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

TRANSOURCE PENNSYLVANIA, LLC, *Plaintiff*, v. STEPHEN M. DEFRANK, Chairman, Pennsylvania Public Utility Commission, KIMBERLY M. BARROW, Vice Chairman, Pennsylvania Public Utility Commission, JOHN F. COLEMAN, JR., RALPH V. YANORA, AND KATHRYN L. ZERFUSS, Commissioners, Pennsylvania Public Utility Commission, all in their official capacities, and the PENNSYLVANIA PUBLIC UTILITY COMMISSION, *Defendants*.	Case No. 1:21-cv-01101-JPW Judge Jennifer P. Wilson Electronically filed document *Complaint Filed 6/22/21*

PLAINTIFF TRANSOURCE PENNSYLVANIA, LLC'S SUR-REPLY IN OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

INTRODUCTION

Defendants argue for the first time in their reply brief that Transource Pennsylvania LLC's ("Transource") complaint is barred because it seeks retrospective relief. *See* Doc. 180 at 2-5. This argument was not made in Defendants' opening brief—at most, Defendants alluded to it in hypothetical form and did not develop or support the point at all. Accordingly, the argument is waived and should not be considered at all.

To the extent the argument is nevertheless considered, it is without merit. Transource seeks relief that is straightforwardly prospective. Transource wants to build a new transmission line. The only thing stopping it from moving forward is an order by Defendants denying it a certificate of public convenience on grounds that violate federal law.

Transource requests prospective injunctive relief prohibiting Defendants from enforcing this unlawful denial. Defendant's unlawful denial prevents Transource from taking certain preparatory actions, resulting from the recission of Transource's provisional certificate of public convenience as part of the challenged order; prospective injunctive relief would allow Transource to resume these activities without the threat of sanctions from the PUC for conducting public utility activities in Pennsylvania.

Transource also requests a declaration that Defendants' order is unlawful. Such a declaration will require Defendants to reconsider Transource's application for a certificate in a manner consistent with federal law and enable Transource to obtain the required authorization to start construction without the threat of sanctions from the PUC.

All this requested relief is purely prospective in nature. Transource does not seek any retrospective remedy, such as money damages for the harm it has incurred due to the PUC's order. Under well-established law, the Eleventh Amendment allows this suit.

ARGUMENT

I. Defendants' Argument Regarding Allegedly Retrospective Relief Is Waived and Should Be Disregarded.

The Court should not even consider Defendants' argument regarding allegedly retrospective relief because the point has been doubly waived. First, Defendants omitted that argument from the summary judgment briefing, which, as Transource previously argued, was the proper place to raise it. *See* Doc. 176 at 5-7. Second, Defendants then omitted the argument from their opening brief in support of their motion for judgment on the pleadings. *See* Doc. 174 at 11-13. That brief mentioned retroactive relief only once, and only in a passing hypothetical. The entirety of the discussion consisted of this sentence: "Moreover, to the extent that Plaintiff seeks retroactive declaratory relief against Individual Defendants, as they

are state officials sued in their official capacities only, *Ex parte Young* would not apply and they would be entitled to Eleventh Amendment immunity." *Id.* at 12. As Transource pointed out, Doc. 176 at 16, Defendants made no argument that Transource actually *was* seeking retroactive relief. Nor did Defendants cite any authority in support of such a proposition.

This drive-by reference was not enough for Defendants to preserve the issue. "Reply briefs are not the time to present new argument," *Atlantic Power & Electric Co. v. Big Jake*, 583 F. Supp. 3d 631, 642 (D.N.J. 2022) (quotation marks omitted), and "a 'passing reference' to an issue in an opening brief" is insufficient to preserve the issue for development in reply. *Bayer AG v. Schein Pharm., Inc.*, 129 F. Supp. 2d 705, 716 (D.N.J. 2001), *aff'd*, 301 F.3d 1306 (Fed. Cir. 2002).

As this Court has held in declining to entertain an argument elaborated for the first time in reply, "a moving party cannot support its motion with a sparse argument, wait for the non-moving party to note the sparseness of the argument, then respond with a reply brief that sets forth the full argument that should have been made in the original supporting brief." *Spriggs v. City of Harrisburg*, No. 22-CV-01474, __ F. Supp. 3d __, 2023 WL 4278671, at *7 n.3 (M.D. Pa. June 29, 2023) (Wilson, J.).

Accordingly, the Court should disregard page 2 through the top of page 5 of Defendants' reply brief, Doc. 180.

II. Transource Seeks Purely Prospective Relief.

To the extent the Court does consider the merits, Defendants' position is easily rejected. The Supreme Court has held that, to determine whether a complaint "avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (citation omitted).

Here, there is an ongoing violation of federal law: Transource wants to construct a new transmission line in Pennsylvania, and it cannot do so because the PUC refused permission on the grounds that are preempted and that violate the dormant Commerce Clause. This is not a "lingering" effect, *cf.* Doc. 180 at 4; it is the present, ongoing effect of the PUC's unlawful actions which continues to cause injury. And the relief sought is purely prospective. Transource seeks an injunction against the enforcement of the PUC's unlawful order, which would restore the provisional certificate of public convenience Transource was granted while its application was pending before the PUC, allowing Transource to take certain steps toward developing its project; and it would enjoin the PUC from imposing sanctions on Transource for violating the challenged order if Transource did so. *See* Compl. 40-41 (Request for Relief). This relief is purely future-oriented. Transource also seeks a declaration that the challenged order is unlawful, which would clear the way

for the PUC to reconsider Transource's application in a manner consistent with federal law. *Id.* That, too, is prospective relief.

By contrast, Transource seeks no retrospective relief. Although it was injured in the past by the PUC's unlawful order—the resulting delay to its project has imposed costs on the company—Transource does not seek to be made whole for that loss. It does not seek monetary damages of any kind.

To the extent the PUC believes the relief sought is retrospective because the PUC's order was issued in the past, the Supreme Court and Courts of Appeals have already rejected that notion. The Supreme Court explained in *Verizon Maryland* that even when a plaintiff "seeks a declaration of the *past*, as well as the *future*, ineffectiveness of [a state regulatory commission's] action," the suit is not barred by the Eleventh Amendment so long as it does not implicate the "past liability of the State" or "impose upon the State 'a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials.'" 535 U.S. at 646 (citation omitted). Here, Transource does not seek to impose past liability upon Pennsylvania for any monetary loss.

The PUC failed to address any of the numerous cases Transource cited applying *Ex parte Young* to similar claims, including, for example, *Town of Barnstable*, which directly refutes the PUC's position in a factually similar context.

See Town of Barnstable v. O'Connor, 786 F.3d 130, 138-41 (1st Cir. 2015) (cited and quoted at Doc. 176 at 17); Doc. 176 at 14 (collecting similar cases).

The sole authority on which the PUC relies is *Merritts v. Richards*, 62 F.4th 764 (3d Cir. 2023), but that case only underscores the lack of merit in the PUC's position. As the cases cited by *Merritts* describe, the basic rule is that:

> Relief that in essence serves to *compensate* a party injured in the past by an action of a state official in his official capacity that was illegal under federal law is barred even when the state official is the named defendant. This is true if the relief is expressly denominated as damages. It is also true if the relief is tantamount to an award of damages for a past violation of federal law, even though styled as something else. On the other hand, relief that serves directly to bring an end to a present violation of federal law is not barred by the Eleventh Amendment even though accompanied by a substantial ancillary effect on the state treasury.

Papasan v. Allain, 478 U.S. 265, 278 (1986) (cited in *Merritts*, 62 F.4th at 772) (emphasis added, citations and footnote omitted).

In *Merritts*, the Third Circuit applied that rule to bar what was in essence a monetary claim styled as a request for an injunction. The plaintiff in *Merritts* asserted that the Commonwealth had "acquir[ed] … easements without justification" and had "not provid[ed] just compensation." 62 F.4th at 772. It sought what it termed a "reparative injunction." *Id.* The court held that the requested "injunction cannot be fairly characterized as prospective," *id.*—it was, in substance, a demand for retrospective money damages for the allegedly uncompensated taking. Accordingly, the claim was barred by sovereign immunity.

Nothing of the sort can be said in this case. Rather, this is a classic case in which *Ex parte Young* serves to ensure the supremacy of federal law against a violation that is ongoing. To the extent the PUC's arguments regarding retrospective relief are considered at all, they can be readily rejected as meritless.

CONCLUSION

The Court should deny the motion for judgment on the pleadings.

October 3, 2023

Respectfully submitted,

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***Spriggs v. City of Harrisburg*,**
No. 22-CV-01474, __ F. Supp. 3d __,
2023 WL 4278671 (M.D. Pa. June 29, 2023)

2023 WL 4278671
Only the Westlaw citation is currently available.
United States District Court, M.D. Pennsylvania.

Nathaniel SPRIGGS, Plaintiff,
v.
CITY OF HARRISBURG, et al., Defendants.

Civil No. 1:22-CV-01474
|
Signed June 29, 2023

Synopsis

Background: City's former director of public works, who was a person of color, brought action against city and mayor alleging that mayor abuse her position in directing and demanding that director promote or create municipal positions for her family members and that director was terminated for refusing to do so. Specifically, former director asserted claims for First Amendment retaliation under § 1983, a violation of the Pennsylvania Whistleblower Law (PWL), wrongful termination under Pennsylvania law, and racial discrimination under § 1981. Defendants moved to dismiss for failure to state a claim.

Holdings: The District Court, Jennifer P. Wilson, J., held that:

director was speaking as a private citizen for First Amendment purposes when he reported mayor's ethics violations;

director failed to adequately allege that white coworkers were similarly situated for purposes of § 1981 claim;

director stated claim under PWL; and

wrongful termination claim was preempted by availability of statutory remedy under PWL.

Motions granted in part and denied in part.

Procedural Posture(s): Motion to Dismiss for Failure to State a Claim.

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MEMORANDUM

JENNIFER P. WILSON, United States District Court Judge

***1** This case involves allegations of First Amendment retaliation brought pursuant to 42 U.S.C. § 1983, a violation of the Pennsylvania Whistleblower Law ("PWL"), wrongful termination under Pennsylvania law, and racial discrimination under 42 U.S.C. § 1981. (Doc. 20.) Plaintiff Nathaniel Spriggs ("Spriggs") asserts that he was employed by Defendant City of Harrisburg ("the City") from 1996 through approximately August 2017, and was recruited by Defendant Mayor Wanda Williams ("Mayor Williams") to return to the City and serve as Director of Public Works in Mayor Williams' administration. Subsequently, Spriggs alleges that Mayor Williams abused her position in directing and demanding that Spriggs promote or create positions for her family members and that Spriggs was terminated for refusing to do so.

Before the court are motions to dismiss filed by Mayor Williams and the City, seeking to dismiss the amended complaint for failure to state a claim upon which relief can be granted. (Docs. 24, 26.) For the reasons set forth below, Defendants' motions will be granted in part and denied in part.

Factual Background And Procedural History

According to the allegations in the amended complaint, Spriggs was first hired by the City in or around 1996, when he began working as a janitor. (Doc. 20, ¶ 16.) Over the next two decades, Spriggs ascended into higher-level jobs in various departments within the City. (*Id.* ¶ 17.) In or about 2015, Spriggs began management-level work within the City's Department of Traffic and Engineering, and in or about early 2017, Spriggs was named the Solid Waste and Logistics Coordinator within the City's Department of Public Works. (*Id.* ¶¶ 18–19.) In or about August 2017, Spriggs left the City's employment, and began working as Director of Public Works for Susquehanna Township. (*Id.* ¶ 21.)

According to Spriggs, after Mayor Williams won the mayoral primary in May 2021, members of her campaign contacted him to discuss the possibility of returning to the City as Director of Public Works. (*Id.* ¶ 22.) Spriggs initially declined, but after several requests from members of her campaign and Mayor Williams herself, Spriggs agreed to return to the City under Mayor Williams' administration. (*Id.* ¶¶ 22–23.) Around August of 2021, then-Mayor Papenfuse also asked Spriggs to return to the City as Director of Public Works. (*Id.* ¶ 24.) Mayor Williams was agreeable to Spriggs returning to the City and working as Director of Public Works prior to the general election. (*Id.* ¶ 25.) Therefore, Spriggs began working for the City again as Director of Public Works on or about September 27, 2021. (*Id.*)

Spriggs alleges that around November or December of 2021, prior to Mayor Williams taking office, she called Spriggs and demanded that he find other work for her son, Dion Dockens ("Dockens"), who was already employed by the Public Works Department, but had previously suffered a non-workplace injury, exhausted his paid leave, and needed a job he could physically perform. (*Id.* ¶¶ 26–27.) Mayor Williams requested that Dockens be assigned a different position than his previous one on a sanitation/recycling truck, but Spriggs advised that there were no other available positions. (*Id.* ¶ 28.) Mayor Williams warned Spriggs to find something or she would get very upset, then gave Spriggs until the end of the day to do so. (*Id.* ¶ 29.) Spriggs re-assigned Dockens to the Highway Department collecting leaf bags for approximately two months until Dockens was able to return to his prior job. (*Id.* ¶ 30.)

***2** According to Spriggs, shortly after Mayor Williams' inauguration, in about January or February 2022, Mayor Williams instructed Spriggs via multiple phone calls to create a management position for Dockens, Mayor Williams' granddaughter, her nephew, and various other members of her family. (*Id.* ¶ 31.) Spriggs began working on either making Dockens a City

Island Superintendent or a Sanitation Supervisor. (*Id.* ¶ 32.) However, the position description for the Sanitation Supervisor position contained certain credentials that Dockens did not have, so Mayor Williams instructed Spriggs to alter the job description to fit Dockens' qualifications. (*Id.* ¶ 33.)

Spriggs next alleges that in February of 2022, Mayor Williams called him and demanded that he discipline an employee for talking about Dockens. (*Id.* ¶ 34.) The employee was related to the ex-girlfriend of one of Mayor Williams' sons. (*Id.*) Spriggs advised Mayor Williams that he could not discipline an employee when no work rules had been violated, but Mayor Williams insisted on immediate discipline. (*Id.* ¶ 35.) Spriggs went to the job site and asked the employee not to make comments during working hours about Dockens, as it upset Mayor Williams. (*Id.* ¶ 36.) Spriggs then advised Mayor Williams that the issue was resolved, and that the employee was counseled. (*Id.* ¶ 37.) Approximately two days later, that employee filed a complaint against Spriggs and the City. (*Id.* ¶ 38.)

Spriggs asserts that in March of 2022, chief counsel for the State Ethics Commission visited the City and explained what constituted ethics violations, putting employees on notice. (*Id.* ¶ 39.) At that point, Spriggs decided that he would not comply with Mayor Williams' demands regarding jobs for her family members. (*Id.* ¶ 40.) In April of 2022, Mayor Williams called Spriggs screaming, asking why he had not yet promoted Dockens. (*Id.* ¶ 41.) Mayor Williams advised that Dockens was considering moving to Ohio if he was not promoted, and threatened to fire Spriggs and his entire management staff if Dockens did so. (*Id.*)

Spriggs contends that on April 29, 2022, Spriggs notified the City Solicitor, Neil Grover ("Grover"), of Mayor Wiliams' demands regarding Dockens, and that he believed her actions violated the state's ethics law. (*Id.* ¶ 42.) Spriggs advised Grover that he was no longer willing to sign off on Dockens' promotion, because Dockens was not qualified for the promotion and Mayor Williams had asked Spriggs to alter the job requirements so that Dockens would be qualified. (*Id.* ¶ 43.) Spriggs told Grover that he believed this to be an ethics violation and wanted no part of it. (*Id.* ¶ 44.) Grover advised that promoting Dockens could result in ethics violation charges against Spriggs, Grover, Mayor Williams, and the City, and that they would not promote him. (*Id.* ¶ 45.)

Next, Spriggs alleges that later that same day, Mayor Williams called Spriggs and stated that Grover had informed her of his conversation with Spriggs regarding Dockens and the risk of an ethics violation. (*Id.* ¶ 46.) Mayor Williams was upset and requested that Spriggs report to her office immediately. (*Id.* ¶ 47.) However, following that phone call, Mayor Williams' assistant Lisa Blackston called Spriggs and informed him that Mayor Williams would instead meet him on Monday, May 2, 2022. (*Id.* ¶ 48.) On Monday, May 2, 2022, Mayor Williams had Spriggs, Grover, and Human Resources Director Joni Willingham ("Willingham") report to her office for a meeting. (*Id.* ¶ 49.) During this meeting, Grover informed Mayor Williams that Dockens is not eligible for a promotion into management because it violates ethics rules. (*Id.*) Mayor Williams then threatened to fire all three of them if they didn't come up with a way to promote Dockens. (*Id.* ¶ 50.)

***3** Spriggs further alleges that in May of 2022, Mayor Williams called Spriggs after Spriggs disciplined an employee who walked off the job during his shift. (*Id.* ¶ 51.) The employee at issue was the boyfriend of Mayor Williams' daughter. (*Id.*) That employee later resigned, and Mayor Williams was upset with Spriggs about the matter. (*Id.*)

Spriggs asserts that on or about June 16, 2022, Dockens was caught by his manager driving a City-owned truck in York without having a proper license. (*Id.* ¶ 52.) At Spriggs' direction, Dockens was disciplined on Friday, June 17, 2022, and was given a one-day unpaid suspension. (*Id.* ¶ 53.) Due to a federal holiday, the next business day was Tuesday, June 21, 2022. At approximately 8:15 a.m. on June 21, City Business Administrator Daniel Hartman ("Hartman") texted Spriggs. (*Id.*) Spriggs called Hartman and Hartman instructed Spriggs to come to his office right away. (*Id.*) When Spriggs inquired as to why,

Hartman stated that he had to administer a discipline to Spriggs. (*Id.* ¶ 55.) When Spriggs inquired about the reason, Hartman replied "I'll tell you when you get here." (*Id.*)

Spriggs asserts that on the way to the City Government Center, he called Mayor Williams, who did not answer. (*Id.* ¶ 56.) When Spriggs arrived, he asked Mayor Williams' secretary what was going on, and the secretary responded "it's f---ed up. [Hartman] will be out in a moment." (*Id.* ¶¶ 57–58.) At that point, Willingham arrived and went into the conference room with Spriggs. (*Id.* ¶ 59.) Spriggs asked Willingham what was going on, and she shrugged and said nothing. (*Id.* ¶ 60.) Hartman arrived with his assistant and sat across from Spriggs, next to Willingham. (*Id.* ¶ 61.) Hartman slid a piece of paper across the table to Spriggs, and it was Spriggs' termination letter. (*Id.*) The termination letter stated that Spriggs was being fired for, *inter alia*, signing payroll action forms the prior business day. (*Id.* ¶ 62.) Spriggs replied that he signed the forms because he had been instructed to do so by the City's Finance Director Marita Kelley ("Kelley"), and the City's Payroll Manager Sarah Fedor ("Fedor"). (*Id.* ¶ 63.)

