IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

TARENCE MOSEY,	Civil Action No.: 3:16-00150-KRG
Plaintiff,	**The Honorable Kim R. Gibson**
v.	*Electronically filed.*
LOGAN TOWNSHIP UNITED FIRE DEPARTMENT, INC.,	
Defendant.	

MEMORANUDM OF LAW IN SUPPORT OF MOTION TO DISMISS

AND NOW, comes the DEFENDANT, LOGAN TOWNSHIP UNITED FIRE DEPARTMENT, INC. ("LTUFD"), by and through its attorneys, KYLE T. McGEE, ESQUIRE, and MARGOLIS EDELSTEIN, and files this Memorandum of Law in Support of its Motion to Dismiss Plaintiff's Complaint, as follows:

I. Introduction

On June 27, 2016, Plaintiff, Tarence Mosey, filed the instant civil action against the Defendant, LTUFD, a volunteer fire department, alleging racial discrimination, retaliation and hostile work environment claims pursuant to 42 U.S.C. § 1981 ("Section 1981") and a state law tort claim of intentional infliction of emotional distress ("IIED"). *See, generally,* Complaint [Dkt. 1]. All of Plaintiff's claims arise from his membership in the LTUFD, which was terminated "in late February 2014." (Complaint, ¶¶ 60-61).[1] For the following reasons, Plaintiff's Complaint

[1] Although immaterial to the legal issues raised in the instant Motion to Dismiss, the effective date of Plaintiff's termination was March 3, 2014. However, whether the termination occurred on March 3, 2014 or "in late February 2014," as alleged by Plaintiff, the result of this Motion is the same.

fails to state a claim upon which relief can be granted and, therefore, should be dismissed pursuant to Fed. R.Civ.P. 12(b)(6).

Specifically, Plaintiff's Section 1981 claims are not actionable because there does not exist a right of action against a state actor under Section 1981. The Defendant, LTUFD, as an entity performing the governmental function of community fire protection, is a state actor under both federal and Pennsylvania law. As such, no direct action under Section 1981 will lie against LTUFD. Rather, a plaintiff must assert rights under Section 1981 against a state actor through the Civil Rights Act of 1871, 42 U.S.C. § 1983 ("Section 1983"), which has not been asserted in the Complaint, nor could a Section 1983 claim be asserted due to the expiration of the two-year statute of limitations.

Similarly, Plaintiff's state law tort claim of IIED is barred by application of the two-year statute of limitations, and must be dismissed. In addition, as a voluntary fire company, LTUFD, is vested with governmental immunity from this state law tort claim under the Pennsylvania Political Subdivision Tort Claims Act, 42 Pa. C.S.A. § 8541.

For these reasons, as more fully stated herein, it is respectfully requested that this Honorable Court grant the instant Motion and dismiss Plaintiff's Complaint, with prejudice, in accordance with and pursuant to Fed. R.Civ.P. 12(b)(6).

II. Facts Alleged in the Complaint[2]

Plaintiff is an African American male who resides in Altoona, Pennsylvania. (Complaint, ¶ 6). LTUFD is a Pennsylvania Non-Profit Corporation located in Altoona, Pennsylvania. (Complaint, ¶ 7). Plaintiff was a member of the LTUFD fire department from November 2007

[2] Under the well-settled Rule 12(b)(6) standard, although LTUFD denies Plaintiff's erroneous and in many cases false allegations, for purposes of this Motion only, the facts alleged in the Complaint will be accepted as true. Fed. R.Civ.P. 12(b)(6).

through February 2014. (Complaint, ¶ 8). Plaintiff was hired as a Firefighter/EMT and held the rank of Captain at the time of his termination. (Complaint, ¶ 9). His job description entailed going on emergency calls, operating fire and medical apparatuses, and supervising others in his capacity of Captain. (Complaint, ¶ 10). Plaintiff was the first and only African American to work for LTUFD. (Complaint, ¶¶ 11-12). During his employment, Plaintiff earned the Act of Valor Award in 2011 due to his efforts in resuscitating a woman from cardiac arrest who was involved in a motor vehicle accident. (Complaint, ¶ 13).

On a daily basis throughout his employment, Plaintiff alleges that LTUFD employees, including Andrew Weimer, Matthew Croft, Luke Baker and Jack Wilkes, called him a "n*****," "porch monkey," "koon" and "spook." (Complaint, ¶¶ 14-17). These racial slurs were also voiced from LTUFD's supervisors, including Captain Ron Weisinger, Captain Chris DeStafano, District Chief Jason Baker, Deputy Chief Rusty Schoenfelt and Fire Chief Fred Schwartz. (Complaint, ¶ 18). These statements were made in front of other individuals. (Complaint, ¶ 19).

In 2008, Plaintiff complained about Andrew Weimer not fighting fire with him because he is black, but received no response. (Complaint, ¶ 21). In 2013, when Plaintiff was Captain, Mr. Weimer told Plaintiff, "I will never take orders from a n*****." (Complaint, ¶ 22). Plaintiff expressed concern to Deputy Chief Schoenfelt and Fire Chief Travis Lunglhofer over Mr. Weimer's statement, but received no response. (Complaint, ¶ 23).

Plaintiff alleges that he was routinely required to do more physically difficult tasks, menial, chore-based labor, that white members of LTUFD were not required to do. (Complaint, ¶ 25). In the Summer of 2013, Deputy Chief Schoenfelt shoved a bucket of paint in front of Plaintiff and instructed him to paint the LTUFD upstairs lounge and outside curb area, while the white members of the LTUFD were not required to perform such tasks on a daily basis.

(Complaint, ¶ 26). Deputy Chief Schoenfelt threatened Plaintiff that he would not be assigned to emergency calls or allowed upstairs if his painting job was not to Schoenfelt's "liking." (Complaint, ¶ 27). Plaintiff was also instructed by Captain DeStafano to clean up after other members in the gym and shower area, and Plaintiff did as he was instructed while being called LTUFD's "bitch." (Complaint, ¶¶ 28-30).

Plaintiff claims he was regularly and repeatedly pushed aside for training classes in favor of his white co-workers. (Complaint, ¶ 31). Plaintiff held a state certifications for EMT (April 2010), a national interior firefighter certification (August 2011), and completed course(s) in state/national hazmat operation. (Complaint, ¶ 33) Thereafter, in 2013, Plaintiff requested to take part in a "fire investigator/inspector" training class to obtain another national certification. (Complaint, ¶32). Plaintiff requested further training opportunities, but was told by District Chief Baker, "You're not taking this f****** class. We have enough people." (Complaint, ¶ 34). Plaintiff was denied clearance to undertake additional training, despite his offering to pay for said trainings himself. (Complaint, ¶ 36). Plaintiff also claims he was passed over for advancement in favor of his white co-workers, including Captain DeStafano and Jon Kimberly, both of which had less experience, training and certifications. (Complaint, ¶ 35).

In 2008 and 2013, LTUFD issued new protective equipment for all white members in Plaintiff's position, but Plaintiff was informed by Fire Chief Schwartz that LTUFD could not afford new equipment for Plaintiff, who had to use outdated equipment from the 1990's. (Complaint, ¶¶ 37-40). Plaintiff was told by Fire Chief Schwartz that he needed to "work his way up," even though Plaintiff was more tenured and more experienced than his white co-workers who received the new protective equipment. (Complaint, ¶ 41).

On two occasions, Plaintiff was physically assaulted by co-workers. (Complaint, ¶ 42). In

the first incident, occurring in early 2012, Matthew Croft kicked Plaintiff in the testicles with his steel-toe boot for asking for assistance with taking the trash out. (Complaint, ¶ 43). Plaintiff formally complained to LTUFD, but received no response. (Complaint, ¶ 44). The second incident, in late 2012, Plaintiff was assaulted while asleep. (Complaint, ¶ 45). Plaintiff contacted Fire Chief Lunglhofer regarding this second incident, where Lunglhofer pleaded with Plaintiff not to report the assault to the police for fear that it would put a "black eye" on the LTUFD. (Complaint, ¶¶ 46-47). Jack Wilkes was suspended, but not terminated for this assault of the Plaintiff. (Complaint, ¶ 48). Upon his return, Mr. Wilkes continued to harass Plaintiff. (Complaint, ¶ 49).

In November of 2013, Plaintiff was invited by his girlfriend and the Newburg Fire Department's Assistant Chief to attend a Newburg Fire Dept. social dance event at a public dance hall in Logan Township. (Complaint, ¶ 50). Following the event, Plaintiff received a certified letter from the Newburg Fire Department chastising Plaintiff for attending said event because he was not a member of the Newburg Fire Dept. and instructing that he was not allowed onto the property in the future. (Complaint, ¶¶ 51-52). Because he took issue with said letter, and as he under the impression that said letter was erroneously transmitted to him, Plaintiff accepted a subsequent invitation from his girlfriend and the Newburg Fire Dept. Assistant Chief to attend another social dance event in December of 2013. (Complaint, ¶¶ 53-57). Plaintiff believes that on numerous occasions, several of Plaintiff's LTUFD co-workers had attended Newburg Fire Dept. social gatherings. (Complaint, ¶ 56).

Following his attendance at the December 2013 Newburg Fire Dept. social dance event, Plaintiff was confronted by Fire Chief Schwartz about his attendance at said social event. (Complaint, ¶ 57). After Plaintiff confirmed his attendance and explained his rationale for

attending, Fire Chief Schwartz threatened Plaintiff by stating that if Plaintiff did not step down as Captain Chief Schwartz would suggest to the LTUFD Fire Chief that Plaintiff be terminated. (Complaint, ¶ 58). Plaintiff did not submit to said threat. (Complaint, ¶59).

In late February 2014, Plaintiff was called into a meeting with LTUFD Deputy Chief Schoenfelt, Fire Chief Lunglhofer and District Chief Baker where Plaintiff was dismissed as a Captain and terminated because it was "unbecoming" of Plaintiff to have attended a Newburg Fire Dept. social gathering. (Complaint, ¶¶ 60-62). Plaintiff claims that none of his white co-workers were reprimanded or terminated from their employment with LTUFD for attending a social gathering. (Complaint, ¶ 63).

During his career with LTUFD, Plaintiff wrote nearly twenty (20) formal complaints regarding the allegedly discriminatory and retaliatory conduct based on his race to both the LTUFD and the Logan Township Supervisors, resulting in the "typical response" of "We have a lot going on right now, and we'll deal with it later." (Complaint, ¶ 64-65). As the result of his being mistreated by the LTUFD, in February of 2014, Plaintiff was diagnosed with post-traumatic stress disorder ("PTSD"), for which he is still treating. (Complaint, ¶¶ 66-67).

As the result of these alleged facts, Plaintiff's Claim asserts claims of discrimination, harassment/hostile work environment, and retaliation pursuant to 42 U.S.C. § 1981, as well the state law tort of intentional infliction of emotional distress.

III. Standard of Review

A valid complaint requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). However, to survive a motion to dismiss, 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*, — U.S. —, —, 129 S.Ct. 1937, 1949 (2009)(citing, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

The Supreme Court in *Iqbal* clarified that the decision of *Twombly* "expounded the pleading standard for 'all civil actions.'" *Iqbal*, 129 S.Ct. at 1953. The Court explained that, although a court must accept as true all of the factual allegations contained in a complaint, that requirement does not apply to legal conclusions. Therefore, the pleadings must include factual allegations to support the legal claims asserted. *Id*. at 1949, 1953. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* at 1949 (citing, *Twombly*, 550 U.S. at 555); *See also, Phillips v. County of Allegheny*, 515 F.3d 224, 232 (3d Cir. 2008); *Wilkerson v. New Media Tech. Charter Sch.*, 522 F.3d 315 (3d Cir. 2008).

The determination of whether a complaint contains a plausible claim for relief is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 129 S.Ct. at 1950 (citing, *Twombly*, 550 U.S. at 556). Accordingly, to survive a motion to dismiss, a plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S.Ct. at 1949 (citing, *Twombly*, 550 U.S. at 556).

Under the Rule 12(b)(6) standard, a "court need not ... accept as true allegations that contradict matters properly subject to judicial notice or by exhibit." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001), amended by, 275 F.3d 1187 (9th Cir. 2001). Nor must the court accept inferences drawn by plaintiff if they are unsupported by the facts set forth in the complaint. *See*, *California Pub. Employee Ret. Sys. v. Chubb Corp.*, 394 F.3d 126, 143 (3d Cir. 2004)(*citing, Morse v. Lower Merion School Dist.,* 132 F.3d 902, 906 (3d Cir. 1997)).

IV. Argument

A. Plaintiff's Section 1981 Does Not Provide A Private Right of Action Against a State Actor, such as LTUFD.

It is well settled in this judicial circuit that Section 1981, "while providing extensive rights, does not itself provide a remedy against state actors." *McGovern v. City of Philadelphia,* 554 F.3d 114, 116 (3d Cir. 2009) (*citing, Jett v. Dallas Independent Sch. Dist.,* 491 U.S. 701,731, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989)). As such, civil claims for the alleged violation of the rights conferred under Section 1981 may not be asserted directly against state actors under Section 1981 because of the absence of a remedy. Rather, "the exclusive federal remedy against state actors for violation of rights guaranteed in § 1981 is 42 U.S.C. § 1983." *Id.*

In Pennsylvania, firefighting and fire protection is a governmental function, such that firefighters and fire departments, including volunteer fire departments, are state actors as a matter of law. *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1144-1148 (3d Cir. 1995). As a fire department for Logan Township, Pennsylvania, LTUFD is a "state actor" against which a Section 1981 action will not lie. Plaintiff's Section 1981 claims, therefore, should be dismissed, with prejudice, as they fail to state a claim upon which relief can be granted by reason of the absence of a remedy for Plaintiff's alleged Section 1981 claims against LTUFD. Fed. R.Civ. P. 12(b)(6); *McGovern*, 554 F.3d at 116; *Mark*, 51 F.3d at 1144-48.

Additionally, as this civil action was filed June 27, 2016, more than two years after Plaintiff's termination from LTUFD "in late February 2014," (Complaint, ¶¶ 60-61), Plaintiff should not be permitted to file an amended complaint to assert his Section 1981 rights under Section 1983 because such an amendment would be futile given the expiration of the two-year statute of limitations for Section 1983 actions in Pennsylvania. Fed. R.Civ.P. 15(a); *McGovern*,

554 F.3d at 115, n. 2 ("McGovern concedes that any potential claim under 42 U.S.C. § 1983 would be barred by its two-year statute of limitations.").

Accordingly, all of Plaintiff's Section 1981 claims, set forth in Counts I through III in the Complaint, should be dismissed as a matter of law. Fed. R.Civ.P. 12(b)(6).

1. No Private Right of Action Exists Under Section 1981 Against State Actors.

The issue of whether a private right of action against state actors exists under Section 1981 was considered and extensively analyzed by the United States Court of Appeals for the Third Circuit ("Third Circuit") in *McGovern v. City of Philadelphia,* 554 F.3d 114 (3d Cir. 2009)("In this appeal we consider whether a private right of action against state actors can be implied under 42 U.S.C. § 1981. We join five of our sister circuits in holding that it cannot."). In holding that no private right of action against state actors exists under Section 1981, the Third Circuit expressly noted the distinction between rights conferred by a statute and a remedy, stating that "this is not a matter of semantics: 'The distinction between rights and remedies is fundamental. A right is a well founded or acknowledged claim; a remedy is the means employed to enforce a right or redress an injury.'" *Id.* at 116 (*quoting, Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372, 384, 38 S.Ct. 501, 62 L.Ed. 1171 (1918)).

Analyzing the Supreme Court's decision in *Jett*, 491 U.S. 701, the Third Circuit held that, "while § 1981 creates *rights*, § 1983 provides the *remedy* to enforce those rights against state actors." *McGovern,* 554 F.3d at 116 (emphasis in original). Thereafter, the Third Circuit analyzed whether the Civil Rights Act of 1991, which amended Section 1981, superseded the Supreme Court's holding in *Jett*. Following an extensive analysis, the Third Circuit found that the Civil Rights Act of 1991 does not alter the holding in *Jett* or otherwise create a private cause

of action against state actors under Section 1981, holding:

> § 1981 created a substantive *right* that both private and state actors must refrain from violating, but the amendment did not create a *remedy* for that violation.
>
> Nothing in the 1991 amendments or its legislative history evidences Congress's desire to alter the Supreme Court's conclusion in *Jett*, nor was *Jett* even mentioned despite the fact that it was decided less than two years before Congress enacted the 1991 Act. Only one who never relies on committee reports would fail to be impressed by the total absence in the committee reports of any mention of *Jett*. Given the long-favored rule of statutory construction that repeals by implication are not favored, we would expect much more than complete silence if Congress intended to set aside such a notable ruling.
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> In sum, because Congress neither explicitly created a remedy against state actors under § 1981(c), nor expressed its intent to overrule *Jett*, **we hold that the express cause of action for damages created by § 1983 constitutes the exclusive federal remedy for violation of the rights guaranteed in § 1981 by state governmental units**. Accordingly, McGovern's § 1981 claim must fail.

McGovern, 554 F.3d at 120-121 (citations omitted; emphasis added).[3]

Since the Third Circuit's holding in *McGovern*, the courts in this judicial circuit have similarly held that Section 1981 does not provide a direct right of action against state actors. *See, e.g., Whaley v. Schiliro*, 644 Fed.Appx. 185 (3d Cir., March 16, 2016)("42 U.S.C. § 1983 provides the exclusive federal remedy for violation of the rights guaranteed in Section 1981."); *Shine v. Merenda*, 586 Fed.Appx. 95, 98 (3d Cir. 2014) (same); *Brown v. SEPTA,* 539 Fed.Appx. 25, 29 (3d Cir. 2013)(same); *Dieffenbach v. Dep't of Revenue*, 490 Fed.Appx. 433, 435 (3d Cir. 2012) ("a private right of action cannot be implied under 42 U.S.C. § 1981"); *Talbert v. Judiciary of the State of N.J.,* 420 Fed.Appx. 140, 141 (3d Cir. 2011)("rights guaranteed by §

[3] In reaching this conclusion, the Third Circuit noted that "§ 1981(c) can establish equal *rights* for parties against private and state defendants without establishing equal *remedies*; the fact that § 1981(c) establishes a private right of action against private defendants does not lead to the conclusion that a parallel right must exist for suits against state defendants if such actions are provided for elsewhere in the statutory scheme," referring to Section 1983. *McGovern*, 554 F.3d at 118 (emphasis in original).

1981 are enforceable against state governmental units only in an action under § 1983"); *N'Jai v. Floyd,* 386 Fed.Appx. 141, 144 (3d Cir. 2010)(same); *Ford v. SEPTA,* 374 Fed.Appx. 325, (3d Cir. 2010)(same); and *Daniels v. Sch. Dist. of Phila.,* 982 F.Supp.2d 462, 478 (E.D. Pa. 2013) (same).

The law in this judicial circuit is clear: there exists no private cause of action against a state actor arising under Section 1981. *McGovern,* 554 F.3d at 116, 120-121.

2. LTUFD is a State Actor.

Having determined that no private remedy exists as to state actors under Section 1983, Plaintiff's claims will necessarily fail if LTUFD is a state actor. In Pennsylvania, the provision of fire protection is a governmental function, and fire companies, including volunteer fire companies, are state actors. *Mark,* 51 F.3d at 1145-1147; *see also, e.g., Comm. v. Barker*, 211 Pa. 610, 61 A. 253 (1905) ("the protection of the city from fire is a municipal function of the highest importance."); *Guinn v. Alburtis Fire Co.*, 531 Pa. 500, 614 A.2d 218, 219-20 (1992) (volunteer fire companies are entitled to governmental immunity even when not engaged in firefighting activities); *Tallon v. Liberty Hose Co. No. 1*, 485 A.2d 1209 (Pa.Super. 1984)(a volunteer fire company may be held liable under Section 1983).

In the instant case, LTUFD's authority to act as a fire company is derived from the authority of Logan Township, Pennsylvania. Pursuant to 53 P.S. § 66801, *et seq.*, Logan Township, a Second Class Township, provided for fire protection within the township. 53 P.S. § 66801, § 66803. In order to establish appropriate fire districts and establish official fire companies to be responsible for those fire districts, Logan Township enacted an ordinance titled, "Establishment of Fire Districts and Recognition of Fire Companies." Logan Township, Pennsylvania, Code of Ordinances, Chapter 7: Fire Prevention and Fire Protection, Part 6

Establishment of Fire Districts, § 601, *et seq.* [Ord. 10-15-98],[4] The purpose of this Ordinance is expressly to "establish fire districts in the Township and to recognize the fire companies authorized to fight fires in the established districts as well as adopt standard operating procedures for the fire companies recognized." *Id.* at § 602 (Exhibit A hereto). LTUFD is one of five officially recognized fire companies by Logan Township. *Id.* at § 604 A (Exhibit A hereto). Under this Ordinance, LTUFD is expressly authorized by Logan Township as follows:

> **A.** The Fire Companies recognized by the Township are hereby authorized to provide such services to the Township as may be necessary for the protection of property and persons situate therein which include, by way of example and not of limitation, the extinguishment and prevention of loss of life and property from fire, automobile accidents, medical emergencies, hazardous materials incidents, and other dangerous situations.
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> **B.** The Fire Companies may also provide non-emergency and public service functions, such as, again by way of example and not of limitation, removing water from property after storms, and assisting in the removal, abatement and prevention of damage or injury to persons or property, whether through natural causes or man-made situations.
>
> **C.** The Fire Companies may also conduct and participate in such training activities and drills either within or outside the Township, as may be deemed necessary by the Township to maintain proficiency in providing service.
>
> **D.** The Fire Companies may also respond to calls and provide services to Fire Districts and municipalities outside of the Fire Districts assigned to such Fire Companies as permitted by the Township.

Id. at § 606 (Exhibit A hereto).

Notably, these government mandated services of LTUFD are exactly the kinds of duties, responsibilities and functions of LTUFD alleged in the Complaint. *See, e.g.,* Complaint ¶¶ 9-10.

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[4] The Logan Township Code of Ordinances is available online at: http://ecode360.com/LO3531; *see also,* http://www.logantownship-pa.gov/index.asp?Type=B_BASIC&SEC={6CE7B3C1-B27F-4313-B004-4B0685E8E2EC}. The relevant portions of said Code of Ordinances are attached hereto as Exhibit "A."

As firefighting is a governmental function as a matter of Pennsylvania law, LTUFD is a state actor. *Mark,* 51 F.3d at 1145-1147. Moreover, as LTUFD is an officially appointed fire department by Logan Township, it is unquestionable that LTUFD performs a government function and is a state actor. *Id.*; Logan Township, Pennsylvania, Code of Ordinances, § 601, *et seq.* [Ord. 10-15-98] (Exhibit A hereto). *See also, Gemmell v. Gill Hall V.F.D.,* Civ. No. 06-1024, 2007 U.S. Dist. LEXIS 52289, 2007 WL 2085327 (W.D. Pa. 2007) ("With respect to the traditional exclusive government functions test, firefighting has been deemed to be a traditional exclusive government function in Pennsylvania. Courts have consistently recognized volunteer fire departments as engaging in a public function and volunteer firefighters as state actors."(*citing, Mark,* 51 F.3d at 1145-46, 1148; *Tallon*, 485 A.2d at 1209)).

LTUFD is a volunteer fire department duly authorized to serve and protect Logan Township from fires and other emergency situations.[5] As such, under well-established Pennsylvania law, LTUFD is a state actor. *Mark,* 51 F.3d at 1145-1147; *Barker*, 211 Pa. 610; *Guinn*, 531 Pa. 500, 614 A.2d at 219-20; *Tallon*, 485 A.2d 1209. As such, no private claim for violation of Section 1981 may be asserted against LTUFD. *McGovern,* 554 F.3d at 116, 120-121. Plaintiff's Section 1981 claims, set forth at Counts I through III of the Complaint, should, therefore, be dismissed. Fed. R.Civ.P. 12(b)(6).

3. Leave to Amend to Assert Section 1983 Claims is Barred by the Two Year Statute of Limitations.

Plaintiff's Complaint does not assert any claim under Section 1983. *See, generally,* Complaint [Dkt. 1]. This is presumably because any Section 1983 claim in this case would be

[5] Plaintiff is well aware of the government function provided by the LTUFD, as he admits in his Complaint that he brought his "nearly twenty (20) formal complaints" regarding the allegedly discriminatory conduct both to LTUFD's supervisory personnel, as well as "to Logan Township Supervisors Mr. Edward Frontino and Mr. James Patterson." (Complaint, ¶ 64).

barred by application of the two-year statute of limitations for Section 1983 claims in Pennsylvania. *See, McGovern*, 554 F.3d at 115, n. 2 ("McGovern concedes that any potential claim under 42 U.S.C. § 1983 would be barred by its two-year statute of limitations."); *see also, Tearpock-Martini v. Borough of Shickshinny,* 756 F.3d 232, 240 (3d Cir. 2014)(Claims that "arise under § 1983 are barred by Pennsylvania's two-year statute of limitations."); *Bougher v. Univ. of Pittsburgh,*882 F.2d 74, 78-79 (3d Cir. 1989).

Plaintiff admits that his membership in the LTUFD was terminated "in late February 2014." (Complaint, ¶¶ 60-61). As Plaintiff's Complaint was not filed until June 27, 2016, any attempt to assert Plaintiff's Section 1981 claims under Section 1983 would be barred by the two-year statute of limitations for Section 1983 claims, which expired "in late February" of 2016, two years after Plaintiff's termination from LTUFD. Plaintiff's Complaint was filed four months following the expiration of the statute of limitations for Section 1983 claims.

Generally, courts should provide leave to amend a pleading unless the amendment would be inequitable or futile. *Grayson v. Mayview State Hospital,* 293 F.3d 103, 108 (3d Cir. 2002); *In re Burlington Coat Factory Litig.,* 114 F.3d 1410, 1434 (3d Cir. 1997); Fed. R.Civ.P. 15(a).

In this case, as the statute of limitations to assert Plaintiff's Section 1981 claims under Section 1983 expired in "late February" of 2016, prior to the June 27, 2016 filing of this civil action, any amendment to now assert said claims under Section 1983 would be futile as time barred. Accordingly, leave to amend to assert the Section 1981 claims under Section 1983 in this civil action should be denied as futile. Fed. R.Civ.P. 15(a).

B. Plaintiff's State Law Claim for Intentional Infliction of Emotional Distress is Barred by the Two Year Statute of Limitations.

Under federal law, a defendant is permitted to raise the statute of limitations in a motion

to dismiss, even though the statute of limitations is an affirmative defense, provided that the plaintiff's untimeliness in bringing the action is apparent from the face of the complaint. *Pension Trust Fund for Operating Eng'rs v. Mortgage Asset Securitization Trans., Inc.,* 730 F.3d 263, 271 (3d Cir. 2013); *W. Penn Allegheny Health Sys., Inc. v. UPMC,* 627 F.3d 85, 105 n. 13 (3d Cir. 2010).

Plaintiff's state law claim for intentional infliction of emotional distress ("IIED") is subject to a two-year statute of limitations. 42 Pa. C.S. § 5524(7). *See also, Robinson v. CONRAIL,* 668 F.Supp.2d 678, 692 (M.D. Pa. 2009)("The statute of limitations for intentional infliction of emotional distress in Pennsylvania is two years from the date of the last conduct.").

As set forth above, Plaintiff admits and alleges that his membership in the LTUFD was terminated "in late February 2014." (Complaint, ¶¶ 60-61). All of the allegedly outrageous conduct giving rise to Plaintiff's IIED claim occurred while Plaintiff was a member of the LTUFD, prior to said termination in "late February 2014." As Plaintiff's Complaint was not filed until June 27, 2016, Plaintiff's IIED claim is barred by the two-year statute of limitations under 42 Pa. C.S. § 5524. Plaintiff's Complaint was filed four months following the expiration of the statute of limitations an IIED claim. 42 Pa. C.S. § 5524; *Robinson,* 668 F.Supp.2d at 692.

Accordingly, Plaintiff's IIED claim, set forth at Count IV of the Complaint, should be dismissed. Fed. R.Civ.P. 12(b)(6).

C. Plaintiff's Intentional Infliction of Emotional Distress Claim is Barred by the Immunity Provisions of the Pennsylvania Political Subdivision Tort Claims Act.

In addition to being barred by the applicable statute of limitations, 42 Pa. C.S. § 5524, Plaintiff's IIED claim should also be dismissed because LTUFD is immune from such tort claims under the Pennsylvania Political Subdivision Tort Claims Act, 42 Pa. C.S.A. § 8541, *et seq.*

("PSTCA"). *See, Mark,* 51 F.3d at 1145 (*quoting*, *Guinn v. Alburtis Fire Co.*, 531 Pa. 500, 614 A.2d 218, 219-220 (1992))("a volunteer fire company is a local agency entitled to governmental immunity" under the PSTCA and "governmental immunity applies even when they are not engaged in fire-fighting activities.").

Under the PSTCA, "no local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person." 42 Pa. C.S. § 8541. Immunity under the Political Subdivision Tort Claims Act is a question of law. *Christy v. Cranberry Volunteer Ambulance Corps., Inc.*, 579 Pa. 404, 410, 856 A.2d 43, 46 (2004). "The overall purpose of the Tort Claims Act, of course, is to limit governmental exposure to tort liability for its acts." *Sphere Drake Ins. Co. v. Phila. Gas Works*, 566 Pa. 541, 548, 782 A.2d 510, 515 (2001). *See also, Lory v. City of Philadelphia*, 544 Pa. 38, 43, 674 A.2d 673, 675-76 (1996), *cert. denied,* 519 U.S. 870, 117 S. Ct. 184 (1996); *Smith v. City of Philadelphia,* 512 Pa. 129, 139-40, 516 A.2d 306, 311 (1986). Pennsylvania's courts have upheld this immunity in cases where the claim did not fall within one of the eight exceptions to the governmental immunity provided for in the Political Subdivision Tort Claims Act, 42 Pa. C.S. § 8542(b).[6]

> In order for liability to be imposed on a local agency, 42 Pa.C.S. § 8542(a) sets forth three conditions that must be met. First, the damages must be recoverable under common law or a statute creating a cause of action if the injury were caused by a person not having available a defense under 42 Pa.C.S. § 8541. Second, the injury must have been caused by the negligent acts of the local agency or an employee of the local agency acting within the scope of his or her office or duties. Finally, the negligent action **must fall within one of the exceptions to governmental immunity set forth in 42 Pa.C.S. § 8542(b)**. *Lindstrom v. City of*

[6] Under the PSTCA, the eight (8) exceptions to governmental immunity are: (1) vehicle liability; (2) care, custody or control of personal property; (3) real property; (4) trees, traffic controls and street lighting; (5) utility service facilities; (6) streets; (7) sidewalks; and (8) care, custody or control of animals. 42 Pa. C.S. § 8542(b).

> *Corry*, 563 Pa. 579, 763 A.2d 394(2000). The plaintiff has the burden of demonstrating that all three conditions have been met.

Sweeney v. Merrymead Farm, Inc., 799 A.2d 972 (Pa.Cmwth. 2002) (emphasis added).

In the instant case, LTUFD is a "local agency" entitled to the protection of governmental immunity under the PSTCA. *Mark,* 51 F.3d at 1145; *Guinn*, 531 Pa. 500, 614 A.2d at 219-220; *see also,* section IV.A.2., *supra*. (regarding LTUFD being a state actor). While the PSTCA provides for eight (8) exceptions to governmental immunity, none of the exceptions apply to the alleged discriminatory and disparate conduct alleged in support of Plaintiff's claim for IIED. 42 Pa. C.S. § 8542(b). *See,* Complaint, ¶¶ 123-126 (alleging IIED based upon racial discrimination, retaliation and harassment).

Therefore, Plaintiff's claim for IIED, set forth at Count IV of the Complaint, should be dismissed against LTUFD because of the immunity provided by the PSTCA. 42 Pa. C.S. § 8541; Fed. R.Civ.P. 12(b)(6).

V. Conclusion

For the above-stated reasons, it is respectfully requested that this Honorable Court grant the instant Motion, thereby dismissing Plaintiff's Complaint. Fed. R.Civ.P. 12(b)(6).

JURY TRIAL DEMANDED

Respectfully Submitted,

MARGOLIS EDELSTEIN

Date: September 13, 2016

/s/ Kyle T. McGee

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