

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

DAVID E. CONLEY)	
)	
Plaintiff,)	Civil Action No.: 5:04CV00030
)	
v.)	<u>MEMORANDUM OPINION</u>
)	By: Hon. Glen E. Conrad
TOWN OF ELKTON, et al.)	United States District Judge
)	
Defendants.)	

The plaintiff, David E. Conley, a former police officer for the Town of Elkton, brings this action pursuant to 42 U.S.C. § 1983 against the Town of Elkton; the Chief of Police for the Town of Elkton, Richard Pullen; and six members of the Elkton Town Council: Cathy Murphy, Jay Dean, Phillip Workman, Theodore Pence, Lucky Sigafoose, and Randell Snow. Specifically, Conley alleges that he was terminated from the police department in violation of his rights to free speech, free association, and procedural due process. Conley also asserts a state law claim for defamation. Jurisdiction of this court is pursuant to 28 U.S.C. §§ 1331 and 1367. The case is currently before the court on the defendants' motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the following reasons, the defendants' motion will be granted in part and denied in part.

Background

The following facts, which are taken from Conley's amended complaint, are accepted as true for purposes of the defendants' motion. See Estate Constr. Co. v. Miller & Smith Holding Co., 14 F.3d 213, 217-218 (4th Cir. 1994). Conley began working as a police officer for the Town of Elkton on September 19, 2000. He was terminated from the police department on April

8, 2003. During the course of his employment, Conley received commendations for exemplary police work.

Conley was assigned to work with a neighborhood watch group on behalf of the police department. At Conley's suggestion, the group became interested in helping the department acquire a canine unit. Chief Pullen told the neighborhood watch group that he would assist with its efforts to obtain the unit, and he advised the group that it would need to raise at least \$10,000. After the money was raised, the group learned that Chief Pullen had not advised the Town Council about the proposed canine unit, which delayed the start of the program. Members of the neighborhood watch group became upset with Chief Pullen and publicly criticized him.

Although Conley originally began working with the neighborhood watch group on behalf of the police department, Conley alleges that he maintained a personal relationship with members of the group and that he regularly communicated with the group while he was off duty. For instance, Conley frequently spoke with the neighborhood watch group after work on matters related to crime prevention.

In the spring of 2003, Conley made several statements regarding the police department to Chief Pullen and Mayor Wayne Printz. Conley complained about another police officer, who used his police radio for personal matters after work. The officer frequently called the police department in an intoxicated state and demanded that Conley drive to his home. Conley emphasized that the police officer's actions impeded the efficiency of the police department's operations and resulted in the misuse of public property. Conley also complained about the lack of work performed by the police department, and he expressed his concerns over whether the police department was properly serving the Town of Elkton. Conley emphasized that he was

responsible for over ninety percent of the cases resolved by the police department in 2002.

Conley contends that these statements were made on matters of public concern.

Conley alleges that Chief Pullen met with members of the Elkton Town Council in late March or early April 2003, and falsely asserted that Conley had conspired to disrupt the operation of the police department. Conley also alleges that Chief Pullen told the Town Council members that the plaintiff had voiced his support for a particular candidate in the election for Sheriff in Rockingham County, a separate jurisdiction. The Town Council subsequently held an executive meeting on April 8, 2003. Conley alleges that during the meeting, “Chief Pullen repeated the unfounded charges he had made to the individual council members over the previous weeks relating to Conley’s political affiliation, statements on matters of public concern and/or association with members of the [neighborhood watch group].” Based on the information provided by Chief Pullen, the Town Council unanimously voted to terminate Conley. Conley was notified of his termination in a telephone message from Chief Pullen. Despite Conley’s requests, the Town refused to provide any reasons for his termination.

On April 21, 2003, the Town Council held a public meeting at which citizens were allowed to voice their support for Conley. During the meeting, Lucky Sigafoose, one of the Town Council members, stated that if he “had not acted on information presented to [him] by Chief Pullen [he] would not have fulfilled [his] duty as an elected official.” Cathy Murphy, another Town Council member, also made the following statements at the public meeting:

Anybody who knows me knows that I do not solicit these Council people. They have minds of their own. They vote their conscience. They vote based on the information they have. I have nothing to do with that. I support the Chief on the recommendation. I did vote for David’s dismissal, but so did five other[s] here.

