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

CHRISTOPHER L. BODKIN,	)	**Civil Action No. 5:08cv00083**
Plaintiff,	)	
	)	**MEMORANDUM OPINION**
v.	)	**& ORDER**
	)	
TOWN OF STRASBURG, et al.,	)	**By: Samuel G. Wilson**
Defendants.	)	**United States District Judge**

In this action under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34 (2000) and 42 U.S.C. § 1983, Plaintiff Christopher L. Bodkin claims that his demotion and eventual termination from the Strasburg Police Department constituted unlawful age discrimination and that his termination violated his procedural and substantive due process rights. He sues the Town of Strasburg and Strasburg's Chief of Police, Tim Sutherly, in his individual and official capacities. Pursuant to Federal Rule of Civil Procedure 12(b)(6), the Defendants have moved to dismiss the due process claims. The court finds that Bodkin has stated a plausible procedural due process claim with respect to his property interest in continued public employment and accordingly denies Defendants' Motion to Dismiss this claim. The court dismisses the remaining due process claims.

I.

The allegations in Bodkin's Complaint are as follows:

Bodkin has been employed as a police officer with the Town of Strasburg since 1988. He achieved non-probationary status, and during his entire employment he has "met or exceeded his employer's legitimate requirements and expectations." (Compl. ¶ 8.) In January 2007, Bodkin spoke with incoming Chief of Police Tim Sutherly about his intention to work for another eight years so that he could support his son and would be eligible for full retirement benefits. In

February, Sutherly demoted Bodkin from Corporal to School Resource Officer, a reassignment that caused Bodkin to lose "certain compensation for holidays and overtime" and "also interfere[d] with Bodkin's scheduled visits with his son." (Compl. ¶ 11.) When the school year ended, Bodkin "reported back to the police station." (Compl. ¶ 18.)

On July 2, 2007, Bodkin spoke with Janice Williams, a town resident, who provided Bodkin with additional information about harassing conduct she had previously reported to another officer. Although Williams at that time appeared satisfied with Bodkin's handling of the investigation, later that afternoon Sutherly informed Bodkin that Williams had lodged a complaint against him. Sutherly presented Bodkin with a memorandum charging him with "'[c]onduct which impairs the efficiency and/or reputation of the Strasburg Police Department' while 'working a complaint' on July 2," (Compl. ¶ 23),[1] and placed him on administrative leave pending an investigation into the incident. The memorandum noted that Bodkin had five days to respond.

On July 6, 2007, Captain Wilkins questioned Bodkin at the department about his conversation with Williams. Bodkin generally described the conversation, and Wilkins did not specifically inquire into its substance. Wilkins informed Bodkin that a state trooper had also filed a complaint against Bodkin regarding the same incident, but did not allow Bodkin to review either complaint.

Later that afternoon, Sutherly met with Bodkin and presented him with a memorandum that purportedly terminated his employment on July 10, 2007, on the grounds of "[s]hirking

[1]According to department rules and regulations, this infraction was serious enough to warrant immediate dismissal. (Compl. ¶ 23.)

official duty" and "[t]aking [an] action which will impair the efficiency or reputation of this department." (Compl. ¶ 26.) The memorandum informed Bodkin of his right to appeal to the Town Manager, but made no mention of any other procedural right. Sutherly then informed Bodkin he could resign, "and it was suggested that if he submitted a resignation that he would be permitted to keep his benefits, i.e., health insurance, accrued vacation pay and the like. Bodkin was led to believe that he would surrender such benefits if he did not resign." (Compl. ¶ 28.) Bodkin relied upon these representations and tendered his resignation effective July 10, 2007.

On July 23, 2007, after consulting with counsel, Bodkin notified Sutherly that he rescinded his resignation, and requested a hearing with respect to his demotion and termination.[2] Sutherly and the Town Manager explained that they accepted Bodkin's resignation in good faith and that his time for appeal had expired.

II.

Under Federal Rule of Civil Procedure 12(b)(6), a court may dismiss a claim for relief if it fails to state a claim upon which relief can be granted. The Supreme Court recently clarified this standard in Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009):

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and

[2]Although the complaint does not cite the specific statutory provision, the court notes that Virginia's Law-Enforcement Officers Procedural Guarantee Act, Va. Code Ann. §§ 9.1-500 to -507 (2006) allows non-probationary police officers to request a hearing following a demotion or dismissal "for punitive reasons." Va. Code Ann. § 9.1-504(A).

plausibility of 'entitlement to relief.'"

Id. at 1949 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556, 557, 570 (2007)). Although the court accepts all factual allegations as true when considering a Motion to Dismiss, Robinson v. Am. Honda Motor Co., Inc., 551 F.3d 218, 222 (4th Cir. 2009), this "tenet . . . is inapplicable to legal conclusions." Iqbal, 129 S. Ct. at 1949. With this plausibility standard in mind, the court now turns to Bodkin's due process claims.

III.

As an initial matter, Defendants argue the court should dismiss Bodkin's procedural and substantive due process claims because Bodkin resigned and therefore cannot demonstrate that Defendants "deprived" him of any constitutionally protected interest. They further maintain that Bodkin's due process claims are without merit. The court finds that Bodkin has sufficiently alleged that his resignation constituted a deprivation for purposes of the due process clause, and also finds that Bodkin has stated a plausible procedural due process claim with respect to his property interest in continued public employment. The court dismisses Bodkin's remaining due process claims.

A.

"[T]o claim entitlement to the protections of the due process clause–either substantive or procedural–a plaintiff must first show that he has a constitutionally protected 'liberty' or 'property' interest, and that he has been 'deprived' of that protected interest by some form of 'state action.'" Stone v. Univ. of Md. Med. Sys. Corp., 855 F.2d 167, 172 (4th Cir. 1988) (internal citations omitted). "Unless there has been a 'deprivation' by 'state action,' the question of what process is required and whether any provided could be adequate in the particular factual

context is irrelevant, for the constitutional right to 'due process' is simply not implicated." Id. A resignation is "sufficiently involuntary to trigger the protections of the due process clause" if the employee reasonably relied on an employer's material misrepresentation of fact that concerned the resignation. Id. at 173-74. Material misrepresentations concern "either the consequences of the resignation or the alternative to resignation." Id. at 174 (internal citations omitted). "The reliance must be reasonable under the circumstances." Id.

Bodkin has stated a plausible claim that his resignation was sufficiently involuntary to trigger the protections of the due process clause. Bodkin alleges that Sutherly suggested that he could retain his benefits if he resigned; Sutherly further convinced him that not resigning meant losing those benefits; and Bodkin relied on these false representations. In the light most favorable, Bodkin relied on a material misrepresentation of fact concerning the resignation, and his reliance was reasonable under the circumstances. Having sufficiently plead that his resignation constituted a "deprivation" for purposes of the due process clause, the court turns to Bodkin's due process claims.

B.

Bodkin claims that his termination deprived him of his property interest in continued public employment and his liberty interest in his reputation and ability to seek future employment, and also that Defendants' conduct violated his substantive due process rights. The court finds that Bodkin has stated a plausible procedural due process claim only with respect to his property interest in continued public employment. Accordingly, the court dismisses the remaining claims.

1.

Bodkin claims that Defendants' deprived him of his property interest in continued public employment because they provided constitutionally insufficient process in terminating him. The court finds that Bodkin has stated a plausible procedural due process claim with respect to this interest and accordingly denies Defendants' Motion to Dismiss this claim.

"The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.'" Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 59 (1999). "Only after finding the deprivation of a protected interest do [courts] look to see if the State's procedures comport with due process." Id. With respect to the first inquiry, the court finds that Bodkin has alleged "a legitimate claim of entitlement to job tenure" and has therefore sufficiently stated that he was deprived of a constitutionally protected property interest. Perry v. Sindermann, 408 U.S. 593, 602 (1972). Property interests subject to procedural due process protection include a person's interest in a benefit when "there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing." Id. at 601. Here, Bodkin has alleged that he was a non-probationary police officer, a near twenty-year veteran who met or exceeded expectations, who was entitled to certain procedural protections under Virginia law. See Johnson v. Fraley, 470 F.2d 179, 181 (4th Cir. 1972) ("[C]ontinuous employment over a significant period of time–such as . . . 29 years–can amount to the equivalent of tenure."). Given these allegations, the court must give Bodkin "an opportunity to prove the legitimacy of his claim of such entitlement in light of the policies and practices of the institution." Sindermann, 408 U.S. at 603 (internal

quotations omitted).[3]

