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

ANNE BRADBURY,	:	**NO. 3:98-CV-1330**
Plaintiff	:	
v.	:	**(Judge Munley)**
	:	
MICHAEL A. LOMBARDO,	:	
PHILIP CAMPENNI,	:	
THOMAS MCFADDEN,	:	
MARIA CAPOLARELLA MONTANTE,	:	
and PITTSTON CITY,	:	
Defendants	:	

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MEMORANDUM

Before the court for disposition is the plaintiff's motion for summary judgment and defendants' motion for summary judgment. The parties in this action are the plaintiff, Anne Bradbury and the defendants, Michael A. Lombardo, Philip Campenni, Thomas McFadden, Maria Capolarella Montante, and Pittston City. For the following reasons, plaintiff's motion for summary judgment will be granted, and defendants' motion for summary judgment will be denied.

Background

This case arises out of plaintiff's termination from her position as Code Enforcement Administrator of Pittston City on April 14, 1998. Plaintiff claims that she was terminated

without benefit of notice, hearing, or court adjudication.[1]

Plaintiff, Anne Bradbury, was hired by Pittston City on November 21, 1990. The plaintiff claims that she was hired as "Code Enforcement Administrator" while the defendants claim that she was appointed as Deputy Director of Accounts. However, both agree that pursuant to Resolution No. 8066, the plaintiff was appointed by Pittston City to serve as Zoning Officer, City Assessor, and Code Enforcement Administrator. The plaintiff performed the duties of Code Enforcement Administrator/Deputy Director of Accounts for a period in excess of seven (7) years, up to and including the time of her termination by the defendants on April 14, 1998.

In April of 1997, Defendants Michael Lombardo, Thomas McFadden, and Philip Campenni ran in the democratic primary for positions of Mayor and Councilmen, respectively, and were elected to those positions in November of 1997. Ms. Bradbury's political affiliation was different from the defendants' and she participated in the campaigns of their opponents. In early 1998, it was determined that, due to budgetary concerns, it would be necessary to eliminate certain positions and redistribute job responsibilities. At that point, the plaintiff's position was terminated without notice or hearing. It is agreed that the termination did not occur "for cause," as there were no complaints regarding the job performance of the plaintiff.

The plaintiff performed several duties in her job for Pittston City. Those duties

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[1]There is no dispute between plaintiff and defendants that the plaintiff was terminated without cause from her position.

included issuing building permits, issuing demolition permits, issuing building occupancy permits, sending out notices of violations, and attending hearings before the district justice.

Standard of Review

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, 247-8 (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 v. Liberty Lobby, Inc., 477 U.S. 242, 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, 477 U.S. at 322. Once the moving party satisfies its burden, the burden 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

In the instant case, the plaintiff claims that summary judgment is appropriate being that she has attained a property interest in her employment due to the Building Official and Code Administrators Building Code (hereinafter "BOCA" or "BOCA Code")[2] and being that she was not fired "for cause" as is required by the code. The defendants claim that summary judgment is appropriate as the plaintiff did not have a contract or special relationship with the city that gave her a property interest in the position. The defendants also allege that the plaintiff did not have the qualifications needed to be a building official under the BOCA Code.

The plaintiff alleges two causes of action in the present case. In Count I, the plaintiff asserts a cause of action for violation of her First Amendment rights in that her termination was due to her political beliefs and affiliation. In Count II, the plaintiff asserts that the

[2]BOCA identifies itself as a non-profit service organization that develops model regulatory construction codes. See Sampson v. Harvey Lake Borough, 881 F.Supp. 138, 140 n. 1 (M.D.Pa. 1995). In the instant case, Pittston City adopted and has been operating under the BOCA Basic Building Code of 1970, since December 13, 1972 when the Code was adopted by Ordinance 10. Bradbury Affidavit #2, at 1.

defendants violated her procedural and substantive due process rights arising from the Fourteenth Amendment to the United States Constitution and 42 U.S.C. Section 1983, in that she was terminated without the benefit of notice, hearing, or court adjudication. The instant motions for summary judgment are brought only in respect to the due process claims of Count II.

A. Is the Plaintiff a "Building Official" as set out in the BOCA Code, and if so was her termination a violation of the Fourteenth Amendment?

