

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

PAUL SALAZAR,

Plaintiff,

v.

No. CIV-10-00645 RLP/LFG

**CITY OF ALBUQUERUQUE,
MARTIN CHAVEZ, former Mayor,
RICHARD BERRY, Mayor,
GREG PAYNE, former Transit Dept. Director,**

Defendants.

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS

Plaintiff Paul Salazar presents the following response to the City of Albuquerque and Mayor Richard *Berry's* Motion to Dismiss Plaintiff's Complaint pursuant to Rule 12(b)(6):

I. STANDARDS FOR DECIDING A MOTION TO DISMISS

In ruling on a motion to dismiss the Court accepts the factual allegations in the complaint as true, and views them in the "light most favorable to the plaintiff." Fed. R. Civ. P. 12(b)(6); *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007). An action fails to "state a claim upon which relief can be granted" if it fails to plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

In *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009), the Court extended this pleading standard to all civil actions and directed district courts to undertake a two-step analysis when considering a motion to dismiss: (1) "begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth"; and (2) "when there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement of relief." *Id.* at 1950.

While well-pleaded factual allegations in the complaint are treated as true for the purposes of a motion to dismiss, the Court reiterated, "we are not bound to accept as true a legal conclusion couched as a factual allegation" and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* at 1949-50. Although it is still not necessary to plead specific facts to support Plaintiff's claims, a plaintiff must allege sufficient facts to give fair notice of what the claim is and the grounds upon which it rests. *Id.* "The plausibility standard requires a plaintiff to show at the pleading stage that success on the merits is more than a 'sheer possibility.' It is not however a 'probability requirement.'" *Braden v. Wal-Mart Stores*, 588 F.3d 585, 594 (8th Cir. 2009).

I. FACTUAL ASSERTIONS IN PLAINTIFF'S COMPLAINT

The Complaint first sets out the parties (¶ 1-4), quotes the City Charter prohibition of the Mayor "becoming involved in the hiring, promotion, demotion, or discharge of any city employee" (¶ 5), asserts jurisdiction (¶ 6), and alleges that Defendants acted both individually and under color of state law. (¶ 7) The Complaint then describes the facts,

which are mostly procedural, starting with Paul Salazar's employment "as a City bus driver on March 25, 2000, (para 8) and ending with the City's failure "to comply with their promises and obligations to return Mr. Salazar to work, pay his back wages, reinstate his benefits, and expunge his record." (§ 30).

There is not, among Plaintiff's factual allegations, a single "legal conclusion couched as a factual allegation." Nor does Plaintiff's Complaint consist of only "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Iqbal*, supra. Nor has Mr. Salazar failed to "allege sufficient facts to give fair notice of what the claim is and the grounds upon which it rests." *Id.*

Defendants' Motion to Dismiss fails to address the Complaint as a whole; instead, the City addresses Plaintiff's claims one by one, incorrectly concluding that each lacks merit and should be dismissed. Paul Salazar was a tenured full-time City employee with a property interest in his employment when the City wrongfully terminated him.

Having terminated Paul Salazar's employment without just cause for reasons connected with the false allegations that he was a sex offender and a child molester, the City unsuccessfully attempted to defend its actions in a Personnel Board hearing, unsuccessfully appealed to the Personnel Board and then to the Second Judicial District Court, and unsuccessfully challenged the Personnel Board's decision to reinstate Paul Salazar on remand to the Personnel Board and in a second appeal to the District Court. The City was well aware of the facts in the case and of the errors it had committed. There is nothing difficult to understand or "implausible" in Plaintiff's Complaint. The facts

supporting Plaintiff's claims are set out chronologically and they are neither speculative or conclusory. The City's Motion to Dismiss should be denied.

II. ARGUMENT AND AUTHORITIES

The City presents argument about the reasons it believes each count in Plaintiff's Complaint should be dismissed. In addition to the impropriety of the City's count-by-count attempt to dismiss Plaintiff's lawsuit, the City's contention have little or no merit:

A. Procedural Due Process (Count 1)

The City's first contention is that Plaintiff has failed to state a claim for a violation of due process because "he prevailed at every step there. . . . the City's Personnel Hearing Officer and Personnel Board sided with him on every occasion." City's Dismissal Memo, at p. 2. Plaintiff's Complaint makes clear, however, that he does not complain about the *Personnel Board's* process.

