IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STEPHANIE SMITH, Plaintiff,	)	
v.	)	CA. No.: 09C-12-101 FSS **(E-FILED)**
DELAWARE STATE UNIVERSITY, Defendant.	)	

ORDER

Upon Defendant's Motion For Summary Judgment – GRANTED.

This is a "whistle-blower" and defamation case. Discovery is over and Plaintiff might prove she was a whistle-blower. But, she resigned. So, she must also prove that she was constructively discharged through retaliation, or that her whistle blowing precipitated other adverse employment action. While Plaintiff points to a handful of slights after she made her complaint, they do not amount to a constructive discharge or other adverse action, as a matter of law.

As to defamation, although Plaintiff can show Defendant gave a prospective employer a falsely disparaging job reference, Plaintiff still got the job. She claims, however, the bad reference delayed her hiring, which cost her income, but

that is only Plaintiff's supposition. Proof that the defamation caused damages is essential to a defamation claim. Before discovery closed, Plaintiff did not have evidence, such as a statement from her new employer, that the bad reference was a factor in her hiring's delay. Only when she faced summary judgment did Plaintiff offer to find evidence proving the defamation actually caused some damage.

I.

In October 2006, several months after being hired as a DSU police officer, Belinda Baker, Smith's rising subordinate and professional rival, asked their boss, Chief James Overton, for a sidearm. Before coming to DSU, Baker had been a police officer in Virginia and had an old school tie to Overton, having gone through the police academy with him in Virginia. Baker, however, had not been certified in Delaware by the Council on Police Training.[1]

Smith protested when Overton gave Baker permission to carry. Smith had a point, as it is a violation of COPT regulations for an uncertified officer to "carry a firearm on duty."[2] Apparently, Overton took the questionable position that Baker was merely assisting with investigations, not conducting police work. Anyway, Baker was issued a sidearm. Smith repeatedly complained about it to Overton and,

[1] 11 *Del. C.* §§ 8401-8410.
[2] 1 Del. Admin. C. § 801-11.4.

eventually, to the COPT's Administrator, Major Harry Downes. The complaint to Downes is the alleged whistle blowing.

Smith claims here that her relationship with Baker and Overton deteriorated after she protested Baker's being armed. After complaining to Overton about the COPT regulations, "Baker developed a very negative attitude toward [Smith]." Smith claims Overton once told her to leave DSU or he would make her life miserable. She further alleges that he undermined her authority, replaced their daily meetings with teleconferences, and de-funded a cadet program, Smith's pet project. Smith further asserts that Overton ordered her to write-up and suspend a subordinate, only to have Overton dismiss the sanction on appeal, making Smith, in her belief, appear like the "bad guy." Overton also started taking Baker to lunch instead of Smith.

Besides the alleged change in Overton, Smith also claims her relationship with her co-workers changed. A Security Lieutenant once yelled and used profanity at Smith in front of others, and Overton's secretary once hung up on Smith as Smith was giving her directions.

Smith does not recall the dates of these events, including the whistle blowing. The dust-up seems to have begun in late October 2006. Smith went on leave

for unrelated reasons in January 2007. The cadet program was de-funded while she was away.

As explained below, the timing has potential significance because the jury would have to decide whether Smith's discomfort was more attributable to whistle blowing than other things. Did the problems start or worsen when Baker was hired, or only after Smith complained? Smith is vague.

According to her complaint, however, Baker's hiring was a problem for Smith from the start. First, Smith alleges that Baker got the job because Baker was Overton's "long time friend." Overton allegedly referred to Baker as "someone he had known for 18 years and a person he felt he could trust." Smith also regarded Baker's hiring as irregular because Baker's paperwork was not reviewed by Smith as it should have been, says Smith. Thus, it cannot be reasonably disputed that Smith's problems with Overton and DSU began several months before her whistle blowing complaint.

Moreover, Smith complains that when Overton left Smith in acting-command during "the summer of 2006," Baker was insubordinate: "It was quite obvious that Ms. Baker did not wish to take orders from [Smith]." Then, according to Smith, following a meeting with him, Smith "noticed that [Overton] began meeting with her less often." Smith alleges that Overton was partial to Baker "because of his

friendship with Ms. Baker." According to Smith that partiality "was creating a hostile work environment for [Smith]." By October 2006, Smith acknowledges that her relationship with Overton "became increasingly strained."

Furthermore, by her own admission, Smith's problems with DSU did not begin with, nor were they entirely related to, Baker. Smith resented Overton's denying Smith a pay raise in January 2006,which she felt she merited. In Smith's belief, she "clearly had more experience and education" than the person who got the raise. Smith also felt she "had several achievements with the Department which alone would justify her salary increase." Smith also was "astonished" by the way Overton treated another employee who had been loyal to Overton.

Thus, by her complaint's terms, Smith had several grievances against Overton and DSU, and their relationship was "strained" before October 26, 2006. Viewing the evidence in the light most favorable to Smith, if it can be said that DSU was hostile to Smith, that hostility had begun well before she blew the whistle in Fall 2006, and none of those things was part of the whistle blowing.

Anyway, on October 26, 2006, Baker asked Smith for a handgun so that Baker could "qualify at the range." Over Smith's objection, which Smith duly noted, Overton ordered Smith to issue the weapon with the understanding that Baker would go directly to and from the range. At about that time, Baker began wearing a police

uniform and a sidearm. As mentioned, that eventually precipitated the complaint to Downes.

Whether the alleged intolerable hostility began when Smith was denied the raise she felt she deserved in January 2006 or later when she complained about Baker's sidearm, it is known that Smith resigned on March 9, 2007. Despite the intolerable hostility she allegedly felt, Smith stayed on for two extra weeks at Overton's request. Following that, she sought employment as a consultant to the department. Smith also applied for unemployment benefits. Her application said rumors had deteriorated her relationship with Overton. Smith did not mention whistle blowing or anything related to it. Were the court allowed to weigh the evidence at this point, which it is not, it might be said that the alleged WPA violation appears to be an afterthought.

Smith further claims that when pursuing employment with the New York City Department of Corrections, DSU provided an erroneous disparaging reference. DSU admits that, but Smith was nonetheless hired. As to this, the dates and facts are hazy, too.

Smith claims that she should have gone to the November 2008 academy, but actually attended in August 2009. Smith claims NYCDOC delayed her hiring for nine months due to DSU's inaccurate, defamatory paperwork. That claim is unproven.

Someone at DSU submitted the reference, dated September 29, 2008, at least 1½ years after Smith quit DSU. In Smith's favor, there is circumstantial evidence from which the jury could find that Overton played a role. He admits that Smith's personnel file was kept in his department and he discussed Smith's reference with DSU's interim associate director of Human Resources in her office. He denies filling it out and submitting it. The HR person testified that although she signed the form, she could not answer some of its questions, sent it to Overton's secretary and never saw it again.

All-in-all, Smith is entitled to a finding here that Overton played a part in the bad reference, which may imply malice by Overton and DSU. But, as discussed below, even if that is so, it does not establish by itself that Smith was constructively discharged nor that the bad reference delayed her hiring in New York. Establishing a Whistleblower Act violation requires more than Plaintiff's complaint was not well-received by her employer. And, a defamation claim requires more than defamation, even if it were malicious.

II.

The Delaware Whistleblower Protection Act protects employees from discharge or other adverse employment action after reporting a "violation."[3] Three

[3] 19 *Del. C.* §§ 1701-1708.

issues are presented by Smith's whistleblower claim here. Did Smith's complaint trigger the WPA, because allowing Baker to carry a firearm before certification amounted to a "violation" under the WPA? Was Smith constructively discharged by DSU? Was there sufficient evidence for a jury to conclude that Smith's complaint was the main reason Smith's employment with DSU ended? Although Smith probably can demonstrate a WPA violation, she cannot prove that she was constructively discharged over it.

A. WPA Violation

A WPA "violation" is an act by an employer that is "materially inconsistent with and a serious deviation" from standards promulgated under laws to protect people from health, safety, or environmental hazards.[4] The COPT regulation requiring armed police officers be certified is a public safety law. Therefore, allowing Baker to carry while on duty potentially amounts to a "serious deviation" from the regulation.

Both parties interpret "on duty" as involving police work and, therefore, focus on whether Baker's activities before certification were police work. No competent witness opined about the nature of her work. At most, Overton was asked about two particular investigations that Baker assisted, and he replied that it "could

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[4] 19 *Del. C.* § 1702(6).

be considered police work." Downes also confirmed that investigatory work, arguably like Baker's, is police work. Thus, despite the lack of clear, expert opinion that the actual work Baker was doing called for COPT certification, the record potentially supports finding both a WPA violation by DSU and a complaint about it by Smith.

B. Constructive Discharge

Smith resigned, but claims she was constructively discharged. To prove that, Smith must show she was subjected to "working conditions so intolerable that a reasonable person would have felt compelled to resign. Something more than a hostile work environment is required."[5] For example, threatening denial of future promotions is not enough.[6] On the other hand, an employee is constructively discharged when she resigns rather than accepts an ultimatum that includes termination, a demotion, or a pay-cut.[7] In short, the employer must have taken some action beyond a threat. And, of course, the constructive discharge must be linked to the WPA complaint.

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[5] *See Rizzitiello v. McDonald's Corp.*, 868 A.2d 825, 832 (Del. 2005) (Plaintiff in a race discrimination lawsuit could not sustain a constructive discharge claim by stating a co-worker was out to get her).

[6] *See, e.g., Meltzer v. City of Wilmington*, 2008 WL 4899230 (Del. Super. Aug.6, 2008) (JOHNSTON, J.) (citing *Rizzitiello v. McDonald's Corp*, 2004 WL 396411 at *3 (Del. Super. Feb. 11, 2004) (SCOTT, J.)).

[7] *See, e.g., Anchor Motor Freight, Inc. v. Unemployment Ins. Appeal Bd.*, 325 A.2d 374 (Del. 1974); *MRPC Fin. Mgmt. LLC v. Carter*, 2003 WL 21517977 (Del. Super. June 20, 2003) (DEL PESCO, J.).

Overton's alleged threat to make Smith's work-life a living hell never materialized. Nor can it be said that conditions at DSU were so hostile, they became intolerable. That is true, even if Smith calls them intolerable. Allegations based on personal beliefs, particularly when unsupported by the record, will not survive summary judgment.[8]

As presented above, Smith's pay was not cut. She did not resign under threat of dismissal. She was not passed over for promotion. Nor were her work conditions altered unfavorably. At most, Smith's cadet program died when she took medical leave in January. Otherwise, a lieutenant spoke sharply to her, a secretary hung up on her, Overton once failed to back her up to her embarrassment, and he stopped meeting her personally. Despite that, when she returned from medical leave and resigned, she nonetheless agreed to work an extra two weeks at Overton's request. She also asked Overton to consider her for an independent consultant position with the department. And when Smith applied for unemployment benefits, she never mentioned the intolerable working conditions.

Assuming each act Smith alleges happened as she says and each was retaliatory, none justified quitting. As presented above, Smith has to prove she was

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[8] *See, e.g., Health Solutions Network LLC v. Grigorov*, 12 A.3d 1154 (Del. 2011) (TABLE).

subjected to individual acts that went beyond the sort of things an employee might encounter anywhere, such as a rude secretary, a sharp rebuke from a supervisor, email rather than personal meetings, and so on.

The same is true even if the handful of supposedly retaliatory acts is taken as a whole. Viewed in the light most favorable to Smith, the evidence shows that when she made her complaint to Downes, her relationship with her superior and DSU was already strained. After the complaint, the relationship continued strained and perhaps there was some hostility. But, a jury could not find that DSU became a hostile environment after the compliant, much less that Smith was constructively discharged.

As to collective activities, there must be a pattern from which it could be said that the environment became so hostile, it was intolerable and, therefore, resigning was a reasonable response. The WPA protects whistle-blowers from retaliation. It does not require, however, that after a disgruntled employee makes a complaint, her employer must then treat her with kid gloves, fearing any slight could justify a resignation followed by a WPA claim.

While it does not inform the decision here, it is undeniable that as she made her WPA complaint, Smith was struggling with a boss who had denied her a

pay raise and whom she considered ungrateful and disloyal. It also is undeniable that Smith was resentful and probably jealous of a professional rival who, for good or bad reasons, was better positioned for promotion. That rivalry, which began before the WPA complaint, continued after the complaint and after Smith returned from her medical leave. At that point, Smith chose to leave DSU. Therefore, it appears that any negative response to the complaint was, at most, only a small part of a larger picture. While that may not be an answer to Smith's WPA claim, it brings into sharper relief her failure to prove constructive discharge, and it helps explain how DSU is entitled to summary judgment in this situation.

III.

Smith also claims a breach of the implied covenant of good faith and fair dealing between employers and employees. The only potentially applicable breach of that covenant here is that Smith's constructive discharge violated public policy.[9] As just discussed, Smith was not constructively discharged and she cannot, therefore, show a breach. Otherwise, Smith has not attempted to prove, nor could she, that she was responsible "for advancing or sustaining" the COPT regulations.[10] According to Smith's pleadings, it was Major Downes "whose responsibility included oversight for

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[9] *See Lord v. Souder*, 748 A.2d 393, 400 (Del. 2000) (citing *E.I. DuPont de Nemours and Co. v. Pressman*, 679 A.2d 436, 441-2 (Del. 1996)).

[10] *Id.*

COPT [and] that police officers acting in a policing capacity must be certified" – not Smith.

IV.

In a separate defamation allegation, Smith claims Defendant falsely answered an employment reference request by erroneously indicating disciplinary issues. Smith must prove that but for Defendant's misstatement, Smith probably would have been hired sooner and the delay in hiring resulted in specific financial loss.[11] In other words, to survive, Smith must present some evidence of causation and damages.

Smith has presented no evidence, through affidavit or otherwise, proving any part of a damage claim. It was not until after oral argument, with trial looming, that Smith tried to find a witness who would say Defendant's action delayed Smith's hiring. That was long after discovery closed in this 2009-filed case, and four months before trial. Moreover, even now the witness has not submitted an affidavit. Now, so close to trial, it is too little and too late. Discovery is closed and no one has testified, much less confirmed, that DSU's misstatement had anything to do with Smith's delayed hire.

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[11] *See, e.g., Spencer v. Funk,* 396 A.2d 967 (Del. 1978).

To be clear, the court has considered the inaccurate, bad reference in connection with Smith's WPA claim, holding for present purposes that it might help prove hostility by Overton and DSU. But, as just explained, a jury could not find on the record presented that the bad reference cost Smith money damages. Therefore, Smith has no defamation claim to present at trial.

V.

For the foregoing reasons, Defendants' motion for summary judgment is **GRANTED**.

IT IS SO ORDERED.

Date: September 27, 2011 /s/ Fred S. Silverman
Judge

cc: Prothonotary (Civil)
pc: Jeffrey K. Martin, Esquire
Sarah DiLuzio, Esquire