IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MARY WILLETT,

OPINION AND ORDER

Plaintiff,

12-cv-305-bbc

v.

VILLAGE OF HOLMEN,
RYAN OLSON, NEAL FORDE,
RICHARD ANDERSON, MARK SEITZ,
MICHAEL DUNHAM, TONY SZAK
and NANCY PROCTOR,

Defendants.

- -

Defendant Village of Holmen terminated plaintiff Mary Willett from her position as the village administrator after other village employees raised concerns about her performance. In this case brought under 42 U.S.C. § 1983 and state law, plaintiff contends that the village and members of the village board violated her right to due process by failing to give her a hearing to dispute the allegations and by making defamatory statements about her that have harmed her ability to get another job. In addition, she contends that defendants breached her employment agreement, violated the Open Meetings Law and committed the tort of wrongful discharge. Defendants' motion for summary judgment, dkt. #38, is ready for review.

If the sole question in this case were whether defendants had treated plaintiff unfairly

when terminating her, plaintiff would have a strong claim. Only a few days after plaintiff received a positive evaluation, defendants sent her a notice itemizing various concerns about her performance and then fired her a week later without hearing her side of the story. Even now, it is far from clear why defendants terminated plaintiff and why they chose to move as swiftly as they did.

Unfortunately for plaintiff, however, a conclusion that defendants may have treated her unfairly is not enough to enable her to survive defendants' summary judgment motion, because she has failed to make the necessary showing that defendants deprived her of property or liberty. Without such a showing, she cannot succeed on her due process claims, which are her only federal claims. Without those claims out of the picture, I am declining to exercise supplemental jurisdiction over plaintiff's state claims. 28 U.S.C. § 1367(c)(3).

From the parties' proposed findings of fact and the record, I find that the following facts are undisputed.

UNDISPUTED FACTS

In August 2009, defendant Village of Holmen hired PeopleFirst HR Solutions to conduct an executive search for a village administrator. In October 2009, plaintiff Mary Willett applied for the position. In both her cover letter and her résumé, plaintiff stated accurately that her job was "clerk-treasurer with administrative duties" for the city of Phillips.

James Geissner, the owner of PeopleFirst, interviewed plaintiff and chose her as a

finalist to be interviewed by the village board. Members of the board at the time included defendants Nancy Proctor (the board's president), Mark Seitz (the chair of the finance and personnel committee), Ryan Olson, Tony Szak, Neal Forde and Richard Anderson. (The parties included no proposed findings about defendant Michael Dunham, but plaintiff alleges in her amended complaint that he is a member of the board as well. Dkt. #37, ¶ 13.) On December 5, 2009, the board interviewed plaintiff. She did not tell the board during the interview that she was the administrator for the city of Phillips, but Geissner told the board that he believed plaintiff's duties, responsibilities and reporting relationships in her current job were "equivalent" to that of an administrator.

After the interview Geissner traveled to Phillips to speak with members of the community about plaintiff. After speaking with the mayor (plaintiff's direct supervisor), Geissner asked plaintiff to revise her application to state that she was the "administrator/clerk-treasurer" for Phillips because he believed this reflected her responsibilities more accurately than her actual title. (Plaintiff cites her own affidavit to support this fact, but defendants do not object to the fact as hearsay, presumably because they believe it is admissible under Fed. R. Evid. 801(d)(2)(D), so I have included it.) Plaintiff complied with this request and submitted a revised application. (The evidence cited by the parties in their proposed findings of fact does not show whether any board members reviewed the revised application.)

In December 2009 plaintiff was hired as the village's administrator. Her contract with the village included the following provisions:

Section 4. Term

Subject to Section 9., the term of this Agreement shall be for three (3) years next following the effective date. Nothing in this Agreement shall prevent, limit or otherwise interfere with the right of the Board to terminate the services of the Village Administrator/Clerk at any time, with or without cause, during the term of this Agreement, subject only to Section 9, below . . . .

