liability; 3) care, custody or control of personal property; 4) commonwealth real estate, highways and sidewalks; 5) potholes and other dangerous conditions; 6) care, custody or control of animals; 7) liquor store sales; 8) National Guard activities; and 9) toxoids and vaccines. 42 Pa.Cons.Stat.Ann. § 8522(b). None of these exceptions dealing with negligence are applicable to the plaintiff's claims of intentional torts. See Brooks v. Carrion, 1996 WL 563897 *4-5. (1996). The defendants were acting within the scope of their employment and none of the exceptions to immunity apply. Accordingly, pursuant to state law they are immune from suit. See La Frankie v. Miklich, 618 A.2d 1145 (Pa. Commw. Ct. 1992);

4. Conspiracy claims

The defendants next allege that the plaintiff has not sufficiently supported his claim of

a conspiracy and summary judgment should be entered in their favor on that claim. The plaintiff claims that his exhibits sufficiently support the conspiracy claim.

Plaintiff alleges both a conspiracy to violate civil rights under section 1985 and a conspiracy under section 1983. To establish a claim under 1985(3), a plaintiff must allege the following: 1) a conspiracy; 2) motivated by a racial or class based discriminatory animus designed to deprive, directly or indirectly, any person or class of persons the equal protection of the laws; 3) an act in furtherance of the conspiracy; and 4) an injury to person or property or deprivation of any right or privilege of a citizen of the United States. United Brotherhood of Carpenters and Joiners of America, Local 610 v. Scott, 463 U.S. 825, 828-29 (1983).

To establish a section 1983 conspiracy claim the plaintiff must establish that the defendants somehow reached an understanding to deny him his rights under section 1983. Kost v. Kozakiewicz, 1 F.3d 176, 185 (3d Cir. 1993) (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970). The key to conspiracy under both statutes is the existence of an understanding among the alleged conspirators to violate the plaintiff's rights. In the present case, plaintiff has presented no proof of such an understanding.

In his brief, the plaintiff cites the affidavits of the plaintiff and one of his witnesses in order to establish the conspiracy. While the paragraphs of the affidavits that the plaintiff cites support the claim that the plaintiff was in some way harassed, the allegations primarily regard Defendant Youron, plaintiff's immediate supervisor. The affidavits nowhere indicate that the defendants met and came to an understanding that they would seek to violate the

plaintiff's rights. In fact, where the affidavits do mention Kowalsky and Dragovich it is to allege that they knew what was occurring, but did nothing, not that they actually took affirmative acts to violate the plaintiff's rights. See Affidavit of Plaintiff, ¶ 19. In fact, for Kowalsky it is alleged, "Mr. Kowalsky went along with decisions stemming from the 2-3 years of complete harassment as it went on down the chain of command." Id. at ¶ 19 (i). Plaintiff has presented no evidence from which a jury could find that a conspiracy existed. Accordingly, judgment shall be granted to the defendants on the conspiracy counts.

Plaintiff has also brought a section 1986 claim against the defendants. Section 1986 prohibits neglect in preventing wrongs conspired to be done under section 1985. 42 U.S.C. § 1986. Accordingly, a section 1985 conspiracy is a prerequisite to a section 1986 claim. See e.g. Clark v. Clabaugh, 20 F.3d 1290, 1295 (3d Cir. 1994). Because judgment is to be entered in favor of the defendants on the section 1985 conspiracy claim, the section 1986 claim must also fail as well.

Conclusion

In conclusion, the defendants' motion for summary judgment will be granted in part and denied in part. It will be granted with respect to all claims, except for those regarding plaintiff's Title VII claim against the Pennsylvania Department of Corrections and his First Amendment PHRA claims against the individual defendants in their individual capacities. An appropriate order follows.

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

STEPHEN M. DEMYUN,	:	
Plaintiff	:	**No. 3:00cv155**
	:	
v.	:	
	:	**(Judge Munley)**
PENNSYLVANIA DEPARTMENT	:	
OF CORRECTIONS, SCI-MAHANOY;	:	
MICHAEL R. YOURON, MARTIN L.	:	
DRAGOVICH AND THOMAS P.	:	
KOWALSKY,	:	
Defendants	:	

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ORDER

AND NOW, to wit, this 14th day of September 2001, the defendants' motion for summary judgment [22-1] is hereby **GRANTED** in part and **DENIED** in part. It is granted with respect to all claims, except for those regarding plaintiff's Title VII claim against the Pennsylvania Department of Corrections and his First Amendment and PHRA claims against the individual defendants in their individual capacities.

BY THE COURT:

_____
JUDGE JAMES M. MUNLEY
United States District Court

Filed: September 14, 2001