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

STEVEN ROMIG,	)	
	)	Civil Action
Plaintiff	)	No. 06-CV-05309
	)	
vs.	)	
	)	
NORTHAMPTON COUNTY DEPARTMENT OF CORRECTIONS;	)	
COUNTY OF NORTHAMPTON;	)	
NORTHAMPTON COUNTY CORRECTIONS OFFICER'S DISTRICT COUNCIL 88 AND LOCAL 2549 AMERICAN FEDERATION OF STATE, COUNTY, LOCAL AND MUNICIPAL EMPLOYEES AFL-CIO; and	)	
JOSE GARCIA, an Adult Individual,	)	
	)	
Defendants	)	

O R D E R

NOW, this 21st day of March, 2008, upon consideration of the following motions and documents:

(1) Motion of Certain Defendants to Dismiss in Part Plaintiff's First Amended Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(6), which motion was filed July 10, 2007 on behalf of defendants Northampton County Department of Corrections, County of Northampton, and Jose Garcia, together with

Response to Motion of Certain Defendants to Dismiss in Part Plaintiff's First Amended Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(6), which response was filed July 24, 2007 on behalf of plaintiff; and

(2) Defendant Northampton County Corrections Officer's District Council 88, Local 2549, American Federation of State, County, Local and Municipal Employees, AFL-CIO's Motion to Dismiss for Failure to State a Claim Pursuant to Rule 12(b)(6) of Federal Rule of Civil Procedure, or, in the Alternative, Motion for

Summary Judgment Pursuant to Rule 56 of the Federal Rules of Civil Procedure, which motion was filed July 13, 2007, together with

> Plaintiff's Response to Defendant Northampton County Corrections Officer's District Council 88, Local 2549, American Federation of State, County, Local and Municipal Employees, AFL-CIO's Motion to Dismiss for Failure to State a Claim Pursuant to Rule 12(b)(6) of Federal Rule of Civil Procedure, or, in the Alternative, Motion for Summary Judgment Pursuant to Rule 56 of the Federal Rules of Civil Procedure, which response was filed July 26, 2007 on behalf of plaintiff;

upon consideration of the briefs of the parties; and for the reasons expressed in the accompanying Opinion,

IT IS ORDERED that the Motion of Certain Defendants to Dismiss in Part Plaintiff's First Amended Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(6) is granted in part and denied in part.

IT IS FURTHER ORDERED that Defendant Northampton County Corrections Officer's District Council 88, Local 2549, American Federation of State, County, Local and Municipal Employees, AFL-CIO's Motion to Dismiss for Failure to State a Claim Pursuant to Rule 12(b)(6) of Federal Rule of Civil Procedure, or, in the Alternative, Motion for Summary Judgment Pursuant to Rule 56 of the Federal Rules of Civil Procedure is granted in part and dismissed in part as moot.

IT IS FURTHER ORDERED that to the extent defendant Northampton County Corrections Officer's District Council 88, Local 2549, American Federation of State, County, Local and Municipal Employees, AFL-CIO's ("Union") motion seeks dismissal of Count IV of plaintiff's First Amended Complaint filed July 3, 2007, the motion is granted.

IT IS FURTHER ORDERED that because defendant Union's motion to dismiss has been granted, its alternative motion for summary judgment is dismissed as moot.

IT IS FURTHER ORDERED that all claims against the Northampton County Department of Corrections are dismissed.

IT IS FURTHER ORDERED that Counts II, IV, VI and VII of plaintiff's First Amended Complaint are dismissed in their entirety.

IT IS FURTHER ORDERED that Count III of plaintiff's First Amended Complaint is dismissed against the County of Northampton.

IT IS FURTHER ORDERED that to the extent Count V of plaintiff's First Amended Complaint alleges a claim for wrongful termination, Count V is dismissed.

IT IS FURTHER ORDERED that Northampton County Department of Corrections and Northampton County Corrections Officer's District Council 88, Local 2549, American Federation of

State, County, Local and Municipal Employees, AFL-CIO are dismissed as defendants in this matter.

IT IS FURTHER ORDERED that in all other respects not inconsistent with this Order and the accompanying Opinion, the Motion of Certain Defendants to Dismiss in Part Plaintiff's First Amended Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(6) is denied.

BY THE COURT:

/s/ James Knoll Gardner
James Knoll Gardner
United States District Judge

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

STEVEN ROMIG, Plaintiff vs. NORTHAMPTON COUNTY DEPARTMENT OF CORRECTIONS; COUNTY OF NORTHAMPTON; NORTHAMPTON COUNTY CORRECTIONS OFFICER'S DISTRICT COUNCIL 88 AND LOCAL 2549 AMERICAN FEDERATION OF STATE, COUNTY, LOCAL AND MUNICIPAL EMPLOYEES AFL-CIO; and JOSE GARCIA, an Adult Individual, Defendants	)	Civil Action No. 06-CV-05309

* * *

APPEARANCES:

ERV D. McLAIN, ESQUIRE
On behalf of Plaintiff

DAVID J. MacMAIN, ESQUIRE
ROBERT J. FITZGERALD, EQUIRE
On behalf of Defendants Northampton County Department of Corrections, County of Northampton, and Jose Garcia

JOHN R. BIELSKI, ESQUIRE
On behalf of Defendant Northampton County Corrections Officer's District Council 88 and Local 2549 American Federation of State, County, Local and Municipal Employees AFL-CIO

* * *

O P I N I O N

JAMES KNOLL GARDNER,
United States District Judge

This matter is before the court on the Motion of Certain Defendants to Dismiss in Part Plaintiff's First Amended Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(6), which motion was filed July 10, 2007 on behalf of Defendants Northampton County Department of Corrections ("Department of Corrections"), County of Northampton ("County"), and Jose Garcia (collectively "County defendants"). Also before the court is Defendant Northampton County Corrections Officer's District Council 88, Local 2549, American Federation of State, County, Local and Municipal Employees, AFL-CIO's ("Union") Motion to Dismiss for Failure to State a Claim Pursuant to Rule 12(b)(6) of Federal Rule of Civil Procedure, Or, in the Alternative, Motion for Summary Judgment Pursuant to Rule 56 of the Federal Rules of Civil Procedure, which motion was filed July 13, 2007.