After Hartman contested this assertion, Spriggs informed Hartman that he had emails to prove it. (*Id.* ¶ 64.) Hartman and Willingham looked at each other, shook their heads, and Hartman said "the Mayor just wants you fired." (*Id.* ¶ 65.) Willingham was present when Spriggs signed the payroll forms that were given to him. (*Id.* ¶ 66.) Kelley and Fedor also approved the payroll action forms at issue, but neither was fired. (*Id.* ¶ 66.) Mayor Williams and the City Council subsequently approved the payroll actions. (*Id.* ¶ 67.) Spriggs contends that the explanation for his termination was a pretext, and that he was instead terminated for reporting, objecting to, and refusing to be complicit in Mayor Williams' unlawful conduct. (*Id.* ¶ 68.)

Spriggs initiated this action by filing a complaint on September 20, 2022. (Doc. 1.) Both Defendants filed motions to dismiss the complaint. (Docs. 10, 16.) Spriggs then filed an amended complaint on January 3, 2023. (Doc. 20.) The amended complaint is now the operative complaint. The prior motions to dismiss were denied as moot the same day the amended complaint was filed. (Doc. 21.)

Count One of the amended complaint is a First Amendment retaliation claim brought pursuant to 42 U.S.C. § 1983 against Mayor Williams in her individual capacity. Count Two is a claim against the City under the PWL. Count Three is a claim against the City for wrongful termination under Pennsylvania law. Finally, Count Four is a claim for racial discrimination under 42 U.S.C. § 1981 against Mayor Williams.

***4** On January 13, 2023, Mayor Williams filed a motion to dismiss the amended complaint and brief in support. (Docs. 24, 25.) On January 17, 2023, the City filed a motion to dismiss the amended complaint and brief in support. (Docs. 26, 27.) Spriggs filed timely briefs in opposition to the motions. (Docs. 28, 29.) Mayor Williams filed a reply brief on February 3, 2023. (Doc. 29.) The City filed a reply brief on February 10, 2023. (Doc. 31.) Thus, both motions are ripe for resolution.

Jurisdiction

This court has jurisdiction under 28 U.S.C. § 1331, which allows a district court to exercise subject matter jurisdiction in civil cases arising under the Constitution, laws, or treaties of the United States. The court has supplemental jurisdiction over the related state-law claims pursuant to 28 U.S.C. § 1367. Further, venue is appropriate under 28 U.S.C. § 1391.

Standard of Review

In order "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955). "Conclusory allegations of liability are insufficient" to survive a motion to dismiss. *Garrett v. Wexford Health*, 938 F.3d 69, 92 (3d Cir. 2019) (quoting *Iqbal*, 556 U.S. at 678–79, 129 S.Ct. 1937). To determine whether a complaint survives a motion to dismiss, a court identifies "the elements a plaintiff must plead to state a claim for relief," disregards the allegations "that are no more than conclusions and thus not entitled to the assumption of truth," and determines whether the remaining factual allegations "plausibly give rise to an entitlement to relief." *Bistrian v. Levi*, 696 F.3d 352, 365 (3d Cir. 2012).

Discussion

A. 1st Amendment Retaliation under 42 U.S.C. § 1983

Mayor Williams[1] first argues that there could be no violation of the First Amendment because Spriggs was not speaking as a citizen, and his speech was thus not constitutionally protected. (Doc. 25, pp. 8–13.)[2] Alternatively, Mayor Williams argues that even if Spriggs has adequately pleaded a First Amendment violation, Count One nevertheless fails because Mayor Williams is entitled to qualified immunity. (*Id.* at 17–18.) Here, Mayor Williams asserts that Spriggs' claim against Mayor Williams does not set forth any action by the Mayor violative of clearly established law or rights. (*Id.* at 18.) In so arguing, Mayor Williams notes that Spriggs admits that he signed off on the payroll action forms, and admits that he made the independent decision to decline to promote Dockens. (*Id.*)

1 The court notes that Count One is against Mayor Williams only. However, despite acknowledging this, the City's brief in support of its own motion sets forth a significant amount of argument that Count One should be dismissed. (Doc. 27, pp. 8–17.) Because Count One was not brought against the City, the court declines to consider these arguments.

