

STATE OF VERMONT

SUPERIOR COURT
Orange Unit

CIVIL DIVISION
Docket No. 277-12-11 Oecv

Jeremy Chouinard
Plaintiff

v.

Town of Williamstown, Williamstown Fire Department
as part of the Williamstown Fire District,
and Ed Eaton, Fire Chief
Defendants

Decision on Defendants' Motion to Dismiss

Plaintiff Jeremy Chouinard challenges his dismissal from the Williamstown Fire Department and asserts two tort-based causes of action: one for negligence in connection with alleged departmental safety violations, and one for intentional infliction of harm in connection with a fire that plaintiff responded to in December 2010. Defendants seek dismissal of certain portions of the complaint.¹

The following facts are taken as true from the complaint. Mr. Chouinard became a member of the fire department in February 2008, just before his seventeenth birthday. He was then issued a self-contained breathing apparatus (SCBA) that he used from March 2009 until December 2010, when, he alleges, it was removed from his locker for reasons that he did not understand at the time. He discovered that his SCBA was missing when he went to the station in response to a December 22, 2010 fire, but he nevertheless responded to the fire on the second truck. Upon arriving at the fire, fire chief Ed Eaton instructed him to crawl under the burning double-wide trailer to remove insulation. Mr. Chouinard did so but thereafter suffered smoke-inhalation injuries that required hospitalization.

Mr. Chouinard submitted a workers' compensation claim for injuries, which was paid. The fire department thereafter instituted a new policy disallowing members from having facial hair which interfered with the fit of the SCBA units. Mr. Chouinard was terminated from the fire department in June 2011 for a violation of that policy. Mr. Chouinard appealed his dismissal to

¹ Defendants styled the motion as seeking either dismissal of portions of the complaint or partial judgment on the pleadings. Defendants then attached a statement of facts so that the court could consider certain materials outside of the complaint. Except as expressly stated in this opinion, the court has disregarded everything other than what is included in the complaint and has accordingly reviewed the motion under the Rule 12(b)(6) standard. See *Condosta v. Grussing*, 144 Vt. 454, 459 (1984) (explaining that if a court does not consider matters outside the pleading, a motion to dismiss does not convert into a motion for summary judgment). Defendants' reply brief furthermore indicates that the remedies sought are in the nature of dismissal for failure to state a claim. Relief can be granted, rather than judgment on the pleadings or merits.

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Mr. Chouinard has now filed a complaint naming either three or four defendants, depending on how the caption is read: the Town of Williamstown, the "Williamstown Fire Department, as part of the Williamstown Fire District," and the fire chief, Ed Eaton. His complaint also appears to state four separate causes of action. He alleges in the first count that he was fired in retaliation for submitting a workers' compensation claim. In his second count, he alleges that his termination was wrongful and not in compliance with the written personnel policy. The third count is styled as a cause of action for violation of OSHA and VOSHA safety regulations, but it more likely was meant to state a basic negligence claim alleging that the four defendants "placed Mr. Chouinard's life and health in jeopardy" by allowing Mr. Chouinard to use a SCBA unit that had not been tested according to the safety standards. The final count is styled as a cause of action for "intent to injure," and it alleges that fire chief Ed Eaton acted intentionally in ordering plaintiff to crawl under a burning structure without SCBA equipment while knowing that this would place plaintiff's "life and health at risk."

The first issue is whether the complaint has been properly brought against the fire department. A fire department is generally viewed as a department of a municipality, and thus does not have the authority to sue or be sued independently of the municipality. 24 V.S.A. § 1951. A fire district, by contrast, is an entity that is created by voters and vested with certain public powers including the authority to "prosecute actions in the name of the district, defend and adjust actions commenced against it and settle claims in favor of and against the district." 20 V.S.A. §§ 2481, 2607. Plaintiff does not contest that his complaint should have been filed against the fire district rather than the fire department. The fire department is therefore dismissed from the complaint.

The second issue involves the characterization of Count III. As noted above, the complaint could be read as attempting to state a claim against the town for violations of the OSHA and VOSHA workplace-safety regulations, even though it is well-settled that these statutes do not create either a private cause of action or a privately-enforceable duty between an employer and an employee. See *American Fed. of Gov't Employees, AFL-CIO v. Rumsfeld*, 321 F.3d 139, 143-44 (D.C. Cir. 2003) (OSHA does not create a private cause of action); *Andrews v. State*, 165 Vt. 252, 258 (1996) (VOSHA regulations do not create privately enforceable duties). Another possible interpretation of the complaint is that it states a simple claim for negligence against the fire district, the town, and the fire chief, with the workplace-safety regulations serving as evidence of the proper standard of care. See, e.g., *Ball v. Melsur Corp.*, 161 Vt. 35, 43-44 (1993) (explaining that OSHA/VOSHA regulations are admissible for this purpose).

However, there are numerous problems with attempting to construe Count III as stating a cause of action for negligence based upon evidence of safety failures in the workplace. The first is that the negligence claim is stated against all three defendants even though the claim is based on safety failures that are alleged to have occurred during the fire chief's course of employment. The rule here is that such negligence claims must be stated exclusively against "the municipality that employed the employee at the time of the act or omission," rather than against another municipality or against the municipal employee in his individual capacity. 24 V.S.A. § 901a(b);

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see also *Holmberg v. Brent*, 161 Vt. 153, 156 (1993) (explaining that different rules may apply for village fire chiefs, which is not the situation here). As an initial proposition, therefore, a negligence complaint based on alleged safety-testing failures cannot be stated against any party other than the fire district.