For the reasons expressed below, I grant in part and deny in part the County defendants' motion. I also grant in part and dismiss in part as moot the Union's motion.[1]

Specifically, I dismiss from the First Amended Complaint all claims against the Department of Corrections and

[1] As discussed below, because I grant the Union's motion to dismiss, I do not consider its alternative argument for summary judgment. Therefore, to the extent the Union's motion seeks summary judgment, the motion is dismissed as moot.

the Union. Count II of the First Amended Complaint (intentional infliction of emotional distress) is dismissed in its entirety. Count III (slander) is dismissed against the County. Count IV (breach of fiduciary obligation) is dismissed in its entirety. Count V (breach of contract/wrongful termination) is dismissed to the extent it alleges a claim for wrongful termination. Counts VI and VII are dismissed in their entirety.

The claims remaining in this matter, therefore, are as follows: Count I (violation of the Fourteenth Amendment to the United States Constitution pursuant to 42 U.S.C. § 1983) against the County; Count III (slander) against Jose Garcia; and Count V (to the extent it alleges breach of contract) against the County.

JURISDICTION AND VENUE

Jurisdiction in this case is based upon federal question jurisdiction pursuant to 28 U.S.C. § 1331. The court has supplemental jurisdiction over plaintiffs' pendent state law claims. See 28 U.S.C. § 1367. Venue is proper pursuant to 28 U.S.C. § 1391(b) because the events giving rise to plaintiff's claims allegedly occurred in Northampton County, Pennsylvania, which is located within this judicial district.

PROCEDURAL HISTORY

On July 20, 2006, plaintiff initiated this action by filing a Praecipe for Writ of Summons in the Court of Common Pleas of Northampton County, Pennsylvania. On November 9, 2006

plaintiff filed an eight-count Complaint in the Northampton County Court of Common Pleas against the Department of Corrections, Northampton County Prison, Northampton County Council, the Union, and Jose Garcia.[2]

The Complaint alleged violations of the Fourteenth Amendment pursuant to 42 U.S.C. § 1983 (Count I), violations of the Constitution of the Commonwealth of Pennsylvania (Count II), intentional infliction of emotional distress (Count III), slander (Count IV), breach of fiduciary obligation (Count V), breach of contract/wrongful termination (Count VI), punitive damages (Count VII), and violation of the Pennsylvania whistleblower law, 43 Pa.C.S.A. § 1421 (Count VIII). Based on plaintiff's assertion of a federal claim, all defendants filed a Notice of Removal on December 4, 2006.

On December 11, 2006 the Union filed a motion to dismiss three counts of plaintiff's Complaint. Plaintiff responded to the Union's motion on January 2, 2007, seeking leave to amend his Complaint. On January 12, 2007, the County defendants, Northampton County Council and Northampton County Prison filed a motion to dismiss part of plaintiff's Complaint. Plaintiff responded on January 26, 2007, again seeking leave to amend his Complaint.

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[2] As discussed below, on July 3, 2007, plaintiff filed his First Amended Complaint. The First Amended Complaint does not name the Northampton County Prison and Northampton County Council as defendants. Therefore, they are no longer listed in the caption as defendants.

By Orders dated June 11, 2007, I granted plaintiff's requests to amend his Complaint and set a deadline of June 27, 2007 for him to do so. Plaintiff filed his First Amended Complaint electronically, in error, on June 27, 2007, and again by paper copy on July 3, 2007.[3]

The seven-count First Amended Complaint names the County defendants and the Union as defendants. It alleges violation of the Fourteenth Amendment to the United States Constitution pursuant to 42 U.S.C. § 1983 (Count I), intentional infliction of emotional distress (Count II), slander (Count III), breach of fiduciary obligation (Count IV), breach of contract/wrongful termination (Count V), punitive damages (Count VI), and violation of the Pennsylvania whistleblower law, 43 Pa.C.S.A. § 1421 (Count VII).

On July 10, 2007 the County defendants filed their motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The Union filed its motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) on July 13, 2007. Plaintiff

[3] Rules 5.1.2(2) and 5.1.2(16) of the Rules of Civil Procedure for the United States District Court for the Eastern District of Pennsylvania require that all initial papers, including an amended complaint, must be filed by paper copy, not electronically. Plaintiff initially filed his First Amended Complaint electronically on June 27, 2007, the deadline for amending his Complaint, and then fixed the error by filing his First Amended Complaint by paper copy on July 3, 2007. Because plaintiff attempted to timely file his First Amended Complaint, and because defendants do not challenge the timeliness of the First Amended Complaint, I deem the First Amended Complaint timely filed.

responded to defendants' motions on July 24, 2007 and July 26, 2007, respectively.