Additionally, Conley alleges that Murphy made the following statement to a local newspaper on December 11, 2003: “Mayor Printz was aware of issues surrounding Conley and why his firing was called for.”

Conley filed suit against the defendants on April 8, 2004. The defendants subsequently moved to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The court held a hearing on the defendants’ motion on October 8, 2004. During the hearing, the plaintiff requested permission to file an amended complaint. Upon the filing of an amended complaint, the defendants renewed their motion to dismiss.

Discussion

When deciding a motion to dismiss under Rule 12(b)(6), the court must determine “whether the complaint, under the facts alleged and under any facts that could be proved in support of the complaint, is legally sufficient.” E. Shore Mkt., Inc. v .J.D. Assoc. Ltd. P’ship, 213 F.3d 175, 180 (4th Cir. 2000). The court must accept the allegations in the complaint as true, and draw all reasonable factual inferences in favor of the plaintiff. The court should not dismiss a complaint for failure to state a claim, unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

1. Plaintiff’s Section 1983 Claims

Section 1983 imposes civil liability on any person acting under color of law to deprive another person of rights and privileges secured by the Constitution and laws of the United States. 42 U.S.C. § 1983. The first inquiry in a case based on § 1983 is whether the plaintiff has been deprived of a constitutional or federal right. Baker v. McCollan, 443 U.S. 137, 140 (1979).

Conley alleges that the defendants terminated him in violation of his rights under the First and Fourteenth Amendments.

a. Plaintiff's First Amendment Claims

Conley's first § 1983 claim is that the defendants terminated him in retaliation for exercising his First Amendment right to speak out on matters of public concern. It is well established that a public employer cannot discharge an employee on a basis that infringes the employee's constitutionally protected interest in freedom of speech. Edwards v. City of Goldsboro, 178 F.3d 231, 245 (4th Cir. 1999) (citing Rankin v. McPherson, 483 U.S. 378, 383 (1987)). Courts must seek "a balance between the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968). "Just as an employee has a right to speak -- even at work -- public employers have the right to run efficient, functional operations, and [courts] must ensure the proper balance between these competing interests." Goldstein v. Chestnut Ridge Volunteer Fire Co., 218 F.3d 337, 351 (4th Cir. 2000).

With these principles in mind, a three-step analysis is used to determine whether a public employer's retaliatory action violates an employee's right to free speech. First, the speech at issue must relate to a matter of public concern. Love-Lane v. Martin, 355 F.3d 766, 776 (4th Cir. 2004). Second, the "employee's interest in First Amendment expression must outweigh the employer's interest in efficient operation of the workplace." Goldstein, 218 F.3d at 352 (quoting Hanton v. Gilbert, 36 F.3d 4, 6 (4th Cir. 1994)). Third, there must be a causal connection between the protected speech and the retaliatory action. Love-Lane, 355 F.3d at 776. The first two steps involve issues of law, while the causation element is a question of fact. Id.

In his amended complaint, Conley identifies several statements that he made to Chief Pullen and Mayor Printz, which allegedly led to his termination.¹ The defendants argue that the statements cited by Conley did not involve matters of public concern. The United States Court of Appeals for the Fourth Circuit has held that “speech involves a matter of public concern when it involves an issue of social, political, or other interest to the community.” Urofsky v. Gilmore, 216 F.3d 401, 406-407 (4th Cir. 2000). The court must focus on “whether the ‘public’ or the ‘community’ is likely to be truly concerned with or interested in the particular expression, or whether it is more properly viewed as essentially a ‘private’ matter between employer and employee.” Berger v. Battaglia, 779 F.2d 992, 999 (4th Cir. 1985). To make this determination, the court must review the content, form, and context of the given statements. Connick v. Myers, 461 U.S. 138, 147-148 (1983). “[This] inquiry is designed to avoid turning every public employee expression of dissatisfaction into a constitutional case.” Holland v. Rimmer, 25 F.3d 1251, 1255 (4th Cir. 1994).

After accepting all of Conley’s allegations as true, and drawing all reasonable factual inferences in his favor, the court concludes that the statements cited by Conley involved matters of public concern. The content of Conley’s statements conveyed a concern for the efficient and effective operation of the police department. Specifically, Conley complained about the lack of work performed by the police department, and he questioned whether the police department was properly serving the citizens of the Town of Elkton. The Fourth Circuit has emphasized that “[m]atters relating to public safety are quintessential matters of ‘public concern.’” Goldstein,

¹ As previously stated, Conley complained about another police officer, who used his police radio for personal use after work. The officer frequently called the police department in an intoxicated state and demanded that Conley drive to his home. Conley emphasized that the police officer’s actions impeded the efficiency of the police department’s operations and resulted in the misuse of public property. Conley also complained about the lack of work performed by the police department, and he expressed his concerns over whether the department was properly serving the Town of Elkton.

218 F.3d at 353. Additionally, the misconduct of police officers and the misuse of police resources ultimately affect the level of service provided to the public, and are therefore matters of public concern. See Brawner v. Richardson, 855 F.2d 187, 192 (5th Cir. 1988) (“Because the speech at issue complained of misconduct within the police department, it should be classified as speech addressing a matter of public concern.”). See also Lilienthal v. City of Suffolk, 275 F. Supp. 2d 684, 691 (E.D. Va. 2003) (holding that fire department issues such as equipment and staffing are matters of public concern). In considering the form and context of Conley’s statements, the court notes that the fact that Conley did not voice his concerns publicly does not undermine the public concern encompassed in his statements. “[P]ublic employees do not forfeit the protection of the Constitution’s Free Speech Clause merely because they decide to express their views privately rather than publicly.” Cromer v. Brown, 88 F.3d 1315, 1326 (4th Cir. 1996).

Having determined that Conley’s statements involved matters of public concern, the court must now determine whether Conley’s interests in making the statements outweighed the defendants’ interest in the efficient operation of the police department. While police agencies have a heightened need to maintain discipline and uniformity within their ranks, Jurgensen v. Fairfax County, 745 F.2d 868, 880 (4th Cir. 1984), there is no evidence at this stage of the case that Conley’s statements caused any disruption within the day-to-day operations of the police department or impeded the performance of his duties as a police officer. Therefore, at this time, the Pickering balancing test weighs in favor of Conley. Since Conley has alleged that the defendants terminated him in retaliation for his protected statements, the court concludes that Conley has sufficiently stated a First Amendment retaliation claim.

Conley's second § 1983 claim alleges that the defendants terminated him in retaliation for his association with the neighborhood watch group. The Fourth Circuit has recognized that "the right to associate in order to express one's views is 'inseparable' from the right to speak freely." Cromer, 88 F.3d at 1331 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)). However, as in the context of a public employee's freedom of speech, a public employee's right to freely associate is not absolute. Edwards, 178 F.3d at 249. "Logically, the limitations on a public employee's right to associate are 'closely analogous' to the limitations on his right to speak." Id. (quoting Wilton v. Mayor & City Council, 772 F.2d 88, 91 (4th Cir. 1985)).

In his amended complaint, Conley alleges that although he was originally assigned to work with the neighborhood watch group on behalf of the police department, he regularly met with members of the group while he was off duty. Specifically, Conley alleges that he spoke frequently with the group after work on matters related to crime prevention. In support of their motion to dismiss, the defendants argue that Conley's contact with the neighborhood watch group affected the operation of the police force. However, Conley suggests that the defendants infringed on his associational rights, because they knew that the group had publicly criticized Chief Pullen and actively campaigned against individual members of the Elkton Town Council. Accepting the plaintiff's allegations as true for purposes of the defendants' motion, the court concludes that such personal issues are not sufficient to outweigh Conley's interest in associating for the purpose of discussing crime prevention -- a matter of utmost public concern. See Edwards, 178 F.3d at 249-250 (concluding that a police officer stated a freedom of association claim where the officer alleged that the defendants infringed upon his associational rights because of the police chief's desire to promote his own personal agenda). Accordingly, the court

concludes that the allegations in Conley's amended complaint are sufficient to state a freedom of association claim.

