UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL NO. 13-10580-RWZ

JOANNE TRIPP

v.

STEPHEN IMBUSCH

MEMORANDUM OF DECISION

February 11, 2014

ZOBEL, D.J.

Plaintiff Joanne Tripp is the mother of a seventeen-year-old Walpole High School ("WHS") student with Down Syndrome. After she engaged in a verbal exchange with a teacher regarding educational programs available to her daughter, defendant, WHS Principal Stephen Imbusch, sent plaintiff a letter in which he demanded that she "cease and desist" from contacting the teacher without first making "an appointment through the proper channels" and pledged to refer future unauthorized contacts to the Walpole Police Department. Docket # 23-11. Plaintiff responded by filing this lawsuit in which she alleges that by sending the letter, defendant (1) infringed her First Amendment right to advocate for her daughter, in violation of 42 U.S.C. § 1983 and the Massachusetts Civil Rights Act ("MCRA"), Mass. Gen. L. ch. 12 § 11I (Counts I and IV); (2) intentionally caused her emotional distress (Count II); and (3) defamed her (Count III). Defendant moves for summary judgment on all counts (Docket

18). Viewing the facts in the light most favorable to plaintiff, the motion is allowed. See, e.g., Estate of Hevia v. Portrio Corp., 602 F.3d 34, 38 (1st Cir. 2010) (legal standard).

I. Background

The Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 et seq., requires public schools to develop an individualized education program ("IEP") for each child with a disability. See id. §§ 1412(a)(4); 1414(d). Plaintiff's daughter, Kendall Tripp, had such a program, and on September 20, 2012, plaintiff, her husband, Kendall's teacher Mary Caine, and WHS Special Education Department Head Andrea Macrina, met to discuss it. Macrina agreed to arrange a time for the Tripps to observe a Language Inclusion Academic Skills program to determine its appropriateness for Kendall.

Later that day, while she picked up Kendall from school, plaintiff approached Caine on the sidewalk next to the pick-up line and asked to speak with her about that morning's IEP meeting. The parties offer very different accounts of the ensuing conversation. Plaintiff states that she "attempted to advocate for her daughter's well-being and also conveyed her sentiments regarding the IEP meeting." Compl. ¶ 8. According to Caine, plaintiff positioned herself "in close proximity" to Caine and was "loud" and "aggressive." Deposition of Mary Caine, Docket # 24-1, at 41. Caine related the conversation to Macrina, who then informed defendant. Defendant asked Caine to write a memorandum recounting the conversation. She complied. See Docket # 23-10. On September 24, 2012, defendant sent plaintiff the letter that led to this

suit. The letter accused her of "confront[ing]" Caine and speaking to her in a "highly inappropriate manner." Docket # 23-11. It further stated that plaintiff should not contact Caine unless she first scheduled a meeting. If plaintiff continued to initiate impromptu conversations, "[she would] be considered a trespasser and the incident[s] [would] be referred to the Walpole Police Department." Id. The letter distressed plaintiff. Upon reading it, she became "nauseous and started crying." Pl.'s Ans. to Interrog. 5, Docket # 30-8. She called her friend, Jacqueline Groden, who testified that plaintiff's voice sounded "shaky" and "scared." Deposition of Jacqueline A. Groden, Docket # 30-2, at 19. Plaintiff feared that there would be criminal repercussions if she continued to contact Kendall's teachers. Deposition of Joanne C. Tripp, Docket # 30-1, at 195.

II. Legal Standard

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). If the evidence presented would allow a reasonable jury to return a verdict for the nonmovant, summary judgment must be denied. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

III. Analysis

A. Counts I and IV: 42 U.S.C. § 1983 and MCRA Claims[1, 2]

Plaintiff claims that defendant's actions violated her First Amendment right to speak to school officials regarding her daughter's education. Defendant responds, *inter alia*, that he is entitled to qualified immunity from suit. See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

"Government officials have qualified immunity from personal liability for actions taken while performing discretionary functions."[3] Lynch v. City of Boston, 180 F.3d 1, 13 (1st Cir. 1999). A public school principal acting under color of Massachusetts law is a government official for § 1983 purposes. See Frazier v. Fairhaven Sch. Comm., 276 F.3d 52, 57-58 (1st Cir. 2002). In a qualified immunity analysis, the court must decide

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[1]I analyze these claims together because "[t]he MCRA is coextensive with 42 U.S.C. § 1983, except that the Federal statute requires State action whereas its State counterpart does not, and the derogation of secured rights [in the State statute] must occur by threats, intimidation, or coercion." Seitins v. Joseph, 238 F. Supp. 2d 366, 377-78 (D. Mass. 2003) (internal quotations and citations omitted).

[2]At the outset, defendant argues plaintiff lacks standing to bring these claims, contending that because she has still attended WHS meetings on Kendall's behalf since she received the letter, plaintiff has not suffered an injury in fact. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (elements of standing). Plaintiff references at least three events—"Back to School Night," "MCAS viewing," and "coffee hour"—that she did not attend because she was afraid of the consequences. Pl.'s Ans. to Interrog. 5. Although the evidence is thin, I conclude that plaintiff has alleged facts sufficient to show she has suffered an injury in fact.

[3]Qualified immunity protects government officials from suit in their individual capacities, but not in their official capacities. Febus-Rodriguez v. Betancourt-Lebron, 14 F.3d 87, 91 n.3 (1st Cir. 1994) (internal quotation and citation omitted). The complaint does not clearly state in what capacity plaintiff sues defendant. See Compl. ¶ 37; Powell v. Alexander, 391 F.3d 1, 22 (1st Cir. 2004) (discouraging the filing of complaints that do not specify capacity). "As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity." Kentucky v. Graham, 473 U.S. 159, 166 (1985). Here, the record does not show that the government entity received such an opportunity. See Docket # 8. Moreover, "the substance of the pleadings and the course of proceedings" thus far does not indicate an official-capacity suit. Powell, 391 F.3d at 22 (quoting Pride v. Does, 997 F.2d 712, 715 (10th Cir. 1993)). And defendant's early invocation of qualified immunity also suggests he is not prejudiced by treating the complaint as one brought against him personally. Id. at 23 (quoting Biggs v. Meadows, 66 F.3d 56, 61 (4th Cir. 1995)). For these reasons, I conclude that the complaint names defendant in only his individual capacity.

"(1) whether the facts alleged or shown by the plaintiff make out a violation of a constitutional right; and (2) if so, whether the right was 'clearly established' at the time of the defendant's alleged violation." Maldonado v. Fontanes, 568 F.3d 263, 269 (1st Cir. 2009) (citing Pearson v. Callahan, 555 U.S. 223, 232 (2009)). The court may address either prong of the analysis first. Pearson, 555 U.S. at 236. "The same qualified immunity standard that applies under § 1983 has also been held to apply to claims under the MCRA." Kelley v. LaForce, 288 F.3d 1, 10 (1st Cir. 2002) (citing Duarte v. Healy, 537 N.E.2d 1230, 1232 (Mass. 1989)).

Courts use a forum analysis to balance the government's interest in limiting a particular property to its intended purpose against an individual's interest in asserting his or her First Amendment right to free speech on that property. See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 800 (1985). The Supreme Court has recognized three types of fora: the public forum, the limited public forum, and the nonpublic forum. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983). A nonpublic forum describes an area that the government has not designated to permit public communication. Id. at 46. Here, the parties agree that the relevant forum is the sidewalk adjacent to the WHS pick-up line, and further agree that the sidewalk is a nonpublic forum. Def.'s Mem. in Supp., Docket # 19, at 11; Pl.'s Mem. in Opp., Docket # 28, at 9; see Grattan v. Bd. of Sch. Comm'rs, 805 F.2d 1160, 1162-1163 (4th Cir. 1986) (holding a school parking lot is a nonpublic forum). Accordingly, as in all analyses of nonpublic fora, I must uphold the government's regulation of First Amendment activity "as long as [it] is reasonable and not an effort to suppress

expression merely because public officials oppose the speaker's view." Perry, 460 U.S. at 46. The reasonableness inquiry requires "a frank consideration of the totality of the circumstances, including the nature of the conduct that a particular statute proscribes." R.I. Ass'n of Realtors, Inc. v. Whitehouse, 199 F.3d 26, 31 (1st Cir. 1999).

Plaintiff alleges no facts that violate her First Amendment rights. Defendant's letter restricts the time and place in which defendant is allowed to speak, not the content or viewpoint of her speech. The government has an interest in ensuring the safe and orderly departure of students from school. Cf. United States v. Kokinda, 497 U.S. 720, 732 (1990) (stating consideration of the "special attributes" of the forum is relevant to the significance of the government's interest and is therefore relevant to the constitutionality of a speech regulation). And plaintiff remains free to advocate on Kendall's behalf; she must simply make an appointment to speak to Kendall's teachers instead of flagging them down near the pick-up line. See generally Wholey v. Tyrell, 567 F. Supp. 2d 279 (D. Mass. 2008) (upholding against First Amendment challenge similar right of access restrictions in the school context). Her undiminished speech right is underscored by Caine's recognition that Massachusetts law requires her to meet with plaintiff if plaintiff so requests. Caine Dep. at 139; see Mass. Gen. L. ch. 71B § 3 ("To insure that parents can participate fully and effectively with school personnel in the consideration and development of appropriate educational programs for their child, a school committee *shall*, upon request by a parent, provide timely access to parents . . . for observations of a child's current program and of any program proposed for the child . . . .") (emphasis added). In short, the letter is content- and viewpoint-neutral, it

serves a significant government interest, and it leaves the plaintiff unencumbered to express her views. The speech restriction it imposes is reasonable.

Because I conclude that defendant did not violate plaintiff's First Amendment right to free speech, I need not consider whether that right was clearly established at the time of the alleged violation. Pearson, 555 U.S. at 236. Defendant is entitled to qualified immunity.

B. Count II: Intentional Infliction of Emotional Distress

Plaintiff claims defendant is liable to her for intentional infliction of emotional distress ("IIED"). To prevail on such a claim, plaintiff must show

> (1) that [defendant] intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of his conduct; (2) that the conduct was "extreme and outrageous" and was "beyond all possible bounds of decency" and was "utterly intolerable in a civilized community;" (3) that the actions of the defendant were the cause of the plaintiff's distress; and (4) that the emotional distress sustained by plaintiff was "severe" and of a nature "that no reasonable man could be expected to endure it."

Agis v. Howard Johnson Co., 355 N.E.2d 315, 318-19 (Mass. 1976) (internal citations omitted) (quoting Restatement (Second) of Torts § 46 (1965)). The Massachusetts Supreme Judicial Court has made clear that the bar set by the second prong of the analysis is exceptionally high:

> [L]iability cannot be predicated [upon] mere insults, indignities, threats, annoyances, petty oppressions or other trivialities nor even is it enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by malice or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort.

Tetrault v. Mahoney, Hawkes & Goldings, 681 N.E.2d 1189, 1197 (Mass. 1997)

(quoting Foley v. Polaroid Corp., 508 N.E.2d 72, 82 (Mass. 1987)).

Assuming plaintiff's distress was severe enough to meet the fourth prong, her claim still fails. The record contains no evidence that defendant intended to inflict emotional distress; plaintiff simply assumes he did. But speculation does not create a genuine factual issue and defeat summary judgment. Rivera-Colon v. Mills, 635 F.3d 9, 12 (1st Cir. 2011). Moreover, defendant's conduct does not approach the egregiousness necessary to sustain a claim. Defendant fielded a complaint involving a distressed teacher, asked her to document the event, and based on her recollections, reasonably circumscribed plaintiff's contacts with school staff. That conduct is far from "beyond all possible bounds of decency." Agis, 355 N.E.2d at 319 (internal quotation omitted).

C. Count III: Defamation

Plaintiff claims defendant libeled her by sending a copy of the letter to the Walpole Police Department and several school officials. "To prevail on a claim of defamation, a plaintiff must establish that the defendant was at fault for the publication of a false statement regarding the plaintiff, capable of damaging the plaintiff's reputation in the community, which either caused economic loss or is actionable without proof of economic loss." White v. Blue Cross and Blue Shield of Mass., Inc., 809 N.E.2d 1034, 1036 (Mass. 2004). The complaint does not identify the allegedly false statement. The only reference to falsity in plaintiff's memorandum in opposition to summary judgment states that "the letter wrongfully accused [plaintiff] of being inappropriate, but [plaintiff] never raised her voice to Ms. Caine or acted in an

inappropriate manner." Pl.'s Mem. in Opp. at 19. I therefore assume it is the false statement to which plaintiff objects.

Once again, plaintiff's claim fails. Plaintiff cites nothing other than her own conclusory statements to explain how defendant's rather vague description of her behavior as "inappropriate" could—or has—harmed her reputation in the community. In fact, if she did experience such harm, her own publication may have been the cause. Plaintiff admitted that she told at least five friends about the letter, Tripp Dep., Docket # 24-4, at 27-34, and could not remember a single time she discussed the matter with someone when she did not raise it herself. Id. at 35. Nor does plaintiff devote a single word to explaining what actual damages she has suffered or why defendant's allegedly false statement is actionable per se. For these reasons, no reasonable jury could find for plaintiff on her defamation claim.

IV. Conclusion

Defendant's motion for summary judgment (Docket # 18) is ALLOWED. Judgment may be entered for defendant.

February 11, 2014 — DATE

/s/Rya W. Zobel
RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE