

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

| | | |
|------------------------------------|---|----------------|
| ARTHUR ALAN WOLK, | : | |
| | : | |
| Plaintiff, | : | CIVIL ACTION |
| | : | |
| v. | : | No. 00-CV-6394 |
| | : | |
| UNITED STATES OF AMERICA, NATIONAL | : | |
| TRANSPORTATION SAFETY BOARD, TEN | : | |
| UNKNOWN NTSB EMPLOYEES, | : | |
| ALLIEDSIGNAL INC. and HONEYWELL | : | |
| INTERNATIONAL, INC., | : | |
| | : | |
| Defendants. | : | |

MEMORANDUM

BUCKWALTER, J.

October 25, 2001

Currently before the Court are Defendants’ Motions to Dismiss Plaintiff’s Second Amended Complaint. Arthur Alan Wolk (“Plaintiff”) alleges a total of eight counts against the three defendants: (1) the National Transportation Safety Board, an independent federal government agency, and through it, the United States government (“NTSB” or “the Government”); (2) Ten Unknown NTSB Employees (“Employees”); and (3) AlliedSignal, now Honeywell International, Inc. (“AlliedSignal”). Defendants seek dismissal of all counts. The Court will grant Defendants’ motions and will dismiss Plaintiff’s complaint in its entirety.

I. BACKGROUND

The case at bar centers around an NTSB investigation and accompanying NTSB report regarding an airplane crash in which Plaintiff was the pilot. Following Plaintiff's accident, NTSB, with contributions from AlliedSignal, a manufacturer of airplane components, investigated the crash, assessed possible causes for it and generated a report for publication on NTSB's website. Upon reading the report, Plaintiff identified some alleged misstatements or inaccuracies and brought them to NTSB's attention. Accordingly, NTSB withdrew the report, disseminated corrections and apologized to Plaintiff. Plaintiff emphasizes in his complaint that, "[o]ne of the most egregious errors [was the implication that]...plaintiff was not properly licensed to fly...." Compl. ¶ 37. This "error" allegedly occurred because NTSB relied on misinformation provided by a news reporter.

After removing the first report, NTSB conducted a second investigation and, with Plaintiff's contributions, drafted another report. Nonetheless, Plaintiff alleges that "factual mistakes" from the initial report reappeared in the second website report. Compl. ¶ 49. Plaintiff alleges that these inaccuracies, and specifically the one about Plaintiff's license, have created a negative impression of him in the media and in the community, thereby damaging his reputation. This alleged injury, Plaintiff claims, has resulted in a loss of business prospects and in public humiliation.

Additionally, Plaintiff suggests that these "errors" were intentional and personally motivated. As a successful aviation attorney, Plaintiff asserts that he has devoted his legal career to "handling airplane crash cases for the families of those killed or injured." Compl. ¶ 8. He also claims to be a preeminent aviation expert, sought after by news media and clients. Compl. ¶ 10.

Plaintiff contends that on account of his legal success and his investigative skill he has “angered employees of the NTSB, who were embarrassed and annoyed that they could spend years ‘investigating’ accidents and not come up with the correct cause, while some lawyer was able to do so consistently.” Compl. ¶ 11. Therefore, Plaintiff contends, Defendants were deliberately careless and reckless in investigating Plaintiff’s accident and provided misinformation that “has and will destroy him both professionally, personally and emotionally.” Compl. ¶ 141, 159 (c-g). Accordingly, Plaintiff brought this action targeting the nature of the investigation, the alleged inaccuracies of NTSB’s reports and the alleged effect of the false statements in the report on Plaintiff.

II. LEGAL STANDARD

For a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court looks first at the language of the rule which provides that, in response to a pleading, a defense of "failure to state a claim upon which relief can be granted" may be raised by motion. Fed. R. Civ. P. 12(b)(6). In considering a motion to dismiss, the court must only consider those facts alleged in the complaint. See ALA v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994). Also, the court must take all well pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. See Jenkins v. McKeithen, 395 U.S. 411, 421 (1969). The pleader must provide sufficient information to outline the elements of the claim, or to permit inferences to be drawn that these elements exist. Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d Cir. 1993). A complaint should be dismissed if "it is clear that no relief could be granted

under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

III. DISCUSSION

Plaintiff's complaint contains the following eight counts: (1) Willful, Wanton, Reckless and Negligent Interference with Business, Profession and Property Rights; (2) Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*; (3) Defamation and Trade Libel; (4) Denial of Equal Protection Under the Fifth Amendment of the United States Constitution; (5) Intentional Infliction of Emotional Distress; (6) Obstruction of Justice and Lying to a Federal Agency; (7) Civil Conspiracy and Concerted Action; and (8) Equitable Relief and Injunction. Each defendant is charged with a different combination of counts.

A. Claims Barred By the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.*

1. Claims Against Employees

Plaintiff asserts claims against Ten (10) Unknown NTSB employees, and specifically served three individuals who he explains are not named defendants but instead represent the unknown employees for the purpose of effectuating service of process.¹ Accordingly, the Court will treat the three named employees in the same manner as the unknown ones.

¹ These individuals are: Frank S. Gattolin, Carl Dinwiddie and Daniel D. Campbell. Plaintiff states in his brief opposing Defendant's motion to dismiss that he sued "Ten Unidentified Employees of the NTSB and was compelled to serve someone, so he served three individual NTSB employees known to him." Pl. Br. at 2.

The Court will dismiss the claims against all employees because the claims arise out of behavior that occurred while the employees were acting within the scope of their employment. Therefore, only the Government could be liable for the employees' behavior. See Brumfield v. Sanders, 232 F.3d 376, 383-4 (3d Cir. 2000). Plaintiff disagrees with the first premise of this analysis contending that Employees failed to follow NTSB procedures thereby exceeding the scope of their employment. The Court disagrees.

The government as in Brumfield has filed a certification of scope of employment and moved to substitute the United States of America pursuant to 28 U.S.C. § 2679 as to any and all tort claims filed against the employees. In response to this, plaintiff states that the certification is improperly submitted but does not say why that is so. He then states that, "This is a motion to dismiss. Evidence is for later on." (*See* Plaintiff's Memorandum of Law in Opposition to Federal Defendants Frank S. Gattolin, Carl Dinwiddie and Daniel D. Campbell's Motion to Dismiss Plaintiff's Second Amended Complaint (Docket No. 35) at p. 6). He concludes by saying that in any event, the Second Amended Complaint shows that the acts of individual defendants were not in the scope of their employment.

The submission of the Affidavit and motion for substitution was attached to the individual defendants' brief in support of their motion to dismiss. As previously stated, plaintiff thinks this is improperly submitted, a proposition with which the court does not agree.

It is true, of course, that this is a motion to dismiss but the issue involving scope of employment and how it should be handled was thoroughly developed by the Third Circuit in Melo v. Hafer, 13 F.3d 736 (3d Cir. 1994). It is entirely appropriate, where as in this case, plaintiff relies on the allegations of his complaint, which to the extent they allege fact and not

opinion, the court accepts as true, to make the determination of scope of employment on that basis.

The Third Circuit in Brumfield quotes the Restatement (Second) of Agency § 230 to explain that “an act, although forbidden or done in a forbidden manner, may be within the scope of employment.” 232 F.3d at 381. The Brumfield court decided that government employees who provided false information during an internal government agency investigation were still acting in the scope of their employment. The court noted that it was “within the scope of Defendant’s employment duties to cooperate with investigators....” Therefore, even though the employees provided inaccurate information, the overall activity was incidental to the employer’s business and fell within the scope of the employment. Id.

In this way, Brumfield resembles the situation at bar. Here, Employees were merely operating within the range of responsibilities allocated to them. Therefore, even if Plaintiff’s allegations about Employees are true, Employees would still be immune to suit. Moreover, even though the Government could be held liable for the actions of its employees, the nature of the claims in this complaint preclude liability. As discussed in more detail *infra*, Plaintiff’s claims are barred by the FTCA because they arise out of alleged instances of defamation. The motion for substitution of the United States of America is granted.

2. Claims Against the United States of America²

² A lawsuit complaining of a federal government agency’s conduct should be brought against the United States government rather than the agency itself. See, e.g., Sarraga v. Girod Vela & Co., Inc., 649 F. Supp. 11, 12-13 (D.P.R. 1986). Plaintiff’s complaint names the United States of America as a party and lists the NTSB beneath it. Accordingly, the Court construes Plaintiff’s suit only to be against the United States of America.

The threshold issue in evaluating Plaintiff's claims against the United States is whether it is immune from suit for these causes of action. It is undisputed that the United States of America may not be sued unless it waives immunity through a Congressional statute. See, e.g., United States v. Mitchell, 445 U.S. 535, 538 (1980). Although the Government partly waived its immunity through the Federal Tort Claims Act, see 28 § U.S.C. 2671 et seq., it retained some exceptions including one which states that this waiver shall not apply to "[a]ny claim arising out of...libel, slander..." 28 § U.S.C. 2680(h). Courts have treated claims for defamation and harm to reputation as encompassed by this provision. See, e.g., Madden v. Runyon, 899 F. Supp. 217, 226 (E.D. Pa. 1995) (granting defendant's motion for summary judgment where plaintiff's claim for defamation, slander and libel was based on allegations that a government agency published false information about plaintiff); D'Imperio v. United States, 575 F. Supp. 248, 253 (D.N.J. 1983) (dismissing plaintiff's claim for harm to reputation on account of immunity under FTCA).

Plaintiff alleges Counts I, V, VII and VIII against the United States and Counts I through VIII, excluding Count VI, now by substitution, against the United States. With the exception of Count IV, each of these claims arises out of Plaintiff's allegation of defamation. Therefore, these claims against the United States are barred by the FTCA.

The Court begins its analysis by first examining Count III, the one specifically addressing defamation and trade libel, in order to understand the origin and nature of Plaintiff's complaint. In Count III, Plaintiff alleges that Defendants conducted an improper or flawed investigation through which they obtained and subsequently disseminated misleading information about Plaintiff's responsibility for the accident. Specifically, Plaintiff identifies

statements regarding the qualifications and licensing of the airplane's pilot that Plaintiff contends depict him as a "careless and negligent pilot." Plaintiff explains his allegations stating that "[defendants] continued their conspiracy to defame the plaintiff and to falsify reports, tests and documents...which would humiliate and damage the plaintiff in his business, profession and reputation." Compl. ¶ 179.

Counts I and V reflect the alleged impact of these misrepresentations. Count I is for interference with business, professional and property rights. Plaintiff states that "disclosure of such information to the public would impair the reputation of the plaintiff in the public's eyes, and would diminish the plaintiff's desirability, both as a lawyer and as a consultant." Compl. ¶ 175. Similarly, Count V is a claim for intentional infliction of emotional distress. Plaintiff contends Defendants' statements allegedly prevented him from working, diminished his "engagement by victims of aircraft accidents, in particular Alaska Airlines Flight 261," and subjected him to humiliation and criticism. Accordingly, the Court finds that these alleged harms arise out of and reflect the impact of Defendants' alleged defamation and libel.

Counts II and VII also derive from an alleged instance of defamation. Under Count II, Plaintiff contends that AlliedSignal and Employees violated RICO by transmitting information and documents through the mails that were "designed to mislead and deny certifying authorities adequate information upon which they could determine the cause of the plaintiff's accident." Compl. ¶ 159 (b). Plaintiff specifically alludes to the underlying defamation stating that AlliedSignal sought to "mislead the NTSB into not understanding how the fuel control and its amplifier worked, all for purposes of directing the NTSB's focus on the plaintiff, rather than

the components of the aircraft as the cause of the accident, while knowing that the plaintiff was blameless.” Compl. ¶ 170 (b).

Plaintiff’s basis for Count VII is similar. Plaintiff states that “the entire purpose of the conspiracy and concerted action was to deprive the plaintiff and the NTSB of the knowledge of the reasons for failure...and it was for the purpose of humiliating, embarrassing, deprecating, hurting and impairing the plaintiff’s ability to function...” Compl. ¶ 220.

Essentially, Plaintiff is stating that the conspiracy’s goal was achieved through the intentional publication of allegedly defamatory statements.

Finally, Plaintiff seeks equitable and injunctive relief under Count VIII on account of the harm caused by the alleged defamation. Again, this count depends upon a finding of defamation and arises out of this allegation.

As all of these counts contain injuries arising out of alleged defamation, they are all barred by the FTCA and the Court will dismiss all claims against the United States of America.

**B. Count Brought Against Both AlliedSignal and Employees:
Equal Protection Under the Fifth Amendment**

In Count IV, Plaintiff raises a claim which he labels “Denial of Equal Protection under the Fifth Amendment of the United States Constitution” where he argues violation of his due process rights, also under the Fifth Amendment. Although he does not bring this count against NTSB, he nonetheless contends that NTSB, Employees and AlliedSignal failed to comply with the proper administrative procedures in investigating Plaintiff’s accident. Compl. ¶ 183. Specifically, Plaintiff explains that when Defendants threatened to release confidential

information and disseminated inaccurate information, they harmed Plaintiff's reputation and violated his Fifth Amendment rights.

Plaintiff's claim fails, however, with respect to all defendants because Plaintiff does not allege injury to a protected interest, as required by the Fifth Amendment. Reputation is not a protected property or a liberty interest. See Paul v. Davis, 424 U.S. 693, 701-2 (1975). However, the Third Circuit has applied a "reputation-plus" test which recognizes a cause of action for harm to one's reputation where there is also a "concomitant infringement of a protected right or interest." Esrek v. Twp of Springfield, 102 F. 3d 79, 83 (3d Cir. 1996).

The alleged harm to Plaintiff's reputation has been discussed *supra*. To satisfy the "plus" requirement, Plaintiff relies on Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 485 (1988), which established that a cause of action can be considered a constitutionally protected interest. Plaintiff contends that by threatening to disclose allegedly confidential information, Defendants forced Plaintiff to settle a lawsuit that he had brought against Fox TV Stations of Philadelphia, and thereby deprived Plaintiff of the cause of action. The Court disagrees with the premise of Plaintiff's argument because Defendants could not "require" Plaintiff to settle. Instead, Plaintiff's decision to accept the settlement offer was his rather than Defendants'. Accordingly, Plaintiff is unable to allege Defendants violated his constitutionally protected interest in this cause of action and therefore fails to establish this prong of the claim. Accordingly, the Court will dismiss this count.

C. Remaining Counts Against AlliedSignal

1. RICO

Plaintiff alleges AlliedSignal violated RICO during its participation in the NTSB investigation of Plaintiff's accident. To have standing to bring a claim under RICO, a plaintiff must allege injury to "business or property." 28 U.S.C. § 1964; see also Sedima, S.P..R.I. v. Imrex Co., 473 U.S. 479, 496 (1985). This injury must be specific or quantifiable. See Maio v. Aetna Inc., 221 F.3d 472, 495 (3d Cir. 2000) (providing a survey of cases where RICO claims were denied for insufficiently alleging injury). Additionally, claims for personal loss are not covered by RICO. See Zimmerman v. HBO Affiliate Group, 834 F.2d 1163, 1169 (3d Cir. 1987).

As Plaintiff's claims are primarily for personal humiliation and harm to his reputation, they are not actionable under RICO. Even where Plaintiff attempts to allege financial injury, his claims are vague and highly speculative. For instance, he contends that he lost "large sums of income" on account of this injury to his reputation. Compl. ¶ 165. These allegations are insufficient to establish a claim under RICO, and accordingly, the Court will dismiss Count II which contains Plaintiff's claims against AlliedSignal under RICO.

2. Defamation

To establish a claim for defamation under Pennsylvania law,³ Plaintiff must allege and eventually prove the following elements:

(1) the defamatory character of the communication; (2) its publication by the defendant; (3) its application to the plaintiff; (4) an understanding by the reader or listener of the statement's defamatory meaning; and (5) an understanding by the

³ Appropriately, both parties apply Pennsylvania law.

reader of listener of an intent by the defendant that the statements refer to the plaintiff.

Tucker v. Fishbein, 237 F.3d 275, 281 (3d Cir. 2001) (quoting 42 Pa. Cons. Stat. Ann. § 8343 (a)(1998)).

The Court believes that Plaintiff fails to make out the first prong of this analysis which requires Plaintiff to establish that Defendants' statements are capable of having a defamatory meaning. See Tucker, 237 F.3d at 281. A statement is defamatory if it:

tends to blacken a person's reputation or expose him to public hatred, contempt, or ridicule, or injure him [or her] in his [or her] business or profession.... [Or] if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.

Livingston v. Murray, 612 A.2d 443, 447 (Pa. 1992) (holding that an article discussing an athletic director's termination and the qualifications of potential replacements does not by the mere juxtaposition of the information impugn the former director's behavior or constitute defamation).

A communication is also defamatory if it ascribes conduct, character or a condition to an individual that would adversely affect his fitness for his business, trade or profession. See Rush v. Philadelphia Newspapers Inc., 732 A.2d 648, 652 (Pa. 1999). In deciding whether a statement is defamatory, the Court must consider the communication in context and determine whether "the effect [of the statement] is fairly calculated to produce, the impression it would naturally engender, in the minds of the average persons among whom it is intended to circulate." Corabi v. Curtis Publ'g. Co., 273 A.2d 899, 907 (Pa. 1971) (quoted by the Third Circuit in Remick v. Manfredy, 238 F.3d 248, 261 (3d Cir. 2001)).

All of the aforementioned counts that pertain to the alleged defamation involve the publication of allegedly inaccurate statements about the technical operations of the plane, the Plaintiff or his qualifications as a pilot. However, those comments specifically credited to AlliedSignal merely address the mechanical failings of the aircraft and the potential maintenance defects. They do not reference the pilot or even suggest the possibility of pilot error and therefore the Court believes they are not capable of having a defamatory meaning.

However, Plaintiff asserts that these statements are intended to imply that the crash could have been avoided if the pilot had handled the situation more skillfully. Even assuming *arguendo* that Plaintiff is accurate in his assessment of AlliedSignal's intent, the import of the statements would only be discernible to an aviation expert. As Plaintiff's potential clients are often the families of victims of airline crashes, it is unlikely that their understanding of these technical areas would be sophisticated enough to grasp these subtle inferences. Additionally, as Plaintiff was never mentioned by name in the report, the potential clients, the media and the community in general would require more information than the report provided in order to derive any negative conclusions about Plaintiff. Accordingly, the Court does not find that the statements Plaintiff identifies are capable of having a defamatory meaning.

3. Intentional Infliction of Emotional Distress

In Count V, Plaintiff brings a claim against AlliedSignal alleging intentional infliction of emotional distress. Although the Pennsylvania Supreme Court has not expressly adopted this cause of action, the Third Circuit has held that it will consider this claim a legally viable one unless or until the Pennsylvania Supreme Court deems otherwise. See Dooley v. City of Philadelphia, No. 99-2764, 2001 U.S. Dist. LEXIS 7437, *83 (E.D. Pa. June 4, 2001). A

claim for intentional infliction of emotional distress requires conduct to be “so extreme in nature as to go beyond all possible bounds of decency such that it would be regarded as utterly intolerable to a civilized society.” Mulgrew v. Sears Roebuck & Co., 868 F. Supp. 98, 103 (E.D. Pa. 1994). Even accepting *arguendo* Plaintiff’s most grave allegations of defamation, embarrassment or harm to his professional reputation, the Court cannot find that this conduct reflects indecency or rises to the level necessary for this claim. Accordingly, this count for intentional infliction of emotional distress will be dismissed.

4. Obstruction of Justice and Lying to a Federal Agency

In Count VI, Plaintiff brings a claim against AlliedSignal labeled “Obstruction of Justice and Lying to a Federal Agency” in which he alleges that AlliedSignal deliberately interfered with a government agency investigation by lying to NTSB. However, Plaintiff does not identify the legal basis of his cause of action. Instead he broadly asserts that “[i]t is unlawful to lie to a federal agency, especially when such conduct would obstruct an investigation of an accident or be in furtherance of a criminal enterprise or conduct.” Compl. ¶ 211.

In his brief opposing AlliedSignal’s motion to dismiss, Plaintiff seems to offer two theories to support this claim. First, Plaintiff contends that an implied private right of action exists under a federal statute. However, he does not identify the statute. The Court generously interprets Plaintiff as intending to ground this claim in RICO. Under RICO, Plaintiff asserts that AlliedSignal aided and abetted other defendants in misleading the FAA and was not honest in its disclosures to the aviation industry. Compl. ¶¶ 163, 164. Despite these allegations, Plaintiff’s apparent effort to derive a private cause of action from RICO fails because the Third Circuit explicitly refused to acknowledge such a cause of action for aiding and abetting under this

statute. See Pennsylvania Ass'n of Edward Heirs v. Righenour, 235 F.3d 839, 840 (3d Cir. 2000).

AlliedSignal offers an alternative interpretation of Plaintiff's statutory authority, suggesting that Plaintiff may have intended to derive a private cause of action from either 18 U.S.C. § 1503, which prohibits obstruction of justice, or 18 U.S.C. § 1623, which prohibits false declarations in a judicial proceeding. However, both of these statutes create criminal penalties not civil ones and accordingly, federal courts have not recognized a private cause of action under them. See, e.g., Forsyth v. Humana, Inc., 114 F.3d 1467, 1482 (9th Cir. 1997). Consequently, Plaintiff's claim fails under this theory.

Plaintiff raises a second potential theory on which to base this claim, explaining that AlliedSignal has committed an "intentional tort" or "prima facie tort" as established under Section 870 of the Restatement (Second) of Torts. Plaintiff, however, made no reference to this theory or its specific elements in his pleadings and therefore the Court does not consider them adequately pled. Accordingly, in the absence of any viable theory on which to base this count, the Court will dismiss it.

5. Civil Conspiracy

In Count VII, Plaintiff brings a claim against AlliedSignal alleging conspiracy based upon the republishing of false and damaging information and deprivation of constitutional rights. The first of these torts is addressed *supra* under the claim for defamation. Similarly, the second is considered *supra* in the discussion of Count IV. As a claim for civil conspiracy requires a predicate tort action and neither of these claims survive the motion to dismiss, Plaintiff's claim for conspiracy also fails.

6. Equitable Relief and Injunction

Finally, in Count VIII, Plaintiff brings a claim for equitable relief and an injunction. As Plaintiff failed to successfully allege any claims against AlliedSignal, the Court has no basis on which to grant relief. Accordingly, Plaintiff's claim under Count VIII is also dismissed.

IV. CONCLUSION

For the foregoing reasons, Defendants' motions to dismiss are hereby GRANTED and Plaintiff's complaint is DISMISSED in its entirety. Plaintiff's claims against the Government, the NTSB, the Ten (10) Unknown Employees and AlliedSignal are all dismissed. In addition, any claims in this action brought against the three named NTSB employees, Frank S. Gattolin, Carl Dinwiddie, and Daniel D. Campbell, are also dismissed. This case is hereby CLOSED.

An appropriate order follows.

motion is hereby **GRANTED**. Accordingly, Plaintiff's Complaint is **DISMISSED** with respect to all counts brought against these defendants.

(3) Upon consideration of the Motion of Federal Defendants [sic] Frank S. Gattolin, Carl Dinwiddie, and Daniel D. Campbell to Dismiss [sic] Second Amended Complaint (Docket No. 34), Plaintiff's response thereto (Docket No. 35), and Defendants' reply (Docket No. 36), Defendants' motion is hereby **GRANTED**. Accordingly, Plaintiff's Complaint is **DISMISSED** with respect to all counts brought against these defendants.

IT IS SO **ORDERED** that Plaintiff's Complaint is **DISMISSED** in its entirety. This case is hereby **CLOSED**.

BY THE COURT:

RONALD L. BUCKWALTER, J.