IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

MARK EASTBURN, JACQUI ERVIN, MCKELVIN B. GILBERT, SUSAN MARKERT, BETH POORE, ANGELA ROBINSON, and YULONDA WILLIAMS,	)	C.A. No. 07C-02-031 (JTV)
Plaintiffs,	)	
v.	)	
DELAWARE DEPARTMENT OF TRANSPORTATION, NATHAN HAYWARD, individually and as Secretary of the Department of Transportation and MARTI DOBSON, individually and as Director of Technology and Support Services Transportation,	)	
Defendants.	)	

Submitted: May 12, 2009
Decided: September 21, 2009

Ronald G. Poliquin, Esq., Young, Malmberg & Howard, Dover, Delaware. Attorney for Plaintiffs.

Laura Gerard, Esq., and Richard W. Hubbard, Esq., Department of Justice, Wilmington, Delaware. Attorney for Defendants.

Upon Consideration of
Defendants' Motion for Summary Judgment
GRANTED IN PART
DENIED IN PART

VAUGHN, President Judge

OPINION

This is the second opinion in this case, the first having been issued on January 16, 2009. In that opinion, the Department of Transportation was granted summary judgment as to all claims asserted against it. In addition, defendants Nathan Hayward and Marti Dobson were granted summary judgment as to all claims asserted against them in their official capacities. Left remaining for further litigation were claims which the plaintiffs asserted against defendants Hayward and Dobson individually under 42 U.S.C. § 1983, and for "slander as a matter of law," "malicious prosecution," and "abuse of process." The defendants' motion for summary judgment as to these claims was deferred so that the record could be more fully developed. The motion is now back before the Court.

FACTS

I will begin by restating the facts as they were set forth in the January 16, 2009 opinion:

> In deciding a motion for summary judgment, the Court must view the facts in the light most favorable to the non-moving parties. I express no opinion about what facts might ultimately be established by the weight of the evidence.
>
> In early 2005, DelDOT had a "zero tolerance" policy regarding acceptable use of computers. Any use deemed inappropriate under the policy exposed the employee to dismissal. According to the complaint, on February 27, 2005, each of the plaintiffs, DelDOT employees, received a phone call from Director Dobson's office individually

summoning them to a meeting at a DelDOT administrative conference room. Each plaintiff was separately escorted to the conference room across a parking lot, where he or she could be observed by other employees. As each employee appeared at his or her meeting, the employee was accused of sending sexually explicit or otherwise offensive material to others via the State internet. After being shown the allegedly inappropriate emails, each employee was given an ultimatum to quit or be fired. The plaintiffs were not given an opportunity to explain their actions. According to affidavits filed by the plaintiffs, it was made clear to them by supervisors that the decision to terminate them had already been made. Each plaintiff was then escorted back to his or her desk to retrieve any personal items, and then escorted to his or her vehicle.

The emails involved were ones which had been sent to the plaintiffs by other DelDOT employees, which the plaintiffs, in turn, forwarded to others. The employees who initially forwarded the emails were not punished. Other employees who exchanged the same emails were warned but not otherwise disciplined. The plaintiffs had not been previously disciplined.

The plaintiffs were classified state employees, and procedures governing their dismissal were governed by the Merit Rules.

Defendant Hayward announced what was happening in an internal memorandum to the Department. This is a portion of defendant Hayward's memo which was sent to all of DelDOT's approximately 2,600 employees:

Everyone confronted to date has been found

> to be exchanging (receive and send) absolutely prohibited pornographic, sexually explicit, or otherwise personally offensive jokes, stories, pictures, cartoons, videos, audios, or similar materials. Some have racial and/or ethnic overtones. All are disgusting. None in any way can be condoned. Nobody can claim they are being disciplined for accidental receipt of unacceptable material.

