

UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF NEW HAMPSHIRE

Brendan Melvin

v.

Civil No. 09-cv-249-JD  
Opinion No. 2010 DNH 078

NextEra Energy Seabrook LLC  
f/k/a FPL Energy Seabrook LLC

O R D E R

Brendan Melvin sued NextEra Energy Seabrook, LLC f/k/a FPL Energy Seabrook, LLC (hereinafter, "NextEra"), alleging wrongful termination and negligent infliction of emotional distress. On January 6, 2010, NextEra's motion to dismiss both counts was granted. Melvin moved for reconsideration, which was denied. Melvin now moves for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b)(1) and (6), and for leave to file an amended complaint.

Background

In his complaint, Melvin brought one count of wrongful termination and one count of negligent infliction of emotional distress against his former employer. Melvin asserted that he was fired for failing to discipline one of his subordinates, Michele Machula, after she allegedly sent vulgar emails to her

coworkers. The complaint was dismissed for failure to state a claim upon which relief could be granted, because Melvin did not allege that he was terminated either for performing an act that public policy encourages or for refusing to do something that public policy condemns.

In his proposed amended complaint, Melvin's factual allegations remain essentially the same, but he adds a third count, for "wrongful termination for retaliation and for violation of public policy: [New Hampshire] Whistle Blower Protection Act, RSA 275-E and applicable federal law." In support of that claim, Melvin asserts that Machula was fired in retaliation for complaining to NextEra about the unethical behavior of a co-worker. Melvin asserts that, although NextEra's professed reason for firing him was his failure to supervise Machula, that explanation is merely pretext. Melvin alleges that NextEra's real reason for firing him was to retaliate for Machula's complaints about her co-worker.

#### Standard of Review

Federal Rule of Civil Procedure 60(b)(1) and (6) allows a court to "relieve a party . . . from a final judgment, order, or proceeding" for "mistake, inadvertence, surprise, or excusable neglect," or "any other reason that justifies relief." Success

under Rule 60(b) "requires more than merely casting doubt on the correctness of the underlying judgment." Fisher v. Kadant, Inc., 589 F.3d 505, 512 (1st Cir. 2009). "Rather, Rule 60(b) relief is extraordinary in nature and, thus, motions invoking that rule should be granted sparingly." Id. (internal quotation marks omitted). The party seeking relief "must demonstrate at a bare minimum, that his motion is timely; that exceptional circumstances exist, favoring extraordinary relief; that if the judgment is set aside, he has the right stuff to mount a potentially meritorious claim or defense; and that no unfair prejudice will accrue to the opposing parties should the motion be granted." Id. (quotation marks omitted).

#### Discussion

As grounds for his motions, Melvin states that, in his complaint, he inadvertently failed to specify that his wrongful termination claim was based on a violation of the New Hampshire Whistleblowers' Protection Act. This "inadvertence," he argues, is grounds for relief from judgment and for allowing him to amend his complaint pursuant to Federal Rule of Civil Procedure 15(a)(2).

NextEra argues that Melvin never explains why he failed to allege his wrongful termination claim properly, and that it is

therefore inexcusable. NextEra also contends that Melvin's motion to amend his complaint should be denied because the amendment is futile. According to NextEra, Melvin does not say that he took any action against which NextEra retaliated, and the New Hampshire statute only forbids retaliation against the employee who reported a violation, not any other employee. Similarly, because Melvin cannot mount a potentially meritorious claim, NextEra argues, the motion for relief from judgment should be denied.<sup>1</sup>

A. Relief From Judgment

Melvin offers no explanation for why he failed to allege a colorable cause of action in his original complaint. He also does not explain why he did not seek to amend his complaint while the case was pending, that is, after NextEra correctly pointed out that the complaint failed to state a claim upon which relief could be granted. Because Melvin has not explained his inadvertence or shown any exceptional circumstances to justify

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<sup>1</sup>NextEra also requests attorneys' fees in opposing Melvin's motions for relief from judgment and for leave to amend the complaint. Local Rule 7.1(a)(1) requires that objections to pending motions and affirmative motions for relief be filed separately. NextEra's request for attorneys' fees is denied.

relief, he is not entitled to it.<sup>2</sup> See Aguiar-Carrasquillo v. Agosto-Alicea, 445 F.3d 19, 28 (1st Cir. 2006) (“‘excusable neglect’ is a fairly flexible concept that encompasses inadvertence”) (citing Pioneer Inv. Serv. Co. v. Brunswick Assoc., 507 U.S. 380, 388 (1993)); United States v. \$23,000 in U.S. Currency, 356 F.3d 157, 164 (1st Cir. 2004) (“ignorance of the rules, or mistakes construing the rules do not usually constitute ‘excusable’ neglect,” and “the reason-for-delay factor will always be critical to the inquiry”); Castellanos-Bayouth v. Puerto Rico Bar Ass’n, 508 F. Supp. 2d 146, 149 (D.P.R. 2007) (party who cited his own mistake, rather than the court’s, and who did not explain why his neglect was excusable, was not entitled to relief).

Even if Melvin had provided an explanation for his inadvertence, or described exceptional circumstances that warranted granting relief, his motion would still be denied because he does not have a potentially meritorious claim. As

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<sup>2</sup>Although Melvin states that he brings his motion pursuant to both subsections (1) and (6) of Rule 60(b), “a defendant cannot use Rule 60(b)(6) to obtain relief on a ground that comes within Rule 60(b)(1).” Ungar v. Palestine Liberation Org., --- F.3d ---, 2010 WL 1078352, at \*4 (1st Cir. Mar. 25, 2010) (construing Claremont Flock Corp. v. Alm, 281 F.3d 297, 300 (1st Cir. 2002)). Because Melvin’s request for relief was based on his claimed “inadvertence,” the motion falls squarely within Rule 60(b)(1), and Rule 60(b)(6) will not be considered.

explained in the order denying Melvin's motion for reconsideration, in order to establish a wrongful termination claim under New Hampshire law, Melvin must allege that he did something that public policy supports or refused to do something that public policy condemns. His proposed amended complaint does not add any new factual allegations that Melvin did anything or refused to do anything. Melvin simply adds a reference to the Whistleblower Protection Act, which forbids employers from firing "any employee . . . because the employee, in good faith, reports or causes to be reported . . . what the employee has reasonable cause to believe is a violation of any law or rule." N.H. RSA § 275-E:2 (emphasis added). Melvin does not allege that he did anything that is protected by RSA 275-E:2 or that is otherwise encouraged by public policy, so his proposed amendments to his complaint are futile.

B. Amending the Complaint

Because his motion for relief from judgment is denied, Melvin's motion to amend his complaint must also be denied. Where "a motion to amend is filed after the entry of judgment, the district court lacks authority to consider the motion under Rule 15(a) unless and until the judgment is set aside." Fisher, 589 F.3d at 508 (emphasis in original). This is because, "once

judgment has entered, the case is a dead letter, and the district court is without power to allow an amendment to the complaint because there is no complaint left to amend." Id. at 509.

Conclusion

For the foregoing reasons, Melvin's motion for relief from judgment (doc. no. 13) and his motion for leave to file an amended complaint (doc. no. 14) are denied.

SO ORDERED.

  
Joseph A. DiClerico, Jr.  
United States District Judge

May 5, 2010

cc: David A. Anderson, Esquire  
Laurie A. Lacoste, Esquire  
Robert A. Shaines, Esquire