IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

RICHARD P. ALEXANDER, Plaintiff, v. TOWN OF CHESWOLD, and CHESWOLD POLICE DEPARTMENT, Defendants.	))))))))))	C.A. No. 04C-09-277 WCC

Submitted: May 18, 2007
Decided: June 27, 2007

MEMORANDUM OPINION

Upon Plaintiff's Motion for Summary Judgment. GRANTED in part and DENIED in part.

Upon Defendants' Motion for Summary Judgment. GRANTED in part and DENIED in part.

Ronald L. Stoner, Esquire; Ronald Stoner, P.A.; 1107 Polly Drummond Plaza; Newark, Delaware 19711. Attorney for Plaintiff.

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CARPENTER, J.

INTRODUCTION

Currently before this Court is cross motions for summary judgment filed by the Plaintiff Richard Alexander and Defendants the Town of Cheswold (the "Town") and the Cheswold Police Department ("Cheswold Police"). Upon review of the record and briefs submitted by the parties, the Court issues the following opinion.[1]

FACTS

Richard Alexander was hired as a "full-time police officer with the Town of Cheswold Police Department" on or around January 2004,[2] and signed the "Oath of Office" relating to his position with the Cheswold Police on February 2, 2004.[3] Mr. Alexander was at some point issued several items from the Cheswold Police, including: an identification card indicating Mr. Alexander was with the Cheswold Police Department; a badge which states "patrolman Cheswold Police;" a police uniform; a .45 caliber weapon; keys to the police office; keys to the police computer room used to draft complaints and other police documents; keys to the process room used to process accused persons and a belt with holders for chemical spray,

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[1]The Court notes the complaint was filed by Mr. Alexander *pro se*, and upon retention of counsel an amended complaint was not filed.

[2]Arb. Decision, D.I. 11, Pl. Ex. 1.

[3]*Id.* at Pl. Ex. 3.

handcuffs, a gun and a baton.[4] On or around March 1, 2004, Mr. Alexander "commenced the Delaware State Police Academy as a Municipal Recruit employed by the Town of Cheswold." Mr. Alexander voluntarily withdrew from the Delaware State Police Academy (the "Academy") on April 21, 2004,[5] however for the next two months, Mr. Alexander's role with the Cheswold Police remained unchanged. Then, on or about June 28, 2004, the Town terminated Mr. Alexander's employment without first providing Mr. Alexander a hearing as required under the Delaware Law Enforcement Officer Bill of Rights (LEOBOR).

About a month after Mr. Alexander was terminated by the Town, a town council meeting was held.[6] When a member of the town questioned the council regarding Mr. Alexander's termination, Mayor Diakos stated, "I don't regret my decision to terminate him. What I fired, they were scraps. . . and thank God, I caught

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[4]Supp. Pl. Mot. Summ. J., Ex. 4 (Vann Dep.) at 20-29; *see also* Arb. Decision, D.I. 11, Pl. Ex. 3, 4, 5.

[5]Arb. Decision, D.I. 11, Def. Ex 6.

[6]Supp. Pl. Mot. Summ. J., Ex. 2 (Diakos Dep.) at 65. (Mr. Alexander attempted to attend the meeting but was excluded from the meeting by Mayor Diakos. As a result, Mr. Alexander remained outside of the meeting as it convened.).

this in time and don't create any more trouble down the road."[7] These statements were then published in the Delaware State News, a local newspaper.[8]

Thereafter, Mr. Alexander filed this suit seeking damages for wrongful termination and defamation. Following arbitration in the matter, the suit is now before this Court on a series of summary judgment motions filed by the parties. This is the Court's decision on those motions.

STANDARD OF REVIEW

After evaluating the facts in the light most favorable to the non-moving party,[9] the Court will grant summary judgment only when the moving party has shown there are no genuine issues of material fact.[10] Since summary judgment is a tool used by the courts to remove factually unsupported claims,[11] it will not be granted when the record reasonably indicates that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to

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[7]*Id.* at 68.

[8]*Id.* at 67.

[9]*Pierce v. Int'l. Ins. Co. of Ill.*, 671 A.2d 1361, 1363 (Del. 1996).