Conley also alleges that the defendants terminated his employment because he voiced his support for a particular candidate in the election for Sheriff in Rockingham County, even though his statements had no impact on the performance of his duties as a police officer. In Jenkins v. Medford, 119 F.3d 1156, 1160 (4th Cir. 1997), the Fourth Circuit emphasized that a public employee's political firing claim must be analyzed under the reasoning developed in Elrod v. Burns, 427 U.S. 347 (1976), and Branti v. Finkel, 445 U.S. 507 (1980). In Branti, the Supreme Court expanded upon Elrod, and explained that the First Amendment prohibits the termination of a public employee because of the employee's affiliation with a particular political party or candidate, unless the employer can demonstrate that party affiliation or political allegiance is "an appropriate requirement for the effective performance of the public office involved." Id. at 518. In this case, there is no information to suggest that political allegiance is an appropriate requirement for the position of town police officer, especially with regard to an election in another jurisdiction. Accepting the plaintiff's allegations as true, the court concludes that the plaintiff's amended complaint states a political firing claim.

b. Plaintiff's Fourteenth Amendment Claim

In Count II of his amended complaint, Conley alleges that the defendants violated his Fourteenth Amendment right to procedural due process. Conley contends that he had a legitimate expectation that he would not be terminated from the police department without just cause, and that he would receive notice and an opportunity to be heard prior to his termination.

"In order to be entitled to the procedural safeguards encompassed by the due process clause of the fourteenth amendment (notice and an opportunity to be heard), the complaining

party must suffer from deprivation of a liberty or property interest.” Beckham v. Harris, 756 F.2d 1032, 1036 (4th Cir. 1985) (citing Board of Regents v. Roth, 408 U.S. 564, 569 (1972)). To establish a protected property interest, state law rules and understandings must provide a “sufficient expectancy of continued employment.” Jenkins v. Weatherholtz, 909 F.2d 105, 107 (4th Cir. 1990) (quoting Bishop v. Wood, 426 U.S. 341, 344 (1976)). In Virginia, an employee is presumed to have an at-will employment relationship. County of Giles v. Wines, 262 Va. 68, 72, 546 S.E.2d 721, 723 (Va. 2001).

The defendants argue that Conley did not have a protected property interest in his continued employment, because he served at the will of the Elkton Town Council. To support their argument, the defendants have submitted copies of the Elkton Town Charter and the Elkton Code.² Section 44 of the Elkton Town Charter provides that “[t]he town council shall have the power and authority to appoint a chief of police and such additional police officers and privates as it may deem necessary or proper....” Section 7 provides that “[a]ll officers and employees appointed may be removed by the town council at its pleasure....” (emphasis added). Additionally, pursuant to Section 27-4 of the Elkton Code, the Town Council “shall employ police officers or terminate their employment, upon the recommendation of the Chief of Police.” The court agrees with the defendants that these provisions indicate that police officers serve at the will of the Elkton Town Council, and that they are subject to discharge at any time. See Jenkins, 909 F.2d at 107 (“A local government employee serving ‘at the will and pleasure’ of the government employer has no legitimate expectancy of continued employment and thus has no protectible property interest.”). See also Beckham, 756 F.2d at 1037 (noting that the Fourth Circuit has previously construed language identical to “at the pleasure of the commission” to

² As the defendants point out, the court may consider matters of public record when reviewing a motion to dismiss. Anheuser-Busch, Inc. v. Schموke, 63 F.3d 1305, 1314 (4th Cir. 1995).

mean that an employee serves at the will of his employer and subsequently has no property interest in his employment).

Notwithstanding the cited provisions from the Elkton Code and the Elkton Town Charter, Conley contends that he had a reasonable expectation of continued employment based on the Town's grievance procedure, which is attached as an exhibit to his amended complaint. Although the Town's grievance procedure provides for notice and an opportunity to respond prior to dismissal, the procedure is not available to police officers. Police officers employed by the Town of Elkton have their own complaint policy and procedure. The complaint policy for police officers, which is also attached to the plaintiff's amended complaint, explains that the policy was established as a result of the current law and practice prohibiting police officers from having recourse to the Town's grievance procedure. The policy sets forth the steps a police officer must take if he has a complaint. Unlike the Town's grievance procedure, the complaint policy for police officers does not specifically provide for notice and an opportunity to respond prior to dismissal. Nevertheless, the court notes that even if the Town's grievance procedure was available to police officers, this would not undermine the Town Council's power to remove police officers at its pleasure. See Jenkins, 909 F.2d at 109 (holding that the sheriff's adoption of an employee handbook, which contained a grievance procedure, did not compromise the sheriff's statutory authority to remove deputies at his discretion). See also Hutto v. Waters, 552 F. Supp. 266, 269 (E.D. Va. 1982) (holding that the policies of the sheriff's department, which provided for notice and an opportunity to be heard prior to dismissal, were "insufficient to negate the fact that a deputy sheriff holds his position at the will of the sheriff and can be dismissed without any constitutionally mandated procedural protections."). For these reasons, the court concludes that the plaintiff did not have a constitutionally protected property interest in his continued