Instead, Paul Salazar's Complaint sets out the untrue and defamatory statements and actions by both Mayor Chavez and Mayor Berry, as well as former Transit Director Greg Payne, who obstructed and prevented the relief ordered by the Personnel Board. To this date, the City has still not actually reinstated Paul Salazar to his position as a Motor Coach Operator or paid any of his back wages. The refusal, led by the City's highest elected official, to comply with the Personnel Board's final orders over a period of several years violated Plaintiff's right to both substantive and procedural due process.

The City also claims that "any errors in the initial predetermination hearing" were cured because "the subsequent hearings provided adequate post-deprivation remedies, and

Plaintiff indeed prevailed there.” Since Plaintiff has still not been reinstated to his bus driver position, since he still has not received any back pay, and since he still must live under a cloud of unsubstantiated allegations, it is hard to see how any due process violations were cured by “the subsequent hearings” or how they “provided adequate post-deprivation remedies.”

The real issue, and the substantial damage, in this case is the City’s false insistence that Paul Salazar is unable to drive a City bus because as a “sex offender” or “child molester” he poses a danger to children riding the bus. Plaintiff alleged in paragraph 16 of his Complaint that:

Mayor Chavez informed the Albuquerque Journal (“City Must Rehire Sex Offender Bus Driver”) on June 17, 2008, that “he plans to appeal the personnel board’s ruling. If *he* loses, Chavez said, *he* will take the matter to court. ‘*This guy is not going to be around kids. Not while I am Mayor,*’ Chavez said. ‘This is outrageous. What parent wants their kid on a bus with someone like that?’”

In paragraph 22 Plaintiff alleged that:

Despite the absence of valid grounds for appeal, Mayor Chavez and the City again appealed the Personnel Board’s decision to the Second Judicial District Court. Defendants again insisted that Mr. Salazar should not be allowed to drive a bus and have contact with any children, claiming that:

Had the Transit Department been given the opportunity, it would have presented evidence to show the number of children riding City buses; it would have presented evidence to establish Salazar’s interaction with these children. Whether Salazar committed the acts with which he was charged, the City has the obligation to prevent its bus riders from the perception that the City had retained employees with

records of having plead no contest to an “attempt to commit criminal sexual (sic) of a minor.”

And in paragraph 40 of the Complaint, Plaintiff alleges that “Defendants lack any evidence to support their invidious and untruthful public insistence that if he was driving a bus it would be dangerous for Plaintiff to be near children.”

On the City’s appeal of the Personnel Board’s order reinstating Mr. Salazar and awarding back pay and benefits, the District Court agreed that the City had denied Mr. Salazar’s right to procedural due process in the termination proceedings and that the Personnel Board’s decision was neither arbitrary nor capricious. *City of Albuquerque v. Salazar*, No. CV-2008-06817 (Jan. 7, 2008). This case has been pending administratively and in the State district courts since Mr. Salazar was fired on July 9, 2007.

In all that time, more than three years, the City through its mayors and its administrative officers has done everything that could be done both within and outside of their lawful authority to obstruct, delay, and deny Paul Salazar’s return to his work as a bus driver. Moreover, the City continues to attempt to advance its false contention that Paul Salazar is a threat to children who might ride on his bus and that he was properly terminated. The claim for violation of procedural due process and the facts that support it are stated clearly. Plaintiff’s procedural due process claim should not be dismissed.

B. Substantive Due Process (Count 2)

The City contends that Plaintiff’s claim for denial of substantive due process must be dismissed because “his claim is both unripe due to the pending state court matter on

his termination, and will be mooted by the City's reinstatement of his employment." Plaintiff alleged in his Complaint that "Defendants lack any evidence to support their invidious and untruthful public insistence that if he was driving a bus it would be dangerous for Plaintiff to be near children." (Complaint, ¶ 40). Plaintiff stated, with factual support, all the elements of a substantive due process "stigma plus" claim.