The court next determines whether Defendants provided constitutionally sufficient process.[4] In the context of terminating a tenured public employee, "all the process that is due is provided by a pretermination opportunity to respond, coupled with post-termination administrative procedures as provided by . . . statute." Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 547-48 (1985). The pretermination "hearing" is necessary, but "need not be elaborate" and need not "definitively resolve the propriety of the discharge." Id. at 545. Due process only requires "notice and an opportunity to respond," and in this pretermination context "[t]he tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." Id. at 546. "Due process does not mandate that all evidence on a charge or even the documentary evidence be provided, only that such descriptive explanation be afforded as to permit [the public employee] to identify the conduct giving rise to the dismissal and thereby to enable him to make a response." Linton v. Frederick County Bd. of County Comm'rs, 964 F.2d 1436, 1440 (4th Cir. 1992).

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[3]Bodkin cites Virginia's Law-Enforcement Officers Procedural Guarantee Act, Va. Code Ann. §§ 9.1-500 to -507 (2006), as the basis for his property interest in continued public employment. Although courts have found that this statute confers such an interest, see Mansoor v. County of Albemarle, 124 F. Supp. 2d 367, 379 (W.D. Va. 2000), the court need not definitively resolve this issue given Bodkin's allegations of a "legitimate claim of entitlement to job tenure." Sindermann, 408 U.S. at 602.

[4]Bodkin argues that Defendants deprived him of procedural due process because their pre-termination procedures did not comply with Virginia's Law-Enforcement Officers Procedural Guarantee Act. This argument is without merit. Bodkin's procedural due process claim is a constitutional claim that must be measured against a constitutional standard, not a state standard. Riccio v. County of Fairfax, 907 F.2d 1459, 1469 (4th Cir. 1990).

In applying these principles, two procedural defects surface from the allegations of Bodkin's Complaint. First, Bodkin was only generally interviewed about the Williams incident and was not permitted to review either complaint filed against him relating to that incident. In the light most favorable, Bodkin did not receive "such descriptive explanation . . .as to permit [him] to identify the conduct giving rise to the dismissal and thereby to enable him to make a response." Linton, 964 F.2d at 1440. Second, after Bodkin involuntarily resigned, Defendants denied him a post-termination hearing, a necessary component of procedural due process. See Garraghty v. Va. Dep't of Corr., 52 F.3d 1274, 1283 (4th Cir. 1995). The court therefore finds that Bodkin has stated a plausible procedural due process claim with respect to his property interest in continued public employment, and accordingly denies Defendants' Motion to Dismiss this claim.[5]

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[5]Defendants have moved to dismiss this claim against the Town of Strasburg and against Sutherly in his official capacity. Municipalities "cannot be held liable under § 1983 on a *respondeat superior* theory," Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691 (1978), but "municipal officials who have 'final policymaking authority' may by their actions subject the government to § 1983 liability." City of St. Louis v. Praprotnik, 485 U.S. 112, 123 (1988) (plurality). A municipal officer has "final policymaking authority" if he has "the responsibility and authority to implement *final* municipal policy with respect to a particular course of action." Riddick v. Sch. Bd. of the City of Portsmouth, 238 F.3d 518, 523 (4th Cir. 2000). This is a question of state law requiring an examination into "relevant legal materials, including state and local positive law, as well as custom or usage having the force of law." Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 737 (1989) (citations omitted).

In the light most favorable, Sutherly and the Town Manager, two municipal officers who potentially had "final policymaking authority," rejected Bodkin's attempt to rescind his resignation. Whether state and local law afforded them the "responsibility and authority to implement *final* municipal policy" regarding Strasburg Police Department personnel decisions is a question more appropriately reserved for summary judgment. Riddick, 238 F.3d at 523. Accordingly, the court denies Defendants' Motion to Dismiss this claim against the Town of Strasburg, and for the same reasons, denies Defendants' Motion to Dismiss this claim against Sutherly in his official capacity. See Kentucky v. Graham, 473 U.S. 159, 165 (1985) ("As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity.").

2.

Bodkin claims that Defendants deprived him of his liberty interest in his reputation and his ability to seek further employment because the accusations that ultimately resulted in his resignation remain in his personnel file for prospective employers to view, and the Town of Strasburg would likely disseminate these records to law enforcement agencies. Because the reasons for dismissal do not imply the existence of a serious character defect, Bodkin has not alleged a deprivation of a liberty interest. Accordingly, the court dismisses this claim.