* * *

Section 7. Salary

In the first year of employment (2010) the Village shall pay the Village Administrator/Clerk as compensation for her performance of the duties and services . . . a base annual salary equivalent of $65,000 effective on the date of hire, with an increase to $67,500 upon successful completion of six months of employment, as determined by the Finance and Personnel committee by the Village. Thereafter, the annual salary shall be as follows, effective: January 1st, 2011—$70,000, January 1st, 2012—$73,000. It is understood that these wage adjustments are contingent upon acceptable job performance as determined by the Finance and Personnel committee. . . .

* * *

Section 9. Resignation; Termination of Employment; Severance Pay, When Applicable

A. The Village may choose to terminate the employment of the Village Administrator/Clerk at any time during the term of this Agreement for cause only after the Village Board provides the Employee an opportunity to be heard with at least one (1) week written notice of the Village Board holding a hearing to determine if cause exists for termination of the Village Administrator. A vote of five (5) members of the Village Board finding cause for termination shall be the determination that cause exists. Termination for cause shall include, but not be limited to, conviction by a court of competent jurisdiction of any criminal act or omission involving moral turpitude (which shall include, but not be limited to, embezzlement, tax evasion, fraud, or criminal sexual conduct) which crime substantially relates to the circumstances of the Village Administrator/Clerk's job duties, a violation of an express provision of the Wisconsin

Statutes, or by failure, refusal, or neglect to perform the assigned duties of the office of Village Administrator/Clerk as prescribed by this Agreement. In the event of termination for cause, the Village shall not be required to pay severance pay as set forth in Section C., below, and the Village Administrator/Clerk shall forfeit any and all accrued but unused benefits, except for accrued vacation.

B. The Village reserves the right at any time, without cause, upon seven (7) days' notice to the Village Administrator/Clerk, to terminate this Employment Agreement subject only to payment of the severance pay under C., below.

C. Severance pay shall be paid by the Village to the Village Administrator/Clerk only in the event of termination of employment pursuant to B., above. A lump sum cash payment equal to the aggregate salary of the Village Administrator/Clerk for a period of three (3) months, together with accrued benefits, including health insurance, shall be paid.

On July 15, 2010, the village increased plaintiff's salary from $65,000 to $67,500 after defendant Seitz conducted a performance evaluation. On January 3, 2011, the village increased plaintiff's salary to $70,000. On February 8, 2011, at plaintiff's performance review, defendant Olson told plaintiff that she was doing a "good job." (The parties do not say what the review process entailed.)

On February 10, 2011, during a closed session of a village board meeting, the village's director of public works stated that he was thinking of resigning because of problems he had with plaintiff. (Plaintiff was not present at the meeting.) The minutes for that hearing indicate that other village employees expressed concerns about plaintiff's performance as well. (Plaintiff includes many proposed findings of fact about what she believes are the motivations for the other employees' comments, but I have not included these facts because

they are not relevant.) Defendants Seitz and Olson were surprised by the concerns.

In response to the comments about plaintiff, the board asked staff to provide their view on plaintiff's performance at another meeting on February 21, 2011. In a letter dated February 14, 2011, defendant gave plaintiff notice of the board meeting to "consider [her] job status as Village Administrator." The notice listed nine "areas of concern" that different staff members had, such as a misrepresentation about her experience on her résumé, misrepresentations on her time sheets, a lack of confidence and trust from department heads, a failure to provide timely reports and an inability to communicate about the budget.

On February 16, 2011, a reporter from a local newspaper spoke to defendant Seitz about plaintiff and the upcoming board meeting. (The parties do not explain how the reporter learned about these matters. However, the reporter testified in his deposition that a former village administrator had informed him in November 2010 that plaintiff had falsified her job application.) The following day, the newspaper printed a story with the title "In hot water: Holmen administrator faces hearing":

> The Holmen Village Board will hold a special closed-door meeting Monday to discuss Village Administrator Mary Willett's "job status."
>
> The purpose of the meeting is to address some performance issues, concerns raised by other staff members and an allegation that Willett misrepresented her administrative experience when she applied for the Holmen job.
>
> "The meeting is to get everybody's side of the story and get this sorted out," said Village Trustee Mark Seitz, who chairs the board's Finance and Personnel Committee.
>
> Seitz said he couldn't be more specific about staff complaints and performance issues. "There's only so much I can comment on." he said. "The last thing I want to do is put something out in public before Mary has a chance to

respond."

Willett was hired as the village's third administrator a little over a year ago and was due for an annual review in January.

Department heads normally fill out evaluations as part of the administrator's annual performance review. When Willett's review was done, those staff evaluations were not part of it, an issue raised at the village board meeting last week.

"Staff had some concerns about being involved in the process," Seitz said. "Once we heard from them, there were some legitimate issues that need to be addressed."

When she was hired, Willett was touted as the first village administrator to have been an administrator before starting the job. The problem is, the board has learned, she wasn't actually an administrator. She was the clerk/treasurer of Phillips, a city in northern Wisconsin that has never had a city administrator.

"That's a serious concern to all of us," Seitz said. "It's certainly part of the equation, something we have to ask her about."

Seitz was surprised that the La Crosse firm the village paid to screen candidates, PeopleFirst HR Solutions, hadn't discovered the discrepancy.

Willett said Wednesday that the title of the position she had in Phillips was "Clerk/Treasurer with Administrative duties" and that "there is not and never has been a misrepresentation of my background and experience when I applied for the position."

A few days later, the same newspaper ran a story with the same information.

In an email dated February 19, 2011 (a Saturday), plaintiff's lawyer informed the village attorney that plaintiff could not attend the February 21 meeting because she "has a preliminary diagnosis as suffering from depression." (Plaintiff was later diagnosed with generalized anxiety disorder with situation-cued panic attacks.) Plaintiff's lawyer asked the village "to respect her privacy interests with respect to this information." In addition, he

proposed that the village board address its concerns to plaintiff in writing and allow her two weeks to submit a written response, in lieu of a hearing. The village attorney forwarded the email to the board. (The parties do not say when the board received the email, except that it was before the February 21 meeting.) Plaintiff's lawyer talked to at least some members of the board to discuss the possibility of plaintiff's providing information at a later date, but the board decided to go ahead with the February 21 meeting.

On February 21, the board approved a motion to terminate plaintiff under Section 9.B. of her employment agreement, which allowed the board to terminate plaintiff without cause, "subject only to payment of . . . severance pay." (The parties provided few details about what happened at the meeting before the vote, except that the board members believed that plaintiff's absence from the meeting was "unacceptable.")

After the vote, a reporter for the local newspaper interviewed defendant Proctor. Later that evening, the newspaper published a story called "Holmen board fires village administrator":

> The Holmen Village Board voted unanimously Monday night to terminate the contract of Village Administrator/Clerk Mary Willett after just over a year of service.
>
> The board deliberated behind closed doors for about an hour before deciding to invoke a clause in Willett's contract that allows the village to terminate her contract without cause. The clause requires that Willett get severance pay if she is dismissed.
>
> "Basically, it was based on complaints raised by staff about her performance," said Village Attorney Alan Peterson. He said he couldn't go into detail about the complaints until he talked with Willett's lawyer.
>
> Willett, who had not reported for work at the Village Hall for several days, did

> not attend the meeting Monday night. "It was her choice not to come," said Village President Nancy Proctor.
>
> Department heads share their observations and concerns as a normal part of the administrator's performance review process. Proctor said the concerns raised did not come as a surprise to the board.
>
> One major concern, Proctor said, is that Willett has still not produced a budget document for this year.

On March 11, 2011, the village attorney sent plaintiff a proposed "separation agreement and general release," with the unanimous approval of the board. Under the agreement, plaintiff would not receive severance pay unless she agreed to a number of things, including the release of the village from any liability related to her termination. Plaintiff did not sign the agreement.

After plaintiff filed this lawsuit, the village sent plaintiff a check for severance pay, along with a letter in which it stated that it "decided to tender the three months severance pay per Section 9.C. [of the employment agreement] and withdraw its request for a release." Plaintiff returned the check.

On April 26, 2011, plaintiff started working for Congressman Sean Duffy. (Plaintiff does not say what her position is.) On November 24, 2012, plaintiff applied for administrator positions in the city of Black River Falls, the village of Merrimac and the city of New Lisbon. She received rejection letters for each of these positions.

OPINION

Section 1 of the Fourteenth Amendment to the United States Constitution prohibits

the state from "depriv[ing] any person of life, liberty, or property, without due process of law." Plaintiff argues that defendants violated this clause by failing to give her a hearing before terminating her and making negative comments about her to the press. She says that she had a right to a hearing because the employment contract she had with the village gave her a property interest in her job and because defendants' defamatory comments deprived her of her liberty to practice her occupation.

Defendants do not argue that plaintiff waived any right she had to a hearing by failing to appear at the February 21, 2011 meeting, so I do not consider that question. However, defendants deny that they deprived plaintiff of property or liberty, as those terms have been defined by the Supreme Court and the Court of Appeals for the Seventh Circuit.

A. Property

A public employee's job may qualify as her "property" under the due process clause if she has a contract that "contain[s] a promise of continued employment." Palka v. Shelton, 623 F.3d 447, 452 (7th Cir. 2010). In particular, the contract "must provide some substantive criteria limiting the state's discretion, as for instance in a requirement that employees can only be fired 'for cause.'" Miyler v. Village of East Galesburg, 512 F.3d 896, 898 (7th Cir. 2008). See also Krieg v. Seybold, 481 F.3d 512, 520 (7th Cir. 2007) (without clause providing that public employee could only be discharged for just cause, at-will employee had no protected property interest in continued employment).

In this case, plaintiff acknowledges that her contract allowed the village to fire her for

any reason, so long as it gave her severance pay and seven days' notice. However, she points to another provision that required the village to give her a hearing before firing her "for cause." She argues that defendants did not actually rely on the provision of the contract that allowed her to be terminated without cause because the village initially attempted to obtain a release from her before providing severance pay. Thus, plaintiff says, the village must have fired her "for cause" and should have provided a hearing. For their part, defendants deny that they terminated plaintiff for cause, pointing out that, when they fired her, they invoked the provision that allowed them to do so without cause and they (eventually) offered plaintiff severance pay without conditions.

The parties' dispute is a red herring. In a case in which a public employee is relying on a contract to create a property interest, the question is not what the employer's "real" reason for firing the plaintiff was, but whether the language of the contract placed substantive limits on the employer's discretion. In this case, plaintiff's contract did not require the village to have "cause" to fire plaintiff in any instance. Rather, the contract states that, *if* the village fired plaintiff for cause, it was required to follow certain procedures; it did not place any substantive limits on the village's discretion.

This is an important distinction because "[p]rocedural guarantees, whether relied on or not, do not establish a property interest protected under the Fourteenth Amendment's Due Process Clause." Rujawitz v. Martin, 561 F.3d 685, 688 (7th Cir. 2009). See also Redd v. Nolan, 663 F.3d 287, 298-99 (7th Cir. 2011) ("[I]t is well established that such procedural protections under state law do not provide the substantive restrictions on the

employer's discretion that would be needed to establish a federally protected property interest in continued employment."). Thus, it makes no difference whether defendants fired plaintiff with cause or without. Either way, the most that plaintiff could show is that defendants breached her employment agreement by failing to follow its procedures. Accordingly, I conclude that defendants did not deprive plaintiff of property within the meaning of the due process clause and I am granting defendants' summary judgment motion as to this claim.

B. Liberty

An employer's public statements may deprive an employee of her "liberty" within the meaning of the due process clause under some circumstances if it inhibits her ability to find another job. The standard is a high one. "[A]ny time an employee is involuntarily terminated, some stigma attaches which affects future employment opportunities. This type of harm does not infringe on an employee's protected liberty interests." Ratliff v. City of Milwaukee, 795 F.2d 612, 625 (7th Cir. 1986).

