

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

IK PYO HONG)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 04-1403
)	(EGS)
)	
WASHINGTON METROPOLITAN AREA)	
TRANSIT AUTHORITY, <i>et al.</i>)	
)	
Defendants.)	
)	

MEMORANDUM OPINION

Plaintiff Ik Pyo Hong worked for the Washington Metropolitan Area Transit Authority ("WMATA") as a transportation engineer from 1992 to 2004. Plaintiff is suing WMATA and its general counsel, Cheryl Burke, (collectively, "defendants"), challenging defendants' determination that plaintiff is permanently barred by WMATA's conflict-of-interest provision from accepting a Project Director position at the Virginia Department of Rail and Public Transportation (DRPT). Defendants have filed a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1), on the basis that defendants are immune from these types of suits under the WMATA Compact.

Upon careful consideration of the defendants' motion, the responses and replies thereto, and for the following reasons, the Court concludes that defendants' motion will be **GRANTED** and this case will be **DISMISSED WITH PREJUDICE**.

I. Background

WMATA was established in 1966, when Congress approved an interstate compact (the "Compact") between Maryland, Virginia, and the District of Columbia; the goal of the signatories to the Compact was to improve transportation for the Washington, D.C. metropolitan region. See D.C. Code Ann. § 9-1107.01, *et seq.* (West 2001). To that end, the Dulles Corridor Rapid Transit Project ("Dulles Corridor Project") is a joint venture involving the U.S. Department of Transportation, the Virginia DRPT, private developers, and WMATA, and seeks to extend WMATA's metro line to Dulles Airport. See Complaint ("Compl.") at ¶ 9; Defendants' Motion to Dismiss ("Def. Mot.") at 2. The structure of the Dulles Corridor Project is such that the federal government will provide half of the funding, contingent on approval of an environmental impact statement and other requirements and the Virginia DRPT will be the grantee of the federal funds. Def. Mot. at 2-3. DRPT has entered into an agreement with a joint venture known as the Dulles Transit Partners ("the Partners"), who will construct the rail extension. *Id.* at 3. WMATA will oversee the Partners' work. *Id.*

Until March of 2004, plaintiff was the Director of the WMATA Office of Extensions. Compl. at ¶ 10. In this capacity, plaintiff's responsibilities included completion of the environmental impact statement for the Dulles Corridor Project.

Compl. at ¶ 10. Defendants contend, and plaintiff does not refute, that his duties in 2003 also included serving as WMATA's representative in negotiations between DRPT and the Partners, and between WMATA and DRPT. Def. Mot. at 3-4.

In October 2003, DRPT issued a solicitation seeking a Project Director for the Dulles Corridor Project. Compl. at ¶ 12. Plaintiff applied for the position and was selected, but, as a result of WMATA's determination that plaintiff is permanently barred from employment with DRPT on any projects involving the Dulles Corridor Project, DRPT apparently canceled its offer of employment. Compl. at ¶¶ 13-16.

WMATA's general counsel, Cheryl Burke, concluded that because plaintiff had personally participated on high level work involving WMATA and the DRPT, it would be a conflict of interest for him to take the Project Director position at DRPT. Def. Mot. at 6. Ms. Burke also determined that plaintiff was permanently barred from such a position, pursuant to Section 6.06.02 of WMATA's Standards of Conduct regulations, which provides:

Following termination of employment by WMATA, any person who was an employee, officer or agent of WMATA is permanently barred from working on any matter on which the person participated personally and substantially while employed at WMATA.

Id.

Plaintiff seeks declaratory and injunctive relief, claiming Tortious Interference with Prospective Business Advantage based

on what he claims is WMATA's erroneous legal opinion, which he alleges has damaged his ability to obtain employment in his field. Compl. at ¶¶ 22-33. Defendants have moved to dismiss the suit on the grounds that WMATA is immune from tort actions involving discretionary functions, such as employment decisions.

II. Standard of Review

Defendant moves to dismiss this action pursuant to Fed. R. Civ. P. 12(b)(1), alleging that this Court lacks subject matter jurisdiction over plaintiff's claims. In the Rule 12(b)(1) context, the plaintiff bears the burden of establishing the Court's jurisdiction. See, e.g., *Tripp v. Executive Office of the President*, 200 F.R.D. 140, 142 (D.D.C. 2001); *Vanover v. Hantman*, 77 F. Supp. 2d 91, 98 (D.D.C. 1999) (citing *Pitney Bowes Inc. v. U.S. Postal Serv.*, 27 F. Supp. 2d 15, 19 (D.D.C. 1998)). In so doing, the plaintiff may rely on and the Court may consider materials outside of the pleadings without converting a motion to dismiss into a motion for summary judgment. See Fed. R. Civ. P. 12(b)(1); *Land v. Dollar*, 330 U.S. 731, 735 n.4, 67 S. Ct. 1009 (1947) ("[W]hen a question of the District Court's jurisdiction is raised, either by a party or by the court on its own motion, ... the court may inquire, by affidavits or otherwise, into the facts as they exist."); *Teva Pharmaceuticals, USA, Inc. v. U.S. Food and Drug Admin.*, 182 F.3d 1003, 1008 (D.C. Cir. 1999); *Artis v. Greenspan*, 158 F.3d 1301, 1305-06 (D.C. Cir. 1998).