The plaintiff claims that she has stated a valid claim under the Due Process Clause of the U.S. Constitution. The plaintiff's substantive and procedural due process claims derive from the Fourteenth Amendment, and are brought against the defendants under 42 U.S.C. § 1983. To state a valid claim under the Due Process Clause, a plaintiff must show that he or she has been deprived of a protected liberty or property interest. Davidson v. Cannon, 474 U.S. 344, 348 (1986). A continued expectation of employment and thus a property interest in employment can be created by state law or local ordinance. See Board of Regents v. Roth, 408 U.S. 564, 577 (1972); Gallagher v. Borough of Downington, 1999 WL 345495, at *2 (E.D.Pa.). In the instant case, the plaintiff claims that the property interest is created as a result of the BOCA Code. She alleges that under the BOCA Code she is considered a building official and therefore held a property interest in her employment, which was deprived when she was released without cause by Pittston City.

If a plaintiff can show a legitimate claim of entitlement, due process mandates that any deprivation of that entitlement be preceded by notice and an opportunity for a hearing.

Midnight Sessions, Ltd. v. City of Philadelphia, 945 F.2d 667, 679 (3d Cir. 1991), cert. denied, 503 U.S. 984 (1992). The BOCA Code provides, in part, that, "the department of building inspection of Pittston City is hereby created and that the executive official in charge thereof shall be known as the building official." BOCA Code § 107.1. In addition, the code states that the building official will "not be removed from office except for cause and after full opportunity has been granted for him to be heard on specific and relevant charges by and before the appointing authority." BOCA Code § 107.2. In the instant case, the plaintiff alleges that she was a "building official" and therefore could not be removed from her position without cause and without a hearing. In order to be considered a building official, a person must be an full-time employee of the city.

We find that the plaintiff in the instant case was a full-time city employee. In several cases within the Third Circuit, courts have determined that employees could not be considered "building officials" under the BOCA Code because they were hired as independent contractors and not as full-time employees. See Sampson v. Harvey's Lake Borough, 881 F.Supp. 138 (M.D.Pa. 1995); see also Wentling v. Honey Brook Township, 1998 WL 103184 (E.D.Pa. 1998). In the instant case, the plaintiff was hired in 1990 to work as a full-time, salaried employee of Defendant Pittston City and worked until her termination in 1998. She was listed on the Pittston City payroll and received health benefits, vacation time, and sick pay.

In both Sampson and Wentling, the plaintiffs were hired as temporary employees and

were not on the payroll. That was a major factor in the determination that they were not building officials and hence could be fired without cause. Sampson, 881 F.Supp. at 142-43; Wentling, 1998 WL 103184, at *3. In the present case, the plaintiff was a full-time employee of the city who was on the payroll of the city for seven years.

Although there have been cases in the Third Circuit dealing with the distinction of whether someone is a full-time employee or an at-will employee, there have been no cases cited, and our research has not revealed any cases, dealing with the determinative issue in the present case. That is, what is required for a person to be considered a building official when that person clearly is a full-time employee and has arguably performed some or most of the duties of a building official. We find that the plaintiff is a building official under the BOCA Code adopted by the city.

Section 108.0 of the BOCA Basic Building Code states that the duties and powers of a "building official" are as follows:

> The building official shall enforce all provisions of the Basic Code and shall act on any question relative to the mode or manner of construction and the materials to be used in the erection, addition to, alteration, repair, removal, demolition, installation of service equipment, and the location, use, occupancy, and maintenance of all buildings and structures, except as may otherwise be specifically provided for by statutory requirements or as herein provided.

BOCA Code § 108.0

In addition, the BOCA statute includes the following specific categories among the duties set out for a building official:

108.1: Applications and Permits: He shall receive applications and issue permits for the erection of building and structures and inspect the premises for which such permits have been issued . . .;

108.2: Building Notices and Orders: He shall issue all necessary notices or orders to remove illegal or unsafe conditions . . .;

108.3: Inspections: He shall make all the required inspections, or he may accept reports of inspection by authoritative and recognized services or individuals. . . or he may engage such expert opinion as he may deem necessary to report upon unusual technical issues that may arise, subject to the approval of the appointing authority;

In the present case, the plaintiff claims in her brief that she performed the following duties as an employee of the City of Pittston:

1) Issued Building Permits;
2) Issued Demolition Permits;
3) Issued Building Occupancy Permits;
4) Sent Out Notices of Violations;
5) Ordered properties vacated and closed;
6) Attended Hearings Before the District Justice;
7) Investigated Complaints;
8) Enforced all of the codes of Pittston City, including the BOCA Basic Building Code;
9) Dealt with problems associated with dilapidated structures or portions of dilapidated structures;
10) Dealt with electrical violations that were possible fire hazards; and
11) Enforced ordinances regarding high weeds, snow removal on sidewalks, and unsanitary conditions.

Transcript Deposition of Anne Bradbury (hereinafter "DAB"), at 11-12.

Pursuant to the unrebutted testimony of the plaintiff at her deposition, we find that the duties performed by the plaintiff closely parallel the duties set out in the BOCA Code for a

building official.[3] In accordance with Section 108.1, she issued permits; (DAB, at 11-12) in accordance with Section 108.2, sent out notices of violations; (Id.) in accordance with Section 108.3, made the required inspections or accepted reports of inspection by authoritative and recognized services or individuals; (Id.) and in accordance with Section 108.6, kept records and files of actions taken by the Code Enforcement Department. Id. In addition, there was no other employee who was performing the duties set out under BOCA for a building official. Id. Thus, we find that the plaintiff has sufficiently demonstrated that she was the "building official" and therefore possessed a property interest in her job.

Once the moving party has demonstrated an absence of evidence from which a reasonable jury could return a verdict for the non-moving party, the non-moving party may not simply sit back and rest. Anderson, 477 U.S. at 248. Rather, the non-moving party must by its own affidavit, or by the "depositions, answers to interrogatories, and admissions on file" designate "specific facts showing that there is a genuine issue for trial." Celotex, 477 U.S. at 324. In the instant case, we find that the defendants have not demonstrated that there is a genuine issue for trial on this issue.

The defendants admit that the plaintiff "may have issued permits for the erection of buildings and structures," however they allege that she did not inspect the same structures as indicated by BOCA 108.1. See Defendants' Brief in Opposition to Plaintiff's Motion for Summary Judgment (hereinafter "Defendants' Brief in Opposition"). In her affidavit, the

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[3]The defendant does not challenge that plaintiff did in fact perform these duties except as set out in this memorandum.

plaintiff stated "I would receive the initial complaint, or I would witness the complaint, first-hand. If I felt that I needed a certain area of expertise, such as an engineer, a plumber, or an electrician, then we had part-time people that did that, I would contact them." DAB, at 11.

This court concludes that the actions set out in the plaintiff's statements were in accordance with the duties for a building official provided for in the BOCA Code. According to 108.3 of the BOCA Code, the building official will make all the required inspections, **OR** <u>he may accept reports of inspection by authoritative and recognized services or individuals</u>. We find that this is exactly what the plaintiff stated that she did. Aside from this, the defendant does not allege that the plaintiff did not perform the duties set out in the BOCA code.

The defendants in opposing plaintiff's motion for summary judgment and supporting their own motion for summary judgment focus on their assertion that the plaintiff did not meet the qualifications set out in the BOCA Code. The BOCA Code states that in order to be <u>eligible for appointment</u>, "the building official shall have had at least five (5) years building experience as a licensed professional engineer or architect, building inspector, contractor or superintendent of building construction. For three (3) years of which experience he shall have been in responsible charge of work. . . ." BOCA Code § 107.5. The defendants argue that at the time of her appointment, the plaintiff was not experienced as a licensed professional engineer, architect, contractor, superintendent of building construction and did not have formal training in the design and construction of buildings.

We find that the qualification issue is not one that is determinative in the present case. The statute states that the qualification requirements relate to the time of appointment. In the instant case, the plaintiff had been appointed by Pittston City and worked for seven years until she was terminated. Therefore, we find that the qualifications section of the BOCA Code is no longer relevant with regard to the plaintiff, as the defendants determined at the time of Bradbury's appointment that she was qualified for the position and proceeded to hire her. In addition, as the plaintiff alleges, any challenge to that statute now, is fruitless, as the plaintiff has had the five years required experience as a building inspector, as she worked with the city for a period of seven years. For the reasons cited above, we find that the qualifications issue is not relevant in determining whether the plaintiff should be considered a building official for the purposes of the BOCA Code.

In determining that the plaintiff is a building official under the BOCA Code, this court is aware that the mere creation of a position by the terms of the BOCA Code does not require the city to fill it. Sampson, 881 F.Supp. at 138. However, in the present case, we find that the plaintiff can be considered the building official for Pittston City. The plaintiff performed the duties set out in the BOCA Code and the defendants did not demonstrate that there was any other Pittston City official who performed any of the duties of a building official. Cf. Duchesne v. City of Des Plaines, 1998 WL 397836, at *4 (N.D.Ill.) (finding that the plaintiff in that case was not a building official based in part on the fact that there was another city employee who performed the primary duties of a building official set out in the BOCA

Code).

B. Whether there is evidence of a custom, pattern or practice by the City of Pittston which caused the Plaintiff harm?

The defendants in their Memorandum of Law in Support of their Motion for Summary Judgment argue that Pittston should be dismissed as a defendant from the Section 1983 action. In order to be subject to 1983 liability, a plaintiff must show that it was harmed by an official policy or custom. Monell v. Department of Social Servs., 436 U.S. 658 (1978). The defendants claim that there was no custom or policy in place in the instant case that would lead to the termination of the plaintiff. After reviewing the relevant case law, we find that is not the case. We have determined that the plaintiff was harmed by an official policy or custom. In Monell, the Supreme Court defined an official policy for purposes of a 1983 claim as a "statement, ordinance, regulation, or decision officially adopted and promulgated by" a municipality's officers. Id. at 690.

Additionally, the Supreme Court has held that a single action "where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered, "can constitute a 'policy' for purposes of establishing municipal liability." Pembaur v. City of Cincinnati, 475 U.S. 469, 480 (1986); see also Young v. Stauffer, 1995 WL 225285, at *3 (E.D.Pa.); Jett v. Dallas Independent School District, 491 U.S. 701, 736 (1989) (finding that a court must determine whether an individual had final policymaking authority to take a certain action such that it could be considered municipal policy).

We have decided that in the present matter, the action of the city council in terminating the plaintiff, constituted policy for purposes of establishing municipal liability. As stated above, an official policy can be an ordinance or decision adopted and promulgated by a municipality's officers. Monell, 436 U.S. at 690. In the instant case, the decision at issue is the resolution adopted by the city council. Note, that the case law has also found that a single action can constitute a policy if a decisionmaker, with final authority makes that decision. Pembaur, 1995 WL 225285, at *3. Although the defendants have not discussed whether the council had final policymaking authority in its memorandum, we have concluded from the evidence submitted that they did have such authority.

The plaintiff submitted in her Appendix in Support of Motion for Summary Judgment, the actual resolution that terminated the plaintiff's employment. It is clearly signified that the defendants in this case, Councilmembers Campenni, Capolarella, McFadden, and Mayor Lombardo all voted for the resolution. As mentioned above, 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. The defendant has not met its burden in demonstrating that the resolution was not a final policymaking decision.

Therefore, we have determined that the city council resolution was a final policymaking decision and was a policy or custom that can establish 1983 liability for the city. Hence, we find that the City of Pittston should not be dismissed as a defendant and that the defendants' motion for summary judgment will be denied in its entirety.

Conclusion

For all of the above-mentioned reasons, we find that there is not a genuine issue of material fact as to whether the plaintiff had a property interest in her position of employment and that the termination of plaintiff from her position with Pittston City is a violation of both her procedural and substantive due process rights pursuant to the Fourteenth Amendment to the United States Constitution. In addition, the city of Pittston should not be dismissed as a defendant. Therefore, the plaintiff's motion for summary judgment will be granted, and the defendants' motion for summary judgment will be denied. An appropriate order follows.

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

ANNE BRADBURY,	:	**NO. 3:98-CV-1330**
Plaintiff	:	
v.	:	**(Judge Munley)**
	:	
MICHAEL A. LOMBARDO,	:	
PHILIP CAMPENNI,	:	
THOMAS MCFADDEN,	:	
MARIA CAPOLARELLA MONTANTE,	:	
and PITTSTON CITY,	:	
Defendants	:	

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ORDER

AND NOW, to wit, this 11th day of August 2000, it is hereby **ORDERED** that:

1. The motion for summary judgment filed by Plaintiff Anne Bradbury [25-1] is **GRANTED**; and

2. The motion for summary judgment filed by the defendants [37-1] is **DENIED**.

BY THE COURT:

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JUDGE JAMES M. MUNLEY
United States District Court

FILED: 8/11/00