

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

BILLIE JEAN MILSTEAD,

Plaintiff,

vs.

MARK BEGICH; WALTER C.
MONEGAN; THE MUNICIPALITY OF
ANCHORAGE; and DOES 1-20
inclusive,

Defendants.

Case No. 3:08-cv-0100-RRB

**ORDER GRANTING MOTION
TO DISMISS AT DOCKET 7**

I. INTRODUCTION

This matter arises from alleged defamatory statements made by Mayor Mark Begich and former Police Chief Walter Monegan and other unnamed Municipality of Anchorage Officials regarding the Plaintiff, Billie Jean Milstead. Milstead alleges in her Complaint, at Docket 1, that the Defendants made false, defamatory, and malicious statements that resulted in the loss of her job and destruction of her reputation in the Anchorage community. She brings this action under the Fifth and Fourteenth Amendments to the

Constitution of the United States; Article 1, Section 7, of the Alaska State Constitution; 42 U.S.C. § 1983; and Alaska law. Defendants filed a Motion to Dismiss at Docket 7, seeking dismissal under Federal Rules of Civil Procedure 12(b)(1) and (6), arguing that Plaintiff has failed to state a claim on which relief can be granted, and that this Court lacks subject-matter jurisdiction. Plaintiff opposes the motion at Docket 10 and Defendants reply at Docket 12. Oral argument was not requested and the Court does not find that it would be helpful.

II. FACTUAL BACKGROUND

According to the Complaint,¹ Milstead worked as the manager of the Panhandle Bar in downtown Anchorage from March 2005 until she was terminated in June 2006. In early 2006, Mayor Begich began a campaign to "clean up" Fourth Avenue, including the Panhandle, which was an alleged haven for drug dealers and prostitutes. A Public Safety Meeting was held on March 24, 2006, which was attended by Mayor Begich, representatives of the Anchorage Police Department, several Anchorage Assembly members, as well as Plaintiff and counsel for the Panhandle. Shortly thereafter, according to the Complaint, Milstead entered into a written agreement with APD to assist in resolving the problems

¹ For purposes of the Motion to Dismiss, the allegations in the Complaint are presumed to be true.

identified, including refusing service to individuals identified by APD as "undesirables." Milstead says APD never produced the list of "undesirables" and failed to return her phone calls in April and May of 2006.

On June 20, 2006, Begich and Monegan held a press conference announcing that APD had been conducting an undercover operation at the Panhandle and that the Municipality intended to shut the Panhandle down. Later the same day, at an Anchorage Assembly meeting, Begich stated that Panhandle management was not cooperating with APD's efforts to clean up the bar and formally asked the Assembly to withdraw its support of the Panhandle's liquor license.

On June 22, 2006, Begich met with counsel for the Panhandle. At this meeting, Begich said it was his and APD's position that Milstead was a drug dealer and that Milstead would have to be removed as bar manager in order for the Panhandle to retain its liquor license. Furthermore, during the June 2006 Anchorage Chapter of the Alaska Cabaret, Hotel, Restaurant & Retailer's Association (CHARR) meeting, Monegan informed the CHARR members that Milstead was a problem bar manager that APD knew was involved with dealing drugs. Milstead alleges that she was subsequently shunned by her peers, other CHARR members, and CHARR subsequently dropped the Panhandle from its membership. The owners

of the Panhandle terminated Milstead's employment in order to keep the liquor license. The Complaint alleges that it was later determined by APD that another employee, not Milstead, was the suspected drug dealer.

Milstead complains that she has been "ostracized by her peers and nearly all others in the bar industry and community. Her reputation has been ruined by the false statements of the chief executive of the municipality and the head of the municipality's police force, despite her complete innocence."²

III. STANDARD OF REVIEW

A motion to dismiss for failure to state a claim made pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims in the complaint. A claim should only be dismissed if "it appears beyond doubt that a plaintiff can prove no set of facts in support of his claim which would entitle him to relief."³ In reviewing a Fed. R. Civ. P. 12(b)(6) motion to dismiss, "[a]ll allegations of material fact in the complaint are taken as true and construed in the light most favorable to the nonmoving party."⁴ In contrast, a Rule 12(b)(1) motion may raise

² Docket 1 at 9.

³ *Vignolo v. Miller*, 120 F.3d 1075, 1077 (9th Cir. 1997).

⁴ *Vignolo*, 120 F.3d at 1077.

a facial or factual challenge to the court's subject matter jurisdiction.⁵ A facial challenge is directed at the legal sufficiency of a claim.⁶ When assessing a Rule 12(b)(1) facial challenge to the court's subject matter jurisdiction, the non-moving party receives the same protections as those under a Rule 12(b)(6) motion, and the court applies a standard comparable to that used for Rule 12(b)(6) motions.⁷

IV. DISCUSSION

Defendants argue alternative reasons for dismissal of this matter, including failure to state a due process claim, failure to bring a §1983 Federal question, and failure to state a claim under Alaska tort law. Specifically, Defendants argue that Plaintiff has pled only a case for defamation and other common-law torts, which do not confer federal jurisdiction.

The Supreme Court's opinion in *Paul v. Davis*,⁸ and the cases which follow it, are dispositive in this matter. In *Paul*, the Court considered whether a charge of defamation, standing alone and apart from any other governmental action, stated a claim for relief

⁵ 2 James W. Moore, MOORE'S FEDERAL PRACTICE, § 12.30[4] at 12-38 (3d ed. 1977).

⁶ *Id.*

⁷ MOORE, *supra*, § 12.30[4] at 12-38 n12.

⁸ 424 U.S. 693 (1976)

under 42 U.S.C. § 1983 and the Fourteenth Amendment. The Court concluded that it did not. In that case, the police department distributed a flyer to local businesses informing them of all persons arrested during 1971 or 1972 for shoplifting. The flyer consisted of mug shot photos and the words "Active Shoplifters." Edward Davis's photo was on the flyer because he had been arrested for shoplifting, but at the time the flyer was prepared and circulated, his guilt or innocence had not been resolved. The flyer was brought to the attention of Davis's employer, who did not fire him, but stated Davis "had best not find himself in a similar situation" in the future.⁹

The Supreme Court acknowledged that Davis's complaint stated a "classical claim for defamation actionable in the courts of virtually every State."¹⁰ But the Court found that Davis could not show a deprivation of rights under the 14th Amendment just because the offending party was a city official and the county government, concluding that the scope of the Due Process Clause of the Fourteenth Amendment and § 1983 does not expand to make actionable those wrongs which ordinarily give rise only to state

⁹ *Id.* at 696.

¹⁰ *Id.* at 697.

tort claims.¹¹ The Court further declined to find that the infliction of a "stigma" by state officials is actionable under § 1983 and the 14th Amendment. "[W]e think the weight of our decisions establishes no constitutional doctrine converting every defamation by a public official into a deprivation of liberty within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment."¹²

However, a combination defamation and termination of government employment, under *Paul*, is sufficient to support a Federal cause of action.¹³ The Ninth Circuit has explained:

The rule in *Paul* has come to be known as the "stigma plus" test for establishing deprivation of liberty based on governmental defamation. Under that test, a plaintiff must show the public disclosure of a stigmatizing statement by the government, the accuracy of which is contested, plus the denial of "some more tangible interest[] such as employment," or the alteration of a right or status recognized by state law.

Ulrich v. City and County of San Francisco.¹⁴ The analysis does not end there. In 2003, the Ninth Circuit explained:

¹¹ *Id.* at 699.

¹² *Id.* at 701-02.

¹³ *Id.* at 710.

¹⁴ 308 F.3d 968, 982 (9th Cir. 2002) (citations omitted).

"[T]he 'stigma-plus' test requires that the defamation be accompanied by an injury directly caused by the Government, rather than an injury caused by the act of some third party [in reaction to the Government's defamatory statements]."

American Consumer Pub. Ass'n, Inc. v. Margosian.¹⁵ As in *Margosian*, even if the Court assumes the truth of Plaintiff's factual allegations, they fail to satisfy the "stigma-plus" test, because "injuries caused by a third party's response to government statements are not cognizable under § 1983."¹⁶ Milstead's injuries, though arguably related to the statements of Mayor Begich and Chief Monegan, were the result of the actions of third parties: her employers at the Panhandle and the members of CHARR. Under *Margosian*, Milstead fails to state a Federal question.

The Court declines to consider the validity of Plaintiff's remaining claims, which all arise under state law. Plaintiff is free to bring those claims in state court.

V. CONCLUSION

For the foregoing reasons, the Motion to Dismiss at **Docket 7** is **GRANTED**. The Federal claims in this matter are

¹⁵ 349 F.3d 1122, 1126 (9th Cir. 2003), citing *WMX Techs., Inc. v. Miller*, 80 F.3d 1315, 1320(9th Cir. 1996).

¹⁶ *Id.*

dismissed with prejudice. Claims made under the Alaska State Constitution and Alaska law are dismissed without prejudice.

ENTERED this 6th day of January, 2009.

S/RALPH R. BEISTLINE
UNITED STATES DISTRICT JUDGE