Semsroth v. City of Wichita

United States District Court for the District of Kansas
October 25, 2004, Decided; October 25, 2004, Filed
CIVIL ACTION No. 04-1245 MLB

Reporter: 2004 U.S. Dist. LEXIS 30727
GRETA SEMSROTH, KIM WAREHIME, SARA VOYLES, AND HEATHER PLUSH, Plaintiffs, v. CITY OF WICHITA, CITY OF WICHITA POLICE DEPARTMENT, CHIEF NORMAN WILLIAMS individually and in his official capacity, Defendant.

Subsequent History: Motion denied by, Claim dismissed by, Remanded by Semsroth v. City of Wichita, 2005 U.S. Dist. LEXIS 26001 (D. Kan., Oct. 20, 2005)

Prior History: Semsroth v. City of Wichita, 2004 U.S. Dist. LEXIS 30726 (D. Kan., Oct. 14, 2004)

Counsel: [*1] For Greta Semsroth, On behalf of herself and all others similarly situated, Kim Warehime, On behalf of herself and all others similarly situated, Sara Voyles, On behalf of herself and all others similarly situated, Heather Plush, On behalf of herself and all others similarly situated, Plaintiffs: Lawrence W. Williamson, Jr., LEAD ATTORNEY, Williamson Law Firm, LLC, Kansas City, KS.

For Wichita City of, District of Kansas, Wichita Police Department, Chief Norman Williams, Individually and in his official capacity, Defendants: Kelly J. Rundell, LEAD ATTORNEY, City of Wichita, Kansas - Law Department, Wichita, KS.

Judges: Monti L. Belot, UNITED STATES DISTRICT JUDGE.

Opinion by: Monti L. Belot

Opinion

MEMORANDUM AND ORDER

I. INTRODUCTION

Plaintiffs, female officers of the City of Wichita's ("city") police department, filed suit against the city, the department, and Chief Norman Williams in his individual and official capacity, alleging a multitude of violations of federal and state law. Plaintiffs' claims allege sexual harassment, hostile work environment, gender discrimination, violations of equal protection and due process, and various state law tort claims.

This case comes before the court on defendants' various motions [*2] to dismiss. Defendants have moved to dismiss Chief Williams in his official capacity, the department, plaintiffs' claim of deprivation of their liberty interest in reputation, and all state tort claims. (Docs. 7, 9, 14, 16). The motions have been fully briefed and are ripe for decision. For the following reasons, the motions to dismiss are GRANTED.

II. MOTION TO DISMISS STANDARDS: FRCP 12(B)(6)

The standards this court must utilize upon a motion to dismiss are well known. This court will dismiss a cause of action for a failure to state a claim only when it appears beyond a doubt that the plaintiff can prove no set of facts that would entitle legal relief or when an issue of law is dispositive. *See Ford v. West,* 222 F.3d 767, 771 (10th Cir. 2000); *Robinson v. Kansas,* 117 F. Supp.2d 1124, 1129 (D. Kan. 2000). All well-pleaded facts and the reasonable inferences derived from those facts are viewed in the light most favorable to plaintiff. *See Ford,* 222 F.3d at 771; *Davis v. United Student Aids Funds, Inc.,* 45 F. Supp.2d 1104, 1106 (D. Kan. 1998). Conclusory allegations, however, have no bearing upon this court's consideration. *See Hall v. Bellmon,* 935 F.2d 1106, 1110 (10th Cir. 1991) (stating [*3] that "conclusory allegations without supporting factual averments are insufficient to state a claim on which relief can be based"); *Overton v. United States,* 74 F. Supp. 2d 1034, 1041 (D. N.M. 1999) (citing *Dunn v. White,* 880 F.2d 1188, 1190 (10th Cir. 1989)). In the end, the issue is not whether plaintiff will ultimately prevail, but whether he is entitled to offer evidence to support his claims. *See Robinson,* 117 F. Supp.2d at 1129.

III. FACTS[1]

Plaintiffs allege unfair treatment in the department on the basis of their gender. Specifically, plaintiffs claim that, as a result of their gender, defendants have denied them job assignments, promotional opportunities, supervisory positions, training, equal pay, bonuses, and other benefits of employment. Plaintiffs also allege that defendants have consistently ignored complaints about the hostile work environment, inadequately investigated female officers'

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[1] The court will not restate all facts as presented in the complaint, but rather list those facts that are pertinent to resolving the issues currently before the court.

complaints, and failed to take action to eliminate unlawful working conditions. Plaintiffs claim to have been harassed [*4] by explicit and crude remarks about the female body, labeled "bitches," and received comments about their make-up. (Doc. 1 at 4 P 6). Plaintiff Semsroth allegedly has received negative remarks in her personnel file regarding conflicts with other male officers. (Doc. 1 at 19 P 62). Plaintiff Warehime claims to have been denied transfers and promotions on numerous occasions. (Doc. 1 at 21 P 71-72). Plaintiff Plush says she has been denied transfers during her two years of service for the Department. (Doc. 1 at 22 P 78).

On February 20, 2004, plaintiffs sent a letter to the attention of Chief Williams and a carbon copy to the mayor and the city manager of Wichita. (Doc. 22 exh. 1). The letter's avowed purpose was to notify defendants of plaintiffs' claims of "sexual harassment, disparate treatment and hostile work environment." *Id.* The facts stated in the letter reference the unequal treatment of women in the department allegedly suffered at the hands of various unnamed officers and supervisors. The letter is devoid of any specific dates and times of the alleged offenses, but rather seems to allege an environment of ongoing discrimination. Plaintiffs also remind defendants of their obligation [*5] to comply with the laws of Title VII. At the conclusion of the letter, plaintiffs demand an amount of $ 1,500,000 to compensate for emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses.

Defendants did not respond to any claims set forth in the letter. Therefore, plaintiffs filed their complaint in this court on July 29, 2004. Defendants have filed four separate motions to dismiss. Defendants move to dismiss the department (Doc. 7), Chief Williams in his official capacity (Doc. 9), the first cause of action as to Chief Williams in his personal capacity (Doc. 9), the fourth cause of action (Doc. 16), and all state law tort claims (Doc. 14). For the following reasons, all four separate motions to dismiss are GRANTED.

IV. ANALYSIS

A. City of Wichita Police Department

Plaintiffs name both the city and the department as defendants in the complaint. A municipality's police department is not a separate suable entity and, as such, the complaint must be dismissed as to the department. *Martinez v. Winner,* 771 F.2d 424, 444 (10th Cir. 1985). Plaintiffs concede that naming the department is inappropriate. (Doc. 22 at 2). Accordingly, defendants' [*6] motion to dismiss the department is GRANTED.

B. Official Capacity Claim

Plaintiffs sue Chief Williams in both his individual and official capacity. An official capacity suit is "to be treated as a suit against the entity." *Kentucky v. Graham,* 473 U.S. 159, 165-66, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985). Therefore, a suit naming both the entity and the official is redundant. *Eberle v. City of Newton,* 289 F. Supp. 2d 1269, 1280 (D. Kan. 2003). Plaintiffs concede that the official capacity claim against Chief Williams is inappropriate. (Doc. 22 at 2.) Accordingly, defendants' motion is GRANTED with respect to claims brought against Chief Williams in his official capacity. Conversely, the claims against Chief Williams in his individual capacity are not affected by this ruling, except as noted below.

C. First Cause of Action as to Chief Williams

Plaintiffs' first cause of action alleges a violation of *Title VII of the Civil Rights Act*. Since "personal capacity suits against individual supervisors are inappropriate under Title VII," *Haynes v. Williams,* 88 F.3d 898, 901 (10th Cir. 1996), plaintiffs have also conceded that dismissal is proper. (Doc. 22 at 2). Therefore, defendants' motion to dismiss the first cause of action [*7] as to Chief Williams in his personal capacity is GRANTED.

D. Fourth Cause of Action

For their fourth cause of action, plaintiffs assert that they have a protected liberty interest in their reputation, and that the city and Chief Williams deprived them of that liberty interest without due process in violation of the *Fifth* and Fourteenth Amendments to the United States Constitution. In order to trigger due process requirements, plaintiffs must first establish that they suffered a deprivation of a protected liberty interest. *Fed. Lands Legal Consortium ex rel. Robart Estate v. United States,* 195 F.3d 1190, 1195 (10th Cir. 1999). To establish that defendants deprived them of a protected liberty interest in their reputation, plaintiffs must show that "(1) the defendant made a statement impugning his or her good name, reputation, honor, or integrity; (2) the statement was false; (3) the defendant made the statement in the course of termination proceedings or the statement foreclosed future employment opportunities; and (4) the statement was published." *Tonkovich v. Kan. Bd. of Regents,* 159 F.3d 504, 526 (10th Cir. 1998).

The only allegations of impugning statements found in the record are occasions [*8] on which plaintiffs allegedly were called "bitches" by other officers (not by Chief Williams) and where Semsroth received a negative remark in her employment file. First of all, the court must accept as true all allegations in the complaint for purposes of a motion to dismiss. That being said, the court can infer that plaintiffs believe that the "bitches" remarks are false. On the other hand, Semsroth does not allege that the negative

remark in her file is false; rather she claims that the male officers involved in the same altercations have not received any negative remarks in their files.

However, even if plaintiffs could show all impugning statements to be false, there must be a showing that the statements were entangled with their interest in employment. *Valdez v. New Mexico,* 109 Fed. Appx. 257, 2004 U.S. App. LEXIS 18616, *13-14 (10th Cir. 2004) (citing *Workman v. Jordan,* 32 F.3d 475 (10th Cir. 1994)). The Tenth Circuit has clearly announced "defamation, standing alone, [is] not sufficient to establish a claim for deprivation of a liberty interest." *Renaud v. Wyoming Dep't of Family Servs.,* 203 F.3d 723, 726-27 (10th Cir. 2000). Plaintiffs have failed to allege any loss that would amount to a tangible [*9] liberty interest. A general allegation that plaintiffs have a loss of employment opportunities is insufficient since "a loss of future positions [is] too speculative and too intangible to constitute a deprivation of a liberty . . . interest." *Valdez,* 109 Fed. Appx. 257, 2004 U.S. App. LEXIS 18616 at *13-14 (internal quotations omitted). Semsroth claims negative remarks were included in her employment file, but she has failed to allege that the remarks resulted in a loss of any tangible employment opportunities. Both Warehime and Plush have been denied transfer opportunities or promotions; however, they allege that this denial is due to their gender and not as a result of any impugning statements made by defendants.

Moreover, fatal to plaintiffs' claim is the failure to allege any publication of the stigmatizing remarks. Publication requires that the offending government agency make the relevant information public. *Asbill v. Hous. Auth. of Choctaw Nation of Okla.,* 726 F.2d 1499, 1503 (10th Cir. 1984). Plaintiffs allege that the name-calling occurred in the work environment and on one occasion a comment appeared in a personnel file. However, intra-governmental dissemination of information, even to other [*10] office personnel, does not amount to publication. *Six v. Henry,* 42 F.3d 582, 586 (10th Cir. 1994); *Asbill,* 726 F.2d at 1503. Lacking evidence to support publication, plaintiffs have failed to establish that any defendant deprived them of a protected liberty interest in their reputation; thus, they were not entitled to any due process protection on this matter. *Fed. Lands,* 195 F.3d at 1195. Accordingly, defendants' motion to dismiss plaintiffs' fourth cause of action is GRANTED.

E. State Law Tort Claims

Defendants move to dismiss plaintiffs' state law tort claims on the basis of plaintiffs failure to comply with the statutory requirements of notice set out in K.S.A. 12-105b:

> Any person having a claim against a municipality which could give rise to an action
> brought under the Kansas tort claims act shall file a written notice as provided in this subsection before commencing such action. The notice shall be filed with the clerk or governing body of the municipality and shall contain the following: (1) The name and address of the claimant and the name and address of the claimant's attorney, if any; (2) a concise statement of the factual basis of the claim, including the date, time, place [*11] and circumstances of the act, omission or event complained of; (3) the name and address of any public officer or employee involved, if known; (4) a concise statement of the nature and the extent of the injury claimed to have been suffered; and (5) a statement of the amount of monetary damages that is being requested. In the filing of a notice of claim, substantial compliance with the provisions and requirements of this subsection shall constitute valid filing of a claim. The contents of such notice shall not be admissible in any subsequent action arising out of the claim. Once notice of the claim is filed, no action shall be commenced until after the claimant has received notice from the municipality that it has denied the claim or until after 120 days has passed following the filing of the notice of claim, whichever occurs first. A claim is deemed denied if the municipality fails to approve the claim in its entirety within 120 days unless the interested parties have reached a settlement before the expiration of that period. No person may initiate an action against a municipality unless the claim has been denied in whole or part. Any action brought pursuant to the Kansas tort claims [*12] act shall be commenced within the time period provided for in the code of civil procedure or it shall be forever barred, except that, if compliance with the provisions of this subsection would otherwise result in the barring of an action, such time period shall be extended by the time period required for compliance with the provisions of this subsection.K.S.A. § 12-105b(d).

The primary purpose of the notice statute is to sufficiently advise the municipality of the time and place of the events while the occurrence is fresh in the minds of those possessing knowledge of the subject. *Bradford v. Mahan,* 219 Kan. 450, 457, 548 P.2d 1223, 1230 (1976); *Howell v. City of Hutchinson,* 177 Kan. 722, 725-26, 282 P.2d 373

(1955); *Tucking v. Bd. of Comm'rs of Jefferson County,* 14 Kan. App.2d 442, 448, 796 P.2d 1055, 1059 (1990). "The notice requirements in K.S.A. § 12-105b(d) are mandatory and a condition precedent to bringing a tort claim against a municipality." *Miller v. Brungardt,* 916 F. Supp. 1096, 1098 (D. Kan. 1996).

