

CHERYL SOMMER,	:	IN THE COURT OF COMMON PLEAS OF
	:	LYCOMING COUNTY, PENNSYLVANIA
Plaintiff	:	
	:	
vs.	:	NO. 00-01,243
	:	
LYCOMING COUNTY SOCIETY FOR	:	
THE PREVENTION OF CRUELTY TO	:	
ANIMALS,	:	
	:	
Defendant	:	MOTION FOR SUMMARY JUDGMENT

Date: September 28, 2001

OPINION and ORDER

Before the Court is a Motion for Summary Judgment seeking to dismiss all Plaintiff’s claims which Defendant filed on July 2, 2001.¹

Procedural History

Plaintiff’s Complaint was filed on August 4, 2000. At or around the same time, on August 7, 2000, Plaintiff filed a Complaint with the Pennsylvania Human Relations Commission (“PHRC”). A portion of Plaintiff’s Complaint in this case is overlapped by Plaintiff’s claims before the PHRC. In effect, Plaintiff claimed before the PHRC that she was fired in retaliation for her reports of sexual harassment (PHRC Complaint, paragraphs D, E), which is identical to one of the claimed charges of whistleblowing in the present case (Complaint, paragraphs 7, 10).

¹ Argument was held September 6, 2001, a response and appropriate brief appendices containing relevant information upon which the summary judgment motion is to be decided have been filed by both parties.

The SPCA filed preliminary objections to Plaintiff's Complaint on the basis that the PHRC proceeding was the exclusive remedy for plaintiff's sexual harassment charges (Preliminary Objections, paragraph 34). This Court denied those preliminary objections on December 7, 2000.

Introduction

Plaintiff claims that she was terminated by the Lycoming County Society for the Prevention of Cruelty to Animals ("SPCA") under the Pennsylvania Whistleblower Law, 43 P.S. Section 1421, et seq. Plaintiff's Complaint details three allegations of whistleblowing: 1) reporting of sexual harassment, 2) reporting of animal mistreatment, and 3) misuse of funds.

Plaintiff's allegations arise out of conduct of an employee of the Defendant, Kenneth Stout, who has since been terminated by the SPCA. Plaintiff avers that she was terminated from her job for reporting claimed misconduct. Defendant contends that Plaintiff was terminated for her failure to agree to reasonable conditions to be attached to her employment with the SPCA, which arose out of performance issues, rather than any claimed reporting of violations. Defendant contends that Plaintiff self-terminated her employment. Plaintiff alleges Defendant's claim is pre-textual and that her termination was retaliatory. Plaintiff submits that summary judgment should not be granted in favor of the SPCA.

Facts

Plaintiff, Cheryl Sommer, was employed by the SPCA as a secretary/receptionist from February 1996 to July 2000. During the course of her employment with the SPCA, Plaintiff continuously received above average performance level evaluation performance ratings. (Exhibit "A" to Plaintiff's

Appendix); one of Plaintiff's co-employees was Mr. Kenneth Stout. Stout's original position at the SPCA was kennel attendant. In July 1999, he was promoted to assistant kennel manager. According to Plaintiff, Mr. Stout treated her co-employees, female members of, the public, and Defendant's female volunteers, inappropriately in the workplace on the basis of their gender. This conduct, according to Plaintiff, occurred over a number of years, but it ended abruptly in March 1999, when Plaintiff told Mr. Stout that the behavior that he had directed towards her was inappropriate.

Plaintiff contends that she had reported Stout's sexual misbehavior to the executive director of the SPCA, Ellen Owens, on a number of occasions prior to its cessation.

Plaintiff, during this period of time also complained of the Assistant Kennel Manager's inhumane treatment of animals on numerous occasions. (Sommer Deposition, pp. 31, 32, 34, 35, 58, 59, 73, 89 and Exhibit "A" attached to Plaintiff's Response to Defendant's Interrogatories). Plaintiff did occasionally observe claimed incidents of rough treatment of animals, and claims to have reported this behavior to her superiors. (Sommer Dep., at pp. 58-59). Other SPCA employees made similar reports with respect to Stout's treatment of animals.

Plaintiff also complained with regard to the Assistant Kennel Manager's possible misappropriations of Defendant's funds on numerous occasions. (Sommer Deposition, pp. 50, 90, 91, 92, 93, 94, 95, 96).

Basically every individual whose Deposition has been taken has indicated that the allegations set forth above with regard to wrongdoings on the part of the Assistant Kennel Manager and

the Executive Director were serious in nature. (Louisa Stone, Exhibit " A " attached to Plaintiff's Responses to Defendant's Interrogatories No. 5; Tina Harding Deposition, p. 5; Jan Lechler Deposition, p. 15; Ellen Owens Deposition, p. 49). Plaintiff alleges that these funds were private funds rather than public funds. (Sommer Dep., at pp. 50-54.) Certain money was utilized by Mr. Stout for a dance charity on behalf of the SPCA, which he sponsored (A. Yeagle Dep. At pp. 9-10; E. Owens Dep. At p. 22).

Plaintiff further alleges that certain other money was misused in the form of Purina Pets for People Program, which allowed adoption of pets with Purina's sponsorship. There existed circumstantial evidence that the Assistant Kennel Manager was diverting donated funds to his own use. (Sommer Deposition, pp. 51, 52).

A dispute exists as to the conversations, which took place at a staff meeting on July 11, 2000. Although Owens and Hershberger recall the Plaintiff effectively calling Owens a liar, this is disputed by Sommer in her Deposition at p. 105, by Yeagle in her Deposition at pp. 13, 14, Harding Deposition, p. 6. Regardless of the content of the conversation at the staff meeting on July 11, 2000, the Defendant has given contrary reasons for the termination of the Plaintiff. Termination was due to the Executive Director and Plaintiff not being able to reach agreement (Louisa Stone Deposition at p. 12), because the Plaintiff called the Executive Director a liar (Owens Deposition at p. 37), because Plaintiff refused to sign a probation notice until her attorney could review same (Yeagle Deposition at p. 16), because Plaintiff asked to see an attorney (Sommer Deposition at p. 120).

Discussion

The summary judgment motion essentially raises three issues as the basis for dismissing Plaintiff's claims. First is that Defendant is not a public employee within the meaning of the Whistleblower Law since it does not receive mandatory public funding and the municipal funding it does receive is not obligatory.

Second, the reports made by Plaintiff to her employer do not constitute reports of waste or wrongdoing or violations of statutes; acknowledging the report of sexual harassment is a violation of statute (*see* this Court's Opinion re: preliminary objections filed December 11, 2000) Defendant contends again that the sexual harassment allegations can only be litigated within the province and procedures provided by the Pennsylvania Human Relations Commission and/or in a separate lawsuit in a state or federal court.

The third basis which Plaintiff contends warrants summary judgment is that the Plaintiff was terminated because of insubordination and not because of making the alleged reports. Since the claim of insubordination is supported by facts that have been developed, this claim is not pre-textual and there are no material facts or records to demonstrate otherwise. *See, Denton v. Silverstream Nursing and Rehabilitation Center*, 729 A.2d 571 (Pa. Super. 1999) and this Court's Opinion filed in *France v. Families United Network*, dated June 28, 2001, Lyc. Co. C.P. No. 00-01,539.

The first and third bases for raising summary judgment can easily be addressed and disposed of. The Whistleblower Law makes a public employee any agency, body or entity who receives funding through the Commonwealth or other authority, including municipal governments. There is no

question in this case that Defendant receives funds for the services it renders from municipalities. It is true that the municipalities may not be required to fund the activities that Defendant performs, but the fact is that they do and public funds are expended to pay for the services rendered by Defendant. The services also are essentially public services in that Defendant and its agents are the duly appointed dog law enforcement police officers for all political subdivisions of Lycoming County. *See*, Humane Society Police Officer Enforcement Act, 3 P.S. §456.1 *et seq.* as well as the Pennsylvania Crimes Code, 18 Pa. C.S.A. §5511(I) and 22 Pa. C.S.A. §501.

The third basis that Defendant raised for the summary judgment action relates to evidence developed in pretrial discovery. Unquestionably (according to Defendant) Plaintiff called the Executive Director of Defendant a liar in front of people gathered for a staff meeting. Defendant contends that the record supports the allegation that Plaintiff was fired for insubordination and that the termination is not for a pre-textual reason. Defendant further states that since such evidence is now introduced in the record that the burden shifts back to Plaintiff to show that the termination for insubordination was not pre-textual.

This Court believes that Defendant misstates the law relating to burden of proof as well as what is necessary to show a wrongful termination under the Whistleblower Act. It is recognized that if Defendant shows that there were legitimate reasons unrelated to the Whistleblower actions of the employee for the employee to be terminated that such may be accepted by the trier of fact and allowed as a defense. This is essentially an affirmative defense. A defense which Defendant carries the burden of establishing throughout the entire trial. Simply by introducing facts to this effect does not mean that the fact

finder is bound by it, nor that any burden is shifted back to Plaintiff. What is created by the evidence submitted in support of and contrary to the Motion for Summary Judgment is that there is a factual dispute that exists between the parties that must be resolved by the trier of fact. That is, was Plaintiff wrongfully terminated because of her reporting of an act of waste, wrongdoing or violation of statute to her superiors, or was she terminated due to insubordination.

The issue that needs to be significantly addressed in determining the summary judgment motion is whether or not there is evidence in this case, that has been produced by Plaintiff in support of her allegations, that she made reports to her employers of acts of waste, wrongdoing or violation of statute. As this Court has noted in its preliminary objection opinion (filed December 11, 2000), clearly the report of an act of sexual harassment constitutes report of a violation of statute. There is no question that Plaintiff made such a report. There is also no question that the Pennsylvania Human Relations Commission could take action on the allegation that sexual harassment occurred. That would be a remedy that Plaintiff could receive if in fact she was sexually harassed. At this point, procedurally, the Pennsylvania Human Relations Commission has chosen not to go forward. Plaintiff is not barred from proceeding against Defendant for sexual harassment related damages, but rather permits Plaintiff to pursue such an action in state or federal court. Plaintiff has not yet filed such litigation. In such litigation, if Plaintiff does pursue it, she will get damages that are attorney fees + cost and punitive damages, potentially. Under the Whistleblower Act, if it is determined that Plaintiff was wrongfully terminated, she would collect damages that would potentially be, lost wages, medical + drug expenses, physical, mental and emotional damages and attorney fees and

costs, under the present litigation. The two are not exclusive. Granted that some of the same facts need to be introduced in each litigation. However, it is possible that the jury in this case could determine that the Plaintiff was sexually harassed and made a report of it, but that the real reason for termination was insubordination. If so, Plaintiff does not recover. At the same time the jury in the sexual harassment charge could determine that she was sexually harassed and that as a result of that harassment she is entitled to receive certain damages. The mere fact that this additional avenue of litigation is open to Plaintiff under the law does not bar her from proceeding to pursue the claims set forth in the instant Complaint.

This Court has also been asked to rule that the other reports Plaintiff has made cannot serve as a basis to support a claim for wrongful termination because they do not constitute acts of waste and wrongdoing. Specifically those reports would relate to: Reports of misuse of money and mistreatment of animals. The report of mistreatment of animals goes to the essence of purpose of Defendant. The mistreatment of animals may in fact constitute a criminal action. Accordingly, if the Plaintiff's allegations are true, the acts of Defendant would be a wrongdoing that is substantially related to the charitable and statutory purposes of Defendant and would be a substantial enough allegation of committing a wrong that would sustain a cause of action under the Whistleblower Act.

As to the misuse of funds, Plaintiff reported to her employers that: (1) "She felt that the money that came in as donations was being put in the fund for the dance that Kenny had." (Hershberger Deposition, p. 6). It is clear from the evidence submitted concerning the summary judgment motion that,

in fact, Defendant did not misuse money. (2)The following was taken at the deposition of Ellen Owens, pp. 21-23.

Q: Can you tell me about the dance fund that was run by Mr. Stout?

A: There is one that's run by me and one that's run by Ken Stout.

Q: I want to know what he does with regard to the one he runs?

A: He sells tickets to a dance.

Q: How was Mr. Stout made accountable for the monies that he received?

A: He was not made accountable for them. He turned the money in and paid the expenses out of money that he had and gave us the rest.

Q: Did you have complaints from anyone with regard to the possible misuse of dance fund monies by Mr. Stout?

A: Cheri complained that Kenny would – that someone would come in with a donation that would be an SPCA donation. Then Kenny would say well, I'm going to count that towards my dance.

Q: Would that, in your authority, act of Mr. Stout have been inappropriate?

A: Well, it was actually sort of a joke, because we didn't – there was no dance fund. There was no dance fund or accounting. If the check was made out to the Lycoming County SPCA, it went into the Lycoming County SPCA Treasury. He was never given any – we never kept track of where those funds came from.

The uncontradicted facts support this and Plaintiff has no evidence to the contrary based upon all matters that have developed since Plaintiff initially made the report of the misuse. It does appear that Plaintiff can introduced evidence that her report of the misuse of money was a report made in good faith probably due

to her lack of understanding as to the nature of the handling of funds within the organization. This does establish a report of wrongdoing that would support a Whistleblower Act because it is not required that the actual waste or misuse of funds occurred. If the actual waste or misuse of funds did not occur, such is a defense.

ORDER

Defendant's Motion for Summary Judgment is DENIED.

BY THE COURT:

William S. Kieser, Judge

cc: John R. Bonner, Esquire
J. David Smith, Esquire
Judges
Suzanne R. Lovecchio, Law Clerk
Gary L. Weber, Esquire (Lycoming Reporter)