IN THE CIRCUIT COURT OF HAMILTON COUNTY, TENNESSEE

CHARLESETTA WOODARD THOMPSON,	)	
Plaintiff,	)	NO. 13C979
v.	)	DIVISION IV
CHATTANOOGA-HAMILTON COUNTY HOSPITAL AUTHORITY, d/b/a ERLANGER HEALTH SYSTEM,	)	JURY DEMAND
Defendant.	)	

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO STRIKE PLAINTIFF'S DEMAND FOR PUNITIVE DAMAGES

Defendant Chattanooga-Hamilton County Hospital Authority, doing business as Erlanger Health System ("Erlanger"), by and through counsel, submits this memorandum of law in support of its motion to strike Plaintiff's demand for punitive damages ("Motion").

I. STATEMENT OF THE CASE

On July 24, 2013, Plaintiff Charlesetta Woodard Thompson ("Plaintiff") filed a Complaint against Erlanger, alleging violations of the Tennessee Disability Act ("TDA"), Tennessee Code Annotated § 8-50-103, and the Tennessee Public Protection Act ("TPPA"), Tennessee Code Annotated § 50-1-304, as well as claims for invasion of privacy and conspiracy. (Complaint, ¶¶32-39). Defendant is a governmental entity. (Complaint, ¶2). Plaintiff has made a demand for punitive damages. (Complaint, Demands for Judgment, subparagraphs (d)-(e)).

II. ARGUMENT

a. Punitive Damages Are Not Recoverable Under The TDA.

The TDA provides for remedies in accordance with the Tennessee Human Rights Act ("THRA"), Tennessee Code Annotated § 4-21-101, et seq. See Tenn. Code Ann. § 8-50-103. The THRA provides for punitive damages only in cases involving housing discrimination. Tenn. Code Ann. § 4-21-311(c). Punitive damages are, therefore, not recoverable under the TDA. Forbes v. Wilson County Emergency Dist. 911 Bd., 966 S.W.2d 417, 422 (Tenn. 1998). As such, Plaintiff's demand for punitive damages under the TDA should be struck.

b. Punitive Damages Are Not Recoverable Under The Governmental Tort Liability Act ("GTLA"), Tennessee Code Annotated § 29-20-101 *et seq*.

As a governmental entity, actions against Erlanger are governed by the GTLA. Moses v. Erlanger Med. Ctr., No. 03A01-9505-CV-00153, 1995 WL 610243, at *1 (Tenn. Ct. App. Oct. 18, 1995) (citing Johnson v. Chattanooga-Hamilton County Hosp. Auth., 749 S.W.2d 36, 37 (Tenn. 1988)) (copy attached); Ketron v. Chattanooga-Hamilton County Hosp. Auth., 919 F. Supp. 280, 283 (E.D. Tenn. 1996) (copy attached). Punitive damages are not recoverable against a governmental entity under the GTLA. Tipton County Bd. of Educ. v. Dennis, 561 S.W.2d 148, 152 (Tenn. 1978) (reasoning that since taxpayers are ultimately burdened with the payment of claims against governmental entities, "most courts have concluded that punitive awards in such cases have little deterrent value and do not advance any other public purpose underlying exemplary damages"). As such, Plaintiff's demand for punitive damages related to all of the remaining claims should also be struck.[1]

[1] Actions against governmental entities under the TPPA are governed by the GTLA. Young v. Davis, No. E2008-01974-COA-R3-CV, 2009 WL 3518162, at *6-7 (Tenn. Ct. App. Oct. 30, 2009) (copy attached).

III. CONCLUSION

For the reasons set forth above, Erlanger respectfully requests the Motion be granted and that Plaintiff's demand for punitive damages be struck.

Respectfully submitted,

MILLER & MARTIN PLLC

By: _____

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that an exact copy of this pleading has been served upon counsel for all parties in this action, or upon said parties themselves as required by law, by delivering a copy thereof, or by depositing a copy of the same in the United States Mail, with sufficient postage affixed thereto to ensure delivery to the following:

Jennifer H. Lawrence, Esq.
Lawrence & Lawrence, PLLC
P.O. Box 1297
Chattanooga, TN 37401

This 3RD day of September, 2013.

By: _____

1995 WL 610243
Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.

Rebecca MOSES, et al., Plaintiffs-Appellants
v.
ERLANGER MEDICAL
CENTER, Defendant-Appellee

03A01-9505-CV-00153 | Oct. 18, 1995.

Attorneys and Law Firms

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Opinion

OPINION

SANDERS., Sr.J.

*1 The Plaintiffs have appealed from a summary judgment dismissing their respective complaints alleging the Defendants tortious acts constituted outrageous conduct.

This appeal is from the action of the trial court in dismissing three separate suits which had been consolidated for trial and are consolidated on this appeal. The Plaintiffs-Appellants, Rebecca Moses and husband, Luke Moses, Brenda Stinnett and husband, Howard Lee Stinnett, and Margaret Tuggle and Linda Slack filed three separate complaints against Defendant-Appellee Erlanger Medical Center alleging the Defendant was guilty of tortious acts constituting outrageous conduct resulting in damages to each of them from mental anguish. It should be noted the Plaintiffs, Margaret Tuggle, Linda Slack and Brenda Stinnett are sisters of Plaintiff Rebecca Moses. It should also be noted the Defendant is a governmental hospital authority created pursuant to Chapter 297 of the Private Acts of Tennessee of 1976 as amended by chapter 125 of the Private Acts of Tennessee of 1977, by chapter 80 of the Private Acts of 1985 and Chapter 99 of the Acts of 1985. *See Johnson v. Chattanooga-Hamilton County Hospital Authority,* 749 S.W.2d 36, 37 (Tenn.1988).

The three complaints, as filed, are virtually the same as to their allegations against the Defendant. We quote, as pertinent, from one of the complaints which mirrors the other two complaints:

"3. That this Complaint arises out of an action that occurred in the City of Chattanooga, Hamilton County, Tennessee.

"4. That on or about June 17, 1992, Mrs. Rebecca Moses delivered a stillborn son in the maternity ward of the Erlanger Medical Center. Dr. Paul E. Snyder was the attending physician and Mrs. Moses was in her twenty-seventh week of pregnancy.

"5. That on or about June 17, 1992, an agent employee of the Erlanger Medical Center named Gloria, informed the plaintiffs that they could save the transportation cost back to Anderson County, Tennessee, where the family cemetery is located, if they would transport the stillborn infant themselves. This employee of the Erlanger Medical Center instructed the plaintiffs to go to the Health Department and get a transit report, and that after this was done the body would be placed in the morgue.

"6. The agent employee of Erlanger Medical Center instructed the plaintiffs that when they were ready to transport the body back to Anderson County, hospital security would go to the morgue and place the stillborn infant in the automobile of the plaintiff's sisters.

"7. The agent employee of the Erlanger Medical Center informed the plaintiffs the stillborn infant would be placed in a box like container, suitable for transportation, and that the hospital would prepare the body for transit.

"8. That on or about the morning of June 18, 1992, when the sisters of the plaintiff were ready to transport the infant back to the burial grounds in Anderson County, Tennessee, an employee of the hospital instructed the sisters of the plaintiff to be at the hospital at 9:00 a.m., and to let Gloria know when they were ready to leave.

*2 "9. When the sister of the plaintiff arrived at the hospital the agent employee of the hospital named Gloria was nowhere to be found. The sisters of the plaintiff were instructed by another agent employee of the Erlanger Medical Center that a transit report from the Health

Department was not necessary, however, the sisters of the plaintiff insisted that one be filled out and signed.

"10. The sisters of the plaintiff were instructed to go to the nurses station where the morgue was contacted and informed that they were on their way to receive the stillborn infant.

"11. The plaintiff's sisters were instructed to drive around to the Emergency Room entrance at the side of the hospital.

"12. When the plaintiff's sisters arrived at the Emergency Room entrance, another agent employee of Erlanger Medical Center, a security guard, had the plaintiff's sisters pull their car over to the side. Ms. Linda Slack, one of the plaintiff's sisters, and Mrs. Brenda Stinnett, another of the plaintiff's sisters, were instructed by the security guard to follow him into the building next to the Emergency Room.

"13. The security guard opened one door and instructed Mrs. Slack and Mrs. Stinnett to follow him into the building.

"14. Mrs. Slack proceeded through the building, and was directed to a little bassinet, resembling the ones in the hospital nursery, where there was a bundle wrapped in a receiving blanket with a note taped to the blanket.

"15. The agent employee of the hospital, who had escorted the plaintiff's sisters to the body, instructed them to pick up the corpse, which was not packaged in any sort of container, but was lying open in the bassinet with nothing more than a receiving blanket to cover the flesh.

"16. The agent employee of the hospital instructed the plaintiff's sisters, that either her [sic] or Mrs. Stinnett would have to sign for the corpse. Mrs. Stinnett then took the stillborn child, which was still wrapped in a receiving blanket, back through the morgue, past the Emergency Room entrance, to their waiting vehicle.

"17. On the two hour and fifteen minute drive to Anderson County, the stillborn infant began to emit a horrible odor, which filled the automobile.

* * *

"20. The plaintiffs aver that the actions of the defendant's agent, amounted to the intentional infliction of emotional distress.

"21. The plaintiffs aver that the actions of the defendant's agents amounted to outrageous conduct.

"22. Due to intentional infliction of emotional distress on the part of the defendant, through its employees and agents, and the outrageous conduct on behalf of the defendant, through its employees and agents, the plaintiffs have suffered permanent and severe emotional injuries and damages."

The Plaintiffs asked for compensatory and punitive damages.

The Defendant, for answer, said that although the Defendant was referred to in the pleadings as "Erlanger Medical Center", it was, in fact, "Chattanooga-Hamilton County Hospital Authority" which owned and operated a hospital known as Erlanger Medical Center and lawsuits brought against it are governed and controlled by the Tennessee Governmental Tort Liability Act, TCA § 29-20-101, et seq. It denied it agreed to assist the Plaintiffs in any way with transporting the corpse from Chattanooga to Anderson County. It denied it agreed to prepare the body for shipment or to place it in a box or container. It denied in general all allegations in the complaint except that Mrs. Moses gave birth to a stillborn baby in the hospital. It denied any of its employees had any authority to make any agreement on behalf of the hospital with reference to the preparation of the body for transportation or assistance in the transportation of the body. The Defendant plead immunity from liability under the Tennessee Governmental Tort Liability Act and specifically immunity under TCA § 29-20-205 of the Act.

***3** After discovery depositions were taken, the Defendant filed a motion to dismiss each of the complaints based on the pleadings pursuant to Rule 12, TRCP, or for summary judgment pursuant to Rule 56, TRCP. In support of its motions, it relied upon the complaints, the depositions of the Plaintiffs, answers of Plaintiffs to interrogatories and a letter written by Plaintiff Brenda Stinnett to the director of the Defendant Hospital.

The Plaintiffs, for response to the motion, relied upon the same documents as the Defendant except the provisions of the Tennessee Governmental Tort Liability Act.

In the interim, Plaintiff Howard Lee Stinnett, husband of Plaintiff Brenda Stinnett, entered a nonsuit.

Upon the hearing of the motion to dismiss/or summary judgment, the court granted the motion for summary judgment and dismissed the complaints.

Defendants have appealed, saying the court was in error. We cannot agree, and affirm for the reasons hereinafter stated.

In the order sustaining the motion for summary judgment, the court did not state the basis for his determination of the case. In our review of the record, we find there were three reasons why the court would have been justified in sustaining the motion for summary judgment.

We first consider the insistence of the Defendant that since the Plaintiffs' only claim for damages results from mental anguish inflicted upon them as a result of the Defendant's acts, it is immune from suit pursuant to TCA § 29-20-205(2). TCA § 29-20-205, as pertinent here, provides:

> Removal of immunity for injury caused by negligent act or omission of employees-exceptions.
>
> Immunity from suit of all governmental entities is removed for injury proximately caused by a negligent act or omission of any employee within the scope of his employment except if the injury:
>
> (1) Arises out of the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused;
>
> (2) Arises out of false imprisonment pursuant to a mittimus from a court, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, *infliction of mental anguish,* invasion of right of privacy, or civil rights;.... (Emphasis ours.)

The application of this exclusion was addressed by this court in the case of *Lockhart v. Jackson-Madison County General Hospital,* 793 S.W.2d 943 (Tenn.App.1990). In Lockhart, the parents brought suit against the county hospital seeking damages resulting from their child's abduction from the hospital. They averred that upon learning of the disappearance of the child they became upset, resulting in emotional and mental damage and trauma to them, resulting in permanent physical damage to them. The chancellor dismissed the complaint and the parents appealed. In affirming the chancellor, this court said:

> [W]e find it significant that the legislature, knowing ... specifically made provisions in the act that governmental immunity would not be removed for any injury arising out of "infliction of mental anguish." The language of the statute is clear and unambiguous that the legislature did not remove governmental immunity for any injury which arises out of mental anguish. We believe the plain language of the statute justifies no other construction of the legislature's intent.

***4** The second reason the court was justified in granting summary judgment is that the complaints as filed do not allege the acts or omissions of the employees of the hospital responsible for their injuries were *within the scope of his or her employment.* The complaints refer to "an agent employee of Erlanger Medical Center named Gloria" and "another agent employee of Erlanger Medical Center, a security guard". The hospital, in its answer, denied any of its employees had authority to make an agreement on its behalf with reference to preparing the body for transportation or assisting in the transportation of the body.

This issue was addressed in the case of *Gentry v. Cookevill General Hospital,* 734 S.W.2d 337 (Tenn.App.1987). In Gentry, suit was brought against the hospital and attending physicians for injuries to a minor on the occasion of her birth. One of the reasons for the court's granting summary judgment was "the physicians were not agents of the city and the complaint failed to state any cause of action against the city other than the negligence of the physicians". In affirming the trial court, this court said, as pertinent, at 339:

> Said Act, T.C.A. § 29-20-201, provides in pertinent part as follows:
>
> > General rule of immunity from suit-Exception.-(a) Except as may be otherwise provided in this chapter, all governmental entities shall be immune from suit for any injury which may result from the activities of such governmental entities wherein such governmental entities are engaged in the exercise and discharge of any of their functions, governmental or proprietary.
> >
> > * * *

> (c) When immunity is removed by this chapter any claim for damages must be brought in strict compliance with the terms of this chapter.

T.C.A. § 29-20-205 provides in pertinent part:

> ... Immunity from suit of all governmental entities is removed for injury proximately caused by a negligent act or omission of *any employee within the scope of his employment*.... (Emphasis in Gentry.)

[1] A complaint against a governmental entity for tort must overtly allege that the tort was committed by an employee or employees of the governmental entity within the scope of his or their employment. A complaint which does not so state does not state a claim for which relief can be granted because the action is not alleged to be within the class of cases excepted by the statute from governmental immunity.

[2] The complaint, as amended by the dismissal of the individual defendants, does not state a claim for which relief can be granted against the City.

Also see Lockhart v. Jackson-Madison County General Hospital, 793 S.W.2d 943, 946 (Tenn.App.1990).

The third reason the trial court was warranted in sustaining the Defendant's motion was the Plaintiffs failed to state a cause of action in their complaints for outrageous conduct. The landmark case in this jurisdiction addressing an action for outrageous conduct is *Medlin v. Allied Investment Company,* 398 S.W.2d 270 (Tenn.1966). The court, speaking through Chief Justice Burnett, quoted with approval as follows, at 274:

> ***5** *Extreme and Outrageous Conduct.*
>
> The cases thus far decided have found liability only where the defendant's conduct has been extreme and outrageous. It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct is characterized by "malice", or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all bounds of decency, and to be regarded as atrocious, and utterly untolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous."

The court then stated:

> From the foregoing portion of the Restatement, we find the two factors which must concur in order to outweigh the policy against allowing an action for the infliction of mental disturbance: (a) the conduct complained of must have been outrageous, not tolerated in civilized society, and (b) as a result of the outrageous conduct, there must be serious mental injury;....

