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FRANK LONG, JOSEPH SHIPLEY, MICHAEL WHITE, individually and on behalf of all others similarly situated, Plaintiffs, v. SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, Defendant.	COURT OF COMMON PLEAS PHILADELPHIA COUNTY May Term, 2017 No. 00784 Class Action

REPLY IN SUPPORT OF DEFENDANT'S PRELIMINARY OBJECTIONS TO PLAINTIFFS' COMPLAINT

A. This Action Should Be Dismissed Pending Disposition of the Federal Action

The most telling support for dismissal due to the interconnectedness of the federal action and this action is Plaintiffs' reliance on the federal court proceedings as a basis to attempt to defeat sovereign immunity. Even if sovereign immunity could be waived (*see* Section B *infra*), Plaintiffs' contention of waiver necessarily depends on the outcome of the federal appeal, according to Plaintiffs' own argument. Plaintiffs' argument in response to SEPTA's preliminary objections to the complaint reveals the validity of SEPTA's *lis pendens* defense.

Contrary to the assertions by Plaintiffs, the factual basis and alleged damages for Plaintiffs' federal FCRA claims overlap substantially with their state CHRIA claims. In both this action and the federal action, Plaintiffs have demanded "actual" damages in addition to statutory damages. Without regard for whether "actual" damages are recoverable, the only conceivable basis for "actual" damages would relate to the denial of employment based on a background check. Whether the denial of employment was because of a procedure to obtain the background checks (FCRA) or a policy providing for their use (CHRIA), the result and only conceivable source of "actual" damages are the same – no employment. By persisting with this action, Plaintiffs are attempting a "double-recovery" for the same "actual" damages which should not be permitted.

Plaintiffs have identified no prejudice or legally cognizable reason why this action cannot be either held in suspense or dismissed pending the outcome of the federal action, whereas SEPTA has identified a basis for actual and unfair prejudice. SEPTA would be forced to defend two substantially similar claims in two different jurisdictions simultaneously, requiring two parallel and duplicative courses of discovery. Plaintiffs would have two opportunities to attempt to prove damages and potentially receive recoveries, including two separate awards for attorneys' fees and costs for substantially similar and likely duplicative work. In the interest of judicial economy, Plaintiffs' CHRIA claims before this Court should be either held in suspense or dismissed pending the outcome of Plaintiffs' federal claims.

B. SEPTA Is Immune from CHRIA Claims

SEPTA is immune from Plaintiff's CHRIA claims. Sovereign immunity is not a waivable defense. *See, e.g., Tulewicz v. SEPTA*, 606 A.2d 427 (Pa. 1992) (sovereign immunity defense is non-waivable); *see also SEPTA v. Hussey*, 588 A.2d 110 (Pa. Cmmw. Ct. 1991) ("it is well established that governmental immunity cannot be waived."). Sovereign immunity is a valid defense no matter when raised.

The law does not support a distinction between SEPTA and state colleges for purposes of sovereign immunity. SEPTA, like Pennsylvania state colleges, is a Commonwealth agency entitled to sovereign immunity on CHRIA claims. *See Poliskiewicz v. East Stroudsburg University*, 536 A.2d 472, 475 (Pa. Cmmw. Ct. 1998) (barring CHRIA claims against state colleges). When the Commonwealth Court found that state colleges were immune from CHRIA claims, it relied on court decisions explaining that state colleges were Commonwealth agencies, including *Finkelstein v. Shippensburg State College*, 370 A.2d 1259, 1260 (Pa. Cmmw. Ct. 1977). In *Finkelstein*, the Commonwealth Court specifically noted that Shippensburg State College was "a state agency, owned and operated by the Commonwealth." 370 A.2d at 1260; *see also Williams v. West Chester State College*, 370 A.2d 774, 775-6 (Pa. Cmmw. Ct. 1977) ("It is clear that West Chester State College is a state agency owned and operated by the Commonwealth. Based upon this status, … state colleges are cloaked with sovereign immunity."); *Brungard v. Hartman*, 315 A.2d 913, 914 (Pa. Cmmw. Ct. 1974) ("There is no question that [Mansfield State College] is an agency of the Commonwealth …. As an agency of the Commonwealth, Mansfield State College is cloaked with sovereign immunity.").

Plaintiffs' reliance on *Taha v. County of Bucks*, , ___ F.3d ____, No. 16-3007, 2017 WL 2871757 (3d Cir. July 6, 2017), a recent federal court opinion, is misplaced. *Taha* is a nonbinding opinion unrelated to an employer's use of criminal history information in hiring

decisions. *Taha* examined whether an arrestee could sue county defendants for actual and punitive damages for publishing his expunged arrest record in violation of a different section of the CHRIA, Section 9121. Section 9121 restricts government entities from publishing expunged arrest records. It makes sense that a government agency would not be immune from a Section 9121 violation, since the section is specifically directed to government entities.

SEPTA did not waive its sovereign immunity defense by not moving to dismiss the amended complaint in the federal action on the basis of immunity. The federal action was dismissed before SEPTA answered the complaint. Even if sovereign immunity was a waivable defense, which it is not, it would be asserted in an answer in federal proceedings, a notice pleading forum. Plaintiffs' argument is akin to arguing waiver because a defense was not asserted in preliminary objections to a complaint. The only conceivable source of waiver of a defense would be through failure to include the defense in new matter. Pre-answer motion practice challenging the sufficiency of a complaint cannot be a source of waiver of defenses asserted with the answer. Whether the pleading standard supports a pre-answer factual or legal sufficiency challenge depends on the forum.

The law provides SEPTA immunity from Plaintiffs' CHRIA claims under Section 9125. The question presented by this action is whether Plaintiffs can bring claims under Section 9125 of the CHRIA against an employer, who is a Commonwealth agency. SEPTA is not accused of publishing expunged arrest records in violation of Section 9121. Unlike Section 9121, Section 9125 is not directed to government entities or related to employment. Case opinions relating to Section 9121 are inapplicable.

The immunity from CHRIA claims enjoyed by state colleges is not different than the immunity enjoyed by SEPTA. Both SEPTA and state colleges are considered Commonwealth agencies entitled to the same immunity from CHRIA claims. No case opinion exists that supports anything other than SEPTA's immunity from the CHRIA claims asserted by Plaintiffs. Accordingly, SEPTA's preliminary objections to the complaint should be sustained and Plaintiffs' complaint should be dismissed with prejudice.

C. Plaintiffs' Claims Fail on the Merits

Plaintiffs' individual claims fail because Plaintiffs' did not sufficiently plead the elements of a claim under the CHRIA. A violation of the CHRIA requires more than merely being denied employment due to a conviction. In fact, the CHRIA is a permissive statute that allows an employer to deny employment due to a conviction, including "minor" convictions.

To establish their claims, Plaintiffs must plead facts that show their disqualifying convictions were unrelated to their suitability for employment. Plaintiffs merely asserted that their felony convictions were "minor." Plaintiffs failed to allege any further facts sufficient to actually perform an individual suitability assessment, such as grading of crimes, length of incarceration, aggravating factors, or any other circumstances of their convictions. Without allegations that reveal that their disqualifying convictions were unrelated to their suitability for the positions for which they applied, Plaintiffs cannot make out their claims under the CHRIA.

The *Taha v. Cty. of Bucks* opinion relied on by Plaintiffs also does not support their claims. *Taha* applies the *Federal Rules of Civil Procedure*, rather than the *Pennsylvania Rules of Civil Procedure*. Even still, *Taha* explains:

> A court certifying a class … must "find[ ] that ***the questions of law or fact common to class members predominate over any questions affecting only individual members.***" … An individual question is one where members of a proposed class will need to

> present evidence that varies from member to member, while a common question is one where the same evidence will suffice for each member, while a common question is one where the same evidence will suffice for each member ….

Taha v. Cty. of Bucks, No. 16-3077, 2017 WL 2871757, at *12 (3d Cir. July 6, 2017) (citing *Tyson Foods, Inc. v. Bouaphakeo*, 136 S.Ct. 1036, 1045 (2016). The *Taha* court further explained that this "requirement focuses on whether essential elements of the class's claims can be proven at trial with common, as opposed to individualized, evidence." *Id.* (*quoting Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349 (3d Cir. 2013)).

Here, Plaintiffs' claims depend entirely on individualized determinations of suitability for employment for each class member. Plaintiffs' own pleadings acknowledge that their claims require an examination of individual factors, such as "the nature of the crime, the age of the conviction, [each applicant's] employment history, and the years [each applicant] has been in the general population without any further convictions," to determine whether the disqualifying conviction relates to suitability for employment in the applied for position. See Exhibit "A" at ¶¶ 41, 54, 63. This evidence varies among the three named Plaintiffs – much less the entire class. Even the named Plaintiffs do not have the same convictions or criminal records, the same ages of convictions, the same employment history, the same number of years without further convictions or the same applied for positions. There is no way to evaluate whether a class member's disqualifying conviction relates to suitability for employment without performing an individualized assessment. Thus, Plaintiffs' claims do not qualify for class treatment.

Both the individual and class claims fail on their merits based on the pleadings. Plaintiffs' individual claims fail because Plaintiffs have not plead allegations that reveal their disqualifying convictions were not related to their suitability for employment. The putative class

claims do not qualify for class treatment on the face of the pleadings. Accordingly, SEPTA's preliminary objections to the complaint should be sustained and Plaintiffs' claims dismissed with prejudice.

D. Exemplary and Punitive Damages Should be Struck

SEPTA is a Commonwealth agency employer. Contrary to Plaintiffs' assertions, under *Feingold v. SEPTA*, 517 A.2d 1270 (Pa. 1986), Commonwealth agencies, including SEPTA, are broadly immune from punitive damages. Pennsylvania courts routinely cite *Feingold* for this proposition. *See e.g., Rhoads v. Philadelphia Housing Authority*, 978 A.2d 431 (Pa. Cmmw. Ct. 2009) (holding that punitive damages were unavailable in a lawsuit against the Philadelphia Housing Authority alleging wrongful use of civil proceedings and fraudulent misrepresentation because "the Supreme Court has specifically declared that such damages are not recoverable against an authority that is an agency of the Commonwealth."); *Bolden v. SEPTA*, 953 F.2d 807, 830-1 (3d Cir. 1991) (holding that a former SEPTA employee bringing claims for an allegedly unconstitutional drug test that resulted in his discharge could not receive punitive damages because SEPTA is a Commonwealth agency); *JHE, Inc. v. SEPTA*, No. 011101790, 2002 WL 1018941 (Pa. Com. Pl. May 17, 2002) (striking a contractor's demands for punitive damages against SEPTA in a lawsuit for alleged violations of the Pennsylvania Public Works Bond Payment Act and breach of contract).

Since *Feingold*, the Pennsylvania Supreme Court has reaffirmed that "*Feingold* … held that it is against the public policy of our Commonwealth to award punitive damages against a Commonwealth agency." *City of Philadelphia Office of Hous. & Cmty. Dev. v. Am. Fed'n of State Cty. & Mun. Employees, Local Union No. 1971*, 876 A.2d 375, 378 (Pa. 2005). The

Pennsylvania Supreme Court further explained that an "award of punitive damages against [a Commonwealth entity] cannot stand because it exacts retribution on the blameless or unknowing taxpayers who would bear the brunt of the award." *Id.*

The case opinions relied on by Plaintiffs, *Taha* and *In re Pittsburgh Citizen Police Review Board*, 16 Pa. D. & C. 5th 435, 441-2 (Pa. Com. Pl. Sept. 23, 2010), *aff'd,* 36 A.3d 631 (Pa. Cmmw. Ct. 2011), also do not support liability for punitive damages under CHRIA. As discussed above, in *Taha*, a federal court examined whether an arrestee could recover punitive damages against a county and a county correctional facility for "willfully" publishing his expunged arrest record in clear violation of Section 9121 if CHRIA. Similarly, in *In re Pittsburgh Citizen Police Review Board*, the Allegheny County Court of Common Pleas stated in dicta that if a police department were to disseminate intelligence, investigative or treatment information in violation of CHRIA, it could be subject to a range of damages. 16 Pa. D. & C. 5th at 441-2. The *Taha* and *In re Pittsburgh Citizen Police Review Board* opinions have nothing to do with Plaintiffs' current claims against SEPTA. Furthermore, both are nonbinding opinions that do not address or limit SEPTA's well-established immunity from punitive damages.

Plaintiffs' demand for exemplary and punitive damages is invalid, as a matter of law. Accordingly, SEPTA's preliminary objections to the complaint should be sustained and the demand for exemplary and punitive damages should be stricken.

E. Conclusion

Defendant SEPTA respectfully requests that its preliminary objections to Plaintiffs' Complaint be sustained and that Plaintiffs' Complaint be dismissed with prejudice.

Respectfully submitted,

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