III. Discussion

A. The Scope of WMATA's Immunity

As a Compact between Maryland, Virginia, and the District of Columbia, WMATA shares their sovereign immunity. See *Beebe v. WMATA*, 129 F.3d 1283, 1287 (D.C. Cir. 1997); *Sanders v. WMATA*, 819 F.2d 1151, 1154 (D.C. Cir. 1987); *Morris v. WMATA*, 781 F.2d 218, 219-220 (D.C. Cir. 1986). Section 80 of the Compact waives that immunity for certain types of torts committed in the performance of a proprietary function, but retains immunity for torts occurring in the performance of a governmental function.

The Authority shall be liable for its contracts and torts and those of its Directors, officers, employees and agents committed in the conduct of any proprietary function, in accordance with the law of the applicable signatory (including rules on conflict of laws), but shall not be liable for any torts occurring in the performance of a governmental function.

See D.C. Code. Ann. § 9-1107.01(80).

As the court in *Beebe* explained,

[T]he immunity question often turns on whether the activity is 'discretionary' or 'ministerial,' a dichotomy employed by the Federal Tort Claims Act. ... To determine whether a function is discretionary, and thus shielded by sovereign immunity, we ask whether any 'statute, regulation, or policy specifically prescribes a course of action for an employee to follow.' ... If no course of action is prescribed, we then determine whether the exercise of discretion is 'grounded in 'social, economic, or political goals.' ... If so grounded, the activity is 'governmental,' thus falling within section 80's retention of sovereign immunity.

129 F.3d at 1287 (citations omitted).

B. Defendants' Determination that Plaintiff was Permanently Barred from Employment by DRPT on the Dulles Corridor Project

1. Plaintiffs' Claims Against WMATA

Defendants concluded that plaintiff was barred from work with DRPT on the Dulles Corridor Project because he had personally and substantially participated on Dulles Corridor Project work while working for WMATA. Def. Opp. at 6. Plaintiff argues that that legal determination regarding the conflict of interest and WMATA's decision to publish that determination to plaintiff's prospective employer, DRPT, was *ultra vires* and thus can be reviewed by this Court. Pl. Opp. at 4-5. Plaintiff also challenges the substance of WMATA's determination that the DRPT Project Director position would be a conflict of interest, contending that the environmental impact statement portion of the project had concluded and that the work he sought to do for DRPT was different in scope and kind from what he had done for WMATA. Pl. Opp. at 6. Finally, plaintiff claims that WMATA's regulation section 6.06.02 is an invalid covenant not to compete. Pl. Opp. at 9.

Defendants counter that there are strong public policy reasons for the post-WMATA employment restrictions plaintiff is challenging. Defendants contend that these "revolving door" rules prevent actual or apparent conflicts of interest that erode public confidence in government and prevent favoritism, improper

influence, and corruption in government contracting. Def. Mot. at 8. Defendants also maintain that plaintiff's work on the Dulles Corridor Project went beyond the environmental impact statement and that their "revolving door" limitations, common throughout federal and state governments, fall within WMATA's authority. Def. Reply at 2-3.

2. Plaintiff's Claims Against Defendant Cheryl Burke

Plaintiff argues generally that the defendants' actions, including the actions of General Counsel Cheryl Burke, were *ultra vires* and therefore they are not shielded by immunity as discretionary functions. Pl. Opp. at 4. Defendants, on the other hand, contend that the Complaint alleges no wrongdoing by Ms. Burke and does not allege that she was acting outside the scope of her employment when she issued her legal opinion that plaintiff was permanently barred under WMATA's regulations from working for DRPT on the Dulles Corridor Project, and that therefore the claims against her must be dismissed.

C. The Court Lacks Subject Matter Jurisdiction Over Plaintiff's Claims Against Defendants WMATA and Burke

This case is controlled by *Burkhart v. WMATA*, 112 F.3d 1207 (D.C. Cir. 1997) and *Beebe v. WMATA*, 129 F.3d 1283 (D.C. Cir. 1997). Those cases compel this Court to dismiss plaintiffs' Complaint against both defendants, for lack of subject matter jurisdiction.

