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

Diane Radicke, Plaintiff,	:	
	:	CIVIL ACTION
v.	:	
	:	NO. 00-2346
Sam Fenton, Individually and as Mayor of Bristol Township; Berkheimer Associates; and H.A. Berkheimer, Inc; Defendants.	:	

Memorandum and Order

YOHN, J. March , 2001

Plaintiff Diane Radicke was a clerk for the firm that administers Bristol Township's earned income tax. In the course of her employment, she uncovered an office memo discussing the audit of a Bristol resident and disclosed the contents of the memo to the resident. Radicke alleges that the memo demonstrates that the audit was improper. The tax administrator discharged her, and she, in turn, sued it and the township mayor. Her complaint alleges retaliatory discharge in violation of her freedom of speech and in violation of state law. Here, the administrator moves for dismissal.

The court grants the motion in part. With respect to the state law claim of wrongful discharge, there is no public policy exception for Radicke's disclosure which would limit the ability of the administrator to fire her, and the at-will employment relationship between Radicke and the tax administrator does not impose a duty of good faith and fair dealing on the administrator. With respect to the whistleblower statute claim, Radicke does not allege an

essential element – disclosure to either an "appropriate authority" or her employer. With respect to the intentional infliction of emotional distress claim, the administrator's alleged conduct is not sufficiently outrageous. Therefore, Counts V, VII, VIII, and IX will be dismissed. Counts III, IV, and VI remain.

I. Background

In deciding a motion to dismiss, the court must "accept as true all allegations in the complaint and all reasonable inferences that can be drawn from them after construing them in the light most favorable to the non-movant." *Jordan v. Fox, Rothschild, O'Brien & Frankel,* 20 F.3d 1250, 1261 (3d Cir. 1994). "A court may dismiss a complaint [at this stage] only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

Between March 19, 1996 and February 23, 2000, plaintiff Diane Radicke worked as a clerk for defendant Berkheimer Associates, which is a division of defendant H.A. Berkheimer, Inc. Am. Compl. at ¶ 7. The two Berkheimer defendants are hereinafter simply referred to as "Berkheimer". Per authorization by the Township of Bristol, Berkheimer serves as the township's earned-income-tax officer. *Id.* at ¶ 6, Ex. A (Township Resolution No. 37-96). As a clerk, Radicke's duties included providing township citizens with information about their tax records. *Id.* at ¶ 8.

On November 23, 1999, defendant Sam Fenton, the township mayor, ordered Berkheimer to audit Donald Mobley, who is Fenton's political opponent and is a frequent critic of township policy. *Id.* at ¶ 10. Berkheimer subsequently informed Mobley that it would audit him, and on

December 2, 1999, Mobley arrived at Berkheimer's office and asked Radicke about his tax records. *Id.* at ¶¶ 11, 12, 13.

While searching through the records, Radicke retrieved a memo that stated "Mayor says this person is employed and wants audited. I will be giving to Joe McBride to audit. This a political thing and should not be discussed with taxpayer if contacts us." *Id.* at ¶¶ 14, 15. Radicke told Mobley of this memo, and Mobley thereafter refused to cooperate with the audit. *Id.* at ¶¶ 16, 17.[1] Berkheimer subsequently asked Radicke to submit to a lie detector test to determine if she had made any disclosures to Mobley. *Id.* at ¶ 18. Radicke refused to take the test, and Berkheimer discharged her. *Id.* at ¶ 21. Radicke alleges that Fenton directed Berkheimer to conduct the lie detector test and that Fenton also directed Berkheimer to dismiss her. *Id.* at ¶¶ 19, 22.

III. Discussion

Berkheimer moves for dismissal of Counts III-IX of the Amended Civil Complaint (hereinafter "complaint").[2] Berkheimer argues that the allegations fail to give rise to the claims. The various arguments are discussed sequentially.[3]

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[1] A criminal complaint was brought against Mobley for refusing to cooperate in the audit. *Id.* at ¶ 23. Radicke's amended complaint states that District Justice Joanne V. Kline dismissed the case because she found that the audit was politically motivated and illegal. *Id.* Neither party has provided a copy of District Justice Kline's decision.

[2] Counts I and II pertain exclusively to defendant Fenton. Am. Compl. ¶¶ 29, 42.