A notice filed with the municipality must substantially comply with the requirements set out in the statute. K.S.A. § 12-105b(d). Substantial compliance can only occur if plaintiffs [*13] make an attempt to state each element of the notice. *Tucking,* 14 Kan. App.2d at 446-47, 796 P.2d at 1058. "An omission of one or more relevant elements makes the notice fatally insufficient." *Id.* at 442.

Plaintiffs' notice has failed to substantially comply with K.S.A. 12-105b(d). Specifically, the letter failed to provide plaintiffs' addresses as required in element one. [2] It failed to provide the addresses of the public officers and employees involved, as required by element three. It also failed to list the names of the officers who allegedly were involved in the incidents. And, fatal to their claim, is the absence of "a concise statement of the factual basis of the claim, including the date, time, place and circumstances of the act, omission or event complained of," as required in element two. K.S.A. § 12-105b(d).

Plaintiffs' letter may be sufficient to apprise defendants of any claims of employment discrimination and unequal treatment suffered at the hands of the city. However, section 12-105b(d) requires proper notice for any state tort claims, not claims based [*14] on federal law. Plaintiffs state three causes of action which are founded on state tort law, namely, intentional infliction of emotion distress, negligent training, and failure to train. [3] The letter fails to give a concise statement of the factual basis of their state tort claims. One main purpose of the notice statute is to give the city an opportunity to investigate the claims and make an informed decision when determining whether to comply with the monetary demand. *See Wiggins v. Housing Auth.,* 19 Kan. App. 2d 610, 614, 873 P.2d 1377 (1994). Since the city had no notice that plaintiffs claimed intentional infliction of emotional distress, negligent training, and failure to train, it could not properly investigate those claims. *Dunegan v. City of Council Grove, Kan. Water Dep't,* 77 F.Supp.2d 1192, 1205 (D. Kan. 1999). Accordingly, no court has jurisdiction to hear such claims unless proper notice was filed prior to commencing the action. *Gessner v. Phillips County Comm'rs,* 270 Kan. 78, 81-82, 11 P.3d 1131, 1134 (2000). [4] Therefore, defendants' motion to dismiss is GRANTED as to counts eight, nine, and ten.

In the alternative, plaintiffs have requested that this court dismiss the state claims without prejudice in order that they may amend the complaint. Plaintiffs have failed to attach a proposed amended complaint as required by this [*16] court's Rule 15.1, nor have they offered any explanation how an amended complaint, if allowed, will cure the deficiencies noted. Therefore, the motion to amend is DENIED.

V. CONCLUSION

In sum, defendants' motions to dismiss are GRANTED. The state tort claims are dismissed, with prejudice.

A motion for reconsideration of this order pursuant to this court's Rule 7.3 is not encouraged. The standards governing motions to reconsider are well established. A motion to reconsider is appropriate where the court has obviously misapprehended a party's position or the facts or applicable law, or where the party produces new evidence that could not have been obtained through the exercise of reasonable diligence. Revisiting the issues already addressed is not the purpose of a motion to reconsider and advancing new arguments or supporting facts which were otherwise available for presentation when the original motion was briefed or argued is inappropriate. *Comeau v. Rupp,* 810 F. Supp. 1172 (D. Kan. 1992).

Any such motion shall not exceed three pages and shall strictly comply with the standards enunciated by this court in *Comeau v. Rupp.* The response to any motion for reconsideration shall not exceed three [*17] pages. No reply shall be filed.

IT IS SO ORDERED.

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[2] The notice also failed to list plaintiff Plush as a claimant. Therefore, her state tort claims fail as a matter of law.

[3] Defendants propose that plaintiffs' claim of conspiracy to interfere with [*15] civil rights is based on state tort law since plaintiffs failed to cite the applicable provisions of the Constitution or federal statute. However, construing the pleadings in the light most favorable to plaintiffs, the court concludes that count six is a claim based on the United States Constitution.

[4] Defendants, in their answer, stated that "Plaintiffs failed to comply with K.S.A. 12-105b." Plaintiffs assert that defendants cannot seek dismissal because they have not denied plaintiffs' performance with the requirements of K.S.A. § 12-105b "with particularity" as required by *Fed. R. Civ. P. 9(c)*. Plaintiffs conveniently overlook *Rule 9(c)*'s requirement that performance of conditions precedent must be generally averred. Plaintiffs' complaint does not do so; indeed, it does not even mention K.S.A. 12-105b. Plaintiffs cannot complain about defendants' alleged failure (which was no failure at all) to comply with *Rule 9(c)* when they themselves have failed to do so.

Dated this 25th day of October 2004, at Wichita, Kansas.

UNITED STATES DISTRICT JUDGE

/s/ Monti Belot

Monti L. Belot