In *Burkhart*, a passenger sued WMATA after a physical altercation with a bus driver. 112 F.3d at 1209. A jury found WMATA liable for negligent hiring, training, and supervision. On appeal, WMATA claimed that it was immune from such suits. The U.S. Court of Appeals for this circuit held that the negligence claims should have been dismissed. *Id.* at 1217. Specifically, the court stated

The WMATA compact confers upon WMATA broad power to '[c]reate and abolish ... employments' and 'provide for the qualification, appointment, [and] removal ... of its ... employees without regard to the laws of any of the signatories,' ...; '[e]stablish, in its discretion, a personnel system based on merit and fitness,' ... and 'control and regulate ... the service to be rendered'...

The hiring, training, and supervision choices that WMATA faces are choices 'susceptible to policy judgment.' The hiring decisions of a public entity require consideration of numerous factors, including budgetary constraints, public perception, economic conditions, 'individual backgrounds, office diversity, experience and employer intuition.' ... Similarly, supervision decisions involve a complex balancing of budgetary considerations, employee privacy rights, and the need to ensure public safety. ... Such decisions are surely among those involving the exercise of political, social, or economic judgment.

As a result, we conclude that the hiring, training, and supervision of WMATA personnel are governmental functions.

Id. (citations omitted).

Six months after it decided *Burkhart*, the Court of Appeals for this circuit issued its opinion in *Beebe v. WMATA*. In that case, an employee brought tort and contract claims - including

wrongful interference with employment relationship - after the department within which he worked was reorganized and he applied but was not selected for a particular position within the reorganized department, but instead was given a different position. 129 F.3d at 1286.

After a discussion of governmental versus proprietary functions and the holding in *Burkhart*, *id.* at 1287, the appellate court concluded that

[A]ll actions challenged by Beebe involved a large measure of choice, and we perceive no distinction between the discretion here and the hiring, training, and supervision of bus operators at issue in *Burkhart*. If anything, the activity in this case - reorganizing an entire office - involved even greater degrees of political, social and economic considerations.

Id. at 1288. The court thus affirmed the district court's dismissal of the tort claims. *Id.*

Importantly for the case presently before this Court, the *Beebe* court also had to consider whether two WMATA officials sued in their individual capacities for their involvement with the reorganization were also immune from suit. *Id.* After noting that the "scope of immunity of WMATA employees for torts committed in the course of governmental or discretionary functions is a road not well traveled," the appellate court concluded that the individuals were also immune from suit. *Id.* at 1288-89. The court specifically found that even the intentional torts and the individuals' actions motivated by what

plaintiff claimed was personal animus, were related to their roles in the reorganization and that none of plaintiff's allegations came "even close to [the] extremes" where officials' actions are found to fall outside the scope of their official responsibilities. *Id.* at 1289.

Like the employment decisions at issue in *Burkhart* and *Beebe*, WMATA's conflict-of-interest and "revolving-door" rules involve choices, policy considerations, and "political, social, and economic considerations." It is not hard to imagine the kinds of considerations and competing interests that might go into developing and enforcing a regulation such as section 6.06.02. For example, on the one hand, WMATA wants to be able to attract qualified, highly-trained individuals for senior positions, and needs to be able to compete with private industry in doing so; a restrictive post-employment policy might deter otherwise-interested individuals from seeking such positions. On the other hand, WMATA must be concerned about public perception, loyalty, and the risk that private industry employers will "raid" WMATA seeking to lure WMATA employees away for any number of reasons, such as their experience, connections, and/or access to public officials. As defendants persuasively argue, plaintiff's case raises exactly these kinds of concerns because he represented and negotiated on behalf of WMATA with the very same

entity and on the very same project with whom he now seeks to work.

Thus, in accordance with *Burkhart* and *Beebe*, the Court concludes that WMATA's determination that plaintiff is permanently barred from working for DRPT as a Project Director on the Dulles Corridor Project is a discretionary function and WMATA is immune from plaintiff's claims. Furthermore, the Court finds nothing in plaintiff's Complaint or pleadings that would support a finding that Defendant Burke was acting outside the scope of her employment when she issued the legal opinion at issue in this case. See *Beebe*, 129 F.3d at 1289. Therefore, Burke, too, enjoys immunity from this suit because she was engaged in a discretionary function.

IV. Conclusion

For the foregoing reasons, the Court determines that defendants are immune from suit with regard to their legal opinion that plaintiff is permanently barred from employment with DRPT on the Dulles Corridor Project. Accordingly, defendants' motion to dismiss is **GRANTED** and plaintiff's Complaint is **DISMISSED WITH PREJUDICE**. A separate Order and Judgment accompanies this Memorandum Opinion.

Signed: Emmet G. Sullivan
United States District Judge
September 26, 2005

Notice via ECF to all counsel of record.