

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

MARTIN C. MELTZER,)
)
Plaintiff,)
) C.A. No. 07C-12-197 MMJ
v.)
)
CITY OF WILMINGTON, JOHN)
SHERIDAN, and BRENDA)
JAMES-ROBERTS,)
)
Defendants.)

Submitted: May 27, 2008
Decided: August 6, 2008

Upon Defendants' Motion to Dismiss.
GRANTED IN PART. DENIED IN PART.

OPINION

G. Kevin Fasic, Esquire, Wilmington, Delaware, Attorney for Plaintiff

David H. Williams, Esquire, James H. McMackin, Esquire, Morris James, LLP.,
Wilmington, Delaware, Attorneys for Defendants

JOHNSTON, J.

STATEMENT OF FACTS

Martin C. Meltzer is an Assistant City Solicitor in Wilmington. In 2004, Meltzer was questioned by the City Personnel Director concerning a harassment allegation made by another Assistant City Solicitor (“Harassment Claimant”). Meltzer provided information that supported Harassment Claimant’s claim for Workers’ Compensation benefits. Shortly thereafter, John Sheridan, the City Solicitor, and Brenda James-Roberts, First Assistant City Solicitor, terminated Harassment Claimant’s employment.

Meltzer, who handles employment matters for the City, informed Sheridan and James-Roberts that the termination of Harassment Claimant may have violated Delaware’s Workers’ Compensation statute.¹ In accordance with section 2-339 of the Wilmington City Code, Meltzer sent a report regarding the Workers’ Compensation matter, and his participation in the harassment claim, to the City Personnel Director and the Mayor’s Chief of Staff.

Meltzer claims that due to his participation in the harassment claim and his report, Sheridan and James-Roberts retaliated against and harassed him.² Meltzer

¹19 *Del. C.* § 2365.

²Meltzer claims the retaliatory conduct included the following: unwarranted and unsupported criticism of Meltzer’s job performance; excessive documentation placed in Meltzer’s personnel file; creation of a hostile work environment; assignment of unreasonable
(continued...)

alleges that this retaliation caused damage to his reputation, humiliation, embarrassment and physical ailments.³

PROCEDURAL HISTORY

On December 26, 2007, Meltzer filed a Complaint alleging: (I) violation of Delaware's Whistleblowers' Protection Act; (II) breach of the implied covenant of good faith and fair dealing; (III) public policy violation/City whistleblowers' ordinance; (IV) violation of the Workers' Compensation Retaliation Act; (V) age discrimination; (VI) intentional infliction of emotional distress; and (VII) violation of 42 U.S.C.A. § 1983.

On March 28, 2008, Defendants filed a Motion to Dismiss Plaintiff's Complaint in part. On April 18, 2008, Meltzer filed a response. The Court heard oral argument on April 24, 2008. The Court permitted both parties to file supplemental argument. Meltzer acknowledged that he cannot maintain an action for individual liability under Count V (age discrimination). The Court will consider the remaining Counts.

²(...continued)

tasks shortly before Meltzer's pre-approved medical leave; refusal of assistance; provision of lower salary increases, bonuses and salary "bumps"; failure to promote; denial of equitable share of funds appropriated by the City to supplement the salaries of attorneys with "experience and time in the profession"; and age discrimination.

³*E.g.*, loss of sleep, anxiety, diarrhea, nervous tension, high blood pressure, chest pains, pre-diabetes.

ANALYSIS

Count I – Violation of Delaware’s Whistleblowers’ Protection Act

Meltzer claims that Defendants violated Delaware’s Whistleblowers’ Protection Act.⁴ Specifically, Meltzer maintains that Defendants discriminated against him as a result of his report, which outlined possible violations of the Workers’ Compensation Act.

Sheridan and James-Roberts respond that Meltzer is not entitled to relief under 19 *Del. C.* § 1703, because section 1703 only applies to actions taken by employers. Sheridan and James-Roberts are Meltzer’s supervisors, not employers.

Section 1703 provides in part:

An employer shall not discharge, threaten or otherwise discriminate against an employee regarding the employee’s compensation, terms, conditions, location, or privileges of employment: (1) Because the employee, or a person acting on behalf of the employee, reports or is about to report to a public body...a violation which the employee knows or reasonably believes has occurred or is about to occur,...or (4) Because the employee reports verbally or in writing to the employer or to the employee’s supervisor a violation, which the employee knows or reasonably believes has occurred or is about to occur, unless the employee knows or has reason to know that the report is false.

⁴19 *Del. C.* § 1703.

This Court previously has ruled that a State employee cannot sue individuals under the Whistleblowers' Protection Act.⁵ Other jurisdictions have reached the same conclusion.⁶ Defendants' Motion to Dismiss Count I against the individual Defendants is hereby **GRANTED**.

Count II – Breach of the Implied Covenant of Good Faith and Fair Dealing

Defendants argue Meltzer cannot maintain an action for breach of good faith and fair dealing, because he is still employed. Defendants cite Delaware case law, in which the Court found “both a falsification and a termination must be present to support a claim for breach of the covenant.”⁷ If an employee resigns, rather than being terminated, the employee may have a claim for constructive

⁵*Postell v. Eggers*, 2008 WL 134830, at *5 (Del. Super.); *Tomei v. Sharp*, 902 A.2d 757, 767 (Del. Super. 2006) (“Tomei has brought a whistleblower action against two individual State employees.... There are several reasons why she cannot recover against them under the terms of the statute. First, Tomei was an employee of the State, not of the two individuals. Second, the State is liable for the financial obligations that could result from a successful action under the Whistleblower Act, and duty-bound to comply with any of the non-monetary remedies, if ordered. Third, the definition of employer in the Act does not include individuals”).

⁶*See Palladino v. VNA of Southern New Jersey, Inc.*, 68 F.Supp.2d 455, 464 (D.N.J. 1999).

⁷*Rizzitiello v. McDonald's Corp.*, 2004 WL 396411, at *3 (Del. Super); *see E. I. duPont de Nemours and Co. v. Pressman*, 679 A.2d 436, 444 (Del. 1996).

discharge.⁸ However, an employee cannot claim constructive discharge solely on the basis of denial of future promotions.⁹

Meltzer argues termination is not a necessity. Meltzer cites *Hudson v. Wesley College, Inc.*, in which a professor who was denied tenure, but not fired, brought a claim for breach of an implied covenant of good faith and fair dealing.¹⁰ However, in *Hudson*, Wesley College had a policy that professors were forced to apply for tenure after teaching for a specified period of time.¹¹ Any professor denied tenure was granted an additional year of employment, and then terminated.¹² In effect, the professor was facing certain termination. Therefore, *Hudson* was permitted to assert a claim for breach of the covenant.

Delaware case law demonstrates that breach of the covenant of good faith and fair dealing can be claimed only when an employee has been fired or constructively discharged. Withholding or denying future promotions “is

⁸*Rizzitello*, 2004 WL 396411, at *3.

⁹*Id.*

¹⁰1998 WL 939712, at *9 (Del. Ch.).

¹¹*Id.* at *5.

¹²*Id.*

insufficient as a matter of law to support a claim for constructive discharge.”¹³ As a policy matter, to permit Meltzer’s breach of good faith and fair dealing claim would force courts to examine whether current employees have been treated fairly. This is not the intent of the covenant. Therefore, because Meltzer is still employed, he may not bring a claim for breach of the implied covenant of good faith and fair dealing. Defendants’ Motion to Dismiss Count II is hereby **GRANTED.**

Count III – Public Policy Violation/City Whistleblower Ordinance

Meltzer claims that Defendants violated the City of Wilmington’s Policy and Procedures and the City Code by engaging in acts of retaliation and discrimination. Specifically, Meltzer claims the Wilmington whistleblower ordinance incorporates a private right of action.

Section 40-7(a) of the Wilmington Code states:

Any city employee who reported a violation or suspected violation of a law or regulation promulgated under the laws of the city, the state, or the United States, shall be protected in accordance with state law unless the employee did not make the report in good faith.

Defendants argue that the City ordinance does not create any further substantive rights or an implied private right of action.

¹³*Rizzitiello*, 2004 WL 396411, at *3.

When a statute does not expressly create a private remedy, the Court must assess: (1) whether Plaintiff is part of a class of specific persons the statute was enacted to protect; (2) whether there is any evidence of legislative intent to grant or deny a private cause of action under the statute; and (3) whether the presence of a private cause of action is consistent with the purpose of the legislation.¹⁴

Delaware's Whistleblowers' Protection Act creates a private right of action:

A person who alleges a violation of this chapter may bring a civil action for appropriate declaratory relief, or actual damages, or both within 3 years after the occurrence of the alleged violation of this chapter.¹⁵

Plaintiff, as a City employee, clearly is part of the specific class section 40-7 was enacted to protect. There is no evidence that Wilmington City Council intended to deny a right of private action. When read together, it appears from the clear wording and intent of section 40-7(a) of the Wilmington Code, that City Council intended to confer the rights and protections accorded under State law to City employees. The protections under State law include the right to bring a civil action for alleged violations of whistleblowers' protection. Therefore, the Court

¹⁴*Eller v. Barrton*, 2007 WL 4234450, at *7 (Del. Super.).

¹⁵19 *Del. C.* § 1704(a).

finds that section 40-7(a) of the Wilmington City Code permits a private right of action. Defendants' Motion to Dismiss Count III is hereby **DENIED**.

Count IV – Violation of the Workers' Compensation Retaliation Act

Meltzer claims Defendants violated Delaware's Workers' Compensation Act.¹⁶ Defendants argue that Meltzer is not entitled to relief under 19 *Del. C.* § 2365 because section 2365 only applies to actions taken by employers. Sheridan and James-Roberts are Meltzer's supervisors and not his employers.

Section 2365 provides, in relevant part:

It shall be unlawful for any employer or the duly authorized agent of any employer to discharge or to retaliate or discriminate in any manner against an employee as to the employee's employment because such employee has claimed or attempted to claim workers' compensation benefits from such employer.... Any claim of an employee alleging such action by an employer shall be filed with the Superior Court within 2 years of the employer's alleged action.

Meltzer asserts Sheridan and James-Roberts are the authorized agents of his employer, the City of Wilmington.

Regardless of whether Sheridan and James-Roberts acted as agents of the City, Meltzer cannot maintain individual actions against City employees.

Meltzer's employer is the City of Wilmington. The claim in Count IV against Defendants Sheridan and James-Roberts is hereby **DISMISSED**.

¹⁶19 *Del. C.* § 2365.

Count VI – Intentional Infliction of Emotional Distress

Defendants argue that Meltzer’s claim for intentional infliction of emotional distress is barred by the Worker’s Compensation Act. Meltzer claims he falls within the personal dispute exception.¹⁷ The personal dispute exception provides:

(18) Personal injury sustained by accident arising out of an in the course of employment... b. Shall not include any injury caused by the willful act of another employee directed against the employee by reasons personal to such employee and not directed against the employee as an employee or because of the employee’s employment.

In order to be exempted, the wrongful acts must be “completely unrelated to the conditions existing in, or created by the workplace.”¹⁸ Even viewing the evidence in the light most favorable to Meltzer, all claims are related to or created by his role as an employee. Therefore, the personal dispute exception does not apply. It is well settled that an employee’s common law claim against an employer for intentional infliction of emotional distress is barred by the exclusivity provision of the Workers’ Compensation Act.¹⁹

¹⁷19 *Del. C.* § 2301(18)(b).

¹⁸*Konstantopoulos v. Westvaco Corp.*, 690 A.2d 936, 939 (Del. 1996); *Postell v. Eggers*, 2008 WL 134830, at *3 (Del. Super.).

¹⁹*Limehouse v. Steak & Ale Restaurant Corp.*, 2004 WL 1280400, at *3 (Del.); *Konstantopoulos v. Westvaco Corp.*, 690 A.2d 936, 938-40 (Del. 1996); *Barber v. City of Lewes*, 1997 WL 127951 at *18-19 (Del. Super.); *Battista v. Chrysler Corp.*, 454 A.2d 386, 288 (Del. Super. 1982).

Count VII – Violation of 42 U.S.C.A. § 1983

Section 1983 of title 42 of the U.S.C.A. provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suite in equity, or other proper proceeding for redress.

Meltzer claims Defendants violated his First Amendment right of protected speech. Defendants counter that Meltzer’s speech was made pursuant to his official duties, and thus is not protected by the First Amendment. Meltzer argues that further discovery is needed to determine if his speech was in the scope of his duties.

In *Garcetti v. Ceballos*,²⁰ Deputy District Attorney Ceballos, filed a section 1983 claim against the county and his supervisors. Ceballos claims he wrote a memorandum in which he exposed governmental misconduct. Ceballos argued that he suffered retaliation for writing the memorandum. The *Garcetti* Court held that “when public employees make statements pursuant to their official duties, the

²⁰547 U.S. 410 (2006).

employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”²¹

The United States Supreme Court outlined a test to determine if a public employee’s speech is accorded Constitutional protections. The Court must determine

whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer’s reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public. This consideration reflects the importance of the relationship between the speaker’s expressions and employment. A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity’s operations.²²

Whether an incident or speech is within a public employee’s official duties is a mixed question of fact and law.²³

Meltzer’s complaint outlines three distinct incidents of speech:

- (1) Meltzer provided information during an informal investigation into Harassment Complainant’s claim;

²¹*Id.* at 421.

²²*Id.* at 418.

²³*Foraker v. Chaffinch*, 501 F.3d 231, 240 (3d Cir. 2007).

- (2) Meltzer reported to Sheridan and James-Roberts that their actions in terminating Harassment Complainant's employment could be construed as violating the Delaware Workers' Compensation Act;
- (3) Meltzer reported to the City Personnel Director and the Mayor's Chief of Staff as to the substance of his report to his supervisors and his participation in the harassment claim

Meltzer admits his report to his superiors was made in conformance with the City Code. In addition, Meltzer handled employment matters for the City.

Therefore, his speech could be construed to be part of his official duties.

However, at this time, the Court does not have sufficient information about

Meltzer's official duties to definitively resolve this issue. Without more, the Court cannot determine whether Meltzer's speech was within his official duties.

Therefore, Defendants' Motion to Dismiss is premature and is **DENIED AT THIS TIME.**

Punitive Damages

Plaintiff alleges entitlement to punitive damages under the Whistleblowers' Protection Act and the Workers' Compensation statute (Counts I and IV). Neither 19 *Del. C.* § 1704 (Whistleblowers' Protection; Relief and Damages) nor 19 *Del. C.* § 2365 (Workers' Compensation; Relief to be Granted) provide for punitive damages. Ordinarily this Court presumes that the legislature intended to

exclude remedies not enumerated by statute.²⁴ In *Pekala v. E. I. duPont de Nemours and Co., Inc.*, this Court held: “The plain language of Section 2365 does not support a claim for punitive damages. In addition, the Court also finds that Plaintiff has failed to articulate any egregious conduct of an intentional or reckless manner with respect to the termination process or the Plaintiff’s specific termination that would rise to the level required for punitive damages.”²⁵

Paragraphs 46 and 47 of the Complaint state that the conduct of Defendants was extreme, outrageous, intentional and/or reckless. These bare-bones allegations are insufficient to place Defendants on notice of what specific conduct purportedly is particularly reprehensible and egregious. Additionally, Plaintiff was not terminated by his employer.

Therefore, Defendants’ Motion to Dismiss Plaintiffs’ claims for punitive damages is hereby **GRANTED**.

CONCLUSION

The Defendants’ Motion to Dismiss Counts II (Breach of the Implied Covenant of Good Faith and Fair Dealing) and VI (Intentional Infliction of Emotional Distress) is hereby **GRANTED**. Defendants’