2 For ease of reference, the court utilizes the page numbers from the CM/ECF header.

In response, Spriggs argues that the complaint makes it clear that he was speaking as a private citizen because the speech at issue—talking to Grover, the City's Solicitor, about potential ethics violations—was not ordinarily within the scope of his job duties. (Doc. 28, p. 8.) Additionally, Spriggs argues that Mayor Williams is not shielded by qualified immunity because a reasonable official in her position would know that firing the Public Works Director for reporting ethical improprieties would violate his right to free speech. (*Id.* at 10–11.)

***5** To state a claim under 42 U.S.C. § 1982, a plaintiff must demonstrate that: (1) the alleged misconduct was committed by a person acting under color of state law; and (2) the conduct deprived him of a right, privilege, or immunity secured by the Constitution or laws of the United States. *West v. Atkins*, 487 U.S. 42, 48, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988). For a defendant to be held liable for violation of a plaintiff's civil rights, the defendant must have personal involvement in the alleged wrongs. *Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3d Cir. 1988).

A public employee seeking to state a claim for retaliation under the First Amendment must allege that "(1) his speech is protected by the First Amendment and (2) the speech was a substantial or motivating factor in the alleged retaliatory action,

which, if both are proved, shifts the burden to the employer to prove that (3) the same action would have been taken even if the speech had not occurred." *Dougherty v. Sch. Dist. of Phila.*, 772 F.3d 979, 986 (3d Cir. 2014).

For the first element, a public employee's speech is protected by the First Amendment "when (1) in making it, the employee spoke as a citizen, (2) the statement involved a matter of public concern, and (3) the government employer did not have 'an adequate justification for treating the employee differently from any other member of the general public' as a result of the statement he made." *Hill v. Borough of Kutztown*, 455 F.3d 225, 241–42 (3d Cir. 2006) (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 418, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006)).

For a public employee's speech to be protected by the First Amendment, he must have spoken as a citizen, meaning that his speech must not have been undertaken pursuant to his job responsibilities as a public employee. *See Garcetti*, 547 U.S. at 421–22, 126 S.Ct. 1951. As the Supreme Court has noted, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* at 421, 126 S.Ct. 1951. However, if "the public employee's speech is not part of his ordinary job duties or is uttered as sworn testimony in a judicial proceeding, then the employee is acting as a private citizen and his speech hence may or may not be protected under the First Amendment," depending on whether the speech involved a matter of public or private concern. *Falco v. Zimmer*, 767 F. App'x 288, 298–99 (3d Cir. 2019).

Here, Mayor Williams asserts that the speech at issue was "undeniably made within [Spriggs'] official duties and clearly involved duties ordinarily within the scope of his job duties as Director of Public Works." (Doc. 25, p. 11.) Mayor Williams asserts that the speech at issue is Spriggs' decision not to promote Dockens, as she argues that "[i]ssues such as employee discipline and promotions are clearly within the ordinary scope of [Spriggs's] job responsibilities as Director of Public Works." (*Id.* at 12.) Spriggs, on the other hand, contends that he was not an ethics advisor or watchdog for the City. (Doc. 28, p. 8.) Further, Spriggs asserts that he was not employed to warn the Mayor about ethical violations, nor was his reporting of purported ethical violations part of the work he was paid to perform on an ordinary basis. (*Id.*)

The court disagrees with Mayor Williams' narrow interpretation of the speech at issue as being "issues such as employee discipline and promotions." Rather, it is clear from the face of the complaint that the speech at issue is Spriggs' report to Grover, which was later relayed to Mayor Williams, that Spriggs believed that complying with Mayor Williams' requests relating to Dockens and other family members would constitute ethical violations.

***6** Several years after *Garcetti*, the Supreme Court noted that the holding in *Garcetti* "said nothing about speech that simply relates to public employment or concerns information learned in the course of public employment." *Lane v. Franks*, 573 U.S. 228, 239, 134 S.Ct. 2369, 189 L.Ed.2d 312 (2014). Indeed, "the mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—speech." *Id.* at 240, 134 S.Ct. 2369. Rather, "the critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties." *Id.* It is clear that reporting the Mayor's purported ethical violations to the City Solicitor was not *ordinarily* within the scope of Spriggs' duties as Director of Public Works for the City. Because Mayor Williams did not provide argument as to the other elements, the court need not address them at this time.

Having concluded that Spriggs has adequately pleaded a claim for a clearly established constitutional violation, the court likewise concludes that Mayor Williams is not entitled to qualified immunity at this stage of the proceedings given that she has not presented any other argument on qualified immunity. Therefore, Mayor Williams' motion to dismiss Count One of the amended complaint will be denied.

B. Racial Discrimination

Next, Mayor Williams argues that Spriggs failed to plead any facts suggesting racial animus, which is fatal to his claim at Count Four for racial discrimination in contracts under 42 U.S.C. §§ 1981. (Doc. 25, pp. 14–15.) Mayor Williams contends that Spriggs has pleaded neither facts suggestive of direct evidence of racial discrimination nor facts that would support an inference of racial discrimination. (*Id.* at 15.)

In opposition, Spriggs argues that the amended complaint pleads that Grover, a white male, also spoke out against Mayor Williams' actions and was not fired. (Doc. 28, pp. 13–14.) Furthermore, Spriggs argues that the amended complaint alternatively pleads that Spriggs was not truly fired for improperly approving payroll forms because two white females (Kelley and Fedor) who also approved the payroll forms were not fired. (*Id.* at 14.) Spriggs contends that these facts are sufficient to establish a plausible inference of unlawful discrimination, because the amended complaint pleaded two instances of similarly situated white employees who were not terminated for taking the same actions he did. (*Id.* at 13–14.)

In her reply brief, Mayor Williams argues that the "similarly-situated individuals" identified by Spriggs—Grover, Kelley, and Fedor—are not similarly situated to Spriggs, and his claim therefore fails. (Doc. 30, pp. 4–8.)

Section 1981 prohibits race-based discrimination in the making and enforcing of contracts. *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 302, 114 S.Ct. 1510, 128 L.Ed.2d 274 (1994). To state a claim for racial discrimination under § 1981, a plaintiff must plead sufficient facts to support the following elements: (1) the plaintiff is a member of a racial minority; (2) defendant(s) intended to discriminate on the basis of race; and (3) the discrimination concerned one or more of the activities enumerated in the statute, which includes the right to make and enforce contracts. *Brown v. Philip Morris, Inc.*, 250 F.3d 789, 797 (3d Cir. 2001).

The court agrees with Mayor Williams that the amended complaint does not plead sufficient facts to establish that the individuals Spriggs asserts to be similarly situated to him do, in fact, meet the necessary criteria. A plaintiff may establish an inference of racial discrimination based on disparate treatment by demonstrating that similarly situated non-protected persons were treated more favorably.

For an individual to be "similarly situated" to a plaintiff, the individuals must be "similarly situated" in all respects—in other words, they must have "dealt with the same supervisor, ... [been] subject to the same standards[,] and ... engaged in the same conduct." *Hatch v. Franklin Cnty.*, 755 Fed. App'x 194, 199 (3d Cir. 2018) (citing *In re Tribune Media Co.*, 902 F.3d 384, 403 (3d Cir. 2018)). Although the amended complaint does assert that Grover, Kelley, and Fedor engaged in the same conduct, it is devoid of facts demonstrating that they dealt with the same supervisor as and were subject to the same standards as Spriggs. Therefore, Spriggs has failed to adequately plead a claim for racial discrimination under § 1981 and Mayor Williams' motion to dismiss Count Four of the amended complaint will be granted. Count Four will be dismissed without prejudice.

C. Pennsylvania Whistleblower Law

***7** The City argues that Spriggs failed to show concrete or surrounding circumstances connecting his report of waste and/or wrongdoing with his dismissal, and that Count Two, brought under the PWL, must be dismissed. (Doc. 27, pp. 17–21.) The City's argument centers around the lapse of time between Spriggs' conversation with Grover about a purported ethics violation on April 29, 2022, and Spriggs' termination on June 21, 2022. (*Id.*)

In response, Spriggs asserts that he has adequately pleaded that he objected to Mayor Williams' demands to promote and/or advance Dockens, discussed this being a violation of the Pennsylvania Ethics Act with Grover, who is an appropriate

employer pursuant to the PWL, that Mayor Williams threatened to terminate him after the report was made, and that he was terminated within weeks for taking action he was authorized to take. (Doc. 29, pp. 4–5.)

The amended complaint clearly pleads fact sufficient to state a plausible claim that Spriggs' reports to Grover about Mayor Williams' purported unethical requests was connected to his termination approximately six weeks later. The amended complaint contains specific allegations about Mayor Williams' phone calls and interactions with Spriggs regarding his refusal to carry out her demands. (Doc. 29 ¶¶ 29, 33, 41, 46–47.) Additionally, the amended complaint specifically pleads that following Spriggs' report to Grover of the purported unethical conduct, Grover notified Mayor Williams, who then conducted a meeting with Spriggs, Grover, and Willingham in which Mayor Williams explicitly advised that they would all be terminated if they refused to promote Dockens. (*Id.* ¶ 50.) Furthermore, Spriggs was terminated on the first business day following him directing the discipline of Dockens. (*Id.* ¶¶ 53–65.) During the meeting at which he was terminated, the amended complaint asserts that after Spriggs pointed out that the conduct for which he was allegedly being terminated had been approved by other City employees, Hartman said "the Mayor just wants you fired." (*Id.* ¶ 65.) Therefore, Spriggs adequately pleaded a causal connection between his report of waste and/or wrongdoing[3] and his dismissal. The City's motion to dismiss Count Two will be denied.

[3] The court notes that in its reply brief, the City argues that Spriggs' report to Grover does not constitute a report of wrongdoing or waste. However, the court declines to address that argument, as it was raised for the first time in the City's reply brief. *See Interbusiness Bank, N.A. v. First Nat'l Bank of Mifflintown*, 328 F. Supp. 2d 522, 529 (M.D. Pa. 2004) ("It is improper for a party to present a new argument in [a] reply brief.") (quoting *United States v. Medeiros*, 710 F. Supp. 106, 109 (M.D. Pa. 1989)). The purpose of a reply brief is to respond to arguments raised in an opposition brief, not to raise new arguments. *United States v. Martin*, 454 F. Supp. 2d 278, 281 n.3 (E.D. Pa. 2006) (citing *Medeiros*, 710 F. Supp. at 109); *accord* M.D. Pa. L.R. 707 (defining a reply brief as "[a] brief in reply to matters argued in a brief in opposition"). Thus, a moving party cannot support its motion with a sparse argument, wait for the non-moving party to note the sparseness of the argument, then respond with a reply brief that sets forth the full argument that should have been made in the original supporting brief. According, the argument relating to whether Spriggs adequately pleaded a report of waste and/or wrongdoing is not being considered.

D. Wrongful Termination

***8** Finally, the City argues that a wrongful termination or wrongful discharge claim can only be brought in the absence of a statutory remedy, and because a potential remedy exists under the PWL, the wrongful termination claim is preempted. (Doc. 27, pp. 23–25; Doc. 31, pp. 7–8.)

Spriggs concedes that this cause of action is available only if he does not have a statutory remedy for the alleged retaliatory discharge. (Doc. 29, p. 6.) However, Spriggs argues that he is entitled to plead mutually exclusive causes of action and if it becomes clear during discovery that he is eligible for remedies set forth in the PWL, the City would be able to raise this issue in a motion under Rule 56. (Doc. 29, pp. 6–7.)

Pennsylvania is an at-will employment state. *Geary v. United States Steel Corp.*, 456 Pa. 171, 319 A.2d 174 (1974). Although this generally means that an employer may terminate an employer at any time for any reason, there are a limited number of statutory and common law exceptions to at-will employment. *Paul v. Lankenau Hosp.*, 524 Pa. 90, 569 A.2d 346 (1990). One such exception exists where the termination violates "a clear mandate of [Pennsylvania] public policy." *Mclaughlin v. Gastrointestinal Specialists, Inc.*, 561 Pa. 307, 750 A.2d 283, 287 (2000).

However, it is well settled that courts will not entertain a separate common law action for wrongful discharge where specific statutory remedies are available. *Clay v. Advanced Computer Applications*, 522 Pa. 86, 559 A.2d 917, 918 (1989). Both the Pennsylvania Supreme Court and federal courts applying Pennsylvania law, have found preemption of the common law wrongful discharge claim by a more specific statute. *See Clay*, 559 A.2d at 918–19 (holding that the PHRA preempted a common law wrongful discharge claim based on discrimination); *Bruffett v. Warner Comms., Inc.*, 692 F.2d 910, 920 (3d Cir. 1982) (holding that Pennsylvania courts would not create a common law wrongful discharge claim where statutory relief existed under the PHRA); *Pierce v. New Process Company*, 580 F. Supp. 1543, 1546 (W.D. Pa. 1984) (granting summary judgment to the defendant on a wrongful discharge claim because statutory relief existed under the ADEA). It is the existence of the remedy, not the success of the statutory claim, which determines preemption. *Jacques v. AKZO Int'l Salt, Inc.*, 422 Pa.Super. 419, 619 A.2d 748, 753 (1993).

Indeed, courts have held that the PWL has the same preemptive effect on the common law public policy exception as other statutes, and have accordingly barred plaintiffs from pursuing the public policy exception when the PWL affords a statutory remedy. *See*, *e.g.*, *Katzenmoyer v. City of Reading, Pa.*, 158 F.Supp. 2d 491, 503–04 (E.D. Pa. 2001) ("Under Pennsylvania law, there is an action for wrongful discharge only where there is no available statutory remedy for the aggrieved employee ... Courts have specifically applied this rule to bar common law claims where a plaintiff had cognizable claims under the Whistleblower Act"); *Freeman v. McKellar*, 795 F. Supp. 733, 742 (E.D. Pa. 1992) ("On the facts alleged, plaintiff has an appropriate statutory remedy under the Whistleblower Act.... Accordingly, the court will dismiss Counts III and IV"). Accordingly, the City's motion to dismiss Count Three will be granted with prejudice.

Conclusion

***9** For the foregoing reasons, the court will grant in part and deny in part both Mayor Williams' and the City's motions to dismiss. (Docs. 24, 26.) An appropriate order follows.

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