UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

DARREN M. TRIPP,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	Civil No. 03-289-P-S
SCOTT COLE and THE TOWN OF BETHEL,	)	
	)	
	)	
Defendants	)	

MEMORANDUM OF DECISION ON MOTIONS TO STRIKE AND RECOMMENDED DECISION ON MOTIONS FOR SUMMARY JUDGMENT

Darren Tripp used to be the police chief in Bethel. According to Tripp, he was discharged from employment on trumped up grounds because he refused to obey an order from the Town Manager, Scott Cole, to have dismissed a dog-at-large summons that was issued to a Bethel resident and because he spoke out about the same. The defendants, Cole and Bethel, have moved for summary judgment against Tripp's whistleblower, First Amendment retaliation, and emotional distress claims. (Docket No. 27.) Because the record does not support Tripp's claims, I recommend that the court grant the defendants' motion. Also addressed herein are Tripp's cross-motion for summary judgment (Docket No. 32) and three motions to strike (Docket Nos. 33, 51 and 52.)

Facts

The Town of Bethel hired Darren Tripp as a police officer in October 1989. Town Manager Philip Tarr elevated Tripp to Chief of Police in March 1998. (Pl. Statement of Add'l Mat. Facts, Docket No. 44, ¶ 1.) Defendant Scott Cole became Town Manger in June of 1999

and remains in that position at this time. (Id., ¶ 2.) As Town Manager, Cole had direct supervisory authority over Tripp, including the power to suspend Tripp for "misconduct, negligence, inefficiency, insubordination, disloyalty, unauthorized absence or other justifiable reasons when alternative personnel actions are not appropriate" or to discharge Tripp for dishonesty, misconduct, or "other action or conduct materially affecting or impairing the efficiency of the municipal service." (Defs. Statement of Mat. Facts, Docket No. 28, ¶¶ 2-3, 33-34.)

On October 1, 2002, Tripp observed a dog-at-large and contacted Bethel's animal control officer, Osman Hart, who responded to the call. (Docket No. 44, ¶ 53.) Mr. Hart apprehended the dog and issued a summons to its owner, one Sherri or Cheri Thurston. Ms. Thurston contacted Town Manager Scott Cole and complained about the summons. According to Ms. Thurston, town employees, including the town engineer, who were working on the sewer main in front of her house had observed the incident and informed her that the animal control officer went into her garage to apprehend her dog. Although Cole did nothing at first, after Ms. Thurston's fourth call to his office, Cole asked the engineer about the incident, who described the animal control officer's conduct as "bizarre." (Docket No. 28, ¶¶ 54-56.) Based upon the engineer's statement, Cole spoke to Tripp and asked Tripp if he could dismiss the summons.[1] (Id., ¶ 57.) Tripp told Cole that the matter was in the district attorney's hands. (Id.) Cole then asked Tripp to ask the district attorney to see if he would dismiss the summons based upon the information provided by the engineer. (Id.) Tripp surreptitiously recorded a subsequent telephone call he had with Cole, on or about November 10, 2002, two days before Ms. Thurston's arraignment date. (Docket No. 44, ¶ 15.) A "transcription" of the conversation is

[1] Cole requested the same from Mr. Hart, the animal control officer. According to Hart, he felt that he was being asked to do something illegal and he told Cole that he would not comply. (Docket No. 44, ¶¶ 9-13.)

found within Tripp's affidavit, attached as exhibit 2 to Tripp's statement of additional material fact. (Docket No. 44, Attach. 2.) During the conversation, Cole again asked Tripp to ask the district attorney to "dump" the summons. Tripp responded that the district attorney might not be willing to do so, to which Cole responded that he wanted Tripp's word that he would ask the district attorney to do so. Tripp replied, "I can ask the district attorney what he wants to do, but when it comes this far, you know, I'm not comfortable doing this." Tripp also replied that he would talk to the district attorney, but did not know what the district attorney would do. The remainder of the conversation primarily concerned the merits of the summons and whether Ms. Thurston was being treated preferentially for social or class reasons. However, Cole indicated to Tripp when Tripp asked what he was supposed to give as a reason for "dumping" the summons that Tripp could have the DA call him so he could explain what he had been informed of by the town engineer, who had observed the Animal Control Officer apprehend the Thurston dog. Tripp maintains that, at the time, he believed that Cole was unlawfully ordering him to cause the Thurston summons to be dismissed. (Id., ¶¶ 17-19; see also Docket No. 28, ¶ 59.) Tripp never said anything to Cole about his belief that Cole's request was illegal. (Docket No. 28, ¶¶ 66, 68.)

On November 12, 2002, at Ms. Thurston's arraignment, Tripp informed the district attorney that Cole wanted the summons dismissed and had directed Tripp to pass on that wish to the district attorney. (Docket No. 44, ¶ 20; Docket No. 28, ¶ 64.) That same day, Cole e-mailed Tripp and asked whether Tripp had asked the district attorney to dismiss the case. The next day, Tripp went to Cole's office and told Cole that he had passed the request on and that he did not know what the district attorney was going to do about it. Cole thanked Tripp and the meeting ended.[2] (Docket No. 44, ¶¶ 22-23.)

[2] In his statement of material facts, Tripp cites his affidavit testimony that Cole "did not seem pleased with my report." The defendants have moved to exclude this affidavit testimony on the ground that it directly contradicts

Four months later, on March 17, 2003, Cole provided Tripp with a notice of suspension. (Docket No. 28, ¶¶ 5-6.) The suspension notice catalogued nine concerns allegedly held by Cole in relation to Tripp's performance of his police duties. (See Am. Compl., Docket No. 16, Appendix 2.) The concerns did not include the failure to get the Thurston summons dismissed. If true,[3] the concerns set forth in the notice were sufficient to justify Tripp's suspension. (See Docket No. 28, ¶¶ 36-39, 41-46, 49-51.) During the suspension, which ended on April 18, 2003, Tripp continued to receive his salary and benefits. (Docket No. 28, ¶ 5.) At that time, Cole did not link the suspension to the dog-at-large summons. (Id.) Between March 17, 2003, and April 18, 2003, Tripp and Cole met on approximately four occasions. Each was represented by counsel. During these meetings, Cole focused on operational deficiencies in the Bethel Police Department. The purpose of the meetings was to determine whether Tripp would return to the position of Police Chief and to establish performance expectations for Tripp to meet upon his return to duty. (Id.)

The complaints catalogued in the notice of suspension included many that were quite dated, as much as two years old, and had not been addressed with Tripp at the time they first arose. Nor, prior to the letter of suspension, were these concerns previously documented in Tripp's personnel file. Nor, prior to the letter of suspension, had Tripp ever been subjected to

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Tripp's prior deposition testimony to the effect that Cole thanked Tripp for passing along Cole's request "and that was it." (Docket No. 52.) I grant the defendants' motion because Tripp was clearly asked at his deposition what Cole's response was and Tripp merely indicated, "I don't recall. I believe he thanked me for doing that and that was it. As I remember, it was a very, very short meeting." (Id. at 2.) In any event, my recommendation does not turn on this evidentiary issue because I do not reach the question of whether Tripp's speech regarding the Thurston summons was the cause of his suspension and ultimate termination.

[3] In his deposition testimony, Tripp acknowledged the accuracy of many of the issues raised by Cole, including the facts that Tripp's wife used the Police Department computer, that Tripp drove his wife to high school dances and basketball games using the police cruiser and while on duty, that Tripp did not consistently offer to assist the Town's director of public works with snow removal operations during the winter of 2002-2003, and that Tripp made a remark in a local store to the effect that a beverage bottle appeared to be in the shape of a vibrator, which was made in the vicinity of, was overheard by, and was offensive to one or more female employees. (Docket No. 28, ¶ 86.)

any disciplinary proceeding. (Docket No. 44, ¶¶ 6-8.) Before his suspension, Tripp had approached two Bethel selectmen and shared with them his perception that his relationship with Cole had "cooled" and his feeling that it was due to the Thurston summons issue. At their depositions, both selectmen testified that they thought the relationship deteriorated on account of the dog-at-large incident. One opined (without asserting a basis for personal knowledge) that Cole's termination of Tripp was influenced by both the incident and Tripp's tape recording of his discussion with Cole.[4] (Id., ¶¶ 24-30.)

Time passed, evidently without incident, until the following winter. On January 5, 2004, Cole gave Tripp a document outlining Cole's concerns about a report that Tripp had failed to respond to an armed robbery call on December 2, 2003. (Docket No. 28, ¶ 12.) Over the next month, three letters followed, back and forth, while the matter was being investigated, ending with what lawyers might call Tripp's surreply letter of February 2, 2004. (Id., ¶¶ 13-15.) On February 12, 2004, allegedly as a result of the investigation, Cole notified Tripp in writing that he was terminated from his employment and provided reasons therefor.[5] (Id., ¶ 16; Docket No.

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[4] These facts are offered by Tripp on the issue of causation. Although I do not find it necessary to reach the issue of causation in the discussion of the merits of this case, it is noteworthy that Tripp also offers facts that would tend to undermine his causation argument. Specifically, Tripp offers a statement that Cole advocated for the elimination of the Bethel Police Department because he thought the Town would be better served by the Oxford County Sheriff's Department and would get more for its money, and because he felt that it was difficult to hire and retain quality officers due to the small size of the Bethel Police Department and the lack of opportunity for officers to advance in rank in such a small department. (Docket No. 44, ¶ 8.)

[5] On December 2, 2003, an armed robbery occurred in Bethel and numerous attempts by dispatch to contact or notify Tripp, including by his personal pager, cell phone and police radio, went unanswered. According to Tripp, he had deactivated his pager earlier that day while in court and forgot to turn it back on. In addition, dispatch placed telephone calls to the Bethel Police Department. Although Tripp acknowledges that telephone records reflect that dispatch placed the calls and that he was present at the station at the time the calls were placed, Tripp maintains that the phone did not ring. In addition to the pager, radio and telephone line, calls to Tripp's personal cell phone, which was in his possession, also went unanswered, evidently because the cell phone was set to vibrate rather than ring and Tripp did not sense the vibration when called. Eventually, a call was placed to the nearby town office and another town employee went to the police department and notified Tripp that dispatch was trying to contact him. According to Tripp, the resulting delay was only 12 minutes and was insignificant because the felons were apprehended by other officers. (Docket No. 28, ¶ 92; Docket No. 43, ¶ 92.)

Tripp asserted that the police station phone did not ring because the phone line had been disabled by a faulty answering machine, admitted that it was not possible for dispatch to reach him by radio, and indicated that he

44, ¶ 33.) Tripp appealed the notice of termination to Bethel's Board of Selectmen. (Docket No. 28, ¶ 17.) On appeal, the Town's Board of Selectmen upheld the termination with a 3-2 vote on March 16, 2004. (Docket No. 28, ¶ 36; Docket No. 44, ¶ 18.) At the time of their determination, the members of the Board of Selectmen were aware of the dog-at-large incident. (Docket No. 44, ¶ 38.)

Subsequent to the Board's determination of the matter, Karen and William Hopkins, Cole's former neighbors, secretively tape recorded a conversations they had with Cole on March 24, 2004. During that conversation, Cole described Tripp as a moron, liar and son-of-a-bitch and as an unethical person without any integrity.[6] (Id., ¶ 37.)

The Town of Bethel was insured for workers' compensation coverage through participation in the Maine Municipal Association Workers' Compensation Fund from October 1, 2002, through March 11, 2004. (Docket No. 28, ¶ 101.)[7]

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failed to detect the vibration from his cell phone. (Docket No. 28, ¶ 94; Docket No. 44, ¶ 94.) According to the defendants, Cole terminated Tripp because of the communications breakdown and because he considered Tripp's statements about why the breakdown had occurred to be dishonest. (Docket No. 28, ¶ 95.)

Tripp appealed his termination to the Bethel Board of Selectmen. On appeal, four of the five members of the Board found that the telephone in the Bethel Police Department rang when Oxford County Dispatch tried to reach Tripp by landline call to the police station, and three of the five members voted to sustain the termination. (Id., ¶ 96.) The transcript of the dispatch's two calls to the Bethel Police Department's telephone indicates that the first call from dispatch was not answered and that dispatch hung up after hearing five rings on its end of the line and that the second call was picked up by the Bethel Police Department answering machine. The transcript does not establish whether the telephone at the station actually rang. (Docket No. 28, ¶ 97; Docket No. 44, ¶ 97.)

[6] The defendants have moved to strike Mr. Hopkins's affidavit in its entirety on the ground the Tripp failed to timely disclose to them that Tripp intended to call Hopkins as a witness and what Hopkins's anticipated testimony would be. (Docket No. 51.) I deny the motion because it is moot: the specific testimony the defendants object to was never introduced by Tripp in either of his statements of material fact. In addition, the defendants' concern that Tripp first disclosed the existence of Hopkins's testimony only two weeks prior to the discovery deadline, thereby allegedly preventing the defendants from deposing Hopkins, is the kind of concern that should have been raised in the context of Local Rule 26. Local Rule 26 does not permit written discovery motions without prior leave of court. D. Me. Loc. R. 26(b).

[7] The parties do not indicate what ever became of Ms. Thurston's dog-at-large proceeding. According to the amended complaint Ms. Thurston entered a plea of "guilty" and received a fine. (Docket No. 14, ¶ 18.) However, the defendants deny this allegation. (Docket No. 15, ¶ 18.)

Plaintiff's Motion to Strike Statements of Fact

Before discussing the merits of the summary judgment motions before the court, I digress to address docket number 33, Tripp's motion to strike. In this filing Tripp challenges more than 40 of the defendants' statements of material fact, almost universally on the ground that the statement does not relate factual information or is otherwise not in compliance with some aspect of Local Rule 56. It is difficult to understand the rationale behind the motions, it is almost as though Tripp is trying to help the court understand what constitutes a material fact. Although I have entirely disregarded the motion, Tripp will observe that the factual statement I have offered in this recommendation does not recite every statement of fact offered by the defendants and, in some instances, rephrases the statements that have been credited in order to conform to the underlying record. To the extent Tripp has a legitimate basis to object to my factual statement, he may take it up in an objection to my recommendation. Tripp's motion to strike (Docket No. 33) is denied.

Summary Judgment Discussion

A movant is entitled to summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material if its resolution would "affect the outcome of the suit under the governing law," Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986), and the dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party," id. I view the record in the light most favorable to the nonmovants and I indulge all reasonable inferences in their favor. See Thames Shipyard & Repair Co. v. United States, 350 F.3d 247, 276 (1st Cir. 2003).

Tripp's amended complaint recites four causes of action: (1) retaliation for Tripp's alleged exercise of First Amendment rights; (2) a purported statutory "whistleblower" claim; (3) a whistleblower retaliation claim pursued under the Maine Human Rights Act; and (4) a state tort claim for intentional infliction of emotional distress. In their "motion to dismiss and for summary judgment," the defendants walk through these causes of action one by one. I depart from this approach in order to address the whistleblower claim first because the relevant precedent indicates that, "[w]hen balancing the rights of the employee against those of the employer, an employee's First Amendment interest is entitled to greater weight where he is acting as a whistle-blower in exposing government corruption." Guilloty Perez v. Pierluisi, 339 F.3d 43, 53 (1st Cir. 2003).

A. Whistleblower retaliation

"Section 4572(1)(A) of the [Maine Human Rights Act] makes it illegal for an employer to discriminate against an employee in retaliation for the employee's exercise of rights under the Maine Whistleblowers' Protection Act (MWPA)," 26 M.R.S.A. §§ 831-840. Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261 (1st Cir. 1999); 26 M.R.S.A. § 4572(1)(A). "The MWPA, in turn, protects an employee from discrimination when he has complained to the employer in good faith about a workplace-related condition or activity that he reasonably believes is illegal, unsafe, or unhealthy." Higgins, 194 F.3d at 261 (citing 26 M.R.S.A. § 833(1)(A)-(B)). Neither the MHRA nor the MWPA has a requirement that the matter reported or complained of must actually be illegal. Instead, an employee must have a reasonable belief that the employer's conduct was illegal and must communicate his or her belief to the employer in good faith. Id. at 261-62 (citing Bard v. Bath Iron Works, 590 A.2d 152, 154 (Me. 1991)). Tripp asserts his whistleblower claim under both the MWPA (count II) and the MHRA (count

III). In opposition to summary judgment, Tripp concedes that the only available cause of action is under the MHRA. (Docket No. 34 at 10.) See Schlear v. Fiber Materials, Inc., 574 A.2d 876, 878 (Me. 1990).

The defendants contend that summary judgment should enter because, among other things, Tripp did not engage in activity protected by the MWPA. (Docket No. 27 at 14.) Tripp maintains that a reasonable person in his position would have believed that Cole's request to see if the Thurston summons could be dismissed was a violation of the Maine criminal code, specifically, 17-A M.R.S.A. § 751, which prohibits the obstruction of governmental administration by means of force, violence or intimidation. According to Tripp, "he unmistakably recognized the intimidation laced through the words spoken by Scott Cole to have the Chief *give his word* that the Thurston Summons would be dismissed." (Docket No. 34 at 11 (itals. in orig.).) The facts in the record do not support Tripp's contentions. Cole did not order that Tripp succeed in getting the summons dismissed, by hook or by crook. Cole informed Tripp that he expected Tripp to ask the district attorney to "dump" the charge, to inform the district attorney about what the town engineer said and to tell the district attorney that he could call Cole if he wanted to discuss it further. These facts cannot support a whistleblower claim because a reasonable person would not consider it an obstruction of government administration to ask the district attorney to drop a charge based on the particular circumstances of a case. As Cole argues in his motion, "[s]peaking to a DA about whether to prosecute a summons is a common aspect of police work, and within the discretion" of police officers. (Docket No. 27 at 15.) Moreover, Cole's statement that he expected Tripp to honor his request does not rise to the level of intimidation. "Intimidation may be defined as '[u]nlawful coercion, extortion, duress, or putting in fear.'" State v. Janisczak, 579 A.2d 736, 738 (Me. 1990) (quoting Black's Law Dictionary 736

(5th ed. 1979)). There is absolutely no basis in the record for a finding that Tripp was unlawfully coerced or placed in fear by Cole's request. In addition to these basic deficiencies, the whistleblower claim also lacks merit because Tripp never voiced any concern that he considered Cole's request to be unlawful. I cannot help but conclude from a reading of the MWPA that it is a basic prerequisite to a whistleblower protection claim that the plaintiff has actually blown the proverbial whistle. 26 M.R.S.A. § 833(1)(A), (2). In this case, Tripp merely stated to Cole that he was "not comfortable" asking the district attorney to drop the charge with the arraignment date two days off. Without having blown the whistle, and without having a reasonable basis to believe that Cole's request constituted obstruction of government administration through intimidation, I conclude that Tripp did not engage in activity protected by the MWPA. Accordingly, I recommend that the court grant the defendants' motion for summary judgment with respect to counts II and III.

B. First Amendment retaliation

Workplace retaliation against public employees based on their speech may be actionable where (1) the speech involves a matter of public concern; (2) the First Amendment interests of the plaintiff and the public outweigh the government's interest in functioning efficiently; and (3) the protected speech was a substantial or motivating factor for the adverse employment action visited upon the plaintiff. Mihos v. Swift, 358 F.3d 91, 102 (1st Cir. 2004). The defendants challenge all three aspects of Tripp's claim. (Docket No. 27 at 3-8.) I agree with the defendants that the speech at issue does not involve a matter of public concern and that Tripp's interest in sounding off about either Cole's efforts to get the Thurston summons dismissed or the "cooling off" of Tripp's working relationship with Cole are not sufficiently weighty to support a free speech claim. Accordingly, I do not reach the issue of causation.

"Whether an employee's speech addresses a matter of public concern must be determined by the content, form and context of a given statement, as revealed by the whole record." Connick v. Myers, 461 U.S. 138, 147-48 (1983). "The problem in any case is to arrive at a balance between the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the [public employer] in promoting the efficiency of the public services it performs through its employees." Pickering v. Board of Educ., 391 U.S. 563, 568 (1968). These two aspects of the analysis present questions of law. Guilloty Perez, 339 F.3d at 51. According to Tripp, "[t]here can be no higher public concern th[a]n to have justice evenly administered without the Town's [a]dministrators capriciously granting favors to *special citizens*." (Docket No. 34 at 7 (itals. in orig.).) The problem with this argument is that it does not identify any "given statement" by Tripp; it only offers Tripp's personal opinion as to what Cole's personal motives were when he interceded on Ms. Thurston's behalf. Sifting through Tripp's memorandum produces the following two categories of relevant speech by Tripp: (1) Tripp's statements to Cole and the district attorney concerning Cole's request that the summons be dismissed and (2) Tripp's statements to two selectmen about his concern that his working relationship with Cole had suffered as a result of the Thurston summons matter. Contrary to Tripp's assertions, and as already explained, there is nothing in the record to support a finding that Tripp's speech served to divulge criminal activity, official corruption or other illegal conduct on the part of Cole. Nor did Tripp's speech actually relate Tripp's personal dissatisfaction with the fact that Cole was "interfering with" (Docket No. 34 at 7) or improperly trying "to affect" (Id. at 8) the way in which Tripp performed his police duties. Tripp merely expressed his discomfort at raising the issue with the district attorney at the arraignment stage of the process. With these glosses stripped from the mix, it becomes much more evident that Tripp's speech related far

more to his private concerns about working conditions than to matters of inherent concern to the electorate.

The issue is complicated by the fact that Cole, although having supervisory authority over Tripp, is not himself a law enforcement officer. However, abstracting the facts slightly, it would seem that if Cole were the chief of police and Tripp were an officer within his department, Cole's activities vis-à-vis the Thurston summons would be nothing out of the ordinary. It is not extraordinary that police department supervisors should seek to influence the prosecution of a summons based on eye-witness reports and subjective judgments about the merits of a prosecution. Certainly Tripp would not want to suggest that a subordinate officer should inform the public every time a supervising officer disagrees about the merits of a summons. Moreover, when the summons is prosecuted despite a supervisor's disagreement, it seems doubly curious that the mere fact of the supervisor's "interference" should be deemed worthy of a public statement. Although this abstraction does not answer the question presented, it helps to focus in on the real dispute: Tripp was upset that Cole was poking his nose into police business. But, importantly, the record does not reflect that Tripp ever expressed that concern to Tripp or the other individuals to whom he spoke. Although it might be a legitimate matter for public concern that the Bethel Town Manager had involved himself in the day-to-day operation of the Bethel Police Department in connection with a dog-at-large summons, Tripp cannot base his free speech retaliation action on Cole's words and acts, only on his own speech.

On balance, I conclude that the actual speech at issue in this case did not amount to an exercise of Tripp's First Amendment rights. Tripp merely debated with Cole about the proper performance of Tripp's duties, passed along Cole's request to the district attorney, and divulged to two selectmen his private concerns over his working conditions. With respect to Tripp's

conversations with Cole, the content, form and context were that Tripp would pass along Cole's request, but that the status quo would be preserved insofar as the matter would remain subject to the district attorney's discretion. With respect to Tripp's conversations with the district attorney, all that can be inferred is that Tripp passed along Cole's request. With respect to Tripp's conversations with the selectmen, Tripp merely stated his subjective belief that his relationship with Cole had "cooled." Although the "big picture" might be newsworthy, the actual content, form and context of Tripp's speech reflect that Tripp was speaking primarily as an employee concerned about how he was going to perform his job with regard to the Thurston summons and about private perceptions that directly related to his personal working relationships, not as a concerned public citizen speaking about matters predominantly of public concern.[8] "[W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." Connick, 461 U.S. at 147.[9] Accordingly, I recommend that the court grant the defendants' motion with respect to count I.

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[8] As the Fifth Circuit has observed, "an employee cannot transform a personal conflict into an issue of public concern simply by arguing that individual concerns might have been of interest to the public under different circumstances." Markos v. City of Atlanta, 364 F.3d 567, 570 (5th Cir. 2004). It is not difficult to conceive of slightly different speech under slightly different circumstances that could legitimately be described as primarily of public concern, but the factual record in this case does not present the kind of content, form and context that should form the basis of a First Amendment claim.

[9] Although I recognize that it is not mandatory that speech be directed toward the public in order to maintain a claim of First Amendment retaliation, see Rivera-Jimenez v. Pierluisi, 362 F.3d 87, 94 (1st Cir. 2004) (finding that speech internal to a public agency that raised the possibility of corruption within the agency was of public concern), "[p]ublication of the speech is a factor to be weighed in determining whether the speech was of public concern." Markos, 364 F.3d at 571. So, too, is whether the speech was made in connection with an established public controversy already taking place within a public forum. Id. at 572. The internal and private nature of the speech in this case is one more factor that tips the scales away from finding that Tripp's speech warrants First Amendment protection.

C. Intentional infliction of emotional distress

The defendants maintain that Tripp's tort claim for emotional distress is barred by the exclusivity and immunity provision of the Maine Workers' Compensation Act. They are correct. See Gordon v. Cummings, 2000 ME 68, ¶ 13, 756 A.2d 942, 945 (citing 39-A M.R.S.A. § 104); Cole v. Chandler, 2000 ME 104, ¶¶ 9-16, 752 A.2d 1189, 1194-97 (precluding tort claims between co-employees). The defendants also maintain that Tripp's tort claim against Cole is barred by discretionary function immunity and that the claim against Bethel is barred by sovereign immunity under the Maine Tort Claims Act. (Docket No. 27 at 19-21.) Tripp concedes these points by failing to address them in his opposition memorandum. Accordingly, I recommend that the court grant defendants' motion with respect to count IV.

D. Tripp's cross-motion for partial summary judgment

Tripp has filed a motion seeking summary judgment on the issue of whether the defendants have offered a legitimate, non-retaliatory reason for suspending and discharging him from town employment. (Docket No. 32.) Because I have concluded that Tripp fails to state a prima facie claim of retaliation, I conclude that Tripp's motion is moot. Furthermore, it is worth observing that Tripp's motion is highly irregular. The defendants' burden to offer a legitimate, non-retaliatory reason for imposing adverse employment actions on Tripp is merely a burden of production; the burden of persuasion always remains with Tripp. See Rodriguez-Cuervos v. Wal-Mart Stores, Inc., 181 F.3d 15, 19 n.1 (1st Cir. 1999). Finally, a review of Tripp's motion reveals that he is seeking some form of relief based on alleged due process violations, even though his complaint fails to assert any such claim. I recommend that the Court deny Tripp's motion.

Conclusion

For the reasons stated herein, I **DENY** the defendants' motion to exclude the Hopkins affidavit (Docket No. 51), **GRANT** their motion to exclude certain affidavit testimony by Tripp (Docket No. 52), **DENY** Tripp's motion to strike (Docket No. 33), and **RECOMMEND** that the court **GRANT** the defendants' motion to dismiss and for summary judgment (Docket No. 27) and **DENY** Tripp's cross motion for summary judgment (Docket No. 32).

NOTICE

> A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, and request for oral argument before the district judge, if any is sought, within ten (10) days of being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.
>
> Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

Dated September 24, 2004

TRIPP v. COLE et al
Assigned to: JUDGE GEORGE Z. SINGAL
Referred to:
Demand: $
Lead Docket: None
Related Cases: None
Case in other court: None
Cause: 28:1331 Fed. Question: Employment Discrimination

Date Filed: 12/15/03
Jury Demand: Both
Nature of Suit: 442 Civil Rights: Jobs
Jurisdiction: Federal Question

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