The Fourteenth Amendment protects the "right to procedural due process when governmental action threatens a person's liberty interest in his reputation and choice of occupation." Ridpath v. Bd. of Governors Marshall Univ., 447 F.3d 292, 307 (4th Cir. 2006). "To implicate a constitutionally protected liberty interest, defamatory statements must at least 'imply the existence of serious character defects such as dishonesty or immorality,' 'that might seriously damage [the plaintiff's] standing and associations in his community' or 'foreclose[] his freedom to take advantage of other employment opportunities.'" Zepp v. Rehrmann, 79 F.3d 381, 387 (4th Cir. 1996) (quoting Robertson v. Rogers, 679 F.2d 1090, 1092 (4th Cir. 1982) and Bd. of Regents v. Roth, 408 U.S. 564, 573 (1972)).

Here, Bodkin alleges that accusations of "[s]hirking official duty" and "[t]aking [an] action which will impair the efficiency or reputation of this department" remain in his personnel file and are likely to be viewed by prospective employers. (Compl. ¶¶ 23, 26, 32, 41.) These charges relate to Bodkin's job performance; they do not implicate a liberty interest because on their own they do not imply that Bodkin has a serious character defect like dishonesty or immorality, and Bodkin has not otherwise alleged these charges carry such a connotation. See

Ridpath, 447 F.3d at 309 (alleging that an athletic director's "corrective action" called into question his professional competence, honesty, and integrity within the intercollegiate athletics community implied a serious character defect); see also Luy v. Balt. Police Dep't, 326 F. Supp. 2d 682, 687, 690-91 (D. Md. 2004) (accusations of "cowardice in responding to a call . . . blatant disregard for police policy, and leadership problems for [an officer's] questioning of police procedures" do not imply serious character defects). Accordingly, the court dismisses this claim.

3.

Finally, Bodkin fails to allege a violation of substantive due process. The threshold test for determining if an executive act violates substantive due process is "whether the challenged conduct was 'so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.'" Hawkins v. Freeman, 195 F.3d 732, 738 (4th Cir. 1999) (en banc) (quoting County of Sacramento v. Lewis, 523 U.S. 833, 847 n.8 (1998)). Conscience-shocking conduct involves "abusing [executive] power, or employing it as an instrument of oppression," id. at 742 (quoting Collins v. City of Harker Heights, 503 U.S. 115, 126 (1992)); "the conduct must be 'intended to injure in some way *unjustifiable by any government interest*,'" id. (quoting Lewis, 523 U.S. at 849 (emphasis added)). Only when the executive conduct meets this threshold showing does the court then "inquire into the nature of the asserted liberty interest." Id. at 738.

Here, Defendants' alleged conduct does not "shock the conscience" and therefore does not implicate substantive due process. Bodkin's termination was not conduct "intended to injure in some way unjustifiable by any government interest." Lewis, 523 U.S. at 849. Bodkin has

failed to meet this threshold showing.[6] Accordingly, the court dismisses Bodkin's substantive due process claim.

III.

For the reasons stated, is it **ORDERED** and **ADJUDGED** that Defendants' Motion to Dismiss is **DENIED** as to Bodkin's procedural due process claim with respect to his property interest in continued public employment, but **GRANTED** as to all other due process claims.

Enter: This ____ day of June 2009.

_____
UNITED STATES DISTRICT JUDGE

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[6]The court notes that Bodkin's right to continued public employment, if any, was a right created by state law. Substantive due process protects those fundamental rights "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty." Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (internal citations and quotations omitted). Bodkin's asserted right to continued public employment does not, therefore, implicate substantive due process. See Huang v. Bd. of Governors of Univ. of N.C., 902 F.2d 1134, 1142 n.10 (4th Cir. 1990); Myers v. Town of Landis, 957 F. Supp. 762, 770 (M.D.N.C. 1996); see also Hill v. Borough of Kutztown, 455 F.3d 225, 235 n.12 (3d Cir. 2006) ("This court has held explicitly that public employment is not a fundamental right entitled to substantive due process protection."); McKinney v. Pate, 20 F.3d 1550, 1556 (11th Cir. 1994) (en banc) ("[A]reas in which substantive rights are created only by state law (as is the case with tort law and employment law) are not subject to substantive due process protection.").