[3] Berkheimer additionally argues that the court lacks subject matter jurisdiction over Radicke's claims, that Radicke does not have standing to bring her claims, that Radicke's pleadings are not sufficiently specific, that there are no grounds for punitive damages, and that the Township of Bristol is a necessary party under Rules 12(b)(7) and 19. These arguments are

A. Counts III & IV

Count III claims that Berkheimer violated Radicke's First Amendment speech protections by discharging Radicke in retaliation for her disclosure. Am. Compl. at ¶ 53. The First Amendment applies to private parties in certain circumstances. Specifically, the First Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment. *See, e.g., Bigelow v. Virginia*, 421 U.S. 809, 811 (1975). The clause prohibits only actions that can fairly be attributed to the state. *See, e.g., Blum v. Yaretsky*, 457 U.S. 991, 1002 (1982); *NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988)("As a general matter the protections of the Fourteenth Amendment do not extend to private conduct abridging individual rights."). Hence, Berkheimer must comply with the strictures of the First Amendment to the extent that Berkheimer is a state actor.

Berkheimer argues that its discharge of Radicke is not a state action. Defs.' Mem. at 10-14. But a private party may be deemed a state actor where the party acts at the direction of or in concert with a state official. *See, e.g., Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970);

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without merit.

The court has federal question jurisdiction over Radicke's constitutional claims and has supplemental jurisdiction over the state claims. *See, e.g.,* 28 U.S.C. §§ 1331, 1343, 1367. Radicke's complaint sufficiently alleges injury-in-fact, causation, and redressability. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Anjelino v. the New York Times Co.*, 200 F.3d 73, 88 (3d Cir. 1999). And it is plain that the complaint meets the notice pleading standard. *See, e.g., Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993). Drawing all reasonable inferences in Radicke's favor, ¶¶ 17-23 of the complaint adequately establish grounds for punitive damages, albeit as an element of damages and not as a separate count.

Finally, Berkheimer appears to believe that without the Township as a defendant, Berkheimer would not be able to cross-claim against Mayor Fenton and would not be able to hold the Township liable for any loss Berkheimer suffers in this action. Berkheimer offers no legal reasons to justify these beliefs, and therefore the court rejects Berkheimer's argument.

McKeesport Hosp. v. Accreditation Council for Graduate Med. Educ., 24 F.3d 519 (3d Cir. 1994); *Krynicky v. Univ. of Pittsburgh*, 742 F.2d 94, 101 (3d Cir. 1984) (elaborating joint participant test). The complaint alleges that Mayor Fenton, a state official, directed Berkheimer to terminate Radicke's employment. Assuming that this allegation is correct and drawing all reasonable inferences from this allegation, Berkheimer is plainly a state actor with respect to Radicke's termination.

Second, Berkheimer argues that Radicke's disclosure of the office memo is not protected speech. Defs.' Mem. at 15. Berkheimer and Radicke both suggest that the approach taken by *Pickering v. Board of Educ.*, 391 U.S. 563, 572 (1968), is appropriate. Defs.' Mem. at 14; Pl.'s Mem. 8-9. Under this approach, "[i]n determining whether the speech of an employee deserves constitutional protection, [the court] must strike a 'balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pro v. Donatucci*, 81 F.3d 1283, 1287 (3d Cir. 1996) (quoting *Pickering*, 391 U.S. at 568). The court must determine whether Radicke's disclosure is speech related to a matter of public concern and must weigh Radicke's interest in her disclosure against Berkheimer's interest in promoting efficiency among its employees. *See id.* at 1288. Furthermore, the complaint must show that the disclosure "was a substantial or motivating factor in the alleged retaliatory action." *Id.*

A public employee's speech is protected when it relates "to any matter of political, social, or other concern to the community." *Connick v. Myers*, 461 U.S. 138, 146 (1983); *accord Swineford v. Snyder County*, 15 F.3d 1258, 1274 (3d Cir. 1994) (finding that disclosure of

governmental improprieties was quite plainly a matter of public concern). Here Radicke specifically told Mobley about alleged governmental improprieties – namely a politically-motivated audit. Drawing all inferences in Radicke's favor, her disclosure is protected speech. Furthermore, the complaint provides no information concerning any inefficiencies for Berkheimer resulting from this disclosure. Accordingly, I, at this stage, strike the balance between Radicke's constitutional interests and Berkheimer's efficiency interests in Radicke's favor. *See Czurlanis v. Albanese*, 721 F.2d 98, 103 (3d Cir. 1983) (striking balancing in favor of employee who disrupted office affairs by accurately exposing corruption.). Finally, reading the allegations in the light most favorable to Radicke, her disclosure directly led Berkheimer to discharge her.