In finding the plaintiffs' declaration was insufficient to state a cause of action for outrageous conduct, the court said at 275:

> The declaration of the plaintiffs is insufficient because the plaintiffs have not alleged a course of conduct on the part of the defendant which could be classed as outrageous. It is not enough in an action of this kind to allege a legal conclusion; the actionable conduct should be set out in the declaration.

It will be observed from the allegations of the Plaintiffs' complaints quoted above that "plaintiffs have not alleged a course of conduct on the part of the defendant which could be classed as outrageous." The Plaintiffs have alleged a legal conclusion. The actionable conduct of the Defendant has not been set out.

In the case of *Swallows v. Western Electric Company, Inc.,* and Pinkerton's, Inc., 543 S.W.2d 581 (Tenn.1976) the plaintiff filed an action, as pertinent, charging the defendants were guilty of "outrageous conduct". The defendants filed a motion to dismiss, contesting the sufficiency of the complaint. The trial court dismissed the complaint. On appeal, the supreme court affirmed. In doing so, the court, speaking through Chief Justice Cooper, said, at 582, 583:

> Liability for the tort of "outrageous conduct" exists only where (1) the conduct of the defendants has been so outrageous in character, and so extreme in degree, as to be beyond the pale of decency, and to be regarded as atrocious and utterly intolerable in a civilized society, and

(2) the conduct results in serious mental injury. (Citations omitted.)

* * *

The Tennessee Rules of Civil Procedure, while simplifying and liberalizing pleading, do not relieve the plaintiff in a tort action of the burden of averring facts sufficient to show the existence of a duty owed by the defendant, a breach of the duty, and damages resulting therefrom. The complaint in this action is replete with conclusions couched in the language of Medlin, *supra,* but does not undertake to describe the substance and severity of the conduct of appellee's employees which allegedly amounted to harassment, nor the substance and severity of the conduct of Pinkerton in its investigations, nor the actions of Western Electric in attempting to discipline appellant. And, as was pointed out in Medlin "it is not enough in an action of this kind to allege a legal conclusion; the actionable conduct should be set out in the [complaint]," *supra* 398 S.W.2d at page 275. This is so because the court has the burden of determining, in the first instance, whether appellees' conduct may reasonably be regarded as so extreme and outrageous as to permit recovery or whether the conduct is such as to be classed as "mere insults, indignities, threats, annoyances, petty oppression, or other trivialities," for which appellees would not be liable. *See* comments to § 46 of the Restatement of Torts, Second.

***6** The decree of the chancellor is affirmed. The cost of this appeal is taxed to the Appellants and the case is remanded to the trial court for the collection of cost.

GODDARD, P.J., and FRANKS, J., concur.

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919 F.Supp. 280
United States District Court,
E.D. Tennessee.

Paul KETRON and Thomas Randall White, Plaintiffs,
v.
CHATTANOOGA–HAMILTON COUNTY HOSPITAL AUTHORITY, d/b/a Erlanger Medical Center, Mack McCarley, individually and in his official capacity as Vice President of Support Services, and Joel Heaton, individually and in his official capacity as Director of Construction Services, Defendants.

No. 1:95–CV–92. | Jan. 23, 1996.

Former employees of county hospital authority brought action against county hospital authority and authority officials, alleging retaliatory discharge claims and § 1983 claims that they were discharged after exercising their First Amendment rights. County hospital authority and officials moved to dismiss complaint. The District Court, Collier, J., held that: (1) county hospital authority and officials in their official capacities were immune to retaliatory discharge claims under the Tennessee Governmental Tort Liability Act (TGTLA); (2) allegations that officials participated in decision to discharge former employees and to otherwise retaliate against and harass them for making complaints about official malfeasance stated retaliatory discharge claim against officials in their individual capacities; (3) allegation that county hospital authority had policy or custom of discharging employees who complained about illegal activities was insufficient to state § 1983 claim against county hospital authority and officials in their official capacities; and (4) allegations in complaint were sufficient to state § 1983 claim against officials in their individual capacities.

Motion granted in part and denied in part.

West Headnotes (16)

[1] **Federal Civil Procedure**
Judgment on the Pleadings

Standard of review applicable to motion for judgment on pleadings is same as that for motion to dismiss for failure to state claim. Fed.Rules Civ.Proc.Rule 12(b)(6), (c), 28 U.S.C.A.

1 Cases that cite this headnote

[2] **Federal Civil Procedure**
Clear or certain nature of insufficiency

Federal Civil Procedure
Construction of pleadings

Federal Civil Procedure
Matters deemed admitted; acceptance as true of allegations in complaint

Motion to dismiss for failure to state claim requires court to construe complaint in light most favorable to plaintiff, accept all complaint's factual allegations as true, and determine whether plaintiff undoubtedly can prove no set of facts in support of claims that would entitle relief. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

2 Cases that cite this headnote

[3] **Federal Civil Procedure**
Fact issues

Court may not grant motion to dismiss for failure to state claim based upon disbelief of complaint's factual allegations. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[4] **Federal Civil Procedure**
Insufficiency in general

Federal Civil Procedure
Construction of pleadings

In reviewing motion to dismiss for failure to state claim, court must liberally construe complaint in favor of party opposing motion; however, complaint must articulate more than bare assertion of legal conclusions. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

1 Cases that cite this headnote

[5] **Federal Civil Procedure**

Insufficiency in general

To survive motion to dismiss for failure to state claim, complaint must contain either direct or inferential allegations respecting all material elements to sustain recovery under some viable legal theory. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[6] **Health**

Adverse employment action; wrongful discharge

Under Tennessee law, county hospital authority was governmental entity and political subdivision of state, and therefore county hospital authority and its officials in their official capacities were entitled to immunity under the Tennessee Governmental Tort Liability Act (TGTLA) in former employees' retaliatory discharge claims. West's Tenn.Code, §§ 29–20–201(a), 50–1–304.

1 Cases that cite this headnote

[7] **Officers and Public Employees**

Actions by or against officers and employees

Suits brought against individuals in their official capacities are same as suits brought against governmental employer.

[8] **Health**

Adverse employment action; wrongful discharge

Under Tennessee law, allegations that county hospital authority officials participated in decision to terminate former employees and to otherwise retaliate against and harass former employees for making complaints about official malfeasance and safety violations suggested the officials may have acted outside their authority as agents of county hospital authority and, therefore, stated retaliatory discharge claim against the officials in their individual capacities. West's Tenn.Code, § 50–1–304(c).

[9] **Civil Rights**

Employment practices

Discharged employees' allegation that county hospital authority had policy or custom of discharging employees who complained about illegal activities at the county hospital authority was insufficient to state § 1983 claim against county hospital authority and county hospital authority officials in their official capacities; discharged employees did not allege county hospital authority implicitly authorized, approved or knowingly acquiesced in unconstitutional conduct of its officials. 42 U.S.C.A. § 1983.

2 Cases that cite this headnote

[10] **Civil Rights**

Nature and elements of civil actions

To successfully state claim under § 1983, plaintiff must identify right secured by United States Constitution and deprivation of that right by person acting under color of law. 42 U.S.C.A. § 1983.

[11] **Civil Rights**

Liability of Municipalities and Other Governmental Bodies

Governmental entity may be held liable under § 1983 if governmental entity itself caused constitutional deprivation. 42 U.S.C.A. § 1983.

2 Cases that cite this headnote

[12] **Civil Rights**

Acts of officers and employees in general; vicarious liability and respondeat superior in general

Doctrine of respondeat superior does not apply to civil rights actions against governmental entities. 42 U.S.C.A. § 1983.

[13] **Civil Rights**

Governmental Ordinance, Policy, Practice, or Custom

It is only when execution of government's policy or custom inflicts injury that municipality may be held liable under § 1983. 42 U.S.C.A. § 1983.

[14] **Civil Rights**

Governmental Ordinance, Policy, Practice, or Custom

Government body's policy or custom must be moving force of constitutional violation in order to establish liability of government body under § 1983. 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

[15] **Civil Rights**

Defenses; immunity and good faith

Discharged employees' allegations that their complaints about official malfeasance at county hospital authority constituted constitutionally protected speech and were substantial or motivating factor in adverse action taken against them by county hospital authority officials were sufficient to state § 1983 claim against the officials in their individual capacities, notwithstanding officials' asserted defense of qualified immunity, as allegations indicated it was possible for discharged employees to prove that officials' conduct violated clearly established constitutional right of which reasonable person would have known. U.S.C.A. Const.Amend. 1; 42 U.S.C.A. § 1983.

