

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

OMAR BAGASRA, M.D., Ph.D. : CIVIL ACTION
: :
V. : :
: :
THOMAS JEFFERSON UNIVERSITY, et al : NO. 99-CV-2321

M E M O R A N D U M

Ludwig, J

July 20, 1999

Defendants Thomas Jefferson University, Roger Pomerantz, Alan B. Kelly, Paul C. Brucker, Joseph S. Gonnella, and Muhammad Muktar move to dismiss the complaint for failure to state a claim. Fed. R. Civ. P. 12(b)(6).¹ Jurisdiction is federal question and supplemental. 28 U.S.C. §§ 1331, 1367.

On February 13, 1998 plaintiff Omar Bagasra, M.D., Ph.D was terminated from employment by Thomas Jefferson University. The complaint asserts that he was wrongfully discharged in retaliation for accusations made by him of scientific misconduct on the part of his colleagues. He sues under the False Claims Act, 31 U.S.C. § 3730(h) and the Public Health Services Act, 42 U.S.C. § 289b(e) and also makes state tort claims. Defendants move to dismiss the following: violation of the Public Health Services Act; wrongful discharge; breach of the implied covenant of good faith and fair

¹ Under Rule 12(b)(6), the allegations of the complaint are accepted as true, all reasonable inferences are drawn in the light most favorable to the plaintiff, and dismissal is appropriate only if it appears that plaintiff could prove no set of facts that would entitle him to relief. See Weiner v. Quaker Oats Co., 129 F.3d 310, 315 (3d Cir. 1997).

dealing; defamation per se; invasion of privacy; intentional interference with existing and prospective relationships; intentional infliction of emotional distress; and civil conspiracy. The motion to dismiss will be granted in part and denied in part.

1. Public Health Services Act (Count II) - Granted. Plaintiff voluntarily withdraws this claim. Pl. resp., at 1 n.7.

2. Wrongful Discharge (Count III) - Granted. It is undisputed that Pennsylvania substantive law applies. A wrongful discharge claim is actionable under Pennsylvania law only for employees who are terminable-at-will because those employees have no recourse to a breach of contract claim. Geary v. United States Steel Corp., 456 Pa. 171, 184-5, 319 A.2d 174, 180 (1974); Darlington v. General Electric, 350 Pa. Super. 183, 207, 504 A.2d 306, 318 (1986). Here, defendant does not dispute that plaintiff was employed under a contract.² Accordingly, plaintiff was not terminable-at-will and has recourse under his breach of contract claim.³

3. Implied covenant of good faith and fair dealing (Count V) - Granted. The duty of good faith and fair dealing is inherent in

² Plaintiff asserts that defendant denies the existence of a contract citing to defendants' answer to the complaint at paragraph 90. Paragraph 90 is not relevant to the contractual issue, however. Plaintiff is likely referring instead to paragraph 80. Even so, defendant's answer does not deny the existence of a contract, but only a breach of contract. See compl. ¶ 80, answer ¶ 80.

³Plaintiff is entitled to plead claims in the alternative. Fed. R. Civ. P. 8(e)(2). However, since it is agreed that plaintiff was under contract, this claim may be superfluous.

employment contracts. See Somers v. Somers, 418 Pa. Super. 131, 136, 613 A.2d 1211, 1213-14 (1992). However, Pennsylvania does not recognize an independent cause of action for breach of this implied duty separate and apart from a breach of contract claim. See McGrenaghan v. St. Denis School, 979 F. Supp. 323, 328 (E.D. Pa. 1997); Engstrom v. John Nuveen & Co., Inc., 668 F. Supp. 953, 328 (E.D. Pa. 1987); Drysdale v. Woerth, 1998 WL 966020, at *3 (E.D. Pa. Nov. 18, 1998); see also Parkway Garage, Inc. v. City of Phila., 5 F.3d 685, 701-702 (3d Cir. 1993) (Pennsylvania does not recognize separate tort of breach of duty of good faith when relief may be sought under established cause of action). Since Count IV of the complaint contains an undisputed breach of contract claim, Count V must be dismissed.

4. Defamation Per Se; Invasion of Privacy - False Light (Counts VI and VII) - Denied. According to the complaint, during the months leading up to plaintiff's termination and shortly thereafter, defendants made statements attacking plaintiff's professional reputation - specifically, that he had lost scientific objectivity and was guilty of sexual harassment. Compl., ¶¶ 45 - 55. It is averred that the circumstances surrounding his termination were publicized to co-workers, a federal grants administrator, hospital staff, and the media. Id., at ¶¶ 53, 55, 85. The manner in which plaintiff is alleged to have been terminated - escorted by an armed guard and ordered to turn in his

university identification and leave the building immediately - may also have been defamatory. See Jones v. Johnson & Johnson, 1995 WL 549042, at * 2 (E.D. Pa. Sept. 13, 1995) (conduct without verbal communication may be defamatory).

The specific statements and instances of publication are not set forth in the complaint. Nevertheless, the elements of defamation per se and false light have been alleged with sufficient particularity under Fed. R. Civ. P. 8(a). See GE Capital Mortg. Serv. v. Pinnacle Mortg. Inv., 897 F. Supp. 854, 867 (E.D. Pa. 1995) (defamation need not be pleaded with specificity); Lawrence v. City of Bethlehem, 1997 WL 793012, at * (E.D. Pa. Dec. 4, 1997) (complaint does not need to include the precise defamatory statements or the person who made them to withstand a motion to dismiss).⁴ The detailed facts underlying these claims can be obtained through discovery.

5. Intentional Interference with Existing and Prospective Relationships (Count VIII) - Denied. To make out this claim, plaintiff must show that defendants purposefully interfered with an known existing or prospective contractual relationship between

⁴The statute of limitations for both the defamation and false light claims is one year. 42 Pa. C.S.A. § 5523(1). The action accrues at the time plaintiff knew or should have known of the existence of the claim. See Giusto v. Ashland Chemical Co., 994 F. Supp. 587, 594 (E.D. Pa. 1998). Plaintiff filed suit on February 11, 1999. To what extent the facts underlying plaintiff's defamation and false light claims pre-date February 11, 1998 and may be tolled by the discovery rule cannot be determined at this stage of the proceedings.

plaintiff and a third-party. See Silver v. Mendel, 894 F.2d 598, 601, 604-05 (3d Cir. 1990).⁵ Plaintiff has not specifically pleaded any prospective relationships. See Frempong-Atuahene v. Redevelopment Auth. of the City of Phila., 1999 WL 167726, *6 (E.D. Pa. March 25, 1999) (prospective contractual relationship exists "if there is a reasonable probability that a contract will arise from the parties' current dealings"). However, it is alleged that defendants interfered with his existing relationships with vendors and the NIAID (National Institute of Allergy and Infectious Diseases). Compl., ¶¶ 55, 61. These allegations are sufficient to overcome a motion to dismiss.

6. Intentional Infliction of Emotional Distress - Denied. This workplace claim is disfavored. See Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933, 940 (3d Cir. 1997) ("[I]t is extremely rare to find conduct in the employment context that will rise to the level of outrageousness necessary to provide a basis for recovery for the tort of intentional infliction of emotional distress." (quoting Cox v. Keystone Carbon Co., 861 F.2d 390, 395 (3d Cir. 1988))). Here, the complaint sets forth claims of retaliation and defamation in addition to other violations arising from plaintiff's termination. See Andrews v. City of Philadelphia, 895 F.2d 1469, 1487 (3d Cir. 1990) (retaliation is "extra factor"

⁵Defendants cannot be held liable for interference with a contract to which they are a party. See Nix v. Temple University, 408 Pa. Super. 369, 379, 596 A.2d 1132, 1136 (1991).

that may support intentional infliction claim in workplace environment); Maccord v. The Christian Academy, 1997 WL 83756, at *3 (E.D. Pa. Feb. 20, 1997) (denying motion to dismiss in employment context where complaint alleged defamation in addition to breach of contract and bad faith). The complaint sufficiently alleges the elements of intentional infliction of emotional distress.

7. Civil Conspiracy - Denied. Under Pennsylvania law, civil conspiracy is a "combination of two or more to do an unlawful act or to do an otherwise lawful act by unlawful means." Barmasters Bartending School, Inc. v. Authentic Bartending School, Inc., 931 F. Supp. 377, 386 (E.D. Pa. 1996) (citing Thompson Coal Co., v. Pike Coal Co., 488 Pa. 198, 211, 412 A.2d 466, 472 (1979)). A corporation cannot conspire with itself, or with its employees, officers and agents. See Seigel Transfer, Inc. v. Carrier Express, Inc., 54 F.3d 1125, 1135 (3d Cir. 1995); Johnston v. Baker, 445 F.2d 424, 426 (3d. Cir. 1971). However, a corporation may conspire with its agents or employees if the agents or employees are acting not for the corporation, but for personal reasons. See Siegel, 54 F.3d at 1135-36. This exception has been read expansively to allow conspiracy claims to proceed without a co-conspirator from outside the corporation. See Doe v. Khon, Nast & Graf, P.C., 862 F. Supp. 1310, 1328 (E.D. Pa. 1994); Sanzone v. Phoenix Technologies, Inc.,

No. 89-5397, 1990 WL 50732, at *10-11 (E.D.Pa. Apr. 18, 1990); Denenberg v. American Family Corp., 566 F.Supp. 1242, 1253 (E.D.Pa. 1983). The individual defendants are alleged to have "act[ed] in their own interest and not in the best interest of Thomas Jefferson University, conspired among themselves." Compl., ¶ 104. That pleading is sufficient.

8. Claims against Individual Defendants - Denied. In a complaint, it is unnecessary to identify who committed an allegedly tortious act. Since "the parties are only at the pleading stage, and it is possible that plaintiff may not know which defendant actually took the above actions until discovery is conducted," dismissal is not appropriate. Killian v. McCulloch, 850 F.Supp. 1239, 1248 (E.D.Pa. 1994), (citing Petro-Tech, Inc. v. Western Co. Of N.A., 824 F.2d 1349, 1362 (3d Cir. 1987)).

Accordingly, the following claims and counts will survive: False Claims Act, 31 U.S.C. § 3130(h) (Count I); breach of contract (Count IV); defamation per se (Count VI); invasion of privacy - false light (Count VII); intentional interference with existing and prospective relationships (Count VIII); intentional infliction of emotional distress (Count IX); and civil conspiracy (Count X).

Edmund V. Ludwig, J.

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O R D E R

AND NOW, this 20th day of July, 1999, the motion to dismiss of defendants Thomas Jefferson University, Roger Pomerantz, Alan B. Kelly, Paul C. Brucker, Joseph S. Gonnella, and Muhammad Muktar against plaintiff Dr. Omar Bagasra is granted in part and denied in part, Fed. R. Civ. P. 12(b)(6), as follows:

1. Public Health Services Act, 42 U.S.C. § 289b(e) (Count II)
- granted;
2. Wrongful discharge (Count III) - granted;
3. Implied covenant of good faith and fair dealing (Count V)
- granted;
4. Defamation per se and Invasion of privacy - false light
(Counts VI and VII) - denied;
5. Intentional interference with existing and prospective
relationships - denied;
6. Intentional infliction of emotional distress - Denied.

7. Civil conspiracy - denied;
8. Dismissal of claims against individual defendants - denied.

A memorandum accompanies this order.

Edmund V. Ludwig, J.