STANDARD OF REVIEW

A claim may be dismissed under Federal Rule of Civil Procedure 12(b)(6) for "failure to state a claim upon which relief can be granted". A 12(b)(6) motion requires the court to examine the sufficiency of the complaint. Conley v. Gibson, 355 U.S. 41, 45, 78 S.Ct. 99, 102, 2 L.Ed.2d 80, 84 (1957) (abrogated in other respects by Bell Atlantic Corporation v. Twombly, ___ U.S. ___, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

Ordinarily, a court's review of a motion to dismiss is limited to the contents of the complaint, including any attached exhibits. See Kulwicki v. Dawson, 969 F.2d 1454, 1462 (3d Cir. 1992). However, evidence beyond a complaint which the court may consider in deciding a 12(b)(6) motion to dismiss includes public records (including court files, orders, records and letters of official actions or decisions of government agencies and administrative bodies), documents essential to plaintiff's claim which are attached to defendant's motion, and items appearing in the record of the case. Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, nn.1-2 (3d Cir. 1995).

Except as provided in Federal Rule of Civil Procedure 9, a complaint is sufficient if it complies with Rule 8(a)(2). That rule requires only "a short and plain

statement of the claim showing that the pleader is entitled to relief" in order to give the defendant fair notice of what the claim is and the grounds upon which it rests. Twombly, ___ U.S. at ___, 127 S.Ct. at 1964, 167 L.Ed.2d at 940.

Additionally, in determining the sufficiency of a complaint, the court must accept as true all well-pled factual allegations and draw all reasonable inferences therefrom in the light most favorable to the non-moving party. Worldcom, Inc. v. Graphnet, Inc., 343 F.3d 651, 653 (3d Cir. 2003). Nevertheless, a court need not credit "bald assertions" or "legal conclusions" when deciding a motion to dismiss. In re Burlington Coat Factory Securities Litigation, 114 F.3d 1410, 1429-1430 (3d Cir. 1997).

In considering whether the complaint survives a motion to dismiss, both the District Court and the Court of Appeals review whether it "contain[s] either direct or inferential allegations respecting all the material elements necessary to sustain recovery under *some* viable legal theory." Twombly, ___ U.S. at ___, 127 S.Ct. at 1969, 167 L.Ed.2d at 944 (quoting Car Carriers, Inc. v. Ford Motor Company, 745 F.2d 1101, 1106 (7th Cir. 1984) (emphasis in original).

FACTS

Based upon the averments in plaintiff's First Amended Complaint, which I must accept as true under the foregoing standard of review, the pertinent facts are as follows.

Plaintiff Steven Romig worked for approximately 15 years as a Corrections Officer at Northampton County Prison and was employed by the Department of Corrections.[4] During his employment at the prison, plaintiff was a member in good standing of the Union.[5] A collective bargaining agreement was in effect between the County and the Union from January 1, 2000 until December 31, 2005.[6]

On July 15, 2003 plaintiff was at work and in charge of securing the kitchen and storage room area at the prison.[7] At approximately 7:45 a.m. an inmate, Donald Dillard, was in the "chow line" and, having obtained a tray and utensils, confronted plaintiff, calling him "mother fucker" and "dickhead." Mr. Dillard also brandished a knife at plaintiff.[8]

Using a pressure point technique he had learned in the course of his training as a Corrections Officer, plaintiff subdued Mr. Dillard by applying pressure to his jaw.[9] Approximately 100 inmates and numerous prison guards witnessed the incident, which was captured on closed-circuit camera.[10]

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[4] First Amended Complaint, paragraph 6.

[5] First Amended Complaint, paragraph 26.

[6] First Amended Complaint, paragraph 27.

[7] First Amended Complaint, paragraph 9.

[8] First Amended Complaint, paragraph 10.

[9] First Amended Complaint, paragraph 11.

[10] First Amended Complaint, paragraph 13.

As a result of the incident with Mr. Dillard, plaintiff was suspended without pay from September 19, 2003 until the date of his jury trial in November 2004, and prison officials ordered plaintiff to be handcuffed and removed from the prison, in front of inmates and co-workers, on September 19, 2003.[11] On September 22, 2003, plaintiff was charged with simple assault by the Northampton County District Attorney's Office.[12] Plaintiff pled not guilty and, on November 14, 2004, he was acquitted of the charge by a jury.[13]

After plaintiff's acquittal, prison officials would not allow him to return to work unless he obtained a psychological evaluation to assess his "anger management ability and capability to responsibly return to duties as a corrections officer."[14] The prison did not specify that plaintiff was required to use a particular psychologist.[15]

Plaintiff obtained a report from his treating psychiatrist, Abel A. Gonzalez, M.D., stating that plaintiff was mentally fit to return to work.[16] By correspondence dated July 22, 2005 from Assistant Northampton County Solicitor Charles

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[11] First Amended Complaint, paragraphs 16-17.

[12] First Amended Complaint, paragraph 14.

[13] First Amended Complaint, paragraph 15.

[14] First Amended Complaint, paragraph 18.

[15] First Amended Complaint, paragraph 21.

[16] First Amended Complaint, paragraphs 19, 23.

W. Gordon, plaintiff's employment was terminated because he had failed to obtain a psychological report from psychologist Faust Ruggiero.[17]

During the course of his employment at the prison, plaintiff was a member in good standing of the Union. A collective bargaining agreement between the County and Union was in effect from January 1, 2000 to December 31, 2005.[18] The collective bargaining agreement prohibits discharge or discipline without just cause of any employee who has completed his probationary period. In the agreement, the employer agreed to discipline employees in such a manner so as not to embarrass the employee before the public or other employees.[19] The employer also agreed to comply with all federal and state laws and regulations in operation of the prison.[20]

Plaintiff alleges that the prison officials who investigated the July 15, 2003 incident which led to plaintiff's termination, specifically Jose Garcia and William Beers, were "corrupt, bias [sic], abusive, discriminatory and patently unfair" toward plaintiff.[21] Specifically, defendant Garcia was

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[17] First Amended Complaint, paragraph 20.