[16] **Civil Rights**

Good faith and reasonableness; knowledge and clarity of law; motive and intent, in general

Government officials enjoy qualified immunity if their conduct does not violate clearly established federal statutory or constitutional rights of which reasonable person would have known; proper inquiry is whether reasonable official would have known that challenged conduct violated that right.

Attorneys and Law Firms

***281** Harlan S. Miller, Matthew C. Billips, Kirwan, Goger, Chesin & Parks, P.C., Atlanta, GA, for plaintiffs.

Carlos C. Smith, Christine Mabe Scott, J. Robin Rogers, Strang, Fletcher, Carriger, Walker, Hodge & Smith, Chattanooga, TN, for defendants.

Opinion

MEMORANDUM

COLLIER, District Judge.

Before the Court is the Motion to Dismiss the Complaint and the Amended Complaint filed by Defendants pursuant to *Fed.R.Civ.P.* 12(c) (Court File No. 6). Plaintiffs moved the Court to allow a Second Amended Complaint (Court File No. 8) and responded to Defendants' motion to dismiss (Court File No. 10). The parties filed a Consent Order allowing Plaintiffs to file the Second Amended ***282** Complaint (Court File No. 13). Plaintiffs argue the Second Amended Complaint at least partly cures the grounds for Defendants' motion to dismiss. The Second Amended Complaint brings this action pursuant to 42 U.S.C. § 1983 and *Tenn.Code Ann.* § 50–1–304 (Court File No. 14). For the following reasons, the Court will **GRANT IN PART** and **DENY IN PART** the motion to dismiss.

I. *FACTS*

The facts in this action are largely uncontested. Toward the end of 1993, Paul Ketron ("Ketron") held the position of Associate Director of Engineering at Erlanger Medical Center ("EMC"). Thomas White ("White") held the position of Zone Maintenance Mechanic under Ketron's supervision. Ketron reported to Bob Sachuk ("Sachuk"), EMC's Director of Engineering, who, along with Defendant Joel Heaton ("Heaton"), reported to Defendant Mack McCarley ("McCarley").

During late 1993, Plaintiffs claim they became aware of and complained about an alleged "pervasive practice of malfeasance" in EMC's "Maintenance" and "In House Construction" Departments (Court File No. 10, p. 2). Plaintiffs also complained of safety violations. Plaintiffs registered their complaints of these alleged "incidents of illegal activities in three memoranda to Defendant Heaton and EMC's Board of Directors in late 1993" (*Id.*). Heaton

purportedly responded in a memorandum to Sachuk in September 1993 criticizing Ketron's "attitude" and suggesting disciplinary action (*Id.*). Soon thereafter, Plaintiffs contend they both suffered adverse employment actions, "under the pretext of a reduction in force," in retaliation for reporting alleged illegal activities: Ketron at first took a demotion and transfer, which resulted in a "constructive[ ] discharg[e]" in October 1994; White lost his job in April 1994 (*Id.* at pp. 2–3, 5–6).

II. *STANDARD OF REVIEW*

[1] [2] [3] [4] [5] Defendants moved the Court to dismiss this action under *Fed.R.Civ.P.* 12(c), which is technically a motion for judgment on the pleadings. However, the standard of review applicable to a Rule 12(c) motion is the same as that for a *Fed.R.Civ.P.* 12(b)(6) motion. *Scheid v. Fanny Farmer Candy Shops, Inc.,* 859 F.2d 434, 436 n. 1 (6th Cir.1988). A motion to dismiss under *Fed.R.Civ.P.* 12(b)(6) requires the Court to construe the complaint in the light most favorable to the plaintiff, accept all the complaint's factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of the claims that would entitle relief. *Meador v. Cabinet for Human Resources,* 902 F.2d 474, 475 (6th Cir.), *cert. denied,* 498 U.S. 867, 111 S.Ct. 182, 112 L.Ed.2d 145 (1990); *see also Cameron v. Seitz,* 38 F.3d 264, 270 (6th Cir.1994). The Court may not grant such a motion to dismiss based upon a disbelief of a complaint's factual allegations. *Lawler v. Marshall,* 898 F.2d 1196, 1199 (6th Cir.1990); *Miller v. Currie,* 50 F.3d 373, 377 (6th Cir.1995) (noting that courts should not weigh evidence or evaluate the credibility of witnesses). The Court must liberally construe the complaint in favor of the party opposing the motion. *Miller,* 50 F.3d at 377. However, the complaint must articulate more than a bare assertion of legal conclusions. *Scheid,* 859 F.2d at 436. "[The] complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." *Id.* (citations omitted).

III. *ANALYSIS*

A. *Tenn.Code Ann. § 50–1–304*

[6] Behind the motions to amend the complaint lay Plaintiffs' interest in characterizing the EMC as a "public non-profit corporation" (Court File No. 14, p. 2), rather than "a political subdivision operating and existing under the Constitution and laws of the State of Tennessee" (Court File No. 4, p. 2). Defendants in part premised their motion to dismiss on EMC's status as a political subdivision of Tennessee and the resulting immunity from liability given by the Tennessee Governmental Tort Liability Act ("TGTLA"), *Tenn.Code Ann.* § 29–20–101 *et seq.* (Court File No. 7, p. 7). While not contesting Plaintiffs' amendment to the complaint, Defendants' nonetheless do not concede the status of the EMC as a public non-profit corporation (*See* Court File No. 11).

***283** Plaintiffs correctly argue Section 19, Private Acts of the Tennessee General Assembly, 1976 Tenn.Priv. Acts ch. 297 ("enabling act"), *as amended by,* 1977 Tenn.Priv. Acts ch. 125, specifically denotes the EMC "shall be a public nonprofit corporation." They contend the enabling act thus fails to clearly establish the EMC as a political subdivision of the state. Furthermore, they emphasize case law proffered by Defendants indicates a "highly fact specific" inquiry into the documents creating the EMC is necessary to resolve this issue and they must be allowed discovery toward that end (*See* Court File No. 12, pp. 2–3).

Defendants point to case law, which they argue establishes the EMC as a political subdivision of Tennessee. The Court agrees. The Tennessee Supreme Court in *Chattanooga–Hamilton County Hospital Authority v. City of Chattanooga,* 580 S.W.2d 322 (Tenn.1979) found constitutional the enabling acts creating the Chattanooga–Hamilton County Hospital Authority ("Hospital Authority," now d/b/a "EMC"). The court recognized the "gist" and "primary thrust" of the Tennessee General Assembly's actions as the "autonomous establishment of the Hospital Authority." *Id.* at 327. In context, the court reviewed the enabling act in light of the "home rule" amendment to the Tennessee Constitution. *Id.* at 324. The court analyzed Paragraph 9, § 9 of art. XI of the Tennessee Constitution, which addresses "the consolidation of any or all of the governmental and corporate functions now or hereafter vested in municipal corporations with the governmental and corporate functions now or hereafter vested in the counties in which such municipal corporations are located; ..." *Id.* at 327. Moreover, the court found the office of trustee of the Hospital Authority to be "an independent governmental entity." *Id.* at 329.

In *Johnson v. Chattanooga–Hamilton County Hospital Authority,* 749 S.W.2d 36 (Tenn.1988), the Tennessee Supreme Court examined the applicability of the Workers' Compensation Act of Tennessee ("WCA"), *Tenn.Code Ann.* § 50–6–101 *et seq.,* to the Hospital Authority. The court reviewed Sections 1 (noting the creation of a "governmental Hospital Authority"), 18 (noting the Hospital Authority as

"a public instrumentality acting on behalf of the county"), and 19 (noting the Hospital Authority "shall be a public nonprofit corporation") of the enabling act. *Id.* at 37. The court concluded the Hospital Authority was a "subdivision of the state and county" as contemplated by the WCA, *Tenn.Code Ann.* § 50–6–106(5), which exempts "[t]he state of Tennessee, counties thereof and municipal corporations" from coverage.

Plaintiffs read these cases narrowly, arguing they do not specifically relate to the TGTLA (*See* Court File No. 12, pp. 2–3). The Court understands the cases broadly stand for the proposition that the Hospital Authority, now d/b/a EMC, is a governmental entity and a subdivision of the state. The TGTLA grants immunity to "all governmental entities" when they "are engaged in the exercise and discharge of any of their functions, governmental or proprietary." *Tenn.Code Ann.* § 29–20–201(a) (1995), *quoted in Lockhart v. Jackson–Madison County General Hospital,* 793 S.W.2d 943, 944 (Tenn.Ct.App.1990) (applying the TGTLA to a county hospital). A recent case followed *Lockhart* and specifically applied the TGTLA to EMC. *See Moses v. Erlanger Medical Center,* 1995 WL 610243 (Tenn.Ct.App. Oct. 18, 1995) (denying the plaintiffs' claim of mental anguish). *Moses* recognized EMC as a "governmental hospital authority," *Id.* at *1, and then applied provisions of the TGTLA to the plaintiffs' claims in that case. *See id.* at *2–*3.

[7] Plaintiffs' state law claim is one for retaliatory discharge (*See* Court File No. 14, pp. 6–7). Tennessee courts have held the TGTLA grants immunity to governmental entities for claims of retaliatory discharge. *See Montgomery v. Mayor of City of Covington,* 778 S.W.2d 444, 445 (Tenn.Ct.App.1988); *Williams v. Williamson County Bd. of Ed.,* 890 S.W.2d 788, 790 (Tenn.Ct.App.1994). Given the Court's analysis of applicable case law from Tennessee, the Court concludes EMC is a political subdivision of the state of Tennessee and is immune to a claim against it for retaliatory discharge under the provisions of the TGTLA. The claims brought ***284** against EMC under *Tenn.Code Ann.* § 50–1–304 will be **DISMISSED.** [1]

1 By analogy to the analysis of 42 U.S.C. § 1983 *infra,* the Court also finds the claims brought against Heaton and McCarley in their official capacities pursuant to *Tenn.Code Ann.* § 50–1–304 will be **DISMISSED.** Suits brought against individuals in their official capacities are the same as suits brought against the governmental employer. *See Leach v. Shelby County Sheriff,* 891 F.2d 1241, 1245 (6th Cir.1989), *cert. denied,* 495 U.S. 932, 110 S.Ct. 2173, 109 L.Ed.2d 502 (1990); *Pusey v. City of Youngstown,* 11 F.3d 652, 657 (6th Cir.1993).

[8] The Court finds the claims brought against Heaton and McCarley as individuals should not be dismissed. Plaintiffs admit *Tenn.Code Ann.* § 50–1–304(c) provides a cause of action against an employer and not usually a supervisor (Court File No. 10, p. 11). However, Plaintiffs also point to *Johnson v. Johnson,* 1992 WL 184743 (Tenn.Ct.App. Aug. 5, 1992), which indicates *an agent acting outside of his authority may be liable* for his actions. "[A]bsent any evidence that the defendant acted outside his authority as agent for the employer, the liability is that of the employer and not the agent." *Id.* at *5 (citations omitted). The Complaint alleges both Heaton and McCarley "participated in the decision to terminate Plaintiffs' employment *and to otherwise retaliate against and harass Plaintiffs*" (Court File No. 14, pp. 2–3) (emphasis added). Reading the complaint in the light most favorable to Plaintiffs and taking the factual allegations as true, the Court cannot at this time say Plaintiffs undoubtedly can prove no set of facts entitling them to relief. Accordingly, the motion to dismiss Heaton and McCarley as individuals under *Tenn.Code Ann.* § 50–1–304 will be **DENIED.**

B. *42 U.S.C. § 1983*

1. *EMC and official capacity suits*

[9] **[10]** **[11]** "To successfully state a claim under 42 U.S.C. § 1983, a plaintiff must identify a right secured by the United States Constitution and the deprivation of that right by a person acting under color of law." *Adams v. Metiva,* 31 F.3d 375, 386 (6th Cir.1994) (citation omitted). A governmental entity may be held liable under section 1983 if the governmental entity itself caused the constitutional deprivation. *Searcy v. City of Dayton,* 38 F.3d 282, 286 (6th Cir.1994), *citing Monell v. Department of Social Servs.,* 436 U.S. 658, 690, 98 S.Ct. 2018, 2035–36, 56 L.Ed.2d 611 (1978). As noted above, the Court found EMC to be a political subdivision of the state of Tennessee. In addition, a suit brought against a person in his official capacity is a suit against the governmental entity itself. *See Leach v. Shelby County Sheriff,* 891 F.2d 1241, 1245 (6th Cir.1989), *cert. denied,* 495 U.S. 932, 110 S.Ct. 2173, 109 L.Ed.2d 502 (1990); *Pusey v. City of Youngstown,* 11 F.3d 652, 657 (6th Cir.1993). Thus, the claims brought against Heaton and

McCarley in their official capacities may be analyzed with the claims brought against EMC.

[12] **[13]** **[14]** However, the doctrine of respondeat superior does not apply to governmental entities. *See Monell,* 436 U.S. at 691–95, 98 S.Ct. at 2036–38; *Searcy,* 38 F.3d at 286 (noting that city not liable for injury inflicted solely by employees or agents); *Copeland v. Machulis,* 57 F.3d 476, 481 (6th Cir.1995). "It is only when the 'execution of the government's policy or custom ... inflicts the injury' that the municipality may be held liable under § 1983." *Searcy,* 38 F.3d at 286, *quoting City of Canton v. Harris,* 489 U.S. 378, 385, 109 S.Ct. 1197, 1203, 103 L.Ed.2d 412 (1989) (other citations omitted). Moreover, the policy or custom "must be 'the moving force of the constitutional violation' in order to establish the liability of a government body under § 1983." *Searcy,* 38 F.3d at 286, *quoting Polk County v. Dodson,* 454 U.S. 312, 326, 102 S.Ct. 445, 454, 70 L.Ed.2d 509 (1981) (citation omitted).

Plaintiffs' complaint merely states the alleged conduct took place "pursuant to policy, custom and usage of EMC" (Court File No. 14, p. 2). The Court understands this to mean EMC has a policy or custom of discharging employees who act similarly to Ketron and White. *Hays v. Jefferson County, Ky.,* 668 F.2d 869 (6th Cir.1982) stands for the proposition that a governmental entity is not liable "absent a showing that the [defendant] either encouraged the specific incident of misconduct or in some other way directly ***285** participated in it." *Id.* at 874. This requires Plaintiffs to at least demonstrate EMC "implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct" of Heaton and McCarley. *Id.* Plaintiffs have not done so. The complaint does recite the key words—policy, custom, and usage—yet it goes no further. These recitations are merely legal conclusions without supporting facts. Accordingly, the claims brought against the EMC and Heaton and McCarley in their official capacities under 42 U.S.C. § 1983 will be **DISMISSED.**

2. *Heaton and McCarley in their individual capacities*

[15] **[16]** Defendants argue Heaton and McCarley have qualified immunity for the Section 1983 claims brought against them in their individual capacities (Court File No. 7, pp. 5–7). Government officials enjoy qualified immunity if their "conduct does not violate clearly established federal 'statutory or constitutional rights of which a reasonable person would have known.' " *Gossman v. Allen,* 950 F.2d 338, 341 (6th Cir.1991), *quoting Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). The proper inquiry is whether "a reasonable official would have known that the challenged conduct violated that right." *Id., citing Anderson v. Creighton,* 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987).

Plaintiffs claim their complaints "about official malfeasance at EMC constituted speech protected by the First Amendment" and were "a substantial or motivating factor in the adverse actions taken against them by defendants" (Court File No. 14, pp. 6–7). Case law indicates the exercise of one's First Amendment right to free speech may be protected through a Section 1983 claim. *See McBride v. Village of Michiana,* 30 F.3d 133 (table), 1994 WL 396143, at p. *3 (6th Cir. July 28, 1994) (reversing district court decision dismissing Section 1983 claim based on "retaliatory measures" taken against the plaintiff for exercising right to free speech and freedom of the press); *Boger v. Wayne County,* 950 F.2d 316 (6th Cir.1991) (noting the plaintiff "need not have suffered loss of salary, promotional opportunities, seniority or other monetary deprivations to have a cognizable interest protected by the First Amendment"); *Rakovich v. Wade,* 850 F.2d 1180, 1189 (7th Cir.), *cert. denied,* 488 U.S. 968, 109 S.Ct. 497, 102 L.Ed.2d 534 (1988) (noting "an investigation conducted in retaliation for comments protected by the first amendment could be actionable under section 1983").

Reading the complaint in the light most favorable to Plaintiffs and taking the factual allegations as true, the Court cannot at this time say Plaintiffs undoubtedly can prove no set of facts entitling them to relief. Accordingly, the motion to dismiss Heaton and McCarley as individuals under 42 U.S.C. § 1983 will be **DENIED.**

IV. *CONCLUSION*

The Court will **GRANT** the motion to dismiss as to all claims against EMC and Heaton and McCarley in their official capacities. The Court will **DENY** the motion to dismiss as to all claims against Heaton and McCarley in their individual capacities.

An Order will enter.

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Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.

Jeffrey Adair YOUNG
v.
Gary DAVIS, et al.

No. E2008-01974-COA-R3-CV. | Aug. 3, 2009 Session. | Oct. 30, 2009.

Appeal from the Chancery Court for Bradley County, No. 05-292; Jerri S. Bryant, Chancellor.

Attorneys and Law Firms

Michael M. Raulston, Chattanooga, Tennessee, for the appellant, Jeffrey Adair Young.

Jeffrey M. Atherton, Chattanooga, Tennessee, for the appellees, Gary Davis and Bradley County.

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Opinion

OPINION

CHARLES D. SUSANO, JR.

*1 After being discharged as the director of emergency management for Bradley County, Jeffrey Adair Young ("the Plaintiff"), filed this suit in chancery court against the county mayor and others. The Plaintiff alleges that the defendants conspired to end his employment through actions that (1) amounted to common law retaliatory discharge and (2) were in violation of the Tennessee Public Protection Act ("the Public Protection Act" or "the Act") codified at Tenn.Code Ann. § 50-1-304 (2009). A series of filings and orders eliminated all claims except those against the county mayor, Gary Davis, in his *official* capacity. An amended complaint, again filed in chancery court, added Bradley County as a defendant. Davis and Bradley County will be referred to herein as "the Defendants." The Defendants filed a motion to dismiss on the ground that circuit court had exclusive jurisdiction under Tenn.Code Ann. § 29-20-307 (2000). The Defendants also filed a motion for summary judgment on numerous bases. The Plaintiff filed a response to the motion as well as his own motion to transfer the case to circuit court pursuant to Tenn.Code Ann. § 16-1-116 (2009). The chancery court granted the Defendants' motion for summary judgment and dismissed the case, stating that the motion to transfer was rendered moot by its judgment of dismissal. The Plaintiff appeals. We vacate the judgment of the chancery court and remand with instructions to transfer the case, in its entirety, including the Plaintiff's claims against original defendants Dewey Woody and Troy Spence, to circuit court.

I.

The Plaintiff initiated this litigation in chancery court on November 21, 2005, by filing a complaint that alleges he was "discharged in violation of [the] Public Protection Act of Tennessee, T.C.A. § 50-1-304 [1] [and] pursuant to the common law tort of retaliatory discharge and civil conspiracy." (Footnote added.) The date of discharge was November 23, 2004. The original complaint names Gary Davis, Dewey Woody and Troy Spence ("the original defendants") as defendants without providing any details as to what the individual defendants did wrong. The complaint demands compensatory and punitive damages.

1 The text of the Act, as pertinent, is as follows:

(a) As used in this section:

(1) "Employee" includes, but is not limited to:

(A) A person employed by the state, or any municipality, county, department, board, commission, agency, instrumentality, political subdivision or any other entity of the state;

(B) A person employed by a private employer; or

(C) A person who receives compensation from the federal government for services performed for the federal government, notwithstanding that the person is not a full-time employee of the federal government;

(2) "Employer" includes, but is not limited to:

(A) The state, or any municipality, county, department, board, commission, agency, instrumentality, political subdivision or any other entity of the state;

(B) A private employer; or

(C) The federal government as to an employee who receives compensation from the federal government for services performed for the federal government

> notwithstanding that the person is not a full-time federal employee; and
> (3) "Illegal activities" mean activities that are in violation of the criminal or civil code of this state or the United States or any regulation intended to protect the public health, safety or welfare.
> (b) No employee shall be discharged or terminated solely for refusing to participate in, or for refusing to remain silent about, illegal activities.
> (c) [Deleted by 2009 Pub.Acts, c. 161, § 1, May 7, 2009.]
> (d)(1) Any employee terminated in violation of subsection (b) shall have a cause of action against the employer for retaliatory discharge and any other damages to which the employee may be entitled.
> (2) Any employee terminated in violation of subsection (b) solely for refusing to participate in, or for refusing to remain silent about, illegal activities who prevails in a cause of action against an employer for retaliatory discharge for the actions shall be entitled to recover reasonable attorney fees and costs.

* * *

The original defendants filed a motion to dismiss which admitted Davis fired the Plaintiff but claimed it was done in the best interest of the county after the Tennessee Bureau of Investigation investigated Young's activities and secured his indictment for illegal activities in office. The motion invokes the Governmental Tort Liability Act and argues that the complaint states no facts that support the pleading's conclusions.

The chancery court granted the motion to dismiss as to Mayor Davis in his individual capacity and as to Woody and Spence in both their individual and official capacities. The court instructed the "parties to set [the] case for further argument on the issues of relation back, statute of limitation, and suit against Bradley County." After a motion to reconsider by the Plaintiff and a motion to dismiss Davis in his official capacity were filed, the trial court entered an order reaffirming its dismissal of Spence and Woody with full prejudice, reaffirming its dismissal of Davis in his individual capacity with full prejudice, dismissing all claims under the Public Protection Act, and granting the Plaintiff leave to amend to name Bradley County as a defendant. The court expressly reserved ruling on whether the statute of limitations had expired and whether an amended complaint adding Bradley County would relate back to the filing of the original complaint.

***2** Plaintiff filed his amended complaint [2] on May 23, 2008. In it, he named Gary Davis, in his official capacity, and Bradley County, as defendants. The amended complaint is short enough and important enough to the resolution of this case to repeat the allegations in their entirety:

2 Apparently the plaintiff tendered the amended complaint to the court along with a motion to amend filed on November 16, 2007. There appears to be some question whether and when the motion was served on opposing counsel. The resolution of this dispute is not germane to our disposition of this appeal.

1. On or about November 23, 2004, the Plaintiff was fired from his employment at Cleveland/Bradley Emergency Management Agency.

2. The Plaintiff filed for unemployment benefits, and they were awarded.

3. The Plaintiff would show that the Defendant, Gary Davis in his official capacity as Mayor of Bradley County acting on behalf of Bradley County acted illegally and beyond his authority and the authority of Bradley County in undertaking to deprive the Plaintiff of his employment and did that in violation of the Plaintiff's rights causing emotional distress.

4. The Plaintiff would further show that Gary Davis in his official capacity as Mayor of Bradley County is in fact acting on behalf of Bradley County.

5. Pursuant to Tenn.Code Ann. § 50-1-304(b) the Plaintiff would show Thirteen Thousand ($13,000.00) Dollars of his salary was supplemented by the Federal Government through the Federal Emergency Management Agency (FEMA).

6. The Plaintiff complained to Gary Davis, Mayor of Bradley County, in his official capacity about property being taken from his, the Plaintiff's, office without permission and sought relief and Gary Davis, in his official capacity refused to take any action against the parties responsible.

7. As the result of the Plaintiff's complaints, the wrongs sustained by the Plaintiff, he has suffered a negligent infliction of emotional distress by being deprived of his property, his privacy and by the County's refusal to take appropriate action.

The amended complaint sought only compensatory damages.

The Defendants responded to the amended complaint with a motion to dismiss in which they argued that all claims sounded in wrongful discharge and fell "under the terms and provisions of the Tennessee Governmental Tort Liability Act, T.C.A. § 29-20-101 et seq. [(2000 & Supp.2009)]" and that "only [c]ircuit [c]ourts have exclusive original jurisdiction over any action brought under the [Tennessee Governmental Tort Liability Act]" (referred to herein as "the GTLA"). The Defendants asserted that the chancery court was without "jurisdiction over the subject matter of this lawsuit." The Plaintiff then filed a motion to transfer "pursuant to Tenn.Code Ann. § 16-1-116."[3] The Defendants responded to the motion to transfer by arguing that it was not in the interest of justice, a requirement of the statute to transfer, in light of the protracted nature of the litigation and the pending motions.

3 The text of the transfer statute, Tenn.Code Ann. § 16-1-116, is as follows:

> Notwithstanding any other provision of law or rule of court to the contrary, when an original civil action, an appeal from the judgment of a court of general sessions, or a petition for review of a final decision in a contested case under the Uniform Administrative Procedures Act, compiled in title 4, chapter 5, is filed in a state or county court of record or a general sessions court and such court determines that it lacks jurisdiction, the court shall, if it is in the interest of justice, transfer the action or appeal to any other such court in which the action or appeal could have been brought at the time it was originally filed. Upon such a transfer, the action or appeal shall proceed as if it had been originally filed in the court to which it is transferred on the date upon which it was actually filed in the court from which it was transferred.

Shortly after filing their motion to dismiss for lack of subject matter jurisdiction, the Defendants filed their motion to dismiss "and/or" for summary judgment on the following paraphrased grounds:

Failure to state a claim;

***3** Expiration of the statute of limitations against Bradley County;

Official capacity suit against county mayor is redundant to suit against the county;

Insufficiency and lack of service of process pursuant to Tenn. R. Civ. P. 12.04(4) and (5);

Immunity from suit under the doctrine of sovereign immunity and GTLA;

This was a discretionary function.

The motion was supported by the affidavit of Mayor Davis which stated to the effect that the Plaintiff was an at-will employee appropriately removed within the discretion of Davis in the best interest of Bradley County.

The Plaintiff responded with his own affidavit stating that he was fired for an illegal reason, *i.e.,* his sexual orientation, being "because of my having a boyfriend and for no other reason." The Plaintiff also made some cursory legal arguments against the motion.

The substance of the trial court's order granting summary judgment is as follows:

> After a review of the file and considering argument of counsel, the court hereby finds that the statute of limitations with regard to this claim is clearly expired. To the extent that the Complaint filed in this matter alleges negligent termination or a negligent act on behalf of County Mayor Gary Davis, the firing of Plaintiff in this matter was a discretionary function which removes liability from Defendant Davis. This leaves the only claim pending at this point by the Plaintiff for negligent infliction of emotional distress against Defendant. In the face of the Motion for Summary Judgment, it is the duty on behalf of the Plaintiff to come forward with some evidence to support all elements of his cause of action. He has failed to do so. Therefore, this court grants the Motion.

The Plaintiff then filed a notice of appeal.

II.

The issues, as stated by the Plaintiff, are:

> Whether the Court wrongfully failed to transfer the case once it was shown the Court had no jurisdiction;
>
> Whether the Court improperly dismissed the suit against all defendants.

III.

The issues we address are all issues of law, and, accordingly, we review them *de novo* with no presumption of correctness attaching to the trial court's conclusions of law. *Ganzevoort v. Russell,* 949 S.W.2d 293, 296 (Tenn.1997).

We believe the outcome of this case is controlled by *Flowers v. Dyer County,* 830 S.W.2d 51 (Tenn.1992), even though neither party mentioned the case, much less cited it as controlling authority. *Flowers* involves a GTLA lawsuit filed against Dyer County in chancery court. Dyer County filed a motion to dismiss arguing that chancery court lacked subject matter jurisdiction to hear a GTLA suit. The chancery court denied the motion and Dyer County was granted an interlocutory appeal to this Court. We reversed the judgment of the trial court and directed the dismissal of the lawsuit. We based our ruling on the requirement that GTLA actions be "brought in strict compliance with the terms of [the GTLA]", Tenn.Code Ann. § 29-20-201(c), and the exclusive original jurisdiction of circuit courts over GTLA actions established by the following language in Tenn.Code Ann. § 29-20-307(a): "The circuit courts shall have exclusive original jurisdiction over any action brought under this chapter...."

***4** The Supreme Court agreed with our rationale, but disagreed with our relief in the case, holding that, once the motion to transfer was made, transfer, rather than dismissal, was mandatory. *Id* at 53. The High Court stated the following:

> T.C.A. § 16-11-102, first enacted by the Public Acts of 1877, Chapter 97, provides the following procedures for chancery court jurisdiction of civil cases and transfer to the circuit court:
>
> (a) The chancery court has concurrent jurisdiction, with the circuit court, of all civil causes of action, triable in the circuit court, *except for unliquidated damages for injuries to person or character,* and *except for unliquidated damages for injuries to property not resulting from a breach of oral or written contract;* and no demurrer for want of jurisdiction of the cause of action shall be sustained in the chancery court, *except in the cases excepted.* (Emphasis supplied.)
>
> (b) Any suit in the nature of the cases excepted above brought in the chancery court, *where objection has not been taken by a plea to the jurisdiction,* may be transferred to the circuit court of the county, or heard and determined by the chancery court upon the principles of a court of law. (Emphasis supplied.)
>
> Implicit in the provisions of T.C.A. § 16-11-102 is the positive inference that where a jurisdictional objection has been made, such a transfer is mandated....
>
> We are of the opinion that the Governmental Tort Liability statutes state a further limitation on chancery court jurisdiction under T.C.A. § 29-20-201(b), to the effect that when immunity is removed by the chapter any claim for damages must be brought in strict compliance with its terms. T.C.A. § 29-20-307 places exclusive, original jurisdiction in circuit court over any action brought under its terms, and that court shall hear and decide such suits without the intervention of a jury.

Id. at 52-53 (emphasis and parenthetical material in original). *Flowers* was followed by the Supreme Court in the case of *Woods v. MTC Management,* 967 S.W.2d 800 (Tenn.1998). In the latter case, the High Court said that an action filed "in chancery court when the governing statutory law required it to be filed in circuit court" must be transferred rather than dismissed. *Id.* at 802.

We acknowledge that the motion to transfer in this case was made pursuant to Tenn.Code Ann. § 16-1-116 and not § 16-11-102, but this makes no difference in the outcome. The operative language of both transfer statutes produces the same result, and the language of § 16-1-116, if anything, is more clearly mandatory in using the word "shall" than § 16-11-102 which uses the word "may." We are mindful that § 16-1-116 contains the proviso that the transfer should be "in the interest of justice," but in light of the holdings of *Flowers* and *Woods,* we think that proviso must be interpreted liberally in favor of transfer and that the alternative should be, at worst, dismissal without prejudice so as to allow refiling in the correct court.

***5** The Defendants argue that where a chancery court takes jurisdiction of a case for one purpose, it has jurisdiction for all purposes. *See Industrial Dev. Bd. v. Hancock,* 901 S.W.2d 382, 384 (Tenn.Ct.App.1995). We are not convinced that this

general rule of law overcomes the express pronouncement in the GTLA that the waiver of immunity is effective only in strict compliance with the terms of the GTLA, whose terms place "exclusive original jurisdiction" in circuit court. We note that the Supreme Court's reading in *Woods* of its earlier decision in *Flowers,* is that the chancery court in *Flowers* incorrectly exercised jurisdiction on the basis of general concurrent jurisdiction with circuit court. *Woods,* 967 S.W.2d at 801-02. Also, according to *Sanders v. Lincoln County,* No. 01A01-9902-CH-00111, 1999 WL 684060 (Tenn. Ct.App., M.S., filed Sept. 3, 1999), and the cases cited therein, a chancery court is without jurisdiction over a case seeking damages against a governmental entity even when the chancery court has jurisdiction over other aspects of the case such as a claim for injunctive or declaratory relief. *Id.* at *5-6. Thus, we hold that the chancery court was without jurisdiction over, in the words of the statute, "any [part of the] action brought under this chapter [20 of Title 29, *i.e.,* the GTLA]." Tenn.Code Ann. § 29-20-307. *See Flowers,* 830 S.W.2d at 53 ("T.C.A. § 29-20-307 places exclusive, original jurisdiction in circuit court over any action brought under [the GTLA's] terms.").

Even if the general rule of concurrent jurisdiction were to be applicable in GTLA cases, which we have held it is not, all the claims in the present case, as in *Flowers,* are for "unliquidated damages for injuries to person or character." Tenn.Code Ann. § 16-11-102. Therefore, in light of the Defendants' objection to subject matter jurisdiction, the chancery court was deprived of jurisdiction and obligated to transfer the matter in its entirety.

The Defendants argue that even if transfer of the GTLA part of the case was mandatory, the chancery court correctly dismissed all other claims. We are unable to agree. In the first place, the Defendants ignore their own objection as well as the unliquidated nature of all the other claims. As we have stated, the objection to jurisdiction and the nature of the claims left the chancery court without jurisdiction and powerless to act. *See Computer Shoppe, Inc. v. State,* 780 S.W.2d 729, 734 (Tenn.Ct.App.1989) (subject matter jurisdiction limits the court's power to hear a controversy and cannot be conferred by the parties' conduct).

In the second place, we believe that all of the claims in the present case are "brought under [the] terms" of the GTLA or "brought under this chapter [20, Title 29]." Both parties assume that claims against employees of governmental entities and Public Protection Act claims fall outside the realm of the GTLA; however, they have supplied no briefing as to whether those claims are or are not "brought" under Chapter 20. We conclude that all of the claims asserted in this case were "brought" under Chapter 20 of the Code.

***6** The GTLA does more than simply set the boundaries for claims against governmental entities; it also establishes boundaries for claims against employees of governmental entities for actions related to their duties. The term "Claim" is defined under the GTLA to include "any claim brought against a governmental entity *or its employee.*" Tenn.Code Ann. § 29-20-102(1). (Emphasis added.) If an entity has waived immunity, an employee generally cannot be liable. Tenn.Code Ann. § 29-20-310(b). Even if the entity has not waived immunity, the employee generally, with certain limited exceptions, cannot be sued for an amount in excess of the statutory cap for which the entity could be held liable. Tenn.Code Ann. § 29-20-310(c). Members of boards and commissions are granted absolute immunity by the GTLA except for willful acts. Tenn.Code Ann. § 29-20-201. Finally, and perhaps most important for the purpose of our present discussion, a defendant who claims the benefit of the GTLA as an employee of a governmental entity has the right under the GTLA to a determination by the trier of fact as to whether he or she is an employee. Tenn.Code Ann. § 29-20-313(a). "If the trier of fact determines that the defendant claiming immunity is not a governmental entity employee, the lawsuit as to that defendant shall proceed like any other civil case. If the trier of fact determines that the defendant claiming immunity is a governmental entity employee, *the lawsuit as to that defendant shall proceed in accordance with the provisions of this chapter [20] .*" *Id.* (emphasis added).

As to the Public Protection Act claim, the Plaintiff assumes that the statute which creates a private right of action against employers, including governmental entities, also removes that private right of action from the universe of the GTLA. It is clear to us that the GTLA and governmental immunity in general still sets boundaries applicable to retaliatory discharge claims and Public Protection Act claims. Retaliatory discharge claims that do not satisfy the elements of the Public Protection Act are subject to the GTLA. *Baines v. Wilson County,* 86 S.W.3d 575 (Tenn.Ct.App.2002). The GTLA prevents suits against governmental entities based on common law retaliatory discharge. *Id.* at 581, 583.

Further, it appears to us that even claims which satisfy the elements of the statute must be brought "in compliance" with the GTLA. In *Farmer v. Tennessee Dept. of Safety,*

228 S.W.3d 96 (Tenn.Ct.App.2007), this Court determined whether Public Protection Act claims could be saved from the applicable statute of limitations by the "saving" statutes found in Tenn.Code Ann. §§ 28-1-105 or 28-1-115 (2000). We held that the saving statutes did not apply because sovereign immunity protected the defendant, the State of Tennessee, from application of the saving statutes. *Id.* at 101. In reaching that conclusion, we quoted at length from cases decided under the GTLA, including the following passage which bears repeating here:

> *7 The GTLA reaffirms the doctrine [of sovereign immunity] and merely removes immunity in certain limited and enumerated circumstances. *See* Tenn.Code Ann. § 29-20-201(a); *see also Hawks v. City of Westmoreland,* 960 S.W.2d 10, 14 (Tenn.1997). Consistent with this narrowly defined removal of immunity, "any claim for damages must be brought in strict compliance with the terms of [the GTLA]." Tenn.Code Ann. § 29-20-201(c). One of the terms of the GTLA which demands strict compliance is the statute of limitations.

Id. at 101 (*quoting Lynn v. City of Jackson,* 63 S.W.3d 332, 338 (Tenn.2001)) (bracketed material and quotation marks in original). We know from *Farmer* that sovereign immunity as codified in the GTLA sets parameters applicable to Public Protection Act claims. It follows that such claims must be brought in compliance with, "under [the] terms" of, *Flowers,* 830 S.W.2d at 53, or "proceed in accordance with," the GTLA. Tenn.Code Ann. § 29-20-313.

A few concluding remarks are in order. We are mindful that the Plaintiff is getting a second chance caused by his own choice of the wrong court, but we are constrained by limitations on subject matter jurisdiction and the holding of *Flowers.* The plaintiff in *Flowers* also filed in the wrong court. None of our comments herein should be taken as expressing an opinion as to the merits of this case. In fact, we do not comment as to whether the original complaint or amended complaint even states a claim against any or all defendants. In some situations, we might be inclined to move past the procedural questions to the merits, but to do so in this case would be to act in the first instance as a trial court rather than an appellate court. We are sympathetic to the efforts of the chancellor in trying to dispose of the merits rather than passing her problems on to another court, but we are compelled to first answer the question of whether the chancery court had the jurisdiction to act. We conclude that it was without jurisdiction to act other than to transfer the case. On remand, the chancery court must enter an order transferring the case to circuit court for all purposes.

IV.

The judgment of the trial court is vacated. Exercising our discretion, we tax the costs on appeal to the appellees, Bradley County and Gary Davis. This case is remanded, pursuant to applicable law, with express directions to the chancery court to enter an order transferring all claims against all defendants, namely, Gary Davis, Dewey Wood, Troy Spence, and Bradley County, for all purposes, to circuit court for further proceedings consistent with this opinion.

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IN THE CIRCUIT COURT OF HAMILTON COUNTY, TENNESSEE

CHARLESETTA WOODARD THOMPSON,	)	
	)	NO. 13C979
Plaintiff,	)	
	)	DIVISION IV
v.	)	
	)	JURY DEMAND
CHATTANOOGA-HAMILTON COUNTY HOSPITAL AUTHORITY, d/b/a ERLANGER HEALTH SYSTEM,	)	
	)	
Defendant.	)	

DEFENDANT'S MOTION TO STRIKE
PLAINTIFF'S DEMAND FOR PUNITIVE DAMAGES

Defendant Chattanooga-Hamilton County Hospital Authority, doing business as Erlanger Health System ("Erlanger"), by and through counsel, moves to strike Plaintiff's demand for punitive damages pursuant to Tennessee Rule of Civil Procedure 12.06.

In support of this motion, Defendant relies upon the Complaint and the supporting memorandum of law filed herewith, to which the Court's attention is respectfully directed.

This motion shall be heard on September 16, 2013, at 9:00 a.m. Failure to file and serve a timely written response will result in the motion being granted without further hearing.

Respectfully submitted,

MILLER & MARTIN PLLC

By: _____

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Facsimile: 423-785-8293

Attorneys for Defendant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that an exact copy of this pleading has been served upon counsel for all parties in this action, or upon said parties themselves as required by law, by delivering a copy thereof, or by depositing a copy of the same in the United States Mail, with sufficient postage affixed thereto to ensure delivery to the following:

Jennifer H. Lawrence, Esq.
Lawrence & Lawrence, PLLC
P.O. Box 1297
Chattanooga, TN 37401

This 3RD day of September, 2013.

By: _____