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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

ROBYN LEWIS and LEAH CONE,	)	
	)	
Plaintiffs,	)	
v.	)	**Case No. 18-CV-3173**
	)	
COUNTY OF MACON, a unit of local government and ALBERT JAY SCOTT,	)	
	)	
Defendants.	)	

ORDER

Plaintiffs, Robyn Lewis and Leah Cone, filed their First Amended Complaint (#15) on August 23, 2018, against Defendants Macon County and Albert Jay Scott. Defendants filed their Motion to Dismiss (#16) on September 6, 2018. Plaintiffs filed their Response (#18) on September 20, 2018. For the following reasons, Defendants' motion (#16) is GRANTED in part and DENIED in part.

BACKGROUND

The following background is taken from the allegations in Plaintiff's Amended Complaint. At this stage of the proceedings, the court must accept as true all material allegations of the complaint, drawing all reasonable inferences therefrom in the plaintiff's favor. *Lewert v. P.F. Chang's China Bistro, Inc.*, 819 F.3d 963, 966 (7th Cir. 2016).

Plaintiff Lewis was hired by Macon County on October 6, 1994. She was initially hired to work in the office of the Circuit Clerk of Macon County, and later joined the Macon County State's Attorney's Office (MCSAO) in January 1996. During her tenure

as an employee, Lewis received various promotions including as a Domestic Violence Coordinator and Victim Advocate, until her position with MCSAO was terminated on July 7, 2016. Plaintiff Cone was hired by the MCSAO on July 28, 1997. During her tenure as an MCSAO employee she received various advancements and promotions. She was employed as a Deferred Prosecution Coordinator with the MCSAO at the time of her termination on July 7, 2016.

During the course of their employment, both Plaintiffs executed an acknowledgment affirming their respective receipt of a copy of the Macon County Employee Handbook ("the Handbook"), which governed their employment. Pursuant to the provisions of the Handbook, Macon County promised to provide Plaintiffs with a work environment free of harassment, discrimination, and retaliation. The Handbook further promised Macon County would provide them with continuous employment so long as they met the requirements set forth in the Handbook. The Handbook further granted assurances that prior to separation of employment, employees of the County and the MCSAO would be granted due process and only be terminated "for cause."

In addition to providing Plaintiffs with written assurance of continued employment so long as they adhered to the provisions of the Handbook, the County also in practice only terminated employees for cause. However, despite the written and operative policies of Macon County, Plaintiffs were terminated for other than "good cause" and without due process and in retaliation for their lawful conduct.

Defendant Scott was the elected State's Attorney of Macon County. Kim Tarvin was an employee of the MCSAO. On July 6, 2016, Plaintiff Lewis reported to Macon County Board Chairman Gregory Mattingly, and other supervisory personnel such as the MCSAO Personnel Director, that Kim Tarvin and other employees of the MCSAO had violated certain provisions of the Handbook prohibiting County employees from subjecting other County employees to "direct or indirect political influence or coercion..." In particular, Macon County employees were prohibited from requiring other County employees to participate in or contribute financially to political campaigns; and were otherwise prohibited from requiring employees of Macon County to have a particular political affiliation or support any particular political party or candidate for election to an office of the county or state as a condition of continued employment with Macon County. Lewis also reported that Tarvin had asked her to sign a petition for Scott's re-election, which Lewis refused, and thereafter Tarvin ridiculed her and advised other employees of the MCSAO, including Assistant State's Attorney Nichole Kroncke and Scott, of Lewis' refusal to sign Scott's re-election petition.

Lewis and Plaintiff Cone notified Macon County personnel, including Chairman Mattingly and the MCSAO Personnel Director, that employees such as Tarvin were violating the County's Political Activity Policy by soliciting and electioneering during hours when Tarvin was working for MCSAO at the urging and consent of Scott and making support of Scott's political party and his political campaign for re-election a condition of continued employment with the County in violation of the applicable

provisions of the Handbook and other applicable Illinois statutory provisions. Lewis and Cone also notified Macon County that Tarvin and Scott had violated other Illinois laws protecting employees from discrimination, harassment, and retaliation. In particular, Lewis and Cone advised the County that certain employees of the MCSAO were committing acts in violation of the provisions of the Handbook and also federal and state laws prohibiting discrimination and harassment of employees based on certain protected characteristics.

On July 7, 2016, Mattingly and other senior County management personnel confronted Scott regarding the allegations asserted against himself and Tarvin, and in particular confronted him about the various alleged and reported federal and state law violations committed by himself and Tarvin. As a result of the reports and complaints made to Scott regarding Plaintiffs' allegations, Macon County, by and through its agents, including Scott and Kroncke, terminated Plaintiffs' employment on July 7, 2016. The proffered reason for the termination was due to budgetary cuts, which Plaintiffs allege was a pretext for unlawful discrimination and adverse employment action taken against them for their reporting of illegal and unlawful actions of Tarvin, Kroncke, and Scott for violating the provisions of the County Political Activity Policy and state and federal laws, including the First and Fourteenth Amendments of the U.S. Constitution.

Counts Alleged

Plaintiffs allege ten counts against Defendants in their Amended Complaint. Counts I and II, against Defendant Macon County, allege common law retaliatory discharge. This count alleges that the MCSAO was a hostile workplace, and that Macon County officials should have known that Kim Tarvin and others were engaging in unlawful, hostile, illegal, malicious, and outrageous actions against Plaintiffs. These actions were also in violation of the Employee Handbook. Plaintiffs allege that Edward Flynn, Macon County's corporate counsel, terminated them in violation of the Handbook.

Counts III and IV allege violations of the Illinois Whistleblower Protection Act (740 Ill. Comp. Stat. 174/1 et seq.) against Defendant Macon County. Plaintiffs allege that their termination violated the Whistleblower Act because they refused to participate in or otherwise overlook the illicit and illegal actions of Defendants and other Macon County employees. As a consequence, they were retaliated against in the workplace and were eventually fired on or about July 7, 2016.

Counts V and VI allege violations of the United States Constitution's right to association, pursuant to 42 U.S.C. § 1983, against Defendant Macon County. Plaintiffs allege that Defendant Macon County's actions in terminating them violated their First Amendment right to associate with persons holding political affiliations other than those held by Defendant Scott and other than those promoted for the benefit of those seeking to re-elect Scott. As a result of Macon County's termination of Plaintiffs'

employment for their refusal to be subjected to illegal electioneering and the obligation imposed by Scott to support him and his political party, Macon County violated the constitutionally protected rights of Plaintiffs under the First Amendment. This treatment of Plaintiffs, undertaken by Scott, Kim Tarvin, and Nichole Kroncke, was motivated by illegitimate and illegal animus and was done in retaliation for lawful conduct by Plaintiffs and violated their protected interest in their employment with the MCSAO. This action also resulted in a deprivation of constitutional rights that guaranteed Plaintiffs due process.

Counts VII and VIII allege tortious interference with a current business relationship against Defendant Scott, in that, as a direct result of the actions of Scott, Tarvin, and Kroncke, Plaintiffs' business relationship with Macon County and their employment with the County were terminated on July 7, 2016. Counts IX and X are indemnification claims by Plaintiffs against Macon County pursuant to 745 Ill. Comp. Stat. 10/9-102.

ANALYSIS

A motion under Rule 12(b)(6) challenges the sufficiency of the complaint to state a claim upon which relief may be granted. *Hallinan v. Fraternal Order of Police of Chi. Lodge No. 7*, 570 F.3d 811, 820 (7th Cir. 2009). A complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). These allegations "must be enough to raise a right to relief

above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The allegations that are entitled to the assumption of truth are those that are factual, rather than mere legal conclusions. *Iqbal*, 556 U.S. at 678-79.

Counts V and VI: Freedom of Association

Plaintiffs claim that their right to freedom of association under the First Amendment was violated by Defendant Macon County. Plaintiffs are asserting the right to freedom of expressive association, which arises from the First Amendment and ensures the right to associate for the purpose of engaging in activities protected by the First Amendment. *Montgomery v. Stefaniak*, 410 F.3d 933, 937 (7th Cir. 2005).

Defendants argue that Macon County cannot be liable on such a claim, because in order to state a claim against it under § 1983, Plaintiff must plausibly state a basis for municipal liability. *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 690 (1978).

For municipal liability under § 1983, the constitutional violation must be caused by (1) an express municipal policy; (2) a widespread, though unwritten, custom or practice; or (3) a decision by a municipal agent with "final policymaking authority." *Milestone v. City of Monroe, Wisconsin*, 665 F.3d 774, 780 (7th Cir. 2011). Thus, a county is liable for depriving an individual of his or her constitutional rights only if the deprivation was the result of the county's official policy, custom, or practice. *Wilson v.*

Giesen, 956 F.2d 738, 744 (7th Cir. 1992). Defendants argue that, because State's Attorney Scott and Assistant State's Attorney Kroncke are *state* officials, and not county officials, no liability can lie with Macon County under *Monell*.

Defendants' position is supported by Seventh Circuit case law. In *McGrath v. Gillis*, 44 F.3d 567 (7th Cir. 1995), the Seventh Circuit held that, in Illinois, State's Attorneys are employees of the State of Illinois, not the county in which they are elected, and are thus part of the executive branch of state government. *McGrath*, 44 F.3d at 571. The court found further that, under Illinois law, Assistant State's Attorneys are surrogates for the State's Attorney, because they possess the power in the same manner and to the same effect as the State's Attorney. *McGrath*, 44 F.3d at 571. Thus, State's Attorney's and their assistant prosecutors, under Seventh Circuit case law, are employees of the State of Illinois and not the local municipalities in which they are elected and work. See *National Casualty Co. v. McFatridge*, 604 F.3d 335, 341-42 (7th Cir. 2010) (Illinois law holds that the State's Attorney is a state, and not a county employee.).

Applying the Seventh Circuit's holding on State's Attorneys to municipal liability, at least one district court has found that municipalities are not liable under *Monell* for the actions or policies of their elected State's Attorneys. In *Martin v. City of Chicago*, 2017 WL 782992 (N.D. Ill. Feb. 28, 2017), the plaintiff was arrested by Chicago police and charged with possession of a firearm without a firearm owner's identification card and domestic battery. The domestic battery charge was eventually dismissed by the Cook County State's Attorney's Office and the plaintiff was found not

guilty on the FOID charge following a bench trial. The plaintiff sued the police, the Cook County prosecutors, the City of Chicago, and Cook County for 42 U.S.C. § 1983 violations. The specific claim against Cook County was an indemnification claim for the actions of the Cook County State's Attorney s Office. The district court dismissed the claim, noting that in Illinois, State's Attorneys and Assistant State's Attorneys are state employees, not county employees. As such, the county had no prosecutorial policy and could not have caused any of the plaintiff's alleged injuries. Therefore, the county could not be vicariously liable based on the conduct of the Cook County State's Attorneys Office under Illinois law. *Martin*, 2017 WL 782992, at *3.

Plaintiffs, in response to Defendants' motion, make several arguments about whether Scott was a final policymaker for *Monell* purposes and whether they have stated a constitutional claim. None of those arguments, however, are germane to the position advanced by Defendants: that Macon County (the only Defendant sued over the federal claims in Counts V and VI) cannot be vicariously liable under *Monell* for the actions of Scott and the other employees of the MCSAO because they are employees of the executive branch of the State of Illinois, not Macon County.

Plaintiffs further argue, however, that Macon County was either (1) a "joint employer" with the MCSAO of Plaintiffs, or (2) is a "necessary party" to Plaintiffs' action against Defendant Scott.

Plaintiffs cite to the Seventh Circuit's decision in *Robinson v. Sappington*, 351 F.3d 317 (7th Cir. 2009) to argue that, even if State's Attorneys and their employees are employees of the state and not the county, Macon County could still be liable on Counts V and VI as a joint employer or necessary party. In *Robinson*, the plaintiff had been hired as a legal secretary to a state court judge. One of the circuit court judges sexually harassed the plaintiff, eventually causing the plaintiff to bring a hostile work environment and constructive discharge lawsuit under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e). The plaintiff sued the state judges, as well as the county where the judges worked. The district court granted summary judgment on the merits. On appeal to the Seventh Circuit, the defendant county argued that, even if the district court erred in granting summary judgment on the merits, the county was nevertheless entitled to summary judgment because the state, not the county, was the plaintiff's employer.

The Seventh Circuit agreed with the plaintiff, finding that the "question of joint liability is one that is fact-bound and that necessarily is best addressed by the district court in the first instance." *Robinson*, 351 F.3d at 338. The court went on to find that, independent of the joint employer issue, the county was also a necessary party to the action, because the responsibility for maintaining and funding the county circuit court lies with the county. *Robinson*, 351 F.3d at 338-39. Under Illinois law, the county was responsible for the payment of expenses and judgments emanating from the workings

of that court, and the fact that some of the parties involved were state officials, as opposed to employees of the county, did not alter that fiscal responsibility. *Robinson*, 351 F.3d at 339.

The court finds instructive a decision in a case similar to this one by another court in the Central District. In *Stone v. Pepmeyer*, 2008 WL 879553 (C.D. Ill. Mar. 28, 2008), the plaintiffs, former Assistant State's Attorneys, claimed they were fired from their positions in retaliation for opposing sexual harassment and discrimination by the State's Attorney, and also that they were fired in retaliation for speech protected under the First Amendment. The plaintiffs also sued the county.

The county argued that it could not be held directly liable under § 1983 for the State's Attorney's constitutional violations because he was not a policymaker for the county. The court concluded:

> The Court agrees with Knox County that it is difficult to discern a basis for direct Section 1983 liability against the County based on Pepmeyer's alleged misconduct, particularly since Pepmeyer is considered an elected State official and arguably had exclusive control over Plaintiffs' terminations and work conditions. However, Plaintiffs assert in their response that discovery may uncover a basis for direct liability against Knox County: "The [C]ounty Board's involvement in the termination process, post-termination harassing investigations and the withholding of salaries and benefits after termination are all factual matters that rise to the level of retaliatory action ..." (d/e 19, p. 13). Further, though the County's assertion that it is not Pepmeyer's employer has legal support, the County might arguably be considered a joint employer of Pepmeyer. See *Robinson v. Sappington*, 351 F.3d 317, 338 and n. 9 (7th Cir.2003); see also this Court's Report and Recommendation in consolidated case, *Griffith v. Pepmeyer*, 07-1104, pp. 5-6. If so, the County does not address how that impacts the *Monell* analysis under Section 1983, if at all.

Stone, 2008 WL 879553, at *12.

The court finds that the analysis and decision reached in *Stone* to be sound and applicable to this case. Like in *Stone*, Plaintiffs have argued that Macon County may be found to be a joint employer along with Defendant Scott, or that Macon County could be a necessary party, and this could be shown via discovery. Further, like in *Stone*, Defendants have not addressed how this impacts the *Monell* analysis under § 1983, if it does at all. For those reasons, the court will DENY the motion on this ground. This argument may be re-raised at summary judgment, where the record can be more fully developed and when the applicable procedural rules permit a more thorough and searching analysis. See *Rohrbach v. Blitt and Gaines, PC*, 2016 WL 10314576, at *5 (C.D. Ill. Oct. 11, 2016).

Counts I, II, III, and IV: Common Law Retaliatory Discharge and Illinois Whisteblower Act

Defendants next argue that Counts I through IV of the Amended Complaint are barred by the statute of limitations. Defendants argue that the statute of limitations on the retaliatory discharge and Whistleblower Act claims is one year, based on the Illinois Tort Immunity Act (745 Ill. Comp. Stat. 10/8-101(a)), and because Plaintiffs were terminated on July 7, 2016, and did not file suit until July 9, 2018, their claims are untimely. Plaintiff responds that a two-year statute of limitations applies to their claims, and that the claims are thus timely.

Courts are divided as to the applicable statute of limitations. Two district courts, in *Ward v. City of Bloomington*, 2013 WL 12241836 (C.D. Ill. Nov. 22, 2013) and *Zelman v.*

Hinsdale Township High School District 86, 2010 WL 4684039 (N.D. Ill. Nov. 12, 2010), have found that the two year limitation applies. In *Zelman*, concerning claims for retaliatory discharge and violations of the Illinois Whistleblower Act, the court noted that the Illinois Supreme Court has held that the Tort Immunity Act did not apply in cases of retaliatory discharge because the Tort Immunity Act immunized government entities from liability for torts committed by employees, and retaliatory discharge claims are the result of wrongdoing by an *employer*. *Zelman*, 2010 WL 4684039, at *2, citing *Boyles v. Greater Peoria Mass Transit District*, 499 N.E.2d 435, 439 (Ill. 1986).[1] Therefore, the court concluded, the one-year statute of limitations contained in the Tort Immunity Act did not apply to cases of retaliatory discharge under the Whistleblower Act. *Zelman*, 2010 WL 4684039, at *2. This reasoning was adopted and applied by the court in *Ward*. See *Ward*, 2013 WL 12241836, at *5.

Other courts in this circuit have reached the opposite conclusion, finding that the one-year limitation period applies to retaliatory discharge and Whistleblower Act claims. In *Elue v. City of Chicago*, 2017 WL 2653082 (N.D. Ill. June 20, 2017), the district court concluded that because retaliation in a "whistleblower" situation is considered analogous to retaliatory discharge, and because retaliatory discharge is a tort, the

[1]It should be noted that, while the Illinois Supreme Court in *Boyles* did find that the Tort Immunity Act did not immunize government defendants from suit in cases of retaliatory discharge, the court also held, in the same decision, that the provision of the Tort Immunity Act prohibiting punitive damages *did* apply to bar the plaintiffs from pursuing punitive damages for retaliatory discharge. *Boyles*, 499 N.E.2d at 439. Further, the court in *Boyles* did not address whether the statute of limitations provision applied to retaliatory discharge cases.

one-year statute of limitations period in the Tort Immunity Act was applicable to claims of retaliatory discharge, and thus most district courts have held that the Tort Immunity Act's one-year statute of limitation also applies to claims brought under the Illinois Whistleblower Act. *Elue*, 2017 WL 2653082, at *8.

In *Vasquez v. Board of Higher Education for School District U-46*, 2017 WL 1250839 (N.D. Ill. Apr. 5, 2017), the court also found the one year limitation applied, writing:

> The majority of courts appear to agree that the Tort Immunity Act applies to retaliatory discharge claims to the extent a plaintiff seeks monetary damages. See *Williams v. Office of the Chief Judge of Cook County, Ill.*, No. 13 C 1116, 2015 WL 2448411, at *13 (N.D. Ill. May 21, 2015) (collecting cases), aff'd, 839 F.3d 617. But see *Zelman v. Hinsdale Twp. High Sch. Dist. 86,* No. 10 C 00154, 2010 WL 4684039, at *2 (N.D. Ill. Nov. 12, 2010) (finding that Tort Immunity Act's one-year statute of limitations did not apply to retaliatory discharge claim because "the Tort Immunity Act immunizes government entities from liability for torts committed by employees and retaliatory discharge claims are the result of wrongdoing by an employer"). *Zelman* relied on a broad reading of § 2-109 of the Tort Immunity Act, which provides blanket immunity to a public entity for its employee's own torts and which Illinois courts have found not to apply to retaliatory discharge claims. See id. (citing *Smith v. Waukegan Park Dist.*, 896 N.E.2d 232, 236, 231 Ill. 2d 111, 324 Ill. Dec. 446 (2008)). But the fact that one section of the Tort Immunity Act does not apply to retaliatory discharge claims does not foreclose the applicability of other sections, such as the statute of limitations. See *Kirley v. Bd. of Educ. of Maine Twp. High Sch. Dist. 207*, 2013 WL 6730885, at *11 & n.6 (N.D. Ill. Dec. 20, 2013) (distinguishing *Zelman* and applying one-year statute of limitations found in Tort Immunity Act to retaliatory discharge claim); *Boyles v. Greater Peoria Mass Transit Dist.*, 499 N.E.2d 435, 438, 113 Ill. 2d 545, 101 Ill. Dec. 847 (1986) (retaliation claim for filing worker's compensation claim was not exempt from Tort Immunity Act).

Vasquez, 2017 WL 1250839 at *4.

The court finds the one-year limitation reasoning advanced by *Vasquez* and *Elue*

to be more persuasive than that of the *Ward* and *Zelman* cases. The reading of the *Zelman* court was quite broad, and the fact that one section of the Tort Immunity Act does not apply to retaliatory discharge claims does not foreclose the applicability of other sections, such as the statute of limitations. See *Vasquez*, 2017 WL 1250839, at *4. Thus, the motion is GRANTED to the extent Plaintiffs seek monetary damages in Counts I through IV. However, some of the relief requested by Plaintiffs is equitable, and the claims survive as to those relief requests. See *Vasquez*, 2017 WL 1250839, at *5.

Further, to the extent Defendants argue Counts I through IV should be barred because Plaintiffs were employed by the MCSAO and not Macon County, and that the joint employer argument may only be made in the context of Title VII and not Illinois retaliatory discharge/Whistleblower Act claims, the motion is DENIED on that ground at this time, as noted in the prior section, but may be re-raised at summary judgment, when the arguments can be more fully developed and the court will have a complete evidentiary record with which to work.

Counts VII and VIII: Tortious Interference with a Business Relationship

Defendants next argue that Counts VII and VIII, the claims for tortious interference in a business relationship, should be dismissed because (1) the court lacks jurisdiction over the claims; or (2) the counts fail to state a claim; or (3) the claims are precluded by Defendant Scott's absolute immunity or otherwise applicable privilege. Because the outcome of these legal arguments may depend on the joint employer situation, the court will reserve ruling at this time. These arguments may be raised in a

later motion once the record is more developed in this regard, and a fuller and more searching analysis can be performed.[2]

IT IS THEREFORE ORDERED:

(1) Defendants' Motion to Dismiss (#16) is GRANTED in part and DENIED in part. The motion is granted as to monetary damages on Counts I through IV, and denied in all other respects.

(2) This case is referred to the magistrate judge for further proceedings in accordance with this order.

ENTERED this 16th day of October, 2018.

s/ COLIN S. BRUCE
U.S. DISTRICT JUDGE

[2]Plaintiffs should also make more clear whether Defendant Scott is being sued in his official or individual capacity.