

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

WILLIAM E. BURLAND,	:	CIVIL ACTION
	:	
Plaintiff,	:	NO. 98-4802
	:	
v.	:	
	:	
MANORCARE HEALTH SERVICES, INC.,	:	
	:	
Defendant.	:	

MEMORANDUM

BUCKWALTER, J.

January 26, 1999

Plaintiff brought this action alleging unlawful termination on the basis of age and gender discrimination, as well as several state law claims relating to the manner in which he was hired and fired from his former employer. Defendant moves to dismiss the non-discrimination claims on the merits pursuant to Fed. R. Civ. P. 12(b)(6) or alternatively, for failing to plead fraud with particularity as required under Fed. R. Civ. P. 9(b). Additionally, Defendant moves to strike the prayers for punitive damages contained in the ad damnum clauses of two of the discrimination claims pursuant to Fed. R. Civ. P. 12(f).

For the reasons discussed below, the claims for fraudulent misrepresentation, the breach of the covenant of good faith and fair dealing, and “prima facie tort” will be dismissed, and the prayers for punitive damages will be stricken. Defendant’s motion will be denied in all other respects.

I. BACKGROUND

The facts relevant to the motion are as follows. In late September 1996, Plaintiff William E. Burland saw an advertisement for the position of Market Development Representative and contacted Defendant ManorCare Health Services, Inc. by letter, expressing an interest in employment for that position. See Compl. ¶¶ 10-11. Receiving no response to his letter, Plaintiff accepted a position with another employer on October 18th. See id. ¶ 12. On December 2, 1996, Plaintiff received two telephone calls on his home answering machine, which indicated that Defendant was interested in interviewing him for the previously advertised position. See id. ¶ 13. Plaintiff returned the calls at approximately 10:00 p.m. that night and made an appointment for an interview on December 4th. See id. ¶ 14.

On the day of the interview, Plaintiff met with Sally Banulis and advised her that, because he was presently employed, he would need to give two weeks notice before he left his position. See id. ¶¶ 15-16. On December 10, 1996, Ms. Banulis telephoned Plaintiff and offered him the position, which was to be located at the company's West Deptford Facility. See id. ¶ 17. Meeting again on December 16th to discuss the terms of the employment offer and the position, Plaintiff and Ms. Banulis agreed that his assigned location would be changed to King of Prussia. See id. ¶ 18. Thereafter, Ms. Banulis contacted Plaintiff several times to inquire whether he had, in fact, resigned his current position and to urge him to do so in order to start with ManorCare. See id. ¶ 19. At that time, Plaintiff informed Ms. Banulis that he would not resign his current position until he had received the offer in writing from Defendant. See id. Ms. Banulis then sent Plaintiff a letter via Federal Express on December 24th, reiterating the terms of the position with ManorCare. See id. ¶ 20.

Plaintiff resigned his old position on December 27th and began working for Defendant on January 6, 1997, at which time he was told that he would undergo a two-week training and orientation program. See id. ¶ 21. Six days later, Plaintiff received a telephone call at home from Ms. Banulis, who advised him that there had been a management strategy session and that his position was being eliminated for business reasons. See id. ¶ 23. Plaintiff was also told that there were no other positions available with Defendant. See id.

Plaintiff alleges that management employees of Defendant “knew of the impending changes in marketing strategy and structure at the time he was hired, and that they deliberately concealed from him the fact that his post was under active consideration for elimination.” Id. ¶ 39. He further alleges that, knowing he was concerned about the security of his employment position, see id. ¶ 40, they “deliberately misled [him] into thinking that his position with ManorCare had great potential for growth even as they were considering whether to cut the post,” id. ¶ 41. Moreover, Plaintiff alleges that he “relied upon ManorCare’s representations that his post had great potential for growth and the implicit representation that it would be held open for some reasonable time after he left his” old position. Id. ¶ 43. Finally, Plaintiff claims that “Defendant never advised [him] that there was any possibility that his position would not be held open for a reasonable period of time after he started work with Defendant.” Id. ¶ 44 (emphasis added). As a result, Plaintiff alleges that he suffered myriad direct and consequential damages. See id. ¶¶ 25-30, 32-36.

After receiving a right-to-sue letter from the EEOC, Plaintiff filed the instant complaint, alleging, inter alia, fraudulent and negligent misrepresentation (Counts I and VII, respectively), breach of the covenant of good faith and fair dealing (Count II), “prima face tort”

(Count VI), and discriminatory termination under three federal and state statutes (Counts III-V). Included in his claims under the Age Discrimination in Employment Act (“ADEA”), 29 U.S.C. § 621 et seq., and the Pennsylvania Human Relations Act (“PHRA”), 43 Pa. Cons. Stat. Ann. § 951 et seq. (West 1991) are prayers for punitive damages. See Compl. ¶¶ 51(c) and 55(c).

II. DISCUSSION

A. Standards of Review

“A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) may be granted only if, accepting all well-pleaded allegations in the complaint as true, and viewing them in the light most favorable to plaintiff, plaintiff is not entitled to relief.” In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1420 (3d Cir. 1997). That is, a reviewing court must “refrain from granting a dismissal unless it is certain that no relief can be granted under any set of facts which could be proved.” Schuylkill Energy Resources, Inc. v. Pennsylvania Power & Light Co., 113 F.3d 405, 412 n.5 (3d Cir.) (quoting Fuentes v. South Hills Cardiology, 946 F.2d 196, 201 (3d Cir. 1991)), cert. denied, 118 S. Ct. 435 (1997). “The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.” Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

Additionally, Fed. R. Civ. P. 9(b) requires that “in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” “[W]hile allegations of date, place or time fulfill [Rule 9(b)’s] functions, . . . nothing in the Rule requires them.” Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 742 F.2d 786, 791 (3d Cir. 1984), cert. denied, 469 U.S. 1211 (1985). Rather, “[p]laintiffs are free to use alternative

means of injecting precision and some measure of substantiation into their allegations of fraud.”

Id.

And finally, a party may also move under Fed. R. Civ. P. 12(f) to have the court “order stricken from any pleading . . . any redundant, immaterial, impertinent, or scandalous matter.”

B. Misrepresentation (Counts I and VII)

To state a claim for negligent misrepresentation, a plaintiff must show: “(1) a misrepresentation of a material fact; (2) the representor must either know of the misrepresentation, must make the misrepresentation without knowledge as to its truth or falsity or must make the representation under circumstances in which he ought to have known of its falsity; (3) the representor must intend the representation to induce another to act on it; and (4) injury must result to the party acting in justifiable reliance on the misrepresentation.” Gibbs v. Ernst, 647 A.2d 882, 890 (Pa. 1994). Construing the allegations in favor of Plaintiff, the complaint may be fairly read to encompass such a claim.

Material representations were apparently made by Defendant concerning the potential growth of the new position. Moreover, Defendant may have committed actionable omissions regarding the continued viability of the position or the length of time he might remain employed at that post. Plaintiff also sought and secured a letter from Defendant evidencing the employment offer. In reliance on these oral and written communications, Plaintiff was induced to leave his old position to begin employment with Defendant. Therefore, on these facts, Defendant may be liable for negligent misrepresentation.

However, the allegations fail to substantiate with any specificity the circumstances constituting fraud. A claim for fraudulent misrepresentation requires a plaintiff to show: “(1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance.” Id. at 889.

While state law governs “the quantum of substantive evidence which must be developed at a trial to establish fraud[,] . . . the federal rules govern pleading requirements.” Capitol Life Ins. Co. v. Rosen, 69 F.R.D. 83, 89 (E.D. Pa. 1975). Thus, preliminarily, state law governs the elements that must be identified in the complaint. See, e.g., Union Mut. Life Ins. Co. v. Simon, 22 F.R.D. 186 (E.D. Pa. 1958) (denying dismissal for failing to aver reliance when state law would presume reliance upon a false statement in the absence of proof to the contrary). Rule 9(b) then governs whether the complaint is pled with particularity sufficient to survive a motion to dismiss in federal court. Plaintiff may have met the bare pleading requirements for a fraudulent misrepresentation claim under Pennsylvania law, but he has failed to plead them with the particularity required under Fed. R. Civ. P. 9(b).

Accordingly, while the negligent misrepresentation claim survives, the fraudulent misrepresentation claim is DISMISSED.

C. Breach of the Covenant of Good Faith and Fair Dealing (Count II)

Plaintiff does not allege that there was an employment contract between himself and Defendant, but would like to proceed on a claim for breach of the covenant of good faith and fair dealing. As this Court recently explained, “[w]hile there may be an express or implied

covenant of good faith and fair dealing in an employment contract, a breach of such covenant is a breach of contract action, not an independent action for a breach of a duty of good faith and fair dealing.” Seiple v. Community Hosp. of Lancaster, No. Civ. A. 97-8107, 1998 WL 175593, at *2 (E.D. Pa. Apr. 14, 1998) (Buckwalter, J.).

Accordingly, as “Pennsylvania does not recognize a claim for breach of [the] covenant of good faith and fair dealing as an independent cause of action,” id., Plaintiff’s claim is DISMISSED.

D. “Prima Facie Tort” (Count VI)

Plaintiff also seeks to hold Defendant generally culpable for its alleged unjustified conduct towards him under the heading, “prima facie tort.” However, Pennsylvania courts have thus far declined to recognize such a generalized cause of action for culpable conduct. While conduct amounting to an intentional tort has been held actionable under Pennsylvania law, those instances are properly circumscribed by their factual context. None of these cases, including those cited in Plaintiff’s legal memorandum, concern employment situations.

Furthermore, the Court of Appeals for the Third Circuit has recently held that the Pennsylvania Workmen’s Compensation Act, 77 Pa. Cons. Stat. Ann. § 1 et seq. (West 1992), “provides the sole remedy for injuries allegedly sustained during the course of employment,” Matczak v. Frankford Candy and Chocolate Co., 136 F.3d 933, 940 (3d Cir. 1997) (internal quotations and citation omitted), and thus, functions as a complete bar to state law tort claims in the employment context, see, e.g., Seiple, 1998 WL 175593, at *3.

Accordingly, Plaintiff’s claim for “prima facie tort” is DISMISSED.

E. Prayers for Punitive Damages

Punitive damages are unavailable under either the ADEA, see Lyles v. Meritor Sav. Bank, No. Civ. A. 91-5569, 1992 WL 16580, at *4 (E.D. Pa. June 15, 1992) (Buckwalter, J.), or the PHRA, see Hoy v. Angelone, 720 A.2d 745, 748-49 (Pa. 1998). In light of this authority, and Plaintiff having conceded the point, the prayers for such relief are STRICKEN.

III. CONCLUSION

For the foregoing reasons, Defendant's motion is DENIED with respect to the negligent misrepresentation claim (Count VII) and GRANTED to the following extent:

- (1) the fraudulent misrepresentation claim (Count I) is DISMISSED without prejudice pursuant to Fed. R. Civ. P. 9(b);
- (2) the claims for the breach of the covenant of good faith and fair dealing (Count II) and "prima facie tort" (Count VI) are DISMISSED without prejudice pursuant to Fed. R. Civ. P. 12(b)(6); and
- (3) the prayers for punitive damages contained in paragraphs 51(c) and 55(c) of the complaint are STRICKEN pursuant to Fed. R. Civ. P. 12(f).

An appropriate order follows.

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v.	:	
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MANORCARE HEALTH SERVICES, INC.,	:	
	:	
Defendant.	:	

ORDER

AND NOW, this ____ day of January 1999, upon consideration of Defendant's Motion to Dismiss in Part and to Strike in Part (Docket No. 4), Plaintiff's response thereto (Docket No. 6), and Defendant's reply memorandum (Docket No. 7), it is hereby ORDERED that Defendant's motion is GRANTED IN PART and DENIED IN PART, in accordance with the accompanying memorandum.

BY THE COURT:

RONALD L. BUCKWALTER, J.