employment with the police department, and that his procedural due process claim must be dismissed as a matter of law.³

c. The Individual Defendants' Liability

Conley seeks to recover from Chief Pullen and the members of the Elkton Town Council in their official and individual capacities. Conley's official capacity claims are duplicative of his claims against the Town of Elkton. See Kentucky v. Graham, 473 U.S. 159, 165 (1985) (noting that such suits are "to be treated as a suit against the entity" and that any recovery comes from the entity, not the person sued). Because official capacity suits are essentially suits against the entity itself, they may be dismissed, where as here the government entity is sued. See Love-Lane, 355 F.3d at 783 (4th Cir. 2004). Therefore, the court will dismiss Conley's § 1983 claims against Chief Pullen and the members of the Elkton Town Council in their official capacities.

The defendants also seek dismissal of Conley's § 1983 claims against Chief Pullen and the members of the Town Council in their individual capacities on the basis that they are entitled to qualified immunity.⁴ Qualified immunity protects government officials from liability for civil damages in a § 1983 action "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). To determine whether the individual defendants are entitled to qualified immunity, the court must (1) identify the right allegedly violated; (2) consider whether

³ The court notes that the plaintiff also alleged in his original complaint that the defendants violated his liberty interest rights without due process of law, by publicizing defamatory comments about his termination and by denying him a name clearing hearing. Since these allegations are not included in Conley's amended complaint, the court will assume that he is no longer pursuing the liberty interest claim. See Young v. City of Mount Ranier, 238 F.3d 567, 573 (4th Cir. 2001) ("[I]f an amended complaint omits claims raised in the original complaint, the plaintiff has waived those omitted claims.").

⁴ Because the only claims that the court has held should go forward are Conley's claims under the First Amendment, the court will only address the defense of qualified immunity with respect to these claims.

the right was clearly established at the time of the alleged violation; and (3) determine whether reasonable officials would have known that their actions would violate that right. Love-Lane, 355 F.3d at 783; Edwards, 178 F.3d at 251. In considering whether a right was clearly established at the time of the claimed violation, “courts in this circuit [ordinarily] need not look beyond the decisions of the Supreme Court, the court of appeals, and the highest court of the state in which the case arose....” Jean v. Collins, 155 F.3d 701, 709 (4th Cir. 1998).

The first right allegedly violated by Chief Pullen and the Town Council members is the right of an officer to speak out on matters of public concern without being terminated from the police department. The United States Supreme Court articulated the principles governing this claim in Pickering, decided in 1968, and Connick, decided in 1983. See Mansoor v. Trank, 319 F.3d 133, 139 (4th Cir. 2003) (citing Connick, 461 U.S. at 142; Pickering, 391 U.S. at 568). Therefore, when the defendants allegedly terminated Conley for speaking out on matters of public concern, the governing principles had been established for at least twenty years. The defendants’ primary argument is that “only infrequently will it be ‘clearly established’ that a public employee’s speech on a matter of public concern is constitutionally protected, because the relevant inquiry requires a ‘particularized balancing’ that is subtle, difficult to apply, and not yet well-defined.” DiMeglio v. Haines, 45 F.3d 790, 806 (4th Cir. 1995). While this may be true, the Fourth Circuit has emphasized that it “did not say [in DiMeglio] that a public employee’s right to speak on matters of public concern could never be clearly established.” Cromer, 88 F.3d at 1326 (emphasis in original). Accepting the allegations in the plaintiff’s amended complaint as true, the court concludes that reasonable officials in the defendants’ respective positions would have known that terminating Conley in retaliation for speaking out on matters of public concern

would violate the First Amendment. Accordingly, qualified immunity is inappropriate at this early stage of the case.