[10]*Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979); *Schueler v. Martin*, 674 A.2d 882, 885 (Del. Super. Ct. 1996).

[11]*Durig v. Woodbridge Bd. of Educ.*, 1992 WL 301983 (Del. Super. Ct.), at * 7 (Summary judgment is appropriate when "the nonmoving party bears the ultimate burden of proof and the moving party can illustrate a complete failure of proof regarding an essential element of the nonmovant's case.") (citations omitted).

the circumstances.[12] Further, unless the parties advise the court otherwise, cross motions will be considered a stipulation by the parties to allow the court to render a "decision on the merits based on the record submitted with the motions."[13]

DISCUSSION

I. Wrongful Termination

Mr. Alexander asserts he was denied his right to a hearing pursuant to the LEOBOR when he was terminated by the Town. There are conflicting facts with respect to why Mr. Alexander was terminated. Plaintiff asserts he was terminated for speaking out about Councilman Ryan's alleged illegal act, and the Town asserts the Plaintiff was terminated for both improper conduct and for failure to complete the required police training. However, these facts are not material to the dispute in question. The Court must only determine if Mr. Alexander was entitled to a termination hearing pursuant to the 11 Del. C. § 9203, as there is no dispute that a hearing was not held.

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[12] *Ebersole v. Lowengrub*, 180 A.2d 467, 468-469 (Del. 1962).

[13] Super. Ct. Civ. R. 56(h) states:

> *Cross motions.* Where the parties have filed cross motions for summary judgment and have not presented argument to the Court that there is an issue of fact material to the disposition of either motion, the Court shall deem the motions to be the equivalent of a stipulation for a decision on the merits based on the record submitted with the motions.

See also Browning-Ferris, Inc. v. Rockford Enters., 642 A.2d 820, 823 (Del. Super. Ct. 1993).

To be protected within the LEOBOR, one must be a "law-enforcement officer." Thus, the question before this Court is whether Mr. Alexander, at the time of his termination, was in fact a "law-enforcement officer" pursuant to 11 Del. C. § 9200(b). If so, LEOBOR provides certain "enhanced procedural due process safeguards" which the Town would have been required to comply with before they could terminate the Plaintiff.[14] To answer this question, the Court must first analyze the language within the statute.

Interpreting a statute is a question of law.[15] When interpreting a statute, "the predominant goal of statutory construction is to 'ascertain and give effect to the intent of the legislature.'"[16] Thus, if looking at the plain meaning of the statute it is clear what the intent of the legislature is, then the statute is unambiguous and the plain meaning of the statute controls.[17] If the statute is ambiguous, meaning if it is "reasonably susceptible of different conclusions or interpretations," then the Court must attempt to ascertain the intent of the legislature.[18] In doing so, if a literal

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[14] *Knox v. Elsmere*, 1995 WL 339096, at *3 (Del. Super. Ct.) (The court determined the LEOBOR did not merely protect the same rights the police officer would have as a private citizen, but actually provided greater protection for the police officers.)

[15] *Weiss v. Weiss*, 2007 WL 522290 (Del. Ch.).

[16] *Id.* (citing *Rubick v. Sec. Instrument Corp.*, 766 A.2d 15, 18 (Del. 2000))

[17] *Id.*

[18] *Id.*

interpretation causes a result inconsistent with the general intent of the statute, "such interpretation must give way to the general intent" to allow the court to promote the purpose of the statute and the legislature's intent.[19]

Here, Section 9200(b) defines "law-enforcement officer" for purposes of Chapter 92 as follows, in pertinent part:

> . . . police officer who is a sworn member of the Delaware State Police, of the Wilmington City Police Department, of the New Castle County Police, of the University of Delaware Police Division, the Delaware State University Police Department, of the police department, bureau of police or police force of any incorporated municipality, city or town within this State. . . . Furthermore, no law-enforcement officer not a member of 1 of the above agencies shall be covered by this chapter.[20]

The statute on its face is clear and unambiguous.[21] The statute uses language suggesting that the categories listed for a law-enforcement officer are exhaustive. Thus, the only way for Mr. Alexander to be included within this statute is if he falls under one of the categories enumerated.

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[19] *Id. at *3.* ("[A] court must construe a statute in a way 'that will promote its apparent purpose,' thereby effectuating the legislature's intentions in passing the law.").

[20] 11 Del. C. §9200(b).

[21] *Gale v. Sapp*, 1993 WL 54463 (Del. Super. Ct.) (The Court reviewed Section 9200 and determined it was clear and unambiguous, and that the legislature intended to apply to probationary officers.).

Within the categories listed in section 9200(b), the legislature included "a police officer who is a *sworn* member . . . of the police department, bureau of police or police force of any incorporated municipality, city or town within this State." This is the only category Mr. Alexander may find protection under since it is undisputed Mr. Alexander took an officer oath for the Town prior to commencing with the Academy. But, the argument is whether the completion of the police academy was a prerequisite to Mr. Alexander receiving protection under the LEOBOR.

In review of the legislative intent of his bill, Senator Zimmerman stated:

> The purpose of this Act is to afford the Delaware law enforcement officer's rights to fair notice and a fair hearing on any charge brought against the officer within his or her own department. Present inconsistencies between departmental procedures within the State result in a disparity between individual treatment of law enforcement officers. This Act simply assures basic fundamental due process for all law enforcement officers in intradepartmental disciplinary hearings.[22]

Thus, the purpose of the LEOBOR is to provide consistent procedures for *all* law-enforcement officers, regardless of what department employs them. Allowing each department to determine what constitutes a law-enforcement officer, thereby determining when to apply the additional protections within the LEOBOR, would chip away at the legislature's intent to protect all officers. While the Court concedes the statute is written so as to only include the categories listed, the literal interpretation to

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[22]Synopsis, Senate Bill No. 96, 133rd Gen. Assembly (1985); 65 Del. Laws, c. 12, § 1.

exclude police cadets who act in a law-enforcement capacity on behalf of a particular department, and who took an oath to do so, but who must still complete a police academy to ensure continued employment with that police department, would not promote the legislature's intent.

This Court has already determined that Section 9200 included all "sworn members" of the law-enforcement agency, and did not distinguish between probationary officers.[23] Probation was defined as "the initial period of employment covering the first 18 months, when an employee will be evaluated for suitability to such employment. . . . any probationary employee can be dismissed from service."[24] The Court did not accept the argument that the statute was not intended to protect probationers since no distinction was made within the statute.[25]

Similarly, Mr. Alexander worked for the Cheswold Police and took an officer's oath with respect to that employment. While this may have been deemed a "probationary" period since he was still required to complete the Academy to retain

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[23] *Gale*, 1993 WL 54463.

[24] *Id.* at *1.

[25] *Id.* at *2 ("The court takes note of the fact that the statute's definition of "law enforcement officer" specifies any "sworn member" of the law enforcement agency and makes no distinction with respect to probationary officers. The Court therefore finds that the statute does apply to the Petitioner regardless of his status as a probationary employee of the Wilmington Police Department.").

employment with the Cheswold Police, he nevertheless was a law-enforcement officer pursuant to Section 9200(b). Thus, at that time, Mr. Alexander was protected under the LEOBOR since, as indicated above, the legislature intended to protect *all* law-enforcement officers, including those on a "probationary" period.

However, Mr. Alexander did not complete the Academy, and in fact he voluntarily withdrew from the Academy for medical reasons.[26] Once Mr. Alexander withdrew from the Academy, the Town argues he was no longer on a "probationary" period. But, according to Chief Vann, who appeared to be Mr. Alexander's direct superior, Mr. Alexander's status was not altered by his decision to leave the Academy. For instance, while Mr. Alexander attended the Academy, his salary was paid by COPS, a federally funded program used to hire police officers. Once Mr. Alexander left the Academy, his salary not only remained the same, but he continued to be paid from the COPS grant.[27] Further, Chief Vann acted and believed that Mr. Alexander was simply going to complete the next Academy class since he was unable to complete the Academy class he originally began due to his medical condition,

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[26]While the nature of the medical condition was not disclosed in the briefs filed by the parties, it appears from the testimony provided it was not one that the Cheswold Police believed would prevent Mr. Alexander from eventually completing the required academy classes.

[27]Supp. Pl. Mot. Summ. J., Ex. 4 (Vann Dep.) at 55.

causing Chief Vann to continue to treat him as a recruit.[28] For instance, Mr. Alexander continued to work side-by-side with Chief Vann after leaving the Academy, including riding along with Chief Vann or other recruits. In fact, Chief Vann stated in his deposition:

> After he [Mr. Alexander] left [the Academy], I got with the mayor, and the mayor wanted to keep Rick, so I kept him, and my recollection, I met with Captain Warren[29] to see what his status was. . . . Captain Warren assured me that all he had to do was take up some of his other courses. I got a letter from Rick's doctor saying he was okay, I think it was about maybe a few days later, he was okay to go ahead and try to complete the rest of the academy. Captain Warren had also told him that if that class had finished, he wouldn't graduate with the other guys, but that we could more or less tailor him into other agencies, say like Wilmington or New Castle, somewheres where we could give the rest of the classes for him. He may not graduate with his class, but that he could finish up the other courses by going to other agencies.[30]

Lastly, Mr. Alexander was not required to return the items he was provided by the Cheswold Police as a recruit (*i.e.* the gun, belt, badge, uniform, *etc.*) until June 28, 2004, the date the Town terminated his employment.[31] This again indicates the

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[28]*Id.* at 58.

[29]Captain Warren was the Delaware State Police Officer in charge of the Academy.

[30]*Id.* at 51.

[31]*Id.* at 30

Town's intent to treat him as a police officer even after Mr. Alexander left the Academy.

Once Mr. Alexander left the Academy, the Town and Chief Vann viewed Mr. Alexander as a police recruit who would be attending the next available Academy class and who would eventually become a Cheswold police officer. It follows then that Mr. Alexander continued to work as a law-enforcement officer as defined by Section 9200 up to the time he was terminated by the Town on June 28, 2004. As a result, Mr. Alexander was in fact entitled to protection pursuant to the LEOBOR, and both parties agree Mr. Alexander did not receive a hearing as the LEOBOR requires.

Accordingly, the Plaintiff's motion for summary judgment is hereby partially granted with respect to the wrongful termination claim. Mr. Alexander was a law-enforcement officer at the time he was terminated by the Town, and he was therefore entitled to a hearing that both parties agree was not provided. However, with respect to damages in relation to the wrongful termination, the Court determines this to be a factual issue for a jury to decide.

II. Defamation

Mr. Alexander also asserts a claim of defamation against the Town asserting that his character was defamed when the Mayor stated "What I fired, they were scraps...and thank God I caught this in time and don't create any more trouble down

the road."[32] Mayor Diakos admits to making this statement after the conclusion of a council meeting,[33] and these comments were published in the Delaware State News.[34] However, this claim must be dismissed.

Pursuant to the Tort Claims Act, a governmental entity, which includes towns, is immune from "any and all tort claims seeking recovery of damages."[35] Thus, claims of defamation against a governmental entity are not actionable unless a specific exception within the Tort Claims Act exists.[36] Here, because the Town of Cheswold is a governmental agency, and because there is not an exception which encompasses the facts of this case, the Town is immune from a claim of defamation pursuant to the Tort Claims Act.[37] As a result, the claim of defamation is hereby dismissed.[38]

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[32] Arb. Decision, D.I. 11, Pl. Ex. 9.

[33] Supp. Pl. Mot. Summ. J., Ex. 4 (Diakos Dep.) at 68-69.

[34] The Delaware State News is not a party to this suit.

[35] 10 Del. C. § 4010-4013.

[36] *Davis v. Georgetown*, 2001 WL 985098 (Del. Super. Ct.).

[37] The defamation claim fails for other reasons as well, however the Court need not delve into the additional reasons since it has determined the Tort Claims Act is applicable.

[38] The Court again notes that the complaint was filed *pro se* making it difficult to ascertain which assertions applied to which defendant. The Court makes no distinction between the Town and the Cheswold Police in this instance, and the claim of defamation is also dismissed as to the Cheswold Police to the extent the Plaintiff intended a claim against the department.

CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Summary Judgment is hereby GRANTED in part and DENIED in part and Defendants' Motion for Summary Judgment is hereby GRANTED in part and DENIED in part.

IT IS SO ORDERED.

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Judge William C. Carpenter, Jr.