The plaintiff must do more than prove that a statement is defamatory. Hojnacki v. Klein-Acosta, 285 F.3d 544, 548 (7th Cir. 2002). Even a statement that "causes serious impairment of one's future employment" is not sufficient. Beischel v. Stone Bank School District, 362 F.3d 430, 439 (7th Cir. 2004). Rather, the plaintiff must show that statements have made it "virtually impossible for [her] to find new employment in [her] chosen field." Boyd v. Owen, 481 F.3d 520, 524 (7th Cir. 2007). The court of appeals has

stated the test alternatively as whether the statement "is likely to make [the plaintiff] all but unemployable in the future." Lawson v. Sheriff of Tippecanoe County, 725 F.2d 1136, 1138 (7th Cir. 1984). More specifically, the statements must "rise to the level of accusations of criminality, dishonesty or job-related moral turpitude." Pleva v. Norquist, 195 F.3d 905, 915 (7th Cir. 1999).

In this case, plaintiff contends that various statements printed in the local newspaper have deprived her of the ability to work in her chosen field. Although plaintiff is now employed by a member of Congress, she seems to assume that the relevant field is limited to municipal administrator positions because she points to three administrator positions that she failed to obtain since November 2012. That is a very narrow reading of the standard. Strasburger v. Board of Education, Hardin County Community Unit School District No. 1, 143 F.3d 351, 356 (7th Cir. 1998) ("[S]tate employees have a liberty interest in not being discharged from their employment while being defamed such that they cannot get *other government employment*.") (emphasis added). However, defendants have not raised that issue, so I will not consider it.

In her brief, plaintiff focuses most of her attention on "Seitz's statements regarding misrepresentations by Willett." Plt.'s Br., dkt. #58, at 12. An initial problem with this argument is that plaintiff never identifies a particular statement by Seitz in which he accused plaintiff of misrepresenting anything. Plaintiff does not allege that Seitz or any of the other defendants made a public statement that she was fired for making a misrepresentation or even that a misrepresentation was a factor in that decision. Rather, the newspaper story

plaintiff cites is from several days before plaintiff was fired and it discusses an "allegation" that "Willett misrepresented her administrative experience when she applied for the Holmen job." Dkt. #36-1. However, nothing in the story suggests that Seitz was the source of the allegation and plaintiff does not argue that he was. Strasburger, 143 F.3d at 356 ("We also require the statements to come from the mouth of a public official. Rumors and statements made to public officials do not suffice.") (internal quotations omitted). Rather, it seems that the village's previous administrator was the first to make that allegation against plaintiff.

Another passage states that plaintiff "was touted" as having been an administrator (without saying who "touted" this), even though she was not one. Although this passage may suggest that plaintiff lied about her credentials, again, nothing in the paragraph is attributed to Seitz.

The quotes attributed to Seitz support a view that he did not want to rush to judgment. Although he said that the allegation is "a serious concern to all of us" and "something we have to ask [plaintiff] about," he also said the purpose of the February 21 meeting was "to get everybody's side of the story and get this sorted out" and that "[t]he last thing I want to do is put something out in public before [plaintiff] has a chance to respond." Id. It is not clear which of these statements plaintiff believes is defamatory.

The closest the article comes to attributing a factual statement to defendant Seitz is a passage in which the article paraphrases Seitz as stating that he "was surprised that the La Crosse firm the village paid to screen candidates, PeopleFirst HR Solutions, hadn't discovered the discrepancy." Arguably, the use of the word "discrepancy" could support a

view that Seitz was implying that he believed that plaintiff had misrepresented her experience.

Even if I assume that one of the defendants made a public statement that plaintiff had claimed falsely during the application process that she was an administrator, defendants could not be held liable for that under the due process clause because that statement is true. Ratliff, 795 F.2d at 626 (statements do not trigger due process clause if they are "essentially true"). It is undisputed that plaintiff was not the administrator for the city of Phillips; she was the "clerk-treasurer." It is also undisputed that plaintiff modified her application materials to state that she had been the administrator for the city of Phillips.