The second right allegedly violated by Chief Pullen and the Town Council members is the right of a police officer to associate with other citizens after work for the purpose of expressing his views on matters of public concern without being terminated on the basis of his employers' personal interests. Based on the Supreme Court's decision in Roberts v. United States Jaycees, 468 U.S. 609 (1984), the court concludes that in 2003, it was clearly established that implicit in the right to engage in activities protected by the First Amendment is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." Id. at 622. Therefore, "logic dictates that the right of a police officer to associate with other persons while off-duty in order to express his personal views on a matter of public concern without incurring discipline from his employer ... was clearly established" in April 2003. Edwards, 178 F.3d at 252. Assuming that the plaintiff is able to prove the allegations in his amended complaint, the court concludes that reasonable officials would have understood that firing the plaintiff for associating with the neighborhood watch group after work would violate clearly established law. Accordingly, qualified immunity on Conley's freedom of association claim is inappropriate at this stage of the case.

The court now turns to Conley's political firing claim. The right allegedly violated by Chief Pullen and the members of the Elkton Town Council is the right of a town police officer to voice his support for a candidate in the election for county sheriff without being terminated from the police department. Again, the court finds that this right was clearly established at the time of the alleged violation, as Branti and Elrod were the law long before 2003. Assuming that the plaintiff is able to prove the allegations in his amended complaint, the court concludes that

reasonable officials would have understood that firing the plaintiff for voicing his support for a political candidate in another jurisdiction would violate clearly established law. Therefore, qualified immunity on Conley's political firing claim is also inappropriate at this stage of the case.

d. The Town's Liability

The defendants also argue that the Town of Elkton cannot be held liable for the plaintiff's § 1983 claims. Under Monell v. New York City Dep't of Soc. Servs., 436 U.S. 658, 692-694 (1978), municipalities cannot be held liable for constitutional violations of their employees solely because of the employment relationship. Instead, municipal liability results only "when the execution of a government's policy or custom, whether by its lawmakers or by those whose edicts or acts fairly may be said to represent official policy, inflicts the injury...." Id. at 694. "While municipal policy is most easily found in municipal ordinances, 'it may also be found in formal or informal ad hoc 'policy' choices or decisions of municipal officials authorized to make and implement municipal policy.'" Edwards, 178 F.3d at 244 (quoting Spell v. McDaniel, 824 F.2d 1380, 1385 (4th Cir. 1987)). See also Pembaur v. City of Cincinnati, 475 U.S. 469, 480 (1986) ("Municipal liability may be imposed for a single decision by municipal policy makers under appropriate circumstances.").

Conley's amended complaint alleges that the termination action "was taken by official policy makers of the Town of Elkton pursuant to and embodying the official custom, policy and practice of the Town of Elkton." It further alleges that the plaintiff's constitutional rights were violated as a result of the defendants' actions, statements, and policies. The Fourth Circuit has emphasized that a plaintiff seeking to impose municipal liability under § 1983 must satisfy only the usual requirements of notice pleading specified by the Federal Rules of Civil Procedure.

Jordan v. Jackson, 15 F.3d 333, 339 (4th Cir. 1994). “There is no requirement that he detail the facts underlying his claims, or that he plead the multiple incidents of constitutional violations that may be necessary at later stages to establish the existence of an official policy or custom and causation.” Id. With these principles in mind, the court concludes that Conley’s amended complaint contains sufficient allegations to avoid dismissal of his First Amendment claims against the Town of Elkton.⁵

2. Plaintiff’s Defamation Claim

In addition to his § 1983 claims, Conley asserts a defamation claim against Chief Pullen, Lucky Sigafoose, Cathy Murphy, and the Town of Elkton. Virginia law requires the following elements for a defamation claim: (1) publication; (2) an actionable statement about the plaintiff; and (3) the requisite intent. Kidwell v. Sheetz, 982 F. Supp. 1177, 1187 (W.D. Va. 1997). For a statement to be actionable, it must be false and defamatory, in that it “tend[s] so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.” Chapin v. Knight-Ridder, 993 F.2d 1087, 1092 (4th Cir. 1993). In other words, “merely offensive or unpleasant statements” are not defamatory; rather, defamatory statements “are those that make the plaintiff appear odious, infamous, or ridiculous.” Id. A statement is defamatory per se if it imputes an unfitness to perform the duties of a job or a lack of integrity in the performance of the duties. Yeagle v. Collegiate Times, 497 S.E.2d 136, 138 (Va. 1998). Whether a statement is actionable as defamatory and whether it is defamatory per se are matters of law for the trial court to determine. Id.

