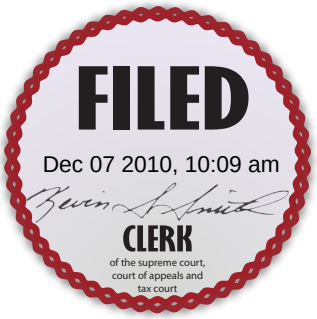

ATTORNEY FOR APPELLANT:

MICHAEL C. KENDALL
Kendall Law Office
Carmel, Indiana

ATTORNEYS FOR APPELLEE:

PAUL H. SINCLAIR
BRIAN J. PAUL
RYAN METZING
Ice Miller LLP
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

RICK J. DEETER,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 34A02-1004-PL-395
	)	
HAYNES INTERNATIONAL, INC.,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE HOWARD SUPERIOR COURT
The Honorable Richard A. Maughmer, Special Judge
Cause No. 34D04-0908-PL-936

December 7, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Rick Deeter appeals the trial court's order granting the motion to dismiss filed by Haynes International, Inc. ("Haynes"). Deeter raises two issues for our review, which we consolidate and restate as one: whether the trial court erred in dismissing Deeter's claims for failure to state a claim upon which relief can be granted. Concluding the trial court did not err as to any of the claims, we affirm.

Facts and Procedural History

The relevant facts follow as set forth in Deeter's complaint. Deeter was laid off by DaimlerChrysler in May 2006, and was a member of the collective bargaining unit represented by the United Auto Workers of America, AFL-CIO ("UAW"). As a UAW member, while laid off, he received ninety-five percent of his average income at the time of his lay off and full employment benefits. An agreement between the UAW and DaimlerChrysler guaranteed Deeter this level of compensation and benefits "indefinitely" while on lay off from DaimlerChrysler. Appendix to Brief of Appellant at 8.

While on lay off, Deeter applied for and secured a position at Haynes in 2006. Prior to Haynes offering Deeter employment, Haynes interviewed him four times and "represented to him that it had inside information about the operations of Chrysler, Chrysler was in bad shape and he would not be recalled, Haynes was without debt as a result of the successful use a [sic] Chapter 11 bankruptcy, and that Haynes had ten to 15 years of contract business already secured." Id. at 9. Deeter began working at Haynes, and was a member of the collective bargaining unit represented by the United Steel Workers of America, AFL-CIO

("USWA"). According to an agreement between USWA and Haynes, Deeter benefitted from an "inability of Haynes to discharge him at . . . will . . ., a grievance procedure, discharge only for cause, binding arbitration, due process, a progressive discipline system, and seniority rights for lay off and recall." Id.

Prior to Deeter completing his probationary period of employment, Haynes offered him a position as a supervisor, which required that he forgo his USWA membership but "promised him equivalent or superior job security to that which he would have . . . as a member of the USWA," or at DaimlerChrysler. Id. at 10. Several Haynes officials told Deeter they began as members of the USWA but chose to become supervisors. Deeter decided to forgo his USWA membership and become a Haynes supervisor.

In September 2008, Deeter was working for Haynes as a Maintenance Supervisor, and had received no verbal or written warnings regarding his work or employment. Unrelated to his employment, Deeter needed surgery to remove a cyst, and scheduled and underwent such surgery between his shifts on two consecutive days. His surgery was completed on the morning of September 16, 2008. After the surgery he slept all day and then arrived at work at his usual 10 p.m. that evening. His doctor instructed him to use Lortab, a narcotic pain reliever.

Throughout his shift, Deeter did not feel well, vomited at least once, felt chills and nausea, had a severe headache, and was sweating. He told Mike Thompson, another supervisor, that he had surgery and was feeling sick, and that he would work in a third supervisor's office because of its dimmer lighting. Upon leaving this office at the end of his

shift, there was a sign over the door "jokingly announcing 'Good Morning Rick!'" Id. at 14. Immediately following this shift, on the morning of September 17, 2008, Deeter met with Mike Pratt, a Haynes Facility Supervisor, to give him work-related information, and told him about his illness and the sign above the door. "Pratt told Deeter not to worry about others' perceptions, assured him he was doing a good job, and told Deeter that he (Pratt) was glad Deeter had come in [for his shift that day] because he could have stayed home." Id. at 15.

On the morning of September 20, 2008, Pratt informed Deeter he "was suspended for five days without pay for 'conduct unbecoming a Supervisor,' without elaboration." Id. "Deeter said he would be forced to consider resigning if it was carried out." Id. After a brief discussion between Pratt and another supervisor, Pratt "promptly announced" Deeter's suspension. Id. at 16. In Deeter's words, he "'resigned,' that is, he was constructively discharged . . . ." Id. "The pretextual reasons [sic] for the suspension were [sic] allegedly sleeping on the job the night Deeter was sick." Id.

Deeter brought suit against Haynes, claiming breach of contract, two counts of promissory estoppel, two counts of negligent misrepresentation, and intentional misrepresentation and constructive fraud. Haynes moved to dismiss all claims for failure to state a claim upon which relief can be granted. The trial court granted Haynes's motion, finding that Deeter's allegations, assumed to be true, "do not equate to either an actual or constructive discharge by [Haynes]." Id. at 23. Deeter now appeals.

Discussion and Decision

I. Standard of Review

We review a trial court order granting or denying a motion to dismiss for failure to state a claim de novo. Sims v. Beamer, 757 N.E.2d 1021, 1024 (Ind. Ct. App. 2001). A motion to dismiss for failure to state a claim pursuant to Indiana Trial Rule 12(B)(6) "tests the legal sufficiency of a claim, not the facts supporting it." Caesars Riverboat Casino, LLC v. Kephart, 934 N.E.2d 1120, 1122 (Ind. 2010). This means we review the complaint in the light most favorable to the non-moving party to determine "whether the complaint states any facts on which the trial court could have granted relief." Id. "In making this determination, we look only to the complaint and may not resort to any other evidence in the record." City of South Bend v. Century Indem. Co., 821 N.E.2d 5, 9 (Ind. Ct. App. 2005), clarified on reh'g on other grounds, 824 N.E.2d 794 (2005), trans. denied.

II. Motion to Dismiss

A motion to dismiss for failure to state a claim challenges the plaintiff's satisfaction of Indiana Trial Rule 8(A), providing for notice pleading, which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." "Although the plaintiff need not set out in precise detail the facts upon which the claim is based, [the plaintiff] must still plead the operative facts necessary to set forth an actionable claim." Trail v. Boys & Girls Club of Nw. Indiana, 845 N.E.2d 130, 135 (Ind. 2006).

At the outset, we note the trial court's decision and Haynes's appellate arguments are based on the trial court finding that "All of the allegations (assumed to be true) in [Deeter]'s

complaint . . . do not equate to either an actual or constructive discharge by [Haynes]." App. at 28. This finding is akin to Cripe, Inc. v. Clark, 834 N.E.2d 731, 735-36 (Ind. Ct. App. 2005), in which our court held a claim for retaliatory discharge failed to state a claim upon which relief could be granted because the allegations were insufficient to demonstrate a constructive discharge. However, we would not go so far as to conclude that Deeter's claims require demonstrating permanent discharge, either actual or constructive.

Here, unlike Cripe, Deeter does not allege only wrongful discharge. As noted above, Deeter's claims are for breach of contract, promissory estoppel, negligent misrepresentation, intentional misrepresentation, and constructive fraud. Therefore, Deeter's possible failure to allege facts suggesting Haynes discharged him does not preclude his claims.

Each of Deeter's claims do, however, rely on the conclusion that Haynes broke its promises to him and gave rise to all of his claims by suspending him. Aside from the particularities of Haynes's promises, Deeter's complaint alleges only that Haynes suspended him for five days and no other wrongful action or omission. Therefore, our review consists of whether this suspension gives rise to Deeter's claims.

Deeter's complaint includes six claims. The first is for Haynes's breach of contract by forming a contract with Deeter promising job security equivalent to while Deeter was a member of the UAW, Deeter's reliance on that promise, and Haynes's breach. Viewing the complaint broadly and in the light most favorable to Deeter, Deeter has not put forth the operative facts necessary to suggest the five-day suspension was immediately a breach of the

promise of job security. This defined, relatively short period of suspension without the threat of more does not constitute the loss of job security.

Deeter's second claim, for promissory estoppel, realleges the facts of Deeter's first claim and further alleges that Haynes made such representations with reckless disregard for their truth or falsity and failed to satisfy those representations by suspending him. For the same reason as above, this claim fails.

Further, our supreme court has stated:

> The doctrine of promissory estoppel encompasses the following elements: (1) a promise by the promissor (2) made with the expectation that the promisee will rely thereon (3) which induces reasonable reliance by the promisee (4) of a definite and substantial nature and (5) injustice can be avoided only by enforcement of the promise.

First Nat'l Bank of Logansport v. Logan Mfg. Co., Inc., 577 N.E.2d 949, 954 (Ind. 1991). Comparing Deeter's complaint with these elements, Deeter has not set forth the operative facts necessary to show that the "injustice" of his suspension can only be avoided by enforcing the alleged promises.

Deeter's third claim, also for promissory estoppel, alleges Haynes promised Deeter his work conduct after his surgery was acceptable, Deeter relied on that to forgo reporting the incident to higher management, and this promise was broken when he was suspended. First, Deeter's reliance on this alleged promise to forgo reporting to higher management is unrelated to Deeter's eventual suspension because Deeter does not allege that reporting the incident to higher management would have mitigated or prevented the suspension. Second,

and again, Deeter has not set forth the operative facts necessary to show that the "injustice" of his suspension can only be avoided by enforcing the alleged "promise."

Deeter's fourth claim, for negligent misrepresentation, alleges similarly to his second claim that Haynes represented to him that he would have equivalent job security as when he was a member of the UAW, induced Deeter to forfeit UAW job security with reckless disregard for the truth or falsity of that representation, and failed to satisfy that representation by suspending him.

Indiana has adopted the definition of negligent misrepresentation as set forth in the Restatement (Second) of Torts. Nicoll v. Cmty. State Bank, 529 N.E.2d 386, 391 (Ind. Ct. App. 1988), trans. denied. The elements at issue are whether Haynes "supplie[d] false information," and whether it "fail[ed] to exercise reasonable care or competence in obtaining or communicating the information." Id. (citation omitted). Because of our conclusion that Deeter's suspension did not result in the loss of job security, he has failed to present the operative facts necessary to suggest that "the information" was false. Further, Deeter has not put forth facts as to Haynes's lack of reasonable care or competence in obtaining or communicating the information. Although Deeter might argue such facts would be discoverable if this claim were to move forward, we decline this invitation to overlook the well-settled requirement that a plaintiff plead "operative facts necessary to set forth an actionable claim." Trail, 845 N.E.2d at 135.

Deeter's fifth claim, also for negligent misrepresentation, realleges the facts of his third claim – that Haynes promised Deeter his work conduct after his surgery was acceptable,

as a result Deeter decided not to report the incident to higher management, and this representation that his conduct was acceptable was evidently erroneous because Deeter was suspended. As stated above, because Deeter does not allege that reporting the incident to higher management would have mitigated or prevented the suspension, he has not alleged he relied to his detriment on this alleged representation by Haynes, and therefore has not alleged facts to support the causation or damages elements of this claim. Accordingly, we conclude his complaint lacks the operative facts necessary to support this claim.

Deeter's sixth claim realleges the facts of his first and second claims under the labels of intentional misrepresentation and constructive fraud. As to his claim of intentional misrepresentation, as stated above, Deeter's suspension alone does not make Haynes's alleged representations of job security false. Because this was not a false representation, the operative facts necessary to set forth an actionable claim are lacking and Haynes's mens rea is irrelevant. As to constructive fraud, this claim also requires a misrepresentation. Darst v. Illinois Farmers Ins. Co., 716 N.E.2d 579, 581 (Ind. Ct. App. 1999), trans. denied. Because Haynes's representation of job security was not false based on the facts alleged, this claim also fails.

Finally, as to Deeter's argument to the trial court that Deeter's suspension is a valid basis for these claims because he was guaranteed progressive discipline and not immediate suspension, we conclude that, based on the complaint, Deeter was guaranteed progressive discipline as a member of the USWA, but ended his membership to become a supervisor. If he had not, this might be more appropriately framed as a labor dispute and involve the

USWA. To the extent Deeter argues progressive discipline is a natural right of an employee even without an explicit agreement, we disagree to the extent that Deeter was "disciplined" here. Beyond that, it is unnecessary to address the limits, contours, and exceptions of any such right.

In sum, we will not go as far as the trial court or Haynes to say that Deeter's claims are insufficient absent allegations of discharge. But we can only rule on the factual allegations before us – a relatively short, defined, suspension. We conclude as a matter of law that the suspension did not give rise to any of Deeter's claims based on alleged promises or representations. Although Deeter alleges disgraceful business practices by Haynes, he has not set forth the operative facts necessary to support an actionable claim.

Conclusion

Haynes's suspension of Deeter did not violate any of the promises or representations Deeter alleges, and consequently, Deeter's complaint did not set forth the operative facts necessary to entitle him to relief. We conclude the trial court did not err by granting Haynes's motion to dismiss.

Affirmed.

MAY, J., and VAIDIK, J., concur.