[18] First Amended Complaint, paragraphs 26-27.

[19] First Amended Complaint, paragraph 28; First Amended Complaint, Exhibit A (collective bargaining agreement), article 31, sections 9, 14.

[20] First Amended Complaint, paragraph 30; collective bargaining agreement, article 31, section 13.

[21] First Amended Complaint, paragraph 31.

the individual acting on behalf of the County who conducted the internal investigation regarding the July 15, 2003 altercation between plaintiff and inmate Donald Dillard.

In conducting this investigation, defendant Garcia directed Corrections Officers under his control to misrepresent, falsify and lie to other officers and supervisors. More specifically, defendant Garcia directed Corrections Officers to falsify incident reports, file supplemental false reports and destroy incident reports. Mr. Garcia yelled, screamed, and berated plaintiff, calling him a "fucking liar" and "the type of person who gave the Department a bad name". Mr. Garcia also uttered and made other "false, feigned, scandalous and malicious" words and statements regarding plaintiff.[22]

As a result, plaintiff has incurred extreme mental anguish, emotional distress, loss of income, humiliation, defamation and loss of life's pleasures.[23] Moreover, he avers that his representation "by the Union under the auspices of Alfred Crivellaro, shop steward and then President of Local 2549 and other Union officials was deficient to such an extent as to have been non-existent."[24]

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[22] First Amended Complaint, paragraph 44.

[23] First Amended Complaint, paragraphs 34, 46. Plaintiff also alleges that the July 15, 2003 incident resulting in the termination of his employment "contributed to marital difficulties which resulted in separation from his wife and an impending divorce." First Amended Complaint, paragraph 33.

[24] First Amended Complaint, paragraph 33.

On several occasions during his employment, plaintiff reported to prison and Department of Corrections officials regarding conditions in the prison kitchen area, including raw sewage dripping from ceiling pipes onto the food preparation area.[25] Plaintiff was advised not to be concerned about the condition and not to further investigate or make public the condition.[26] Plaintiff contacted the Department of Labor and Industry regarding the condition, and prison officials became aware that he had done so.[27]

DISCUSSION

County Defendants' Motion to Dismiss

First, I address the Motion of Certain Defendants to Dismiss in Part Plaintiff's First Amended Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(6), which motion was filed July 10, 2007 on behalf of the County defendants. The motion requests dismissal of (1) all claims against the Department of Corrections as duplicative, (2) Counts II, V, VI and VII of the First Amended Complaint in their entirety and (3) Count III against the County. For the following reasons, I grant in part and deny in part the County defendants' motion to dismiss.

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[25] First Amended Complaint, paragraphs 86-87.

[26] First Amended Complaint, paragraph 88.

[27] First Amended Complaint, paragraphs 98-90. Although plaintiff does not specify, I presume he notified the Pennsylvania Department of Labor and Industry.

Initially, the County defendants argue that because plaintiff asserts identical claims against the County and the Department of Corrections, all claims against the Department of Corrections are unnecessary and should be dismissed as duplicative. Specifically, the claims alleged against both the County and the Department of Corrections are a § 1983 procedural due process claim (Count I), intentional infliction of emotional distress (Count II), slander (Count III), breach of contract/wrongful termination (Count V), punitive damages (Count VI) and violation of the Pennsylvania whistleblower law (Count VII).

In Section 1983 actions, police departments cannot be sued in conjunction with municipalities, because the police department is merely an administrative arm of the local municipality, and is not a separate judicial entity. Padilla v. Township of Cherry Hill, 110 Fed.Appx. 272, 278 (3d Cir. 2004) (non-precedential) (quoting DeBellis v. Kulp, 166 F.Supp.2d 255, 264 (E.D.Pa. 2001) (Van Antwerpen, J.)).

Because the Department of Corrections is merely an administrative arm of the County of Northampton, the local municipality, it is not a proper party on the § 1983 claim. Accordingly, Count I of the First Amended Complaint (violation of the Fourteenth Amendment to the United States Constitution

pursuant to 42 U.S.C. § 1983) is dismissed against the Department of Corrections.

The same logic applies to plaintiff's state-law claims against the County and Department of Corrections. Because the Department of Corrections is an administrative arm of the County, rather than an independent agency, it is not a proper party where plaintiff has alleged identical claims against the County. See Odom v. Borough of Taylor, 2006 WL 401796, at *2 (M.D.Pa. February 21, 2006)(Caputo, J.), which dismissed all claims against a borough police department as an improper party. Accordingly, I dismiss as duplicative Counts II, III, V, VI and VII against the Department of Corrections.

Tort Claims

The County defendants contend that all of plaintiff's tort claims should be dismissed against the County and that one tort claim should be dismissed against defendant Garcia. Plaintiff alleges state-law tort claims in Count II (intentional infliction of emotional distress), Count III (slander) and Count V (wrongful discharge).

The County defendants argue that all of these claims against the County should be dismissed because under the Pennsylvania Political Subdivision Tort Claims Act ("Tort Claims Act"), 42 Pa.C.S.A. § 8541, the County is immune from tort liability. The County defendants also assert, as discussed

below, that Count II should be dismissed in its entirety (including against defendant Jose Garcia) because plaintiff fails to state a claim upon which relief can be granted.

The Tort Claims Act provides:

> Except as otherwise provided in this subchapter, no local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person.

42 Pa.C.S.A. § 8541.

A "local agency" is defined by the Tort Claims Act as a "government unit other than the Commonwealth government." 42 Pa.C.S.A. § 8501.

Plaintiff relies on 42 Pa.C.S.A. § 8550 for the proposition that Tort Claims Act immunity does not apply where an employee has engaged in "willful misconduct." Section 8550 provides:

> In any action against a local agency or employee thereof for damages on account of an injury caused by the act of the employee in which it is judicially determined that the act of the employee caused the injury and that such act constituted a crime, actual fraud, actual malice or willful misconduct, the provisions of sections 8545 (relating to official liability generally), 8546 (relating to defense of official immunity), 8548 (relating to indemnity) and 8549 (relating to limitation on damages) shall not apply.

42 Pa.C.S.A. § 8550.

Section 8550 of the Tort Claims Act governs immunity for individual defendants, not local agencies. See Udujih v. City of Philadelphia, 513 F.Supp.2d 350, 357-358 (E.D.Pa. 2007)

(Pollak, S.J.). Indeed, "although the Tort Claims Act does abrogate immunity for individual employees who commit intentional torts, such abrogation does not extend to the municipality." Id.; see also 42 Pa.C.S.A. § 8545-8550.

Moreover, the County defendants assert that they are immune from tort liability pursuant to § 8541, which is not one of the sections enumerated in § 8550. Accordingly, I conclude that 42 Pa.C.S.A. § 8550 does not apply to plaintiff's tort claims against the County.

Under the Tort Claims Act, therefore, the County has absolute immunity from tort liability except in eight enumerated circumstances set forth in 42 Pa.C.S.A. § 8542, none of which apply to plaintiff's claims of intentional infliction of emotional distress, slander, and wrongful discharge.[28]

Intentional infliction of emotional distress and slander are among the claims against which the Tort Claims Act provides protection to municipal entities. See Udujih, 513 F.Supp.2d at 357-358, which dismisses slander, libel and infliction of emotional distress claims against the City of Philadelphia on the basis of Tort Claims Act immunity.

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[28] 42 Pa.C.S.A. § 8542 permits recovery against a local agency or its employee for injury caused by a "negligent act" that falls into one of eight categories: (1) vehicle liability; (2) care, custody or control of personal property; (3) real property; (4) trees, traffic control and street lighting; (5) utility service facilities; (6) streets; (7) sidewalks; and (8) care, custody or control of animals. 42 Pa.C.S.A. § 8542. Plaintiff does not allege claims of negligence, nor do the facts that form the basis of plaintiff's claims fall into any of these categories.

Therefore, I dismiss Counts II and III of plaintiff's First Amended Complaint against the County.

In addition to alleging his tort claims against the County and Department of Corrections, plaintiff alleges intentional infliction of emotional distress (Count II) and slander (Count III) claims against individual defendant Garcia. The County defendants have not moved to dismiss Count III against Mr. Garcia. However, they argue that Count II should be dismissed in its entirety because, in addition to the County's immunity under the Tort Claims Act, plaintiff has failed to state a claim for intentional infliction of emotional distress.

Because the Tort Claims Act abrogates immunity for government employees who commit intentional torts, see Udujih, supra, defendant Garcia is not entitled to immunity regarding plaintiff's intentional infliction of emotional distress claim. Therefore, I consider the County defendants' argument that plaintiff fails to state a claim for intentional infliction of emotional distress as it relates to individual defendant Garcia.

Under Pennsylvania law, an action for intentional infliction of emotional distress can arise in an employment context where the injury to the employee is caused by harassment which is personal in nature and not a proper part of the

employer-employee relationship. Hoy v. Angelone, 554 Pa. 134,

720 A.2d 745 (1998).

However, a legally cognizable claim for intentional infliction of emotional distress must be based upon conduct that is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society." Hoy, 554 Pa. at 151, 720 A.2d at 754.

"[I]t 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 Carbon Company, 861 F.2d 390, 395 (3d Cir. 1988).

It is generally insufficient to allege 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 characterized by 'malice,' or a degree of aggravation that would entitle plaintiff to punitive damages for another tort." Hoy, 554 Pa. at 151, 720 A.2d at 754.

While loss of employment is unfortunate and often causes severe hardship, it is common, and does not provide a basis for recovery for intentional infliction of emotional distress. Cox, 861 F.2d at 395 (quoting Brieck v. Harbison-Walker Refractories, 624 F.Supp.363, 367 (W.D.Pa. 1985)). Moreover, although "retaliation in the workplace is unlawful and

potentially harmful, not all claims of retaliation surpass the bounds of the everyday." Hannan v. City of Philadelphia, 2007 WL 2407100, at *14 (E.D.Pa. August 22, 2007) (Rufe, J.).

Specifically, plaintiff alleges that defendant Garcia was the individual acting on behalf of the County who conducted the internal investigation regarding the July 15, 2003 altercation between plaintiff and inmate Donald Dillard. Plaintiff alleges that in conducting this investigation, defendant Garcia directed Corrections Officers under his control to misrepresent, falsify and lie to other officers and supervisors, including directing Corrections Officers to falsify incident reports, file supplemental false reports and destroy incident reports.