⁵ If the plaintiff’s claims against the Town are genuinely without merit, as the defendants argue, then they will “no doubt fail either at the summary judgment stage or at trial, where the required showings are appreciably more demanding.” Jordan, 15 F.3d at 340.

The court concludes that the following statements are not defamatory per se, as they cannot be construed to imply that Conley is unfit to perform the duties of a police officer, nor are they severe enough to make Conley appear odious, infamous, or ridiculous under the general defamation standard:

- (i) Sigafoose’s statement that he would not have fulfilled his duty as an elected official if he had not acted on the information presented by Chief Pullen;
- (ii) Murphy’s statement that the Town Council members voted on the basis of the information they had, and that she did not solicit their votes; and
- (iii) Murphy’s statement that “Mayor Printz was aware of issues surrounding Conley and why his firing was called for.”

Even assuming that these statements are provably false, rather than pure expressions of opinion, they do not sufficiently impugn Conley’s abilities or character to suggest that he is unfit to work as a police officer. By contrast, the court concludes that the following alleged statement by Chief Pullen could be construed to imply that Conley lacks integrity or is unfit for the police profession:

Chief Pullen’s statement to the Town Council members that Conley had entered into a conspiracy to disrupt the operation of the police department.

See Echtenkamp v. Loudon County Public Schools, 263 F. Supp. 2d 1043, 1064 (E.D. Va. 2003)

(holding that the plaintiff alleged sufficient facts to support a defamation claim against a defendant, where the defendant stated that the plaintiff was unprofessional and in need of corrective action).

The defendants contend that even if Chief Pullen’s statement is actionable, the plaintiff’s defamation claim must fail as a matter of law because the statement was made during an executive meeting of the Elkton Town Council. The Virginia Supreme Court has held that defamatory communications, even if published with malicious intent, are not actionable if they

are made in the course of a judicial or quasi-judicial proceeding. Lockheed Info. Mgmt. Sys. Co., Inc. v. Maximus, Inc., 259 Va. 92, 101, 524 S.E.2d 420, 424 (Va. 2000) (citing Penick v. Ratcliffe, 149 Va. 618, 636-637, 140 S.E. 664, 670 (Va. 1927)). The Supreme Court has extended this absolute privilege beyond the actual courtroom, when “safeguards that surround a judicial proceeding” have been present. Elder v. Holland, 208 Va. 15, 22, 155 S.E.2d 369, 374 (Va. 1967). “Those safeguards include such things as the power to issue subpoenas, liability for perjury, and the applicability of the rules of evidence.” Lockheed, 259 Va. at 101, 524 S.E.2d at 424.

The defendants cite to Virginia Code § 15.2-1409 to support their contention that the executive meeting of the Town Council was a quasi-judicial proceeding. This statute provides that the “governing body of any locality may make such investigations relating to its government affairs as it deems necessary to assist in such investigations, may order the attendance of witnesses and the production of books and papers and may administer oaths.” The statute further provides that “[s]uch governing bodies may apply to the circuit court for their locality for a subpoena ... against any person refusing to appear and testify....” Although the procedure outlined in the statute may contain some of the safeguards identified by the Supreme Court as prerequisites for the application of the absolute privilege for quasi-judicial proceedings, there is no information to suggest that these safeguards were a part of the executive meeting at issue. Therefore, the court cannot conclude at this stage of the proceedings that Chief Pullen’s statement is entitled to this absolute privilege.

As an alternative argument, the defendants assert that Chief Pullen’s statement is protected by a qualified privilege. “[I]t is well settled under Virginia law that ... ‘statements made between co-employees and employers in the course of employee disciplinary or discharge

matters are privileged.” Echtenkamp, 263 F. Supp. 2d at 1061 (quoting Larimore v. Blaylock, 259 Va. 568, 572, 528 S.E.2d 119 (Va. 2000)). However, this qualified privilege is lost “if a plaintiff proves by clear and convincing evidence that the defamatory words were spoken with common-law malice,” which is defined as “behavior actuated by motives of personal spite, or ill-will, independent of the occasion on which the communication was made.” Southeastern Tidewater Opportunity Project, Inc. v. Bade, 246 Va. 273, 276, 435 S.E.2d 131, 132 (Va. 1993). Given the facts alleged in the plaintiff’s amended complaint, including his assertion that Chief Pullen made the statement out of hatred or a desire to injure the plaintiff, the court concludes that the plaintiff has alleged sufficient facts at this stage of the proceedings to state a defamation claim against Chief Pullen.⁶

Finally, Conley seeks to hold the Town of Elkton liable for defamation, alleging that Chief Pullen’s statement was made as the “official” statement of the Town, and that the Town “ratified the [statement] by making it appear there was just cause” for Conley’s termination. The court concludes that the Town is immune from liability. Although defamation is an intentional tort, municipalities are immune from liability for intentional torts committed by employees during the performance of a governmental function. See Niese v. City of Alexandria, 264 Va. 230, 239, 564 S.E.2d 127, 133 (Va. 2002) (holding that the city was immune from liability for sexual assaults committed by a police officer, since they occurred during the course of a police investigation).

In this case, Chief Pullen communicated the alleged statement during an executive meeting of the Town Council, which was convened to discuss the plaintiff’s employment. The

⁶ As the district court noted in Echtenkamp, this threshold conclusion that plaintiff’s allegations are sufficient to state a claim for defamation against this defendant “is far from a conclusion” that the alleged statement is, in fact, defamatory. Id. at note 15. Likewise, the court notes that in order to provide clear and convincing proof of malice, the plaintiff will have to come forward with far greater evidentiary detail supporting a finding of malice on the part of Chief Pullen. In sum, the plaintiff has “many hurdles to overcome at the summary judgment and trial stages before [he] can prevail on this claim.” Id.

Elkton Town Code specifically authorizes the Town Council to employ or terminate police officers upon the recommendation of the police chief. The Virginia Supreme Court has emphasized that employment decisions regarding police officers are an integral part of a municipality's governmental function of maintaining a police force. Niese, 264 Va. at 240, 564 S.E.2d at 133. Therefore, the court concludes that the Town is immune from liability for any defamatory statements that were made in association with the Town Council's decision to terminate the plaintiff.

Conclusion

For the reasons stated, the following claims are dismissed for failure to state a claim upon which relief may be granted: plaintiff's § 1983 claims against Chief Pullen and the members of the Town Council in their official capacities; plaintiff's procedural due process claim against the Town, Chief Pullen in his individual capacity, and the members of the Town Council in their individual capacities; and plaintiff's defamation claim against Sigafosse, Murphy, and the Town. The defendants' motion to dismiss is denied with respect to plaintiff's defamation claim against Chief Pullen, and plaintiff's First Amendment claims against the Town, Chief Pullen in his individual capacity, and the members of the Town Council in their individual capacities.

The Clerk is directed to send certified copies of this Memorandum Opinion and the accompanying Order to all counsel of record.

ENTER: This 22nd day of February, 2005.

/s/ Glen E. Conrad _____
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

DAVID E. CONLEY)	
)	
Plaintiff,)	Civil Action No.: 5:04CV00030
)	
v.)	<u>ORDER</u>
)	By: Hon. Glen E. Conrad
TOWN OF ELKTON, et al.)	United States District Judge
)	
Defendants.)	

This case is before the court on the defendants' motion to dismiss. For the reasons stated in a Memorandum Opinion filed this day, it is hereby

ORDERED

as follows:

1. Plaintiff's § 1983 claims against Chief Pullen and the members of the Town Council in their official capacities are **DISMISSED**;
2. Plaintiff's procedural due process claim against the Town, Chief Pullen in his individual capacity, and the members of the Town Council in their individual capacities is **DISMISSED**;
3. Plaintiff's defamation claim against Sigafoose, Murphy, and the Town is **DISMISSED**; and
4. Defendants' motion to dismiss is **DENIED** with respect to plaintiff's defamation claim against Chief Pullen, and plaintiff's First Amendment claims against the Town, Chief Pullen in his individual capacity, and the members of the Town Council in their individual capacities.

The Clerk is directed to send a certified copy of this Order and the attached Memorandum Opinion to all counsel of record.

ENTER: This 22nd day of February, 2005.

/s/ Glen E. Conrad
United States District Judge