STATE OF MAINE
CUMBERLAND, ss

SUPERIOR COURT
CIVIL ACTION
Docket No. CV-14-213

DOROTHY SHAFRAN,

Plaintiff

v.

TAMMY COOK d/b/a
BATH FAMILY DENTAL,

Defendant

ORDER ON DEFENDANT'S
MOTION TO DISMISS AND
MOTION TO STRIKE

Before the court are defendant's motion to dismiss plaintiff's complaint in its entirety and defendant's motion to strike exhibits included with plaintiff's response to defendant's motion to dismiss. M.R. Civ. P. 12(b)(6) & 12(f).

In her complaint, plaintiff alleges that during her employment at defendant's dental office, she complained to OSHA concerning certain health practices in defendant's office. (Compl. ¶ 7.) She alleges that after the complaint, Dr. Cook issued unfounded and retaliatory disciplinary warnings against plaintiff and discharged her from employment. (Compl. ¶¶12, 13.) Plaintiff alleges further that Dr. Cook interfered in plaintiff's effort to obtain unemployment compensation and filed a complaint against plaintiff with the Maine Board of Dental Examiners. (Compl. ¶¶16, 18.) Plaintiff filed a complaint with the Maine Human Rights Commission and was issued a right to sue letter on February 4, 2014. (Compl. ¶¶ 21, 23, 25.)

On May 1, 2014, plaintiff filed this lawsuit. She alleges the following: count I: Violation of the Maine Whistleblower's Protection Act; count II: False Light; count III: Intentional Infliction of Emotional Distress; count IV: Negligent Infliction of Emotional Distress; count V: Defamation; count VI: Slander Per Se. In lieu of an answer, defendant filed the pending motion to dismiss on July 25, 2014 and attached two exhibits to the motion. Plaintiff attached five exhibits to her response to the motion. With the reply to plaintiff's opposition, defendant filed a motion to strike plaintiff's exhibits.

For the following reasons, the motion to dismiss is granted in part and denied in part. The motion to strike is granted.

FACTS

The following facts are taken from plaintiff's complaint. Defendant Tammy Cook is a dentist whose business, Bath Family Dental, is located in Bath, Maine. (Compl. ¶ 2.) Plaintiff Dorothy Shafran worked as a hygienist for defendant from July 2008 to October 18, 2011. (Compl. ¶ 3.)

In late 2010, plaintiff became concerned about infection control lapses in defendant's office. (Compl. ¶¶ 4-5.) After discussing her concerns with defendant to no avail, plaintiff filed a complaint with OSHA alleging a number of health and safety hazards at the Bath Family Dental office. (Compl. ¶¶ 6-7.) In response to plaintiff's complaint, OSHA inspectors conducted an inspection of defendant's office on October 4, 2011. (Compl. ¶ 8.)

During the OSHA inspection, defendant told the OSHA inspectors that she knew who filed the complaint and would fire those individuals. (Compl. ¶ 9.) The OSHA inspectors advised defendant that firing an employee for making an OSHA complaint would violate OSHA's whistleblower protections. (Compl.

10.) Defendant responded that she would fire the responsible individuals for another reason and no one would be able to prove it was connected to the OSHA complaint. (Compl. ¶ 10.) After the inspectors left, defendant immediately made statements that she suspected plaintiff was involved in filing the OSHA complaint. (Compl. ¶ 11.)

During the next two weeks, defendant began issuing to plaintiff unfounded and retaliatory disciplinary warnings. (Compl. ¶ 12.) These warnings culminated in plaintiff's termination on October 18, 2011. (Compl. ¶ 13.) As a result of defendant's retaliatory actions, the U.S. Department of Labor filed a complaint against defendant. (Compl. ¶ 14.) Defendant entered a consent agreement with the Department of Labor on February 4, 2013. (Compl. ¶ 15.)

After plaintiff was fired, she sought unemployment compensation. (Compl. ¶ 16.) Defendant challenged plaintiff's right to unemployment compensation and stated plaintiff had been discharged for misconduct. (Compl. ¶ 16.) After a lengthy appeal process, the Unemployment Insurance Commission found that plaintiff had not engaged in misconduct that warranted discharge. (Compl. ¶ 17.)

On May 23, 2012, defendant filed a complaint against plaintiff with the Maine Board of Dental Examiners (the Board). (Compl. ¶ 18.) In her complaint, defendant alleged that plaintiff had engaged in "theft and working out of the scope of one's license and endangering the dentist's license." (Compl. ¶ 18.) Defendant concluded in her complaint, "So I had the privilege of paying [plaintiff] a wage for cheating, lying, stealing, and breaking the rules of her own licensure." (Compl. ¶ 19.) On June 5, 2012, the Board voted to dismiss the complaint and found "no violation of the Dental Practice Act." (Compl. ¶ 20.)

DISCUSSION

A. MOTION TO STRIKE

Defendant filed a motion to strike the exhibits attached to plaintiff's response to the motion to dismiss. M.R. Civ. P. 12(f). In fact, both parties attached exhibits to their pleadings. "The general rule is that only the facts alleged in the complaint may be considered on a motion to dismiss . . . ." See Moody v. State Liquor & Lottery Comm'n, 2004 ME 20, ¶ 8, 843 A.2d 43. Although there are exceptions to the general rule, the majority of the parties' exhibits do not come within the exceptions, are incomplete, and inadmissible. Id. ¶ 10. Further, such additional evidence is better considered on a motion for summary judgment, when the court has the benefit of the organizing principles of Rule 56. The court has not considered these exhibits in deciding this motion to dismiss.

B. MOTION TO DISMISS

1. Standard of Review

On review of a motion to dismiss for failure to state a claim, the court accepts the facts alleged in plaintiff's complaint as admitted. Saunders v. Tisher, 2006 ME 94, ¶ 8, 902 A.2d 830. The court then examines those facts "in the light most favorable to plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory." Doe v. Graham, 2009 ME 88, ¶ 2, 977 A.2d 391 (quoting Saunders, 2006 ME 94, ¶ 8, 902 A.2d 830). "For a court to properly dismiss a claim for failure to state a cause of action, it must appear 'beyond doubt that [the] plaintiff is entitled to no relief under any set of facts that might be proven in support of

the claim.'" Dragomir v. Spring Harbor Hosp., 2009 ME 51, ¶ 15, 970 A.2d 310 (quoting Plimpton v. Gerrard, 668 A.2d 882, 885 (Me. 1995)).

2. Whistleblower Protection Act Claim (Count I); Defamation (Count V), and Slander Per Se (Count VI)

a. Conditional Privilege or Absolute Privilege

Defendant first argues that the basis for plaintiff's complaint, defendant's letter to the Board, is a privileged communication and defendant cannot be liable for her statements in that letter. Plaintiff argues that while the communication may be conditionally privileged, the defendant has either abused that privilege or acted outside the scope of her reporting obligations.

The first issue is the extent of the reporting privilege under the Maine Health Security Act. The provision granting immunity under certain circumstances, 24 M.R.S. § 2511 (2013), provides:

> Any person acting without malice, any physician, podiatrist, health care provider, health care entity or professional society, any member of a professional competence committee or professional review committee, any board or appropriate authority and any entity required to report under this chapter are immune from civil liability:
>
> 1. **Reporting.** For making any report or other information available to any board, appropriate authority, professional competence committee or professional review committee pursuant to law;
>
> . . . .

Interpretation of this section requires a determination of whether the phrase "acting without malice" applies to physicians and health care providers. In Benjamin v. Aroostook Medical Center, the federal district court of Maine appeared to apply the "acting without malice" standard to any report, regardless of who made it. 937 F. Supp. 957, 975 (D. Me. 1996). The Law Court has applied this section, but found it unnecessary "to express an opinion whether the

immunity provided by section 2511 is absolute or conditioned on the reporter acting without malice . . . ." McCullough v. Visiting Nurse Serv. of S. Me., Inc., 1997 ME 55, ¶ 14, 691 A.2d 1201.

Under a plain language interpretation, "acting without malice" must apply only to "any person" and not to physicians and the other entities explicitly listed in this section. This interpretation of the statute is explicitly set forth in the legislative history of an amendment to this section, which explains the old law and how the section was amended:

> Under existing law, immunity from civil and criminal liability is accorded in certain circumstances to any person, physician, health care provider, physicians' professional society, physicians' professional competence committee member or member of the medical or osteopathic board or related health care authority. The immunity applies if an individual or organization in the list above acts without malice in reporting information to an appropriate health care board or authority, in assisting in preparing information to be so reported, or in assisting the board or authority to carry out its duties with regard to the health care profession.
>
> Section 5 makes 3 substantive changes in the existing law.
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> . . .
>
> Third, section 5 accords physicians and the listed health care organizations immunity for reporting to and assisting a pertinent health care board, authority or committee without regard to whether the actions were with malice. This blanket immunity is not accorded to other persons reporting to or assisting the health care boards, authorities or committees; the 'malice' standard remains for these persons.
>
> . . .
>
> [B]lanket civil immunity, as opposed to immunity applying a 'malice' standard, is accorded physicians and the listed health care organizations because they, as opposed to other persons, have certain duties to report imposed by the Maine Health Security Act.

L.D. 2520, Statement of Fact, § 5, at 11-12 (113th Leg. 1988). If defendant's letter to the Board is a report by a physician or one of the listed health care organizations that has a duty to report, defendant is absolutely immune from civil liability for any statements in that report.

Defendant, a dentist, is not a "physician" as defined by the MHSA. The Act defines physician as "any natural person authorized by law to practice medicine, osteopathic medicine or veterinary medicine within this State." 24 M.R.S. § 2502(3). The Act defines health care practitioner as "physicians and all others certified, registered or licensed in the healing arts, including, but not limited to, nurses, podiatrists, . . . dentists . . . ." Id. § 2502(1-A). If the term "physician" included dentists, the inclusion of dentists as a separate group in the definition of health care practitioner would not be required.[1]

Defendant's letter could be a report by a health care provider as defined under the MHSA. Health care provider is defined as "any hospital, clinic, nursing home or other facility in which skilled nursing care or medical services are prescribed by or performed under the general direction of persons licensed to practice medicine, dentistry, podiatry or surgery in this State and that is licensed or otherwise authorized by the laws of this State." 24 M.R.S. § 2502(2). Under this definition, defendant's dental office is a health care provider. There may be a factual issue as to whether the letter was written on behalf of the dental office as an entity or whether it was a personal letter from the defendant.

Assuming that the letter is from a health care provider, the next question is whether the report was made "pursuant to law."[2] Defendant argues that the report was either required or authorized pursuant to two sections of the MHSA.

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1 The definition of health care provider in the Act also supports the conclusion that a

2 Arguably, section 2511 could be read to provide blanket immunity to health care provider reports, regardless of whether they were made pursuant to a statutory duty to report. Given the plain language of the statute, however, which states "any entity required to report" and the legislature's rationale for granting these entities blanket immunity, the better interpretation is to apply blanket immunity only to those reports that are required by law. 24 M.R.S. § 2511; see also McCullough, 1997 ME 55, ¶ 14, 691 A.2d 1201 (health care provider "fulfill[ed] its obligation to report [plaintiff's] termination to the board").

First, defendant argues that 24 M.R.S. § 2506 required the report. That section states:

> A health care provider or health care entity shall, within 60 days, report in writing to the disciplined practitioner's board or authority the name of any licensed, certified or registered employee or person privileged by the provider or entity whose employment, including employment through a 3rd party, or privileges have been revoked, suspended, limited or terminated or who resigned while under investigation or to avoid investigation for reasons related to clinical competence or unprofessional conduct, together with pertinent information relating to that action.

Under this section, the report "shall be made within 60 days" of either termination or another event adverse to the health care practitioner. The statute requires a report only when the actions described in the report led to the termination or other adverse action. See McCullough, 1997 ME 55, ¶¶ 12-14, 691 A.2d 1201 (finding two letters privileged where the letters contained information about the basis for the termination and the specific details about the incidents leading to termination). In this case, according to the complaint, the report was not made within 60 days[3] and the report did not concern actions that led to plaintiff's termination. (Compl. ¶¶ 18-19.) Defendant was, therefore, not obligated to file a report under this section.

Defendant also relies on 24 M.R.S. § 2505, which states:

> Any professional competence committee within this State and any physician or physician assistant licensed to practice or otherwise lawfully practicing within this State shall, and any other person may, report the relevant facts to the appropriate board relating to the acts of any physician or physician assistant in this State if, in the opinion of the committee, physician, physician assistant or other person, the committee or individual has reasonable knowledge of acts of the physician or physician assistant amounting to gross or repeated medical malpractice, . . . professional incompetence,

3 Defendant relies on facts that do not appear in the complaint when addressing the 60-day requirement. (Def.'s Mem. 4-5.)

> unprofessional conduct or sexual misconduct identified by board rule.

This section cannot apply to defendant's letter because the section applies only to reports relating to the acts "of any physician or physician assistant." Plaintiff is neither a physician nor a physician assistant.[4]

Because defendant was not obligated to make a report under the MHSA, defendant does not receive absolute immunity for her letter. It is not clear that section 2511 applies to defendant's report if that report was not authorized "pursuant to" the MHSA. 24 M.R.S. § 2511(1). Nevertheless, the communication could be conditionally privileged under the common law. See Morgan v. Kooistra, 2008 ME 26, ¶ 32, 941 A.2d 447 ("A conditional privilege protects against liability for defamation when society has an interest in promoting free, but not absolutely unfettered, speech." (internal quotation marks omitted)). As explained below, because the motion to dismiss should be denied even if the communication is conditionally privileged, the court does not decide at this point whether a privilege applies.

b. Applying the Malice Standard

Assuming that the malice standard applies to defendant's report, plaintiff has alleged facts that could support a finding of malice. "Malice includes making a statement knowing it is false, with a reckless disregard for its truth, or acting out of spite or ill will." Id. ¶ 34. Plaintiff's complaint alleges that defendant made statements to an OSHA inspector that she was going to fire plaintiff for filing an OSHA complaint. (Compl. ¶ 10.) Plaintiff further alleges that she was

4 As explained above, because defendant herself is not a physician or physician assistant, defendant could make the report only under the clause relating to "any person." Authorized reports from "any person" would not receive blanket immunity. See 24 M.R.S. § 2511 ("Any person acting without malice . . . .").

issued unfounded disciplinary warnings that led to her termination within two weeks of the OSHA inspection. (Compl. ¶¶ 12-13.) Defendant then opposed plaintiff's ability to receive unemployment benefits. (Compl. ¶ 16.) Plaintiff quoted statements from defendant's letter to the Board, which could demonstrate defendant's acrimony towards plaintiff. (Compl. ¶¶ 18-19.) These alleged facts are sufficient to support a finding that defendant acted with malice in making the report to the Board.

Because defendant is not immune from civil liability, counts I, V, and VI of the complaint will not be dismissed.

3. False Light (Count II)

Defendant argues plaintiff's complaint fails to state a cause of action for false light because there is no allegation of publicity, an element of the tort. Maine follows the Restatement's formulation of the tort of false light invasion of privacy, which states:

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Cole v. Chandler, 2000 ME 104, ¶ 17, 752 A.2d 1189 (quoting Restatement (Second) of Torts § 652E (1977)). "Publicity" is defined by the Restatement as:

> "Publicity," as it is used in this Section, differs from "publication," as that term is used in § 577 in connection with liability for defamation. "Publication," in that sense, is a word of art, which includes any communication by the defendant to a third person. "Publicity," on the other hand, means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge.

Id. (quoting Restatement (Second) of Torts § 652D cmt. a (1977)).

In a recent federal case, the court applied Maine law and dismissed a false light claim where the only allegations in the complaint were that the defendant "inform[ed] the Plaintiff's prospective employers and/or medical staffing agencies that the Plaintiff had been dismissed from the Hospital for unsatisfactory performance." Murtagh v. St. Mary's Reg'l Health Ctr., 2013 WL 5348607, at *9 (D. Me. 2013). The court concluded that these allegations were insufficient to satisfy the publicity requirement. Id.

Plaintiff's complaint alleges only that defendant's statements and written complaint to the Board form the basis of her false light claim.[5] The complaint fails to allege publicity. Accordingly, count II of plaintiff's complaint is dismissed.

4. Intentional Infliction of Emotional Distress (Count III)

Defendant argues that she is entitled to judgment on count III because the alleged conduct of filing the report is not extreme and outrageous as a matter of law. A plaintiff must demonstrate the following elements to prevail on an intentional infliction of emotional distress claim:

> (1) the defendant intentionally or recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from [defendant's] conduct;
>
> (2) the conduct was so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious, utterly intolerable in a civilized community;
>
> (3) the actions of the defendant caused the plaintiff's emotional distress; and

5 The Board is generally required to keep complaints confidential. 24 M.R.S. § 2510.

(4) the emotional distress suffered by the plaintiff was so severe that no reasonable [person] could be expected to endure it.

Curtis v. Porter, 2001 ME 158, ¶ 10, 784 A.2d 18 (internal quotations marks omitted). "[I]t is for the court to determine in the first instance whether the defendant's conduct may reasonably be regarded as so extreme and outrageous to permit recovery." Lougee Conservancy v. CitiMortgage, Inc., 2012 ME 103, ¶ 26, 48 A.3d 774 (internal quotation marks omitted). Defendant relies on cases in which the courts held that a plaintiff could not recover as a matter of law because the alleged conduct did not meet the "extreme and outrageous" standard. See Botka v. S.C. Noyes & Co., Inc., 2003 ME 128, ¶ 19, 834 A.2d 947; Staples v. Bangor Hydro-Electric Co., 561 A.2d 499, 501 (Me. 1989); Osgood v. C.U. York Ins. Co., 2006 WL 1980396, at *7 (Me. Super. June 5, 2006).

As plaintiff points out, however, all of these cases were decided on summary judgment. Plaintiff has alleged that defendant engaged in a campaign to destroy her professional reputation, which included baseless disciplinary warnings and a defamatory letter to the Board. (Compl ¶¶ 12, 13, 18, 19, 27, 32, 36.) Because the specific facts may be important regarding whether the defendant's conduct was extreme and outrageous, the court denies the motion to dismiss the intentional infliction of emotional distress claim. Bratton v. McDonough, 2014 ME 64, ¶ 23, 91 A.3d 1050 (explaining that if reasonable people may differ as to whether conduct is "extreme and outrageous," a defendant is not entitled to judgment as a matter of law). Count V of the complaint will not be dismissed.

5. Negligent Infliction of Emotional Distress (Count IV)

Defendant argues that plaintiff's negligent infliction of emotional distress claim fails as a matter of law. A separate negligent infliction claim is limited to situations involving bystander liability, a special relationship between the tortfeasor and the plaintiff, or a separate, independent tort that is the cause of the emotional distress. Jacobi v. MMG Ins. Co., 2011 ME 56, ¶ 17, 17 A.3d 1229. There are no allegations in the complaint regarding bystander liability or a special relationship between the parties. Thus, if plaintiff can recover for negligent infliction of emotional distress, the claim must be based on a separate underlying tort.

Plaintiff has alleged defamation and slander per se. A defamation claim could constitute the underlying tort for the purposes of plaintiff's negligent infliction of emotional distress claim. See Packard v. Cent. Me. Power Co., 477 A.2d 264, 269 (Me. 1984) (affirming trial court's decision granting defendant judgment notwithstanding the verdict on plaintiff's negligent infliction of emotional distress claim where the jury found for defendant on the underlying defamation claim). Although as alleged, negligent infliction of emotional distress is not an independent claim in this case, plaintiff could recover under this theory if she prevails on her defamation claim. Count IV of the complaint will not be dismissed.

The entry is

Defendant's Motion to Strike is GRANTED.

Defendant's Motion to Dismiss is GRANTED as follows: Count II of Plaintiff's Complaint is DISMISSED. Defendant's Motion to Dismiss is DENIED on Counts I, III, IV, V, and VI.

Date: 11-10-14

Nancy Mills
Justice, Superior Court

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