Plaintiff also contends that defendant Garcia yelled, screamed, and berated plaintiff, calling him a "fucking liar" and "the type of person who gave the Department a bad name". In addition, plaintiff avers that Mr. Garcia uttered and made other "false, feigned, scandalous and malicious" words and statements regarding plaintiff.[29] As a result, plaintiff alleges that he has incurred extreme mental anguish, emotional distress, loss of

[29] First Amended Complaint, paragraph 44.

income, humiliation, defamation and loss of life's pleasures.[30]

Accepting these facts as true, which I must do for purposes of this motion to dismiss, I conclude that as a matter of law, the facts alleged do not rise to the level of being "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society." Hoy, 554 Pa. at 151, 720 A.2d at 754.

Plaintiff alleges that his employment was terminated in a way that caused him emotional distress, and that prison officials conspired to terminate his employment. Although plaintiff's allegations are troubling, they simply do not rise to a level "regarded as atrocious and utterly intolerable in a civilized society." Hoy, 554 Pa. at 151. Accordingly, I also dismiss Count II as to Jose Garcia. As a result, Count II of the First Amended Complaint is dismissed in its entirety.[31]

The County defendants also argue that Count V should be dismissed in its entirety on the basis of Tort Claims Act immunity. Count V is a claim for breach of contract and

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[30] First Amended Complaint, paragraphs 34, 46. Plaintiff also alleges that the July 15, 2003 incident resulting in the termination of his employment "contributed to marital difficulties which resulted in separation from his wife and an impending divorce." First Amended Complaint, paragraph 33.

[31] Earlier in this Opinion I dismissed Count II of the First Amended Complaint against the Department of Corrections (see the subsection County Defendants' Motion to Dismiss) and the County (see the subsection Tort Claims). Here I dismiss Count II against Jose Garcia. The effect of these dismissals is to dismiss Count II in its entirety.

wrongful termination against the County and Department of Corrections. The County defendants, while averring that Count V should be dismissed "in its entirety", substantively address only plaintiff's wrongful termination claim, not his breach of contract claim. I therefore construe the County defendants' motion as seeking to dismiss only the wrongful termination aspect of Count V, and do not consider dismissal of Count V to the extent that it alleges a claim for breach of contract.

The United States Court of Appeals for the Third Circuit has held that Pennsylvania law recognizes a tort of wrongful discharge where the termination of an employee violates a "clear mandate of public policy". Wetherhold v. Radioshack Corporation, 339 F.Supp.2d 670, 673 (E.D.Pa. 2004) (Pratter, J.) (citing, inter alia, Novosel v. Nationwide Insurance Company, 721 F.2d 894 (3d Cir. 1983).

Because I have concluded that the County is immune from tort liability under the Tort Claims Act, I dismiss Count V to the extent that it alleges a claim against the County for wrongful termination. See Asko v. Bartle, 1990 WL 67212, at *1 (E.D.Pa. May 14, 1990) (Broderick, S.J.), which dismisses a pendent state-law claim for wrongful discharge against a county and county board of assessment on the basis of Tort Claims Act immunity. However, I do not dismiss Count V, to the extent it

alleges a claim for breach of contract.

Punitive Damages

The County Defendants argue that Count VI, a claim for punitive damages against the County, should be dismissed in its entirety. It is well settled that municipalities are immune from punitive damages in actions brought under § 1983. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271, 101 S.Ct. 2748, 2761, 69 L.Ed.2d 616, 634 (1981).

Plaintiff concedes that punitive damages are not available against municipal entities. However, plaintiff asserts that he only "inadvertently" excluded defendant Garcia from Count V of the First Amended Complaint. (See plaintiff's response in opposition to County defendants' motion to dismiss, page 13.)

A review of Count VII of plaintiff's original Complaint reveals that individual defendant Garcia was named in plaintiff's initial claim for punitive damages. Nevertheless, because Count VI of the First Amended Complaint does not name defendant Garcia, punitive damages are not recoverable against him as presently pled.

Because punitive damages are not available against the County, I dismiss Count VI in its entirety. However, plaintiff may, by proper motion, seek leave to amend his First Amended Complaint specifically for the purpose of adding a demand for

punitive damages against individual defendant Garcia.

Whistleblower Law Claim

Count VII is a state-law claim alleging that the termination of plaintiff's employment violated the Pennsylvania Whistleblower Law.[32] The County defendants argue that Count VII should be dismissed as time-barred. Section 3(a) of the Whistleblower Law protects employees from retaliation based on the employee's report, or plans to report, to the employer or appropriate authority an instance of wrongdoing.[33]

The Law provides that a plaintiff alleging violation of the Law must bring his action within 180 days after the occurrence of the alleged violation.[34] The 180-day time period is mandatory and must be strictly applied. Street v. Steel Valley Opportunities Industrialized Center, 2006 WL 2172550, at *4 (W.D.Pa. July 31, 2006)(Ambrose, C.J.)(citing O'Rourke v. Pennsylvania Department of Corrections, 730 A.2d 1039, 1042 (Pa.Commw. 1999)).

Plaintiff alleges that defendants' conduct as described in the First Amended Complaint constitutes reprisal in violation of the Whistleblower Law for plaintiff's actions in reporting conditions in the prison kitchen area. Plaintiff avers that his

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[32] Act of Dec. 12, 1986, P.L. 1559, No. 169, §§ 1-8, as amended, 43 P.S. § 1421-1428.

[33] 43 P.S. § 1423(a).

[34] 43 P.S. § 1424(a).

employment was terminated on July 22, 2005 in violation of the Law.[35] Plaintiff does not allege facts to establish any violation of the Whistleblower Law subsequent to the date his employment was terminated.

Therefore, under 43 P.S. § 1424(a), plaintiff was required to bring his action within 180 days of his termination on July 22, 2005, at the latest, or by January 18, 2006. Plaintiff did not initiate this action until July 20, 2006, more than seven months after his January 18, 2006 deadline, when he filed a Praecipe for Writ of Summons in the Court of Common Pleas of Northampton County.

Plaintiff avers that his Whistleblower Law claim is not time-barred because he was required by the collective bargaining agreement to resolve disputes through a compulsory and binding arbitration process. Specifically, plaintiff avers that because he disputed his termination through the grievance process set forth in the collective bargaining agreement, his 180-day statute of limitations under the Whistleblower Law did not begin to run until the final ruling of the arbitrator was issued on December 7, 2006.

Additionally, plaintiff argues that his Whistleblower Law claim relates to a provision of the collective bargaining agreement requiring the County and the Union to comply with all

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[35] First Amended Complaint, paragraph 20.

federal and state laws and regulations in operating the prison. Therefore, plaintiff contends that because he brought his Whistleblower Law claim within the four-year statute of limitations for breach of contract claims, see 42 Pa.C.S.A. § 5525, his Whistleblower Law claim is therefore timely.

Plaintiff cites no legal authority in support of his argument that the statute of limitations for his Whistleblower Law claim did not begin to run until issuance of the arbitrator's final decision in December 2007. Rule 7.1(c) of the Rules of Civil Procedure for the United States District Court for the Eastern District of Pennsylvania requires that every motion "shall be accompanied by a brief containing a concise statement of the legal contentions and authorities relied upon in support of the motion. E.D.Pa.R.Civ.P. 7.1(c). This standard applies to briefs in opposition as well as briefs in support of a motion. See Anthony v. Small Tube Manufacturing Corporation, 2007 WL 2844819, at footnote 8 (E.D.Pa. September 27, 2007) (Gardner, J.).

Because plaintiff fails to cite any applicable law in support of his argument that the arbitration provision of the collective bargaining agreement effectively tolls the statute of limitations under the Whistleblower Act, and because the 180-day limit is strictly applied, see Street, supra, I dismiss Count VII in its entirety. However, to the extent plaintiff alleges that

any violation of the Whistleblower Law constitutes a breach of the collective bargaining agreement, plaintiff may make that argument in the context of Count V, his breach of contract claim.

In all other respects, the County defendants' motion to dismiss is denied.

Union's Motion to Dismiss

Finally, I address the Union's motion to dismiss Count IV for breach of fiduciary obligation. The Union argues that plaintiff's factual allegations in support of Count IV are demonstrably false, and that as a matter of law, plaintiff cannot establish a breach of fiduciary obligation.

In the alternative, the Union seeks summary judgment on Count IV pursuant to Rule 56 of the Federal Rules of Civil Procedure. For the following reasons, I agree with the Union and dismiss Count IV in its entirety. Because I granted the Union's motion to dismiss the Count, the Union's alternative request for summary judgment is moot.

Plaintiff alleges that he filed several grievances with the Union related to the July 15, 2003 incident and subsequent disciplinary action and termination of his employment. Nevertheless, he argues that the Union and its designated representatives[36] failed to adequately represent and advocate for

[36] These designated representatives include Officer Unangst; Alfred Crivellaro, then President of the Union; Mr. Donatelli, Vice President of the Union; and Larry Murin, Executive Director of the Union.

plaintiff's best interest.[37] Plaintiff characterizes the Union's representation of him as "so deficient, lacking and negligent as to be non-existent."[38]

Specifically, plaintiff alleges that Mr. Crivellaro and Todd Buskirk, then Acting Director of Corrections at the prison, contrived the condition of psychological clearance in an attempt to interfere with plaintiff's ability to return to work.[39] Moreover, plaintiff avers that Mr. Crivellaro and other union members and officials conspired with, and acted in concert with, prison officials to dissuade and prevent plaintiff from returning to work.[40] Plaintiff also contends that "over the course of this entire matter," he called or inquired of Mr. Crivellaro for advice on more than thirty occasions, and received no response.[41]

Count IV of the First Amended Complaint alleges that the Union breached its fiduciary obligation to plaintiff by failing to properly grieve plaintiff's termination and damages against the Union. Under the Public Employe Relations Act[42], where a union has breached its duty of fair representation by

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[37] First Amended Complaint, paragraphs 57, 58, 61.

[38] First Amended Complaint, paragraph 59.

[39] First Amended Complaint, paragraph 65.

[40] First Amended Complaint, paragraph 70.

[41] First Amended Complaint, paragraph 72.

[42] Act of July 23, 1970, P.L 563, No. 165, Art. I, § 101 to Art. XXIII, § 2301, as amended, 43 P.S. §§ 1101.101 to 1101.2301.

acting in bad faith, a public employee's sole remedy is an action to compel arbitration. Waklet-Riker v. Sayer Area Education Association, 656 A.2d 138, 141 (Pa.Super. 1995).

Plaintiff relies on Reisinger v. Department of Corrections, 568 A.2d 1357, 1360 (Pa.Commw. 1990), in support of his claim for money damages against the Union. This reliance is misplaced. Reisinger addresses the issue of whether an employee can seek money damages from his employer in a situation where his union has exercised bad faith in representing plaintiff, not whether an employee can recover money damages from his union.

Generally, an employee cannot seek reinstatement directly from a court even where the employee's union failed, in bad faith, to pursue the discharge through arbitration. Ziccardi v. Commonwealth of Pennsylvania, 500 Pa. 326, 332, 456 A.2d 979, 981 (1982). However, if the union's fraud or bad faith has prevented a meaningful remedy by arbitration, the employer can be joined in the employee's action against the union for its bad faith breach of fiduciary duty. Martino v. Transport Workers' Union of Philadelphia, 505 Pa. 391, 394, 480 A.2d 242, 243-244 (1984).

Reisinger stands for the proposition that although, under Ziccardi, an employee generally cannot obtain a direct remedy against the employer for a union's bad faith, an exception

exists "where the employee alleges and shows by specific facts that the employer actively participated in the union's bad faith or conspired with the union to deny the employee his rights under the collective bargaining agreement." Reisinger, 568 A.2d at 1360 (emphasis in original)(citing Speer v. Philadelphia Housing Authority, 533 A.2d 504, 111 Pa.Commw. 91 (Pa.Commw. 1987). In such a case, where plaintiff alleges specific facts that his employer actively participated in the union's bad faith, a trial court may award damages against the employer. Reisinger, supra.

Plaintiff cites no other authority for his assertion that money damages are available from the Union for any alleged bad faith, and he has not named his employer (the County) in Count IV of his First Amended Complaint. Therefore, assuming plaintiff can establish that the Union acted in bad faith, the only remedy available to him for his breach of fiduciary obligation claim is an order compelling arbitration of his grievance. See Martino, 505 Pa. at 409, 480 A.2d at 252.

Plaintiff concedes that the termination of his employment has been arbitrated. Indeed, plaintiff incorporates

the final decision issued by Arbitrator Joseph B. Bloom on

December 7, 2006 into his First Amended Complaint.[43]

Plaintiff, in his First Amended Complaint, misrepresents the arbitrator's findings. For example, plaintiff avers that "the Arbitrator finds that the Union on at least six (6) different occasions failed to file grievances on behalf of Romig when a grievance was warranted", and that "the Arbitrator found that the union never filed a grievance regarding the county's decision to have Romig obtain psychological clearance before returning to work".[44]

These so-called "findings" appear in the "Position of the County" section of the arbitrator's decision.[45] Therefore, they are not findings, but rather part of the arbitrator's summary of one party's contentions.

On the contrary, the arbitrator noted that the Union filed grievance CO-03-09 on September 23, 2003, contesting plaintiff's suspension following the July 15, 2003 incident[46]; the Union filed grievance CO-05-01 on January 3, 2005, contesting the County's failure to return plaintiff to work after his

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[43] The First Amended Complaint, paragraph 62 states: "A true and correct copy of said decision is attached hereto, incorporated herein and made part hereof as Exhibit 'B'."

[44] First Amended Complaint, paragraphs 63-64.

[45] First Amended Complaint, Exhibit B, pages 9-10.

[46] First Amended Complaint, Exhibit B, page 3.

acquittal of the assault charge[47]; and the Union filed grievance CO-05-07 on March 1, 2005, contesting the termination of plaintiff's employment on February 16, 2005.[48]

The arbitrator also found that on November 18, 2003, February 10, 2004, January 14, and February 1, 2005, plaintiff was notified in writing that he was required to seek psychological clearance to return to work, and that "[t]he 2005 correspondence included the warning that he was to be terminated if he did not comply."[49]

Moreover, Arbitrator Bloom found that plaintiff initially had a deadline of February 1, 2005 to comply with the County's requirement, a deadline which was extended to February 16, 2005.[50] The arbitrator also found that plaintiff was terminated after failing to meet the February 16, 2005 deadline, and concluded that "[t]he County gave [plaintiff] a legitimate directive and [plaintiff] willfully failed to follow through."[51]

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[47] First Amended Complaint, Exhibit B, pages 5-6.

[48] First Amended Complaint, Exhibit B, page 7.

[49] First Amended Complaint, Exhibit B, page 24.

[50] First Amended Complaint, Exhibit B, page 23.

[51] First Amended Complaint, Exhibit B, page 25. Arbitrator Bloom also found that plaintiff was given "clear direction to see Ruggiero by February 16, 2005" and that "[a]ll [that plaintiff] had to do to return to work and his job was to go to Ruggiero for counseling," but failed to do so despite receiving "full, complete and fair notice" of what he had to do. Id. at pages 25-26.

Because plaintiff's only remedy against the Union is to compel arbitration of his grievances, see Waklet-Riker, supra, and because the decision of Arbitrator Bloom, which plaintiff has incorporated into his First Amended Complaint, makes clear that plaintiff's grievance regarding the termination of his employment has been fully arbitrated on the merits, I conclude that as a matter of law, plaintiff fails to state a claim for breach of fiduciary obligation upon which relief can be granted.

Accordingly, I grant the Union's motion and dismiss Count IV of the First Amended Complaint in its entirety. Because the Union is named only in Count IV, I dismiss the Union as a party to this matter.

CONCLUSION

For all the foregoing reasons, I grant in part and deny in part the County defendants' motion to dismiss. The Union's motion to dismiss is granted, and its alternative request for summary judgment is dismissed as moot.

All claims against the Department of Corrections are dismissed; and Counts II, IV, VI and VII of the First Amended Complaint are dismissed in their entirety. Count III of the First Amended Complaint is dismissed against the County. Count V is dismissed to the extent that it alleges a claim for wrongful termination.

Finally, the Department of Corrections and the Union are dismissed from this matter as parties.