

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

MICHAEL J. GANNON, : CIVIL ACTION
Plaintiff, :
 :
v. :
 :
NATIONAL RAILROAD PASSENGER :
CORPORATION, t/a AMTRAK, :
Defendant. : No. 03-4501

MEMORANDUM AND ORDER

J. M. KELLY, J.

MAY , 2004

Presently before the Court is a Motion to Dismiss Counts I, V and VI of Plaintiff's Complaint filed by Defendant National Railroad Passenger Corporation, t/a Amtrak ("Defendant" or "Amtrak") seeking dismissal of only the state law claims for wrongful termination and negligent and intentional infliction of emotional distress filed by Plaintiff Michael J. Gannon ("Plaintiff" or "Gannon") for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). Plaintiff initiated suit in this Court alleging that he was unlawfully terminated from employment as a criminal investigator in Amtrak's Office of Inspector General following his return from active military service, and asserts the following federal and state law claims: Count I - Wrongful Termination; Count II - Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. §§ 4301-4333 ("USERRA"); Count III - Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 ("ADEA"); Count IV - Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 ("FELA"); Count V - Negligent

Infliction of Emotional Distress; and Count VI - Intentional Infliction of Emotional Distress.

In the instant Motion, Defendant contends that Count I fails to state a claim for which relief can be granted because Pennsylvania law does not recognize a cause of action for wrongful termination of an at-will employment relationship except in special circumstances not present here. Defendant further contends that Counts V and VI fail to state a claim because FELA preempts state law claims for negligent and intentional infliction of emotional distress.

For the following reasons, Defendant's Motion to Dismiss Counts I, V and VI is **GRANTED IN PART** and **DENIED IN PART**.

I. BACKGROUND

For purposes of this Motion, we recount the facts as Plaintiff alleges them.

Gannon was employed at-will as a criminal investigator by Amtrak's Office of Inspector General from August 1989 until August 31, 2001, working at Philadelphia's 30th Street Station. Plaintiff served in the United States Marine Corps and the United States Air Force Reserves. Plaintiff's time in military service is approximately thirty-four years.

While Plaintiff was employed full-time by Amtrak, he was also a Reservist in the Air Force and was called to active duty

on May 1, 1999 to serve in Kosovo during the conflict in the Balkans in 1999. On or about May 2, 1999, Plaintiff reported for active duty at Andrews Air Force Base. During his deployment in 1999, Plaintiff served as a counter-intelligence agent with the Air Force Office of Special Investigations.

Plaintiff timely notified Defendant of his activation for military service in May 1999. Defendant had in place a payroll policy to cease paying employees' salaries while those employees are activated for military service. Despite Plaintiff's timely notice of activation for military service, Defendant failed to enforce its own payroll policy. Defendant continued to pay Plaintiff his salary for the entire period of Plaintiff's deployment from May 1, 1999 to December 17, 1999.

When Plaintiff returned from active military service on December 22, 1999, supervisor Joseph O'Rourke ("O'Rourke") gave him a "Letter of Instruction," which indicated that Defendant overpaid Plaintiff during his tour of duty. During this encounter, O'Rourke also stated to Plaintiff that the Air Force was not Plaintiff's primary employer, which statement Plaintiff alleges to evidence prejudice against Plaintiff due to his military service. The Letter of Instruction directed Plaintiff to contact Defendant's finance manager, Thomas Basara ("Basara"), to arrange for repayment of any wages that Amtrak paid to Plaintiff during his tour of duty.

As directed, Plaintiff contacted Basara, who requested that they meet in mid- to late-January 2000 to discuss the payroll discrepancy.

In August 2000, Amtrak unilaterally began to withhold wages from Plaintiff in order to recover the funds which it paid Plaintiff during his tour of duty. Plaintiff alleges that he has attempted in good faith to reach a repayment arrangement with Defendant and, in that attempt, has retained legal counsel to assist in the wage payment issue.

On or about November 29, 2000, Amtrak retained the National Archives and Records Administration Office of the Inspector General to conduct an investigation of Plaintiff in connection with the wage payment issue. The results of the investigation were never disclosed to Plaintiff.

On August 31, 2001, Defendant terminated Plaintiff's employment. Plaintiff remained unemployed from August 31, 2001 until May 21, 2002.

Plaintiff alleges that he experienced emotional distress and a directly-related physical injury, specifically, the condition of high blood pressure, as a result of the events leading up to the termination of Plaintiff's employment.

On August 4, 2003, Plaintiff initiated this suit by filing a six-count Complaint. Defendant now moves to dismiss Plaintiff's state law claims for wrongful termination and negligent and

intentional infliction of emotional distress, which arguments we address in turn.

II. STANDARD OF REVIEW

The purpose of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) is to test the legal sufficiency of a complaint. Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d Cir. 1993). We therefore accept all factual allegations in the complaint as true and give the pleader the benefit of all reasonable inferences that can be fairly drawn therefrom. Wisniewski v. Johns-Manville Corp., 759 F.2d 271, 273 (3d Cir. 1985). We are not, however, required to accept legal conclusions either alleged or inferred from the pleaded facts. Kost, 1 F.3d at 183. In considering whether to dismiss a complaint, courts may consider those facts alleged in the complaint as well as matters of public record, orders, facts in the record and exhibits attached to a complaint. Oshiver v. Levin, Fishbone, Sedan & Berman, 38 F.3d 1380, 1384 n.2 (3d Cir. 1994). A court may dismiss a complaint only if the plaintiff can prove no set of facts that would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

III. DISCUSSION

A. **Count I - Wrongful Termination Claim**

Pennsylvania law presumes that all employment is at-will and, therefore, an employee may be discharged for any reason or no reason. Luteran v. Loral Fairchild Corp., 688 A.2d 211, 214 (Pa. Super. Ct. 1997). As a general rule, there is no common law cause of action against an employer for termination of an at-will employment relationship. Id.

While the presumption of at-will employment is an "extremely strong one," an exception to this rule has been recognized "only in the most limited of circumstances where the termination implicates a clear mandate of public policy in this Commonwealth." McLaughlin v. Gastrointestinal Specialists, Inc., 750 A.2d 283, 287 (Pa. 2000). In order to set forth a claim for wrongful discharge, "a plaintiff must allege that some public policy of this Commonwealth is implicated, undermined, or violated because of the employer's termination of the employee." Id. at 289. As enunciated by the Pennsylvania Supreme Court, "[p]ublic policy of the Commonwealth must be just that, the policy of this Commonwealth." Id.

Here, Plaintiff's wrongful discharge in violation of public policy claim fails to reference any clearly mandated public policy of the Commonwealth, except for an allegation that "Plaintiff was, at all times relevant to this Complaint, both in

a protected class of persons, specifically a person over age 40 protected by the [ADEA], and a Reservist in the United States Air Force Reserve." (Compl. ¶ 36.) This allegation alone does not appear to implicate any recognized public policy of the Commonwealth of Pennsylvania.

In response to Defendant's Motion, however, Plaintiff contends that it is within the ambit of Pennsylvania courts to declare public policy on non-controversial issues and, further, suggests that it should be the public policy of the Commonwealth to protect the employment of military reservists, who are also Pennsylvania residents, when they are called to war. (Pl.'s Br. in Opposition to Def.'s Mot. to Dismiss at 7.) In support of its legal argument that a Pennsylvania court may declare what constitutes public policy, Plaintiff cites Mamlin v. Genoe, 17 A.2d 407 (Pa. 1941), which generally discusses sources of public policy, but does so outside of the wrongful termination context. Indeed, the Pennsylvania Supreme Court has more recently refused to recognize a claim for wrongful discharge in violation of public policy where there is "no statute, constitutional premise, or decision from this Court to support the proposition that federal administrative regulations, standing alone, can comprise the public policy of this Commonwealth." McLaughlin, 750 A.2d at 288. The court further held that "in order to set forth a claim for wrongful discharge a Plaintiff must do more than show a

possible violation of a federal statute that implicates only her own personal interest." Id. at 289.

Likewise, in this case, Plaintiff fails to direct the Court to any Commonwealth pronouncement that promotes the policy of USERRA,¹ or to any other pronouncement stating that a federal statute standing alone can constitute the public policy of the Commonwealth. Accordingly, Defendant's Motion to Dismiss Count I of Plaintiff's Complaint is **GRANTED**, and Plaintiff's claim for wrongful discharge in violation of public policy is **DISMISSED**.

B. Counts V and VI - Infliction of Emotional Distress Claims

Plaintiff asserts claims for negligent and intentional infliction of emotional distress under both FELA and state common law. Defendant moves for dismissal on the basis that both state law claims for emotional distress are cognizable under FELA and, thus, preempted by FELA.

FELA provides, in pertinent part, that "[e]very common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . .

¹ The public policy exception to Pennsylvania's employment at-will doctrine does not apply where there is an available statutory remedy. See e.g., Cruz v. Pennridge Reg'l Police Dept., Civ. A. No. 02-4372, 2003 U.S. Dist. LEXIS 12962, at *23 (E.D. Pa. July 29, 2003); Holmes v. Pizza Hut of America, Inc., Civ. A. No. 97-4967, 1998 U.S. Dist. LEXIS 13787, at *24 n.10 (E.D. Pa. Aug. 28, 1998). Here, USERRA provides for its own statutory remedy, which includes damages and equitable relief. See 38 U.S.C. § 4323.

. for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier" 45 U.S.C. § 51. The United States Supreme Court has recognized that claims for damages for negligent infliction of emotional distress are cognizable under FELA. Consolidated Rail Corp. v. Gottshall, 512 U.S. 532, 549-50 (1994). While the Supreme Court has not expressed an opinion as to intentional infliction of emotional distress claims, courts have recognized that such claims are also cognizable under FELA. See e.g., Allen v. Nat'l R.R. Passenger Corp., 90 F. Supp. 2d 603, 613 (E.D. Pa. 2000) (citing to courts that have permitted recovery for intentional torts under FELA); Higgins v. Metro-North R.R. Co., 143 F. Supp. 2d 353, 361 (S.D.N.Y. 2001) (collecting cases).

Defendant cites a number of cases in an attempt to support the proposition that FELA applies to preempt Plaintiff's alleged state tort claims arising out of the employment relationship. We remain unpersuaded by Defendant's contention at this procedural juncture. For example, Defendant offers Martin v. Warrington, Civ. A. No. 01-1178, 2002 U.S. Dist. LEXIS 3502 (E.D. Pa. Mar. 1, 2002), for the proposition that state law claims are preempted by FELA and should be dismissed. Upon closer review of that case, the court noted that the plaintiff stipulated to dismissal of the state law claims subsequent to the filing of the motion to

dismiss, and, while the court granted the motion to dismiss, there was no discussion of FELA's preemptive power over state law claims. Id. at *4. Defendant also offers Felton v. Southeastern Pennsylvania Transportation Authority, 757 F. Supp. 623 (E.D. Pa. 1991), but that case merely states that FELA provides the "exclusive source of recovery for employees of interstate railroads injured or killed during the course of their employment," without discussing the preemptive principles suggested by Defendant. Id. at 626-27. Finally, Defendant offers Hartford Accident & Indemnity Co. v. Motor Vehicle Cas. Co., 576 F. Supp. 604 (W.D. Pa. 1984), to support its contention, but that case, an insurance subrogation action, merely states in its procedural history that a FELA claim was earlier dismissed, again without any detailed discussion on preemption. Id. at 607. None of these cases discuss FELA preemption of state law claims for emotional distress arising in the employment context.

It is not entirely clear, then, that a plaintiff is always barred from asserting state law claims for negligent and intentional infliction of emotional distress, at the same time that he seeks recovery pursuant to FELA, under the same facts. See generally, Allen v. Nat'l R.R. Passenger Corp., 90 F. Supp. 2d 603 (E.D. Pa. 2000); DeCesare v. Nat'l R.R. Passenger Corp., Civ. A. No. 99-129, 1999 U.S. Dist. LEXIS 16384 (E.D. Pa. Oct. 25, 1999) (disposing of both state law claims and FELA claims for

emotional distress at summary judgment stage of litigation). Since we cannot conclude that state law claims for negligent and intentional infliction of emotional distress are always preempted by FEOLA, as Defendant suggests, Defendant's Motion to Dismiss Counts V and VI is **DENIED**.

IV. CONCLUSION

For these foregoing reasons, Defendant's Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) is **GRANTED IN PART** and **DENIED IN PART** to the extent that Count I of Plaintiff's Complaint, which asserts a state law claim for wrongful termination in violation of public policy, is **DISMISSED**. All other counts of Plaintiff's Complaint remain before the Court.

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O R D E R

AND NOW, this day of May, 2004, in consideration of the Motion to Dismiss Counts I, V and VI filed by Defendant National Railroad Passenger Corporation, t/a Amtrak ("Defendant") (Doc. No. 4), the Response in Opposition filed by Plaintiff Michael J. Gannon ("Plaintiff") (Doc. No. 6), and Defendant's reply thereto (Doc. No. 8), **IT IS ORDERED** that Defendant's Motion to Dismiss Counts I, V and VI is **GRANTED IN PART** and **DENIED IN PART** to the extent that Count I of Plaintiff's Complaint, which asserts a claim for wrongful termination in violation of public policy, is **DISMISSED**. All other counts remain before the Court.

BY THE COURT:

JAMES MCGIRR KELLY, J.