The *Dover Post* obtained a copy of defendant Hayward's internal memo from an anonymous source and published it in an article on March 9, 2005. The article reported that five state employees had resigned and another seven were facing possible termination "after it was revealed they had pornographic or other prohibited material on their state-owned office computers." No employee names were mentioned in the article. I infer that the seven reported as facing possible termination were the seven plaintiffs.

The plaintiffs' complaint states, and they argue, that they were terminated on February 27, 2005, but according to the record it appears they were not formally terminated then. The defendants have filed payroll information which indicates the plaintiffs continued to receive their salaries. A report prepared by a hearing officer in September 2005 indicates that plaintiffs Eastburn, Robinson, Ervin, Williams and Gilbert were confronted with the emails on February 17 (rather than the 27th), and given until February 23, 2005 to decide whether to resign or be fired. The defendants' Reply to Plaintiffs' Supplemental Answering Memorandum Concerning Defendants' Converted Motion for Summary Judgment also refers to an

April 2005 pre-decision meeting. It appears that these plaintiffs were paid their wages through May 10, 2005 and terminated on that date.

Plaintiffs Eastburn, Robinson, Ervin, Williams and Gilbert all filed grievances under the merit rules. A hearing officer held a "Step 3 grievance hearing" for each of them in August 2005. The hearing officer concluded, and I am summarizing, that the employees did violate the acceptable use policy, but that DelDOT's dismissal only approach was inappropriate and inconsistent with the merit rules' requirement that dismissal be supported by just cause. The hearing officer concluded that just cause existed for a ten day suspension but that just cause did not exist for dismissal. She ordered that plaintiffs Eastburn, Robinson, Ervin, Williams and Gilbert be reinstated and paid all back pay, less ten days. None of the plaintiffs appealed to the Merit Employee Relations Board, and their cases were resolved on that basis.

According to a submission from the defendants, plaintiffs Markert and Poore were not terminated, received their salaries continuously, and did not file grievances.

In apparent reaction to the dismissals, a Legislative Committee on Personnel Practices Committee was formed which conducted an investigation into the terminations. It released a final report in March 2006. I express no opinion on the admissibility of the report. For purposes of this motion only, I will infer that the facts contained in the report, or some of them, are supported by admissible evidence. The Committee concluded, *inter alia*, that the emails were "in poor taste" and should not have been viewed on the state system, but that they were not

pornographic.

> The plaintiffs contend that the actions taken by defendants Hayward and Dobson to terminate them were selective, in that other employees having the same materials were not disciplined, and were a pretext to conceal other, real reasons why defendants Hayward and Dobson wanted them removed from their positions. As some of the plaintiffs state in their affidavits, "Marti Dobson and Nathan Hayward wanted the employees of the Planning Department gone."

It now appears that the February 27, 2005 meetings actually occurred on February 17. On that day plaintiffs Eastburn, Ervin, Gilbert, Robinson and Williams were each given until February 23, 2005 to decide whether to resign or be subjected to dismissal proceedings. None resigned. The plaintiffs just named then went through disciplinary processes which included the following steps on or about the dates indicated:

Date of pre-decision notification letter	February 28, 2005
Pre-decision meeting	April 14, 2005
Dismissal letter	May 10, 2005
Grievance notification letter	May 13, 2005
Step 2 hearing	June 9, 2005
Step 2 decision letter	June 27, 2005
Step 3 hearing	August 17, 2005
Step 3 decision letter	September 12, 2005

The Step 3 hearing officer concluded that the employees had violated computer usage rules but that just cause did not exist for dismissal. The hearing officer

reversed the dismissals and reinstated the employees, imposed a ten day suspension for the violation, and ordered payment of all back pay less ten days. Each of the five employees had a right to appeal the decision of the Step 3 hearing officer to the Merit Employee Relations Board. None did.

Plaintiffs Susan Markert and Elizabeth Poore were not subjected to dismissal proceedings. They were placed on administrative leave with pay and returned to work on September 19, 2005.

STANDARD OF REVIEW

Summary judgment should be granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[1] The moving party bears the burden of establishing the nonexistence of material issues of fact.[2] If a motion is properly supported, the burden shifts to the non-moving party to establish the existence of material issues of fact.[3] In considering the motion, the facts must be viewed in the light most favorable to the non-moving party.[4] Summary judgment is inappropriate "when the record reasonably indicates that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order

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[1] Super. Ct. Civ. R. 56(c).

[2] *Gray v. Allstate Ins. Co.*, 2007 WL 1334563, at *1 (Del. Super.).

[3] *Id.*

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

to clarify the application of law to the circumstances."[5]

DISCUSSION

In their renewed motion, defendants Hayward and Dobson first contend that state employees must assert state law claims which arise from their employment in the administrative grievance process. They contend that this is an exclusive remedy. They rely on 29 *Del. C.* § 5943(a), which reads as follows:

> The exclusive remedy available to a classified employee for the redress of an alleged wrong, arising under a misapplication of any provision of this chapter, the merit rules or the Director's regulations adopted thereunder, is to file a grievance in accordance with the procedure stated in the merit rules. Standing of a classified employee to maintain a grievance shall be limited to an alleged wrong that affects his or her present position.

The defendants also rely on the case of *Hussain v. Delaware Dept. of Natural Resources and Envtl. Control*,[6] which construed § 5943(a) and was decided while the defendants' original motion for summary judgment was pending. In that case, a state employee was terminated. He filed a grievance which was heard through the grievance process and denied. He then filed a Superior Court action, in which he contended that he suffered damages as the result of statements and actions of four individual state supervisors or administrators. The four supervisors and the agency involved were defendants in the suit. The Court granted a defense motion to dismiss.

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[5] *Mumford & Miller Concrete, Inc. v. New Castle County*, 2007 WL 404771, at *4 (Del. Super.).

[6] 2008 WL 4817083 (Del. Super.).

In doing so, the Court reasoned, in relevant part, that: (1) the statements and actions complained of were "inextricably linked" to the plaintiff's termination and the grievance procedure; (2) the Superior Court action against the individual defendants was barred by the exclusivity provision of § 5943(a); and (3) the plaintiff's claim was barred by collateral estoppel.

The plaintiffs respond with contentions that *Hussain* was not a suit against the four supervisors or administrators personally; that it should be interpreted as a case precluding a terminated state employee from bypassing the grievance process via a court complaint rifled with dubious tort claims; that under the defendants' broad application of the decision, state and public officials would have absolute immunity concerning their conduct no matter how egregious; that the defendants' application of *Hussain* would be contrary to the rule of conditional immunity for such officials; and that this case is distinguishable because in this case the individual defendants generated false and improper reasons to terminate the plaintiffs in a humiliating fashion and orchestrated a highly publicized media campaign to destroy the plaintiffs' reputations.

Having considered the parties' contentions and *Hussain*, I conclude that *Hussain* stands for the principle that the "exclusive remedy" clause of § 5943(a) extends to and bars suits in this Court by state employees against state supervisors, administrators or other state employees, individually, for statements or actions which are inextricably linked to a disciplinary proceeding covered by the merit rules. The plaintiffs' complaints about the egregiousness of the alleged wrongs is unavailing because "exclusive" is all encompassing for redress of an alleged wrong falling

within the scope of § 5943(a).

Applying the principle just stated to the facts of this case, I conclude that the plaintiffs' claims for "malicious prosecution" and "abuse of process" must fail because the alleged wrongs associated with such causes of action must be inextricably linked to alleged wrongs falling within the scope of the statute. Therefore, summary judgment will be granted to the defendants as to the plaintiffs' claims for "malicious prosecution" and "abuse of process." I will address the claim of "slander as a matter of law" hereinafter, but first I turn to the federal civil rights claim.

In support of their §1983 claim, the plaintiffs contend that they were terminated at the February 17 meetings, or that they were constructively terminated at those meetings; that a decision to terminate them had already been made before the February 17 meetings began; that the alleged computer use violations were a pre-text for other reasons for dismissing them; and that they were denied due process under the "stigma-plus" test.

I find that the record establishes that none of the plaintiffs were terminated at the February 17 meetings. I also find none of them were constructively terminated at those meetings or thereafter.[7] All plaintiffs continued to receive their salaries after February 17. The record establishes that the five who were terminated were

[7] Constructive termination refers to a resignation under intolerable work circumstances. *Hill v. Borough of Kutztown*, 455 F.3d 225, 232 (3d Cir. 2006) (quoting *Pennsylvania State Police v. Suders*, 542 U.S. 129, 141 (2004) ("The inquiry is objective: Did working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign?")) (*Kutztown* Court confirms that resignation is deemed involuntary and triggers protection of due process clause when the employer forces the employee's resignation or retirement by coercion or duress).

terminated on May 20.

As to the plaintiffs' claims that their supervisors had decided to terminate them by the time of the February 17 meetings and that the reasons given for dismissal were pre-texts, such facts, even if true, do not establish a due process violation. Due process requires an impartial decision-maker before any final deprivation of state employment, but it does not require an impartial decision-maker at pre-termination hearings.[8] Final deprivation of state employment did not occur with the May 20 dismissal letters, because the May 20 dismissals were subject to the grievance process. The Step 3 hearing was held before a decision-maker who was impartial beyond any question of fact, as that hearing officer reversed the dismissal, reinstated the employees, and imposed only a modest suspension. The plaintiffs have not contended at any point in the litigation that the Step 3 hearing officer was not an impartial decision-maker.

The plaintiffs were given pre-decision hearings, on or about April 14, at which they were represented by counsel and given an opportunity to present their defenses. The pre-decision hearing and the subsequent hearings, particularly the Step 3 hearing, satisfied the requirements of due process.

The "stigma-plus" theory does not aid the plaintiffs. To make out a due process claim under this theory, they must show a stigma to their reputations plus deprivation of some additional right or interest.[9] The additional right or interest does

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[8] *McDaniels v. Flick*, 59 F.3d 446, 459 (3d Cir. 1995).

[9] *Kutztown*, 455 F.3d at 236.

not have to be one which, itself, requires due process.[10] When a state employee is deprived of a right or interest and defamed in the process, due process requires a name-clearing hearing.[11] The plaintiffs' stigma-plus argument in this case must fail because they were, in fact, provided with a due process, or name-clearing, hearing before an impartial decision-maker.

For the foregoing reasons, I conclude that the plaintiffs cannot establish a due process violation and that summary judgment should be granted to the defendants on that claim.

Returning to "slander as a matter of law," the plaintiffs allege that defendant Hayward committed slander against them through widely published remarks in newspapers and on television through the state and beyond, and that such comments were made in bad faith and with the malicious intent of destroying the plaintiffs' reputations within the community. I am aware from the record that defendant Hayward wrote an email to all Department of Transportation employees which discussed the confrontations with these plaintiffs, and that there was a newspaper article. The record still seems to be relatively undeveloped on the claim for "slander as a matter of law." For example, I am not able to draw any inferences regarding defendant Dobson's role, if any, regarding the claim for slander. This claim is not separately and expressly addressed in the defendants' moving papers. I cannot conclude from this record as a matter of law that the alleged slander is inextricably

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[10] *Id*. at 237.

[11] *Id*. at 236.

linked to the grievance proceedings, or that the conduct complained of to support a claim of slander was litigated in the grievance process, or that there is no genuine issue of material fact as to these issues. Therefore, the motion for summary judgment as to "slander as a matter of law" will be denied, without prejudice.

Therefore, the defendants' motion is ***granted*** in part and ***denied*** in part.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.
President Judge

oc: Prothonotary
cc: Order Distribution
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