The City apparently contends, in the Summary Judgment Memo at page 3, that Plaintiff cannot meet the condition that to state a stigma plus claim the defamatory statements "must occur in the course of terminating the employee or must foreclose other employment opportunities" While it appears that is exactly what happened, the City argues that "Plaintiff cannot satisfy the third element:

In the present case, the City is contemporaneously with this Motion withdrawing its appeal in state district court, and acting to reinstate Plaintiff. It is also moving in state court to provide him a name-clearing hearing. Accordingly, Plaintiff will no longer be "terminated" or "foreclosed from other employment opportunities." Plaintiff's claim will therefore be moot.

City's Memo at p. 3.

The City's contention that it is now withdrawing its appeal and reinstating Plaintiff so that Plaintiff will "no longer be 'terminated' or 'foreclosed from other employment opportunities'" fails to acknowledge that the City is only acting now because Plaintiff filed the lawsuit that the City is seeking to dismiss. The City claims on the one hand that the "pending state court case . . . will determine the appropriateness of Plaintiff's termination" so "the present case in this court is not ripe;" and on the other hand, the City

contends just a few sentences later that “the City is contemporaneously with this Motion withdrawing its appeal in state district court” and “Plaintiff’s claim will therefore be moot.”

The City asks the Court to dismiss Plaintiff’s Complaint because it is “not ripe” due to the City’s second administrative appeal and because it “will therefore be moot” when the City’s appeal has been dismissed by the State court. The City also claims that it is “acting to reinstate Plaintiff” so he will “no longer be ‘terminated.’”

The City fails to mention, however, that it continues to refuse to reinstate Mr. Salazar to his former position as a City bus driver, as ordered by the Personnel Board. Instead, the City is claiming the right, under the authority of its Chief Administrative Officer, to assign Mr. Salazar to the City’s Solid Waste Management Department, where the City will attempt to force him to choose between driving a garbage truck or again being terminated. Of course, Plaintiff is painfully aware that the City is simply continuing its defamatory course of conduct against him by insisting, without any factual basis whatsoever, that Plaintiff cannot be allowed to drive a City bus because he would endanger child passengers.

The City’s legal arguments against Plaintiff’s substantive due process “stigma plus” claim are without merit and the Court should deny Defendants’ Motion to Dismiss.

C. Defamation Per Se (Count 3)

The City argues that the New Mexico Tort Claims Act “has not waived immunity for claims of defamation against government officials acting within the scope of their

employment.” (City’s Memo at p. 4). The City also contends that a “statement attributed to Defendant Greg Payne at paragraph 25 of the Complaint is not defamatory.”

First, the public statement made by Greg Payne about Paul Salazar is clearly defamatory, stating that “If Mayor Berry was forced to re-hire him (Salazaar), he should have given him a position where he’s not around children.” The contention that it was dangerous for children to be “around” Paul Salazar, is both offensive and defamatory. Since the allegation is one of criminal misconduct, it is defamation per se.

It is also noteworthy that the City argues here that its mayors’ defamatory comments are protected by “immunity for claims of defamation against government officials acting within the scope of their employment.” (City’s Memo, at p. 4; citing *Vigil v. State Auditor’s Office*, 138 N.M. 63; 116 P.2d 854 (Ct. App. 2005). At the same time, the City contends that:

Nothing in the City’s Charter or Merit System Ordinance prevents the mayor, or any other elected official, from commenting publicly on matters of public interest. That includes the commenting on the history and employment status of the City’s employees, and taking a position on litigation of cases, and certainly on high profile ones such as this Public statements made on cases of public interest are not involvement in the hiring or discharge process.

(City’s Memo, at p. 6). The City’s contention that its mayor is both immune from defamation claims and free to comment “on the history and employment status of the City’s employees” apparently even to the extent of making false accusations of criminal misconduct against a City employee whom the Personnel Board has ordered to be reinstated, are not worthy of serious consideration.

Nor does the City's contention that Defendant Greg Payne's statements were not defamatory constitute a basis for dismissal of Plaintiff's Complaint. Rather, what the City is doing is demonstrating the existence of disputed factual and legal issues, which is far from the contention that the case must be dismissed for "failure to state a claim."

D. Abuse of Process (Count 4)

Plaintiff alleged in paragraph 15 of his Complaint that after the Personnel Board ordered Mr. Salazar's reinstatement the first time, Mayor Chavez and Greg Payne "publicly and repeatedly called Mr. Salazar a 'sex offender' and a 'child molester' and announced that they would refuse to reinstate Mr. Salazar as the City Personnel Board ordered." And in paragraph 16 Plaintiff alleged that:

Mayor Chavez informed the Albuquerque Journal on June 17, 2008, that "*he* plans to appeal the personnel board's ruling. If *he* loses, Chavez said, *he* will take the matter to court. 'This guy is not going to be around kids. Not while *I* am mayor,' Chavez said. 'This is outrageous. What parent wants their kid on a bus with someone like that?'"

(Emphasis added). In paragraph 22 of the Complaint Plaintiff alleged that "Despite the absence of any valid grounds for appeal, Mayor Chavez and the City again appealed the Personnel Board's decision..."

Plaintiff has more than sufficiently pled the facts needed to support a claim of improper conduct resulting in damages when Mayor Chavez, Greg Payne, and finally Mayor Berry all publicly announced that Paul Salazar would not be allowed to drive a bus because that would threaten the safety of children on his bus. The City's assertion of immunity for both defamation and abuse of process claims is inapplicable to the claims

against the defendants in their individual capacities and the Motion to Dismiss should be denied in this respect as well.

E. Breach of Employment Contract and Duty of Good Faith and Fair Dealing (Count 5)

The City Defendants contend that they have not violated the employment contract, even though they have repeatedly failed to comply with the requirements of the Merit System Ordinance and the City's Personnel Board. The City has refused to comply with the Board's orders to reinstate Plaintiff, pay his back pay, and otherwise make him whole after he was wrongfully terminated. The City contends that Plaintiff "implies the City was required to automatically comply with the Personnel Board's final orders once they were rendered." Of course, Plaintiff alleges or implies nothing of the sort.

What Plaintiff did allege, however, is that "both Mayor Berry and Mayor Chavez were prohibited by the City Charter from involvement in personnel matters" (§ 57) but that they ignored and overrode the City Charter, Merit System Ordinance, and City Rules and Regulations concerning employee rights and disciplinary actions, and arrogated "to themselves the ability to do or say whatever they wanted."

Whether the public statements made by Mayor Chavez and Mayor Berry against Paul Salazar "are not involvement in the hiring or discharge process" and whether they do or do not "demonstrate actual involvement in the process" are again mixed questions of fact and law that are not appropriately dismissed at the start of the case for "failure to state a claim." Plaintiff has stated sufficient facts and has plausibly explained why his breach of the employment contract claim should be allowed to proceed.

F. Punitive Damages (Count 6)

Plaintiff has sufficiently pled his claim for punitive damages by charging the individual defendants acted “intentionally, willfully, maliciously, and with utter disregard for the truth and the damage caused by their conduct. (Complaint, para. 62). The City erroneously contends that “Plaintiff cannot claim punitive damages” because “the underlying claims fail, or are otherwise barred by state law.” The City refuses to make any distinction between an individual’s liability for punitive damages and the preclusion of such damages against the municipality.

III. CONCLUSION

Plaintiff has been careful to meet the *Twombly-Iqbal* standard by “plausibly” pleading his case. Setting aside the questionable propriety of using a motion to dismiss to challenge separately each of the counts in the Plaintiff’s Complaint, there is little or no merit in the City’s unusual motion to dismiss Plaintiff’s claims, and the City’s Motion to Dismiss should be denied.

Respectfully submitted,

s/ Paul Livingston

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I hereby certify that I filed the foregoing electronically and that copies are provided to all counsel of record by notification and attachment pursuant to the court's CM/ECF system.

s/ Paul Livingston

Paul Livingston