Moreover, as against the fire district, the negligence claim here is much different from *Ball* because this case presents both an employment relationship between the injured party and the defendant and the receipt of workers' compensation benefits, with the concomitant protections for the employer. 21 V.S.A. § 622; *Vella v. Hartford Vermont Acquisitions, Inc.*, 2003 VT 108, ¶ 3, 176 Vt. 151. The VOSHA code does not supersede or in any manner affect the workers' compensation laws of this state, 21 V.S.A. § 222(2), and there does not appear to be any exception that would remove this case from the general rule that workers' compensation benefits are the exclusive remedy for negligence claims against the employer for injuries arising out of and in the course of employment. *Gerrish v. Savard*, 169 Vt. 468, 470 (1999). Plaintiff has not alleged that the town or the fire district had any specific intent to injure him. *Mead v. Western Slate, Inc.*, 2004 VT 11, ¶¶ 12–16, 176 Vt. 274. And even if the negligence claim against the fire chief were not impermissible for the reasons expressed above, the claim against the fire chief would be similarly barred under the workers' compensation exclusivity rule because the duty to provide a safe workplace is a nondelegable duty that rests with the employer alone. See *Garger v. Desroches*, 2009 VT 37, ¶¶ 4–6, 185 Vt. 634 (mem.) (explaining that “[a] failure to ensure that the equipment is appropriate for the job is part of an employer’s nondelegable duty to provide a safe workplace”).

Finally, there is the issue that a negligence claim requires an allegation that the plaintiff suffered an actual harm as the proximate result of the alleged breach of care. *O’Connell v. Killington, Ltd.*, 164 Vt. 73, 76 (1995). In this case, plaintiff alleges that the fire district failed to test its SCBA units regularly in accordance with the workplace-safety regulations, and that this testing failure “placed Mr. Chouinard’s life and health in jeopardy.” But he does not allege that the testing failures caused him any actual harm—rather, he alleges that his smoke-inhalation injuries occurred because he was not wearing his SCBA unit at all at the time he was ordered to go underneath the burning trailer. Given that, it is not possible for the court to read the complaint as alleging that the testing failures give rise to a cause of action for negligence. For these reasons, Count III and request for relief (d) must be dismissed.

Defendants also seek dismissal of Count IV, which appears to allege that the fire chief intentionally intended to injure plaintiff by ordering him to crawl under a burning building without proper equipment during the December 2010 fire, with actual smoke-inhalation injuries resulting. Although the foregoing discussion established that negligence claims cannot be asserted against municipal employees such as fire chiefs, there is an exception for tort claims against municipal employees who are alleged to have committed an act that was “willful, intentional, or outside the scope of employment.” 24 V.S.A. § 901a(e). And although the aforementioned workers'-compensation-exclusivity rules would bar an action based on willful misconduct, e.g., *Kittell v. Vermont Weatherboard, Inc.*, 138 Vt. 439, 441 (1980), an allegation of a specific intent to injure plaintiff is sufficient to bring the claim outside of the scope of the workers-compensation statutes, *id.*; *Mead v. Western Slate, Inc.*, 2004 VT 11, ¶¶ 12–16, 176 Vt. 274, especially when coupled with the allegation that smoke-inhalation injuries actually resulted

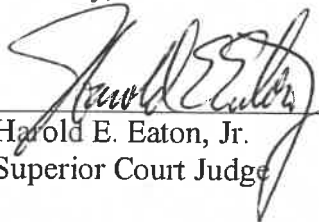
from the act of ordering plaintiff to go under the burning building without adequate safety equipment (thus distinguishing this claim from the lack of injury associated with the negligence claim alleged in Count III). In other words, it is possible that there is a set of facts that would entitle the plaintiff to relief under Count IV, and so dismissal of this count is not appropriate at this time under the standard of review established by *Association of Haystack Property Owners v. Sprague*, 145 Vt. 443, 446 (1985). It is furthermore noted that the alleged testing failures are at least possibly relevant to this claim as evidence of the fire chief's intent to injure, and so the allegations of the testing failures are not necessarily dismissed as they pertain to this claim, at least at this juncture of the proceedings.

The final question involves the timeliness of the appeal with respect to the wrongful-discharge and retaliatory-termination counts. Because there is no statutory procedure for appeals from the discharge of voluntary firefighters, the parties appear to agree that these claims fall within the scope of the rule governing petitions for review of governmental action, which requires petitions for review to be commenced "within 30 days after notice of any action or refusal to act of which review is sought." V.R.C.P. 75(c). Defendants had challenged the timeliness of the appeal on the basis of a comparison between the date of the selectboard decision (Oct. 24, 2011) and the date of the complaint (Dec. 20, 2011), but during the course of the motion practice, defendants have conceded that there was a delay in providing plaintiff with notice of the selectboard decision. For this reason, dismissal on timeliness grounds does not appear to be appropriate at this time.

ORDER

Defendants' Motion to Dismiss (MPR #1), filed January 4, 2012 is *granted* as to the Williamstown Fire Department, Count 3, and Request for Relief (d); the motion is otherwise *denied*.

Dated at Chelsea, Vermont this 27 day of February, 2012.


Harold E. Eaton, Jr.
Superior Court Judge