Count IV of the complaint alleges that Berkheimer and Fenton conspired to deny Radicke her constitutional rights as enforced under § 1983. Am. Compl. at ¶ 60. Berkheimer argues that the complaint fails to allege the elements of a conspiracy sufficient for enforcement under § 1983. Defs.' Mem. at 17-18. However, "[i]f a defendant's conduct satisfies the state-action requirement of the Fourteenth Amendment, that conduct is also action under color of state law and will support a suit under § 1983." *West v. Atkins*, 487 U.S. 42 (1988). Discussion above establishes that Berkheimer is a state actor for the purposes of this motion to dismiss, and therefore it is unnecessary to independently establish § 1983's color-of-law requirement.

B. Counts V & VI

Count V alleges that Berkheimer wrongfully discharged Radicke for having made a

constitutionally protected disclosure. Am. Compl. at ¶ 68.[4] Count III, discussed above, is a constitutional claim, while Count V is fashioned as a state law tort claim arising from the constitutional violation. Berkheimer claims that Count V does not express a recognized cause of action in Pennsylvania. Defs.' Mem. at 18. After examining state law and Third Circuit interpretations of state law, this court concludes that one in Radicke's position cannot bring a state law claim for wrongful discharge based on a disclosure allegedly protected by the First Amendment.[5]

Pennsylvania law has long recognized the doctrine of employment-at-will. *See McLaughlin v. Gastrointestinal Specialists, Inc.,* 750 A.2d 283, 313 (Pa. 2000); *Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611, 614 (3d Cir. 1992). However, the Pennsylvania Supreme Court also recognizes that "[t]he employer's privilege to dismiss an employee with or without cause is not absolute [] and may be qualified by the dictates of public policy." *Shick v. Shirey,* 716 A.3d 1231, 1233 (Pa. 1998); *accord McLaughlin*, 750 A.3d at 313. However, the court has also made clear that this exception to employment-at-will is quite narrow: "[an] employee [is] entitled to bring a cause of action for a termination of [an at-will employment relationship] only in the most

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[4] It is clear from the text of the complaint that Radicke asserts that her First Amendment interests provide a basis for her claim of wrongful discharge. For the reasons discussed in the text of the opinion, her claim will be dismissed. Radicke appears to believe that her complaint also asserts that her conduct as a whistleblower provides the basis for her claim of wrongful discharge. Radicke Mem. at 16. The complaint makes no such claim. And even otherwise, as discussed in section III.C., Radicke does not allege facts sufficient to state a claim under the whistleblower statute.

[5] Because the law on this issue is the subject of reasonable dispute, the dismissal of this claim is without prejudice to the right of the plaintiff to seek to reassert it in the event of further clarification by the Pennsylvania Supreme Court, the United States Supreme Court, or the Third Circuit.

limited of circumstances where the termination implicates a clear mandate of public policy in this Commonwealth." *McLaughlin*, 750 A.3d at 313. Furthermore, the court has specified that although federal law may embody state public policy, federal law in and of itself does not identify the state's public policy. *See id.* 313, 315-16 ("Implicit in the previous determinations of [the Pennsylvania Supreme Court] is that [the public policy of the state is determined] by examining the precedent within Pennsylvania, looking to [the state's] Constitution, court decisions and statutes promulgated by [the state's] legislature."). Thus the Pennsylvania Supreme Court's most recent pronouncement on the issue emphasizes that it is not federal policy but Pennsylvania policy which must be interpreted and specifically held that federal statutes or regulations do not create Pennsylvania policy. *See id.* at 320 ("We believe that it is a mistake to baldly point to a federal statute or administrative regulation and, without more, proclaim this as the public policy of the Commonwealth, such that every violation of any federal code, or statute becomes the basis for seeking a common law remedy against an employer.")

Radicke's claim in Count V must, therefore, be premised on the proposition that the First Amendment embodies a public policy of the state. Compl. at 68. The Third Circuit, in *Novosel v. Nationwide Ins. Co.*, 721 F.2d 892, 898-99 (1983), predicted that Pennsylvania law would recognize that the First Amendment embodies a significant and recognized public policy. *Novosel* was, however, decided without the benefit of *McLaughlin*, which clearly calls the prediction into question. Moreover, a review of state case law fails to reveal approval of the *Novosel* approach. *Cf. McLaughlin*, 750 A.2d at 318 (no mention of *Novosel* in discussion of instances where Pennsylvania recognizes state policy embodied in federal law). Even the Third Circuit has questioned *Novosel's* prescience, *see Borse*, 963 F.2d at 614; *cf. Novosel*, 721 F.2d at

903 (statement of now Chief Judge Becker sur rehearing *en banc*, characterizing *Novosel* as an extremely broad exception to at-will employment and as unlikely to gain acceptance by the Pennsylvania courts). Finally, the Third Circuit has expressly refused to extend *Novosel*. *See Borse*, 963 F.2d at 620. I, of course, cannot ignore *Novosel's* teaching until it is overruled or more specifically limited by the Third Circuit or the Pennsylvania Supreme Court. Fortunately, I need not ascertain *Novosel's* vitality, since state law and predictions of state law otherwise rule out Radicke's claim.

"It is well-settled that [Pennsylvania law does not recognize] a separate common law action for wrongful discharge where specific statutory remedies are available." *Jacques v. Akzo Int'l Salt, Inc.*, 619 A.2d 748, 753 (Pa. Super. 1993); *accord Bruffett v. Warner Communications*, 692 F.2d 910, 919-20 (3d Cir. 1982). Furthermore, "it is the existence of the remedy, not the success of the statutory claim, which determines preemption." *Id.* Here, as discussed above, Radicke has remedies available under 42 U.S.C. § 1983, the statute under which Radicke brings Count III of her complaint. Although the Pennsylvania courts have not directly held that remedies under § 1983 preempt the availability of common law action for wrongful discharge, the Pennsylvania Supreme Court has recognized, in dicta, that the availability of remedies for discrimination under federal statutes can preempt the availability of the wrongful discharge action. *See Clay v. Advanced Computer Applications*, 559 A.2d 917, 921 n 2 (Pa. 1989). I see no reason not to read *Bruffett* and *Jacques* as expressing a general proposition concerning the effect of the availability of alternate remedies. Accordingly, the availability of § 1983 remedies for Radicke's First Amendment claim preempts her claim of wrongful discharge based on the alleged violation of her First Amendment rights.

Finally, in the event that this court were ultimately to find that Berkheimer is not a state actor and therefore that § 1983 remedies were not available to Radicke, the dismissal of Count V would still be required. The Third Circuit predicts that "the Pennsylvania Supreme Court would not look to the First and Fourth Amendments as sources of public policy where there is not state action." *Borse*, 963 F.2d at 620. Based on the discussion above and based on *Borse*, dismissal of Count V is appropriate regardless or whether or not Berkheimer is a state actor.

In Count VI of the complaint, Radicke reasserts the claim of wrongful discharge but bases it on Berkheimer's conditioning her employment on taking a polygraph examination. Under Pennsylvania law, "[a] person is guilty of a misdemeanor. . . if he requires as a condition for employment or continuation of employment that an employee or other individual shall take a polygraph test or any form of a mechanical or electrical lie detector test." *See* 18 Pa.C.S.A. § 7321(a) (2000). Furthermore, the Third Circuit predicts that this statute is a declaration of public policy and that an employee discharged for refusing to submit to a polygraph has a cause of action under Pennsylvania law for wrongful discharge. *See Polsky v. Radio Shack*, 66 F.2d 824, 827-28 (3d Cir. 1981); *Perks v. Firestone Tire & Rubber Co.*, 611 F.2d 1363, 1366 (3d Cir. 1979). The allegations can, when drawing inferences in Radicke's favor, demonstrate that Berkheimer conditioned the continuation of Radicke's employment on her agreeing to take a polygraph examination. Count VI will, therefore, not be dismissed.

C. Count VII

Count VII alleges that Berkheimer violated Pennsylvania's whistleblower statute. Am. Compl. at ¶ 80. Under the law, an employer may not discharge an employee because the employee makes a "good faith report" to the employer or to an "appropriate authority" about "an

instance of wrongdoing or waste." 43 P.S. § 1423 (Supp. 2000). "Appropriate authority" is defined as "[a] federal, state or local government body, agency or organization having jurisdiction over criminal law enforcement, regulatory violations, professional conduct or ethics, or waste; or a member, officer, agent, representative or supervisory employee of the body, agency or organization." 43 P.S. § 1422. Radicke reported Berkheimer's wrongdoing to Mobley, who is not an "appropriate authority." Also, the complaint does not allege that Radicke made any disclosure of the wrongdoing to an appropriate authority or to Berkheimer. Accordingly, Count VII fails to state a claim under the whistleblower statute and will be dismissed.

D. Count VIII

Count VIII claims that Berkheimer's termination of Radicke amounts to a violation of Berkheimer's duty of good faith and fair dealing and was therefore in violation of public policy. Am. Compl. at ¶ 85. Berkheimer argues that it does not owe Radicke a duty of good faith and fair dealing. Defs.' Mem. at 25. Under Pennsylvania law, contractees must fairly and in good faith perform and enforce their contracts. *See, e.g., Donahue v. Federal Express Corp.*, 753 A.2d 238, 242 (Pa. Super. 2000). However, Pennsylvania law recognizes no action for wrongful discharge based upon breach of the duty of good faith and fair dealing in an at-will employment contract. *See Bruffett v. Warner Comm., Inc.*, 692 F.2d 910, 913 (3d Cir. 1982); *McDaniel v. American Read Cross*, 58 F.Supp.2d 628, 634 (W.D. Pa. 1999) ("Although the duty of good faith and fair dealing exists in an at-will employment contract, 'there is no bad faith when an employer discharges an at-will employee for good reason, bad reason, or no reason at all, as long as no statute or public policy is implicated." (quotation omitted)). Consequently, Count VIII will be dismissed.

E. Count IX

Count IX alleges that Berkheimer intentionally inflicted emotional distress on Radicke. Am. Compl. at ¶ 87. Berkheimer correctly argues that the allegations do not substantiate the claimed tort. Defs.' Mem. at 27. To sustain a claim for intentional infliction of emotional distress, a plaintiff must show conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be intolerable in a civilized community." *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1487 (3d Cir. 1990). "At the outset, it must be recognized that it is extremely rare to find conduct in the employment context that will rise to the level of outrageousness necessary to provide a basis for recovery for the tort of intentional infliction of emotional distress." *Cox v. Keystone*, 861 F.2d 390, 395 (3d Cir. 1988). "Described another way, 'it has not been enough that the defendant has acted with intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been charactered by 'malice,' or a degree of aggravation that would entitle the plaintiff to punitive damages for another tort.'" *Hoy v. Angelone*, 720 A.2d 745, 754 (Pa. 1998) (quoting Restatement (Second) of Torts § 46, comment d). Retaliatory termination for reporting an employer's wrongful conduct does not, without more, demonstrate the requisite level of outrageousness. *See McLaughlin v. Gastrointestinal Specialists, Inc.*, 696 A.2d 173, 176 (Pa. Super. 1997), *aff'd*, 750 A.2d 283 (Pa. 2000). As the allegations do not evidence the requisite conduct, Count XI will be dismissed.

III. Conclusion

Radicke's complaint adequately alleges that Berkheimer acted jointly with Mayor Fenton to deprive Radicke of her First Amendment Right to freedom of speech and that Berkheimer wrongfully terminated her employment because she refused to take a polygraph exam. Accordingly, Counts III, IV, and VI survive this motion to dismiss. Radicke's other grounds for claiming wrongful termination are not recognized by state law. Furthermore, the disclosure at issue was not made to an "appropriate authority" or to Berkheimer as required for protection under the whistleblower statute. Finally, Berkheimer's alleged conduct is not sufficiently outrageous under state tort law to constitute intentional infliction of emotional distress. Accordingly, Counts V, VII, VIII, and IX will be dismissed.

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Order

And now, this day of March, 2001, upon consideration of the Amended Complaint (Doc. 5); the defendants Berkheimer Associates and H.A. Berkheimer, Inc.'s motion to dismiss and memorandum in support therein (Doc. 7); and the plaintiff's response (Docs. 8); it is hereby ORDERED that Counts V, VII, and VIII are dismissed. It is also ORDERED that Count IX is dismissed with respect to the Berkheimer defendants. The balance of the Berkheimer defendants' motion is denied.

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William H. Yohn, Jr., Judge