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IN THE UNITED STATES DISTRICT COURT
FOR MIDDLE DISTRICT OF PENNSYLVANIA

MARY T. MILLER,

Plaintiff,

v.

MARY P. KRUIK, etal.

Defendants

No. 3:06-CV-00463

(Vanaskie, C.J.)

DEFENDANTS' MOTION TO DISMISS COMPLAINT

Defendants, Mary P. Kruzik, Gary Williams, Randall Smith, William J. O'Gurek, Charles Getz, Wayne Nothstein, and Carbon County, move to dismiss the plaintiff's complaint pursuant to Fed. R. Civ. P. 12 (b) (6) on the basis of the following:

1. The plaintiff was formerly employed by Carbon County in the Emergency Communications Center.
2. All 911 telephone calls made to the Communications Center are recorded

under Pennsylvania law.

3. Plaintiff alleges that from approximately 9:30 p.m. on April 12, 2005 until the late morning hours of April 13, 2005, a handset at one of the consoles in the Communications Center was left off the hook, causing plaintiff's conversations to be "inadvertently" recorded.
4. Plaintiff does not allege that any of the defendants intentionally recorded her conversations.
5. Plaintiff does not allege that it is the policy of Carbon County to record its employees' conversations or to distribute illegally recorded audiotapes.
6. Plaintiff alleges that defendants shared with each other the "inadvertent" recording of her conversation and relied on what they heard as a basis for suspending and ultimately terminating plaintiff from her employment.
7. The plaintiff bases her complaint on the following legal theories:
 - (a) Count I: Violation of Federal Wiretapping Act, 18 U.S.C. §§ 2511 and 2520;
 - (b) Count II: Pennsylvania Wiretapping Control Act, 18 Pa. C.S.A. §§5703 and 5725;
 - (c) Count III: Pennsylvania Whistleblower Law, 43 P.S. §1423;
 - (d) Count IV: First Amendment claims pursuant to 42 U.S.C. §1983;
8. The plaintiff seeks an award of punitive damages from all parties, including

Carbon County.

9. The plaintiff cannot recover punitive damages from Carbon County, a political subdivision. City of Newport v. Fact Concerts, 453 U.S. 247, 69 L. Ed. 2d 616, 101 S. Ct. 2748 (1981).
10. Plaintiff also seeks to suspend all defendants from public service for a period of six months based on authority contained in 43 P.S. §1426.
11. Elected officials cannot be removed from public office pursuant to 43 P.S. §1426.
12. Plaintiff sues each of the individual defendants in both their “official” and individual capacities.
13. Suing defendants in their official capacities when their employer is named as a separate defendant is redundant and subject to dismissal. *See e.g. Odom v. Borough of Taylor*, 2006 U.S. Dist. LEXIS 8948, 6-7 (M.D. Pa. 2006).
14. Plaintiff’s claims against Carbon County are impermissibly based on a theory of respondeat superior.
15. Plaintiff has not stated a cause of action under either the federal or state wiretap laws.
16. The defendants enjoy qualified immunity from suit.
17. For the reasons set forth in defendants’ supporting brief, the plaintiff has failed to state a cause of action against defendants.

18. Plaintiff cannot amend her complaint to state a cause of action.

WHEREFORE, the defendants, Mary P. Kruzik, Gary Williams, Randall Smith, William J. O’Gurek, Charles Getz, Wayne Nothstein, and Carbon County, request that plaintiff’s complaint be dismissed.

NEWMAN, WILLIAMS, MISHKIN,
CORVELEYN, WOLFE & FARERI, P.C.
By: /s/ Gerard J. Geiger, Esq.
Attorney I.D. No. PA 44099

Dated: April 5, 2006

CERTIFICATE OF SERVICE

I hereby certify that on this date, a true and correct copy of the foregoing document was served upon plaintiff's counsel via ECF.

NEWMAN, WILLIAMS, MISHKIN,
CORVELEYN, WOLFE & FARERI

By: /s/ Gerard J. Geiger, Esq.
Attorney I.D. #44099
Attorney for Defendants,

Dated: April 5, 2006

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

MARY T. MILLER

Plaintiff

MARY P. KRUIK;
GARY WILLIAMS;
RANDALL SMITH;
WILLIAM J. O'GUREK;
CHARLES GETZ;
WAYNE NOTHSTEIN; and
CARBON COUNTY,

Defendants

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Case No. 3:CV 06-00463

JURY TRIAL DEMANDED

The Honorable Thomas I. Vanaskie

(Electronically Filed)

**ANSWER
OF PLAINTIFF
TO MOTION TO DISMISS COMPLAINT
OF DEFENDANTS**

AND NOW, comes Plaintiff, Mary T. Miller, by and through her attorneys, Bruce J. Phillips, Esquire and John P. Rodgers, Esquire, and files this, her Answer to the Motion to Dismiss Complaint of Defendants, Mary P. Kruzik, Gary Williams, Randall Smith, William J. O'Gurek, Charles Getz, Wayne Nothstein, and Carbon County, and in support thereof, avers as follows:

1. Admitted.

2. Denied. It is admitted that all 911 telephone calls to the Communications Center are recorded, however, it is denied that the recorded conversations of Plaintiff in the instant matter were recorded as a matter of Pennsylvania law.

3. Denied. Plaintiff alleges in her Complaint that she was informed by Defendant, Kruzik, that on or about April 13, 2005, a phone line on Console #4 had been left off the hook and had recorded in excess of ten (10) hours of conversation by Plaintiff.

4. Denied. It is admitted that Plaintiff does not allege that Defendants intentionally recorded her conversations, however, it is specifically alleged by Plaintiff in her Complaint that Defendants deliberately, knowingly, and intentionally disclosed the contents of the electronic communication

in violation of the Federal Wiretapping Act, 18 U.S.C.S. §2511(1)(c)-(d) and the Pennsylvania Wiretapping Control Act, 18 Pa. C.S.A. §5703. By way of further answer, Plaintiff further alleges in her Complaint violations of the Pennsylvania Whistleblower Law, 43 P.S. §1423, et seq., by reason of her termination from her position of employment subsequent to a reporting of the illegal acts of Defendants to the Carbon County District Attorney.

5. Denied. Plaintiff specifically alleges in her Complaint that the Individual Defendants, in their official capacities, recorded the conversations of Plaintiff and disclosed them to third parties in violation of Federal and State law.

6. Denied. Plaintiff specifically alleges in her Complaint that Defendants disclosed the contents of the recorded conversations of Plaintiff to third parties; used the recorded conversations in a disciplinary proceeding against Plaintiff; and, ultimately, terminated her from her position of employment. By way of further answer, Plaintiff specifically alleges in her Complaint that the actions of Defendants were undertaken in violation of the Federal Wiretapping Act, 18 U.S.C.S. §2511(1)(c)-(d), and the Pennsylvania Wiretapping Control Act, 18 Pa. C.S.A. §5703. By way of further answer,

Plaintiff further alleges in her Complaint violations of the Pennsylvania Whistleblower Law, 43 P.S. §1423, et seq., by reason of her termination from her position of employment subsequent to a reporting of the illegal acts of Defendants to the Carbon County District Attorney.

7. Admitted.

8. Denied. Plaintiff does not seek an award of punitive damages against Defendant, Carbon County, but, rather, seeks an award of punitive damages against Defendants, Kruzik, Williams, Smith, O’Gurek, Getz, and Nothstein, individually and not in their official capacities.

9. Admitted.

10. Admitted.

11. Denied. 43 P.S. §1426 specifically provides that if an individual in the employment of the Commonwealth or a political subdivision “. . . committed a violation of this act with the intent to discourage the disclosure of criminal activity, the court may order the person’s suspension from public service for not more than six months”. By way of further answer, Defendants, Kruzik, Williams, and Smith, were employees of a political subdivision of the Commonwealth of Pennsylvania and can be suspended for a period not to exceed six (6) months.

12. Admitted.

13. Denied. Plaintiff does not assert a cause of action on the theory of respondent superior, but, rather, asserts a claim against Defendants, Kruzik, Williams, Smith, O'Gurek, Getz, and Nothstein, both individually and in their official capacities as officials and employees, constituting state actors pursuant to 42 U.S.C. §1983.

14. Denied. Plaintiff does not assert a cause of action on the theory of respondent superior, but, rather, asserts a claim against Defendants, Kruzik, Williams, Smith, O'Gurek, Getz, and Nothstein, both individually and in their official capacities as officials and employees, constituting state actors pursuant to 42 U.S.C. §1983.

15. Denied. Plaintiff has alleged specific and profound violations of both Federal and State law as more specifically set forth in Plaintiff's Complaint.

16. Denied. Defendants do not enjoy qualified immunity in any respect.

17. Denied. Plaintiff has alleged specific and profound violations of both Federal and State law as more specifically set forth in Plaintiff's Complaint.

18. Denied. Plaintiff need not amend her Complaint and may otherwise seek leave to amend her Complaint pursuant to the Federal Rules of Civil Procedure.

WHEREFORE, Plaintiff, Mary T. Miller, prays this Honorable Court to deny the Motion to Dismiss Complaint of Defendants, Mary P. Kruzik, Randall Smith, Gary Williams, William J. O'Gurek, Charles Getz, Wayne Nothstein, and Carbon County.

Respectfully submitted,
/s/ BRUCE J. PHILLIPS, ESQUIRE
/s/ JOHN P. RODGERS, ESQUIRE
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