

DIANN E. WELLER, PLAINTIFF vs. BOROUGH OF
CHAMBERSBURG and ERIC OYER, DEFENDANTS,
Franklin County Branch Civil Action - Law A.D. 1997 - 160

Weller v. Chambersburg

Wrongful termination - Procedural due process - Defamation - Invasion of privacy

1. As a general rule, employees are at-will absent a contract, and may be terminated at any time, for any reason or for no reason.
2. The general rule of employment at-will is not abrogated just because the employee is a government worker since one does not have a *per se* right in government employment.
3. In Pennsylvania, a government employee only has a personal or property right in her employment where she can establish a legitimate expectation of continued employment through either a contract or a statute.
4. To find that an employee handbook has legally binding contractual significance, the handbook or an oral representation about the handbook must in some way clearly state that it is to have such effect.
5. Where a personnel handbook merely provides guidelines and may be changed by the employer, it does not constitute an employment contract.
6. The doctrine of equitable estoppel is not an exception to the employment-at-will doctrine; an employee may be discharged with or without cause, and our law does not permit firing an employee for relying on an employer's promise.
7. In a wrongful termination action, a plaintiff's failure to allege the nature of the harm to her reputation as well as her failure to allege that any information harmful to her reputation was published to a third party forecloses her cause of action for deprivation of procedural due process rights.
8. The essential requirements of due process are notice and an opportunity to respond.
9. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement.
10. Where Plaintiff in a wrongful termination action received at least three notices that, if her performance did not improve, she would be terminated, and where Plaintiff had at least two meetings with Defendant/employer where she had ample opportunity to present her side prior to being fired, due process requirements were satisfied.
11. A tenured public employee, which Plaintiff in this case was not, is only entitled to notice, an explanation of the evidence against her and an opportunity to be heard. To require more prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee.
12. In an action for defamation, the plaintiff has the burden of proving: (1) the defamatory character of the communication; (2) its publication by the defendant; (3) its application to the plaintiff; (4) the understanding by the recipient of its defamatory meaning; (5) the understanding by the recipient of it as intended to be applied to the plaintiff; (6) special harm resulting to the plaintiff from its publication; (7) abuse of a conditionally privileged occasion. 42 Pa.C.S.A. § 8343(a).

13. A complaint for defamation must, on its face, identify specifically what allegedly defamatory statements were made, and to whom they were made. If a plaintiff fails to set forth a specific statement that could be defamatory, Plaintiff's claim has no merit and the cause of action must be dismissed.

14. Where Plaintiff in a defamation case does not set forth the actual statements alleged to be defamatory and does not allege to whom the statements were made, preliminary objections in the nature of a demurrer will be sustained.

15. Invasion of privacy action against a former employer who cleaned out Plaintiff's desk will be dismissed where the identity of "private" items is not set forth, Plaintiff failed to allege a legitimate expectation of privacy and the desk belonged to Defendant and was located on its property.

16. In order to maintain an action for public disclosure of private facts, there must be publicity given to private facts which would be highly offensive to a reasonable person and which are of no legitimate concern to the public.

17. Where Defendant allegedly made it known to others that he thought Plaintiff needed counseling, an action for public disclosure of private facts cannot be maintained because this is a statement of opinion and not a disclosure of facts that are protected as private.

Charles E. Ganley, Esq., Attorney for Plaintiff
Thomas J. Finucane, Esq., Attorney for Defendants

OPINION AND ORDER

Kaye, J., September 9, 1997:

OPINION

We have before us the preliminary objections of the Borough of Chambersburg and Eric Oyer ("defendants") in the nature of a demurrer, motion to strike and a motion for a specific complaint. The parties have briefed the issues and argument has been heard by this Court. The matter is now ripe for disposition.

FACTS¹

On October 15, 1996, Diann E. Weller ("plaintiff") was discharged from her employment with the Borough of Chambersburg ("defendant Borough"). Plaintiff had been employed by the defendant Borough as a Secretary/Receptionist since 1972. The events precipitating her dismissal are as follows:

¹ For Purposes of this ruling, the 'facts' are either as acknowledged by both parties, or when viewed in the light most favorable to plaintiff where the 'facts' are in dispute.

On June 14, 1996, Eric Oyer ("defendant Oyer"), then Assistant Borough Manager, met with plaintiff to discuss her work attitude. Defendant Oyer informed her that her attitude and behavior toward her co-workers as well as customers was not acceptable and that unless changes occurred, she could not continue to work at the Borough.

Following the meeting, defendant Oyer sent plaintiff a memo regarding their discussion. The memo cited specific complaints about plaintiff's "inability or unwillingness to control [her] emotions". This memo was signed by plaintiff who stated that she did not agree with the contents of the memo, but she would try to improve.

On September 10, 1996, defendant Oyer issued a second memo to plaintiff regarding leave she had taken without informing the other secretaries. This was a problem that was also addressed in the June memo. Again, defendant Oyer stated that if plaintiff would not comply with the rules, her employment would be terminated.

Defendant Oyer and plaintiff met again on September 13, 1996. Plaintiff, with Oyer's permission, recorded this conversation wherein defendant Oyer expressed his desire for her to seek counseling for the behavior that was affecting her otherwise satisfactory work performance. On October 7, 1996, plaintiff was directed to take the following day off as a "decision making day off without pay" for her unsatisfactory performance. The memo also contained a statement which plaintiff was to sign, without qualification, if she wished to return to work on October 9, 1996. The statement amounted to an agreement with the violations enumerated in the memo as well as an expression of a desire to change or to continue in her employment. Plaintiff returned to work on October 9, but was suspended by defendant Oyer for failing to sign the statement without qualification. Plaintiff's employment with the defendant Borough was terminated on October 15, 1996 following a pre-termination meeting with defendant Oyer.

Plaintiff instituted this action by filing a Praecipe for Writ of Summons against the defendants on April 18, 1997. A complaint was filed on April 24, 1997, alleging causes of action for

violation against defendant Oyer. Defendant's preliminary objections were filed on May 14, 1997 and argument was held on July 3, 1997. The matter is not ripe for disposition, and we will address each objection *seriatim*.

DISCUSSION

I. Due Process

The defendants' first preliminary objection is a demurer to Count I of plaintiff's complaint which alleges that the defendant Borough violated the plaintiff's procedural due process rights by failing to afford her the pre-termination procedures she believes were due. Initially we note that a demurrer challenges the pleadings as failing to set forth a cause of action upon which relief can be granted under any theory of law. *Balsbaugh v. Rowland*, 447 Pa. 423, 290 A.2d 85 (1972). See also *Pa.R.C.P. 1028(a)(4)*. A demurrer admits all well-pleaded facts, and all reasonable inferences arising therefrom. *Firing v. Kephart*, 466 Pa. 560, 353 A.2d 833 (1976).

"The law in Pennsylvania is abundantly clear that, as a general rule, employee are at-will absent a contract, and may be terminated at any time, for any reason or for no reason". *Stumpp v. Stroudsburg Municipal Authority*, 540 Pa. 391, 396, 658 A.2d 33, 335 (1995) [citations omitted] See also *McLaughlin v. Gastrointestinal Specialists*, _____, Pa.Super._____,_____, 696 A.2d 173, 176 (1997). "This general rule is not abrogated just because the employee is a government worker since one does not have a *per se* right in governmental employment". *Pipkin v. Pennsylvania State Police*, ___ Pa._____, _____, 693 A.2d 190, 191 (1997) [citations omitted]. In this case, all parties agree that plaintiff was an at-will employee of the defendant Borough. However, plaintiff asserts that she had a right to due process before she could be terminated from her employment. For the reasons that follow, we reject her position.

Plaintiff first argues that she had a property interest in her employment which guaranteed her procedural due process rights. The law in Pennsylvania is very clear that " a governmental employee only has a personal or property right in [her] employment where [she] can establish a legitimate expectation of

continued employment through either a contract or a statute". *Id.* [citations omitted]. Plaintiff relies on the defendant Borough's Non-Bargaining Personnel Handbook ("handbook") as providing her with a property interest in continued employment. However, "it is well-settled that to find that...a handbook has legally binding contractual significance, the handbook or an oral representation about the handbook must in some way clearly state that it is to have such effect". *Luteran v. Loral Fairchild Corp.*, 455 Pa.Super. 364, 372, 688 A.2d 211, 214 (1997), quoting *Martin v. Capital Cities Media*, 354 Pa.Super. 199, 511, A.2d 830 (1986).

The handbook in the matter *sub judice* did not create such rights in employees to which it applied

On the contrary, the defendant Borough's handbook, under Article I, titled "General Provisions", states that the handbook merely provides "guidelines" to the employees and may be changed or deviated from by the Borough. In addition, Article I states that "the Personnel Handbook does not constitute an employment contract (express or implied) and should not be considered as the total and complete official statement of policy of the Borough of Chambersburg". Given this limiting language, we fail to see how plaintiff could assert that the handbook was intended to have legally binding contractual significance or that she would have reasonably believed that it promised continued employment that could not be terminated with due process.

Although plaintiff claims that she is not asserting that the handbook constitutes an employment contract, she does claim that it gave a reasonable expectation of continued employment. This is basically an equitable estoppel argument which was specifically rejected by the Pennsylvania Supreme Court in *Short v. Borough of Lawrenceville*, PICS No. 97-1334-08-00, June 17, 1997. In *Stumpp, supra*, the Supreme Court said that

in *Paul v. Lankenau Hospital*, 524 Pa. 90, 569 A.2d 346 (1990), we held that "[t]he doctrine of equitable estoppel is not an exception to the employment at will doctrine. An employee may be discharged with o[r] without cause, and our law does not permit firing an employee for relying on an employer's promise'.

Stumpp, 540 Pa. at 397, 658 A.2d at 336, citing *Paul*, 524 Pa. At 95, 569 A.2d at 348. Clearly, there is no equitable estoppel exception to the at-will rule in Pennsylvania.

Plaintiff also argues that she has a liberty interest in continued employment which guaranteed her procedural due process rights. This argument is based upon plaintiff's assertion that her reputation, which is recognized as a fundamental right by the Pennsylvania Constitution, was harmed by defendant Oyer's statements regarding the circumstances of her termination. However, she has failed to plead the damages her reputation sustained or even that any person other than herself an defendant Oyer was informed of the nature of their discussions. Plaintiff simply posits that her reputation was harmed by virtue of her termination from employment. While this is an ingenious argument, if we were to accept it, at-will employment would cease to exist as no employer could terminate an employee as doing so would trigger this asserted "right".

Plaintiff's failure to allege the nature of the harm to her reputation as well as her failure to allege that any information harmful to her reputation was published to a third party forecloses her cause of action. We also note that plaintiff does not seek relief in the form of a "name-clearing" hearing, which is the only relief this argument could possibly entitle her to. Therefore, this argument is insufficient to state a cause of action for deprivation of procedural due process rights.

Notwithstanding the foregoing, even if we were to find that plaintiff was entitled to pre-termination procedures, she still would not prevail. The United States Supreme Court has stated that

the essential requirements of due process...are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirements.

Cleveland Board of Education v. Loudermill,
470 U.S. 532, 546, 84 L.Ed.2d 494, 506
105 S.Ct. 1487, _____, (1985) [citations omitted].

In this case, the plaintiff received at least three written notices that if her on-the-job behavior did not improve, her employment would be terminated. Further she had at least two meetings with defendant Oyer where she had ample opportunity to present her side of the situations seen as problematic. Plaintiff does not deny that she was afforded these procedures. However, she does assert that they were insufficient since she was only given an opportunity to be heard by the person who ultimately dismissed her.

We note that in *Loudermill*, the Supreme Court stated that a tenured public employee, which plaintiff was not, was only entitled to notice, an explanation of the evidence against him, and an opportunity to be heard. *Id.* "To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee". *Id.* Likewise, we hold that the pre-termination procedures that plaintiff was afforded, although completely unnecessary, were adequate to satisfy procedural due process had it been required.

Accordingly, we find that plaintiff has failed to state a cause of action against either defendant for a violation of due process. Therefore, we will grant the defendants' demurrer.

II. Defamation

Defendants also raised an objection in the nature of a demurrer to Count II of plaintiff's complaint in which she alleges that defendant Oyer defamed her during the course of her termination.

When a cause of action for defamation is brought, Pennsylvania law requires the following:

In an action for defamation, the plaintiff has the burden of proving, when the issue is properly raised:

- (1) The defamatory character of the communication.
- (2) Its publication by the defendant.
- (3) Its application to the plaintiff.
- (4) The understanding by the recipient of its defamatory meaning.
- (5) The understanding by the recipient of it as intended to be applied to the plaintiff.

(6) Special harm resulting to the plaintiff from its publication.

(7) Abuse of a conditionally privileged occasion.

42 Pa.C.S.A. §8343(a). See also *Jaindl v. Mohr*, 432 Pa.Super. 220, 637 A.2d 1353 (1994), appeal granted 540 Pa. 583, 655 A.2d 575, affirmed 541 Pa. 163, 661 A.2d 1362 (1995).

In the instant case, plaintiff's complaint alleges that "on an occasion before the plaintiff's termination defendant Oyer told several of plaintiff's co-workers that the plaintiff had used abusive language with customers of the Borough of Chambersburg, that plaintiff was incompetent, and that she needed counseling". The complaint does not make any more specific allegations. Therefore, we must decide whether or not this pleading sufficiently states a cause of action for defamation. We find that it does not.

Before a court analyzes a defamation claim using the factors enumerated in 42 Pa.C.S.A. §8343(a), there must be an allegedly defamatory statement to analyze. If a plaintiff fails to set forth a specific statement that could be defamatory, plaintiff's claim has no merit and the cause of action must be dismissed. See *Holewinski v. Children's Hosp. of Pittsburgh*, 437 Pa.Super. 174, 180, 649 A.2d 712, 716 (1994), allocatur denied 659 A.2d 560. "A complaint for defamation must, on its fact, identify specifically what allegedly defamatory statements were made, and to whom they were made". *Moses v. McWilliams*, 379 Pa.Super. 150, 170, 549 A.2d 950, 960 (1988), allocatur denied 558 A.2d 532.

In the instant case, plaintiff has not set forth a specific statement that is allegedly defamatory. Although she sets forth the content of the alleged statements, it is impossible to determine the context in which they were said since actual statements are not set forth. Further, the complaint does not allege to whom the statements were made. The allegation is also prefaced by the statement that it is "on information and belief" that defendant Oyer told the co-workers the allegedly defamatory subject matter. Therefore, plaintiff is acknowledging that she is uncertain as to what was said and to whom it was said.

Absent an averment as to what was said, it is impossible to determine whether the statements were opinion, in which case they could not be defamatory, or statements of fact. Additionally, since plaintiff has failed to plead to whom the statements were allegedly made, it is impossible to determine whether a privilege may have been abused. In other words, plaintiff has not pled any of the seven elements set forth in 42 Pa.C.S.A. §8343(a). Therefore, plaintiff has not set forth a cause of action for defamation in her complaint and we will grant defendant Oyer's demurrer.

III. Invasion of Privacy

A. Intrusion into seclusion

Plaintiff argues that "defendant Oyer's comments concerning his involvement in Plaintiff's counseling arose to the level of involving himself in her private affair's". Specifically, she asserts that defendant Oyer's request to speak to a counselor of plaintiff's choosing before counseling commenced, in order to explain the circumstances precipitating the counseling, amounts to an intrusion into a private area of her life.

We find that this issue is moot since plaintiff never went for any counseling at her employer's request and is no longer even an employee. Even if defendant Oyer's request could somehow be interpreted as an invasion of privacy, which we seriously doubt, the cause of action cannot be maintained since the invasion never came to fruition.

Plaintiff's complaint further alleges that defendant Oyer invaded her privacy by boxing up the items from her desk after her employment was terminated, though she fails to set forth the identify of the allegedly "private" items, nor does she allege that she had a legitimate expectation of privacy in the items contained in that desk which was the property of her employer and was on her employer's property. There are no allegations of any harm suffered as a result of defendant Oyer's actions. In addition, plaintiff was no longer an employee at the time defendant Oyer cleaned out the desk. We conclude that Plaintiff's complaint has failed to state a claim for invasion of privacy in Count III.

Accordingly, we will grant defendants' demurrer with respect to Court III of Plaintiff's complaint.

B. Public disclosure of private facts.

Count IV of plaintiff's complaint attempts to set forth a cause of action for invasion of privacy (public disclosure of private facts). In order to maintain this cause of action, there must be publicity given to private facts which would be highly offensive to a reasonable person and which are of no legitimate concern to the public. *Harris by Harris v. Easton Publishing Co.*, 336 Pa.Super. 141, 154, 483 A.2d 1377, 1384 (1984).

Plaintiff maintains that defendant Oyer publicized private facts by dispersing information "his perceived need for her to attend counseling". Clearly, any statement made by defendant Oyer to this effect was an opinion and not disclosure of a private fact concerning the plaintiff. Further, the complaint fails to state how the allegedly private information was publicized. The sole basis for this cause of action is a statement made by defendant Oyer that he received "feedback from a whole variety of people", which does not even aver that defendant Oyer made any statements at all. It merely says that people had spoken to him about plaintiff.

Plaintiff has also not alleged any information disseminated by defendant Oyer was highly offensive to a reasonable person, which is a necessary element of the cause of action. Plaintiff merely alleges that defendant Oyer made it known to a "variety of people: that he felt she needed counseling, i.e. it is an expression of defendant Oyer's *opinion*, and not a disclosure of *facts* that are protected as private in nature. Therefore, we will grant defendants' demurrer with respect to Count IV of the complaint.

IV. Motion to Strike

Defendants' objection in the nature of a motion to strike has been rendered moot by our granting their demurrers to all four counts of plaintiff's complaint. Therefore, we need not discuss the merits of this objection.

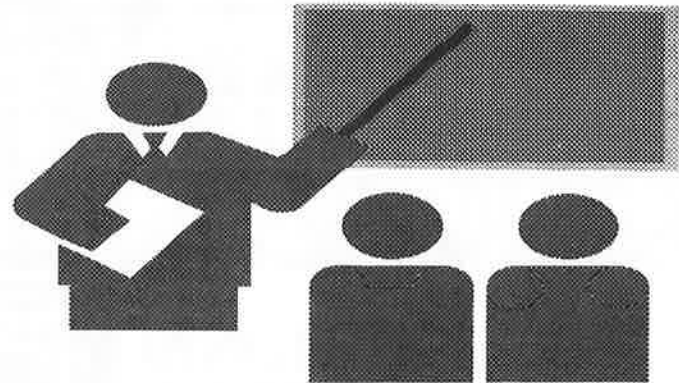
V. Motion for a More Specific Complaint

Defendants' objection in the nature of a motion for a more specific complaint has been rendered moot by our granting their demurrers to all four counts of plaintiff's complaint. Therefore, we need not discuss the merits of this objection.

ORDER OF COURT

NOW, September 9, 1997, upon consideration of the preliminary objections to the complaint in the nature of demurrers, a motion to strike, and a motion for a more specific complaint, the demurrers of the parties' briefs and of oral argument are sustained, and the remaining preliminary objections are determined to be moot.

Plaintiff is granted twenty (20) days from the date hereof to file an Amended Complaint, or a judgment of non pros. may be entered.



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