What is missing from the newspaper article is the context for plaintiff's decision to modify her application, which is that she was told to do so by Geissner (the owner of the company conducting interviews for the city) because he believed it more accurately reflected her responsibilities. This certainly makes plaintiff's actions more understandable, but plaintiff cites no authority for the proposition that a public official violates the due process clause when making a statement that is true but omits mitigating facts. (Plaintiff was interviewed for the story as well and the quotations from her do not supply the missing context; she chose instead simply to deny that she had misrepresented her experience.) Even if plaintiff had a good reason for the revision, it does not change the fact that there was a "discrepancy" between the job title on her application and the actual job title that she held. Particularly because plaintiff cites no evidence that Seitz was even aware of Geissner's involvement in the revision, I do not see how Seitz or any of the other defendants can be

held liable for making these statements.

In her brief, plaintiff argues that there was no "misrepresentation" because she never claimed to be an administrator during her interview and Geissner had explained to board members that he viewed plaintiff to be the equivalent of an administrator. (Plaintiff does not say that Geissner told any of the board members that he instructed plaintiff to revise her application.) Again, these are both mitigating facts, but they do not make her revised application any less inaccurate.

Plaintiff also says that "there is no evidence that the Village Board ever saw the revised job application or résumé," and that "there can be no misrepresentation if the Board did not even see the revised résumé or job application." Plt.'s Br., dkt. #58, at 14. If defendants were suing plaintiff for the tort of misrepresentation, plaintiff would be correct that defendants would have to prove that they relied on her statement. Malzewski v. Rapkin, 2006 WI App 183, ¶¶ 19-20, 296 Wis. 2d 98, 112, 723 N.W.2d 156, 163. However, the question in this case is not whether plaintiff committed a tort but whether *defendants* made a false statement. Even if defendants never viewed plaintiff's revised application, again, that fact does not make the application true.

Plaintiff briefly discusses four other statements in the newspaper articles: (1) defendant Seitz's statement that "there were some legitimate issues that need to be addressed"; (2) defendant Proctor's statement that it was plaintiff's "choice not to come" to the February 21 meeting; (3) defendant Proctor's statement that the "the concerns raised [by staff] did not come as a surprise to the board"; and (4) defendant Proctor's statement that

"[o]ne major concern . . . is that Willett has still not produced a budget document for this year." Defendants stand by the truth of each of these statements, but I need not resolve that issue because the statements do not rise to the level of "criminality, dishonesty or job-related moral turpitude." Pleva, 195 F.3d at 915. Three of the four statements might call into question plaintiff's ability as an administrator, but "[l]abeling an employee as incompetent or otherwise unable to meet an employer's expectations does not infringe the employee's liberty." Hedrich v. Board of Regents of University of Wisconsin System, 274 F.3d 1174, 1184 (7th Cir. 2001).

With respect to defendant Proctor's statement that it was plaintiff's choice not to come to the meeting, plaintiff argues that the statement implies that the allegation of misrepresentation was true and "could not be refuted." Plt.'s Br., dkt. #58, at 18. This argument is contingent on a finding that defendants falsely accused plaintiff of making a misrepresentation. Because I have rejected that view, this argument necessarily fails as well. Accordingly, I am granting defendants' motion for summary judgment with respect to both of plaintiff's due process claims.

C. State Law Claims

When all the federal claims in a case have been dismissed, the general rule is that a district court should decline to exercise jurisdiction over any remaining state law claims under 28 U.S.C. § 1367(c)(3). Redwood v. Dobson, 476 F.3d 462, 467 (7th Cir. 2007). Although exceptions to this general rule exist, neither side asks the court to retain

jurisdiction over the state law claims in the event the federal claims are dismissed. Because neither side has shown that it would be an efficient use of judicial resources to resolve the state law claims, I am declining to exercise jurisdiction over them.

ORDER

IT IS ORDERED that

1. The motion for summary judgment filed by defendants Village of Holmen, Ryan Olson, Neal Forde, Richard Anderson, Mark Seitz, Michael Dunham, Tony Szak and Nancy Proctor, dkt. #38, is GRANTED with respect to plaintiff Mary Willett's claims under federal law.

2. In accordance with 28 U.S.C. § 1367(c)(3), plaintiff's state law claims are DISMISSED WITHOUT PREJUDICE to her refiling them in state court.

Entered this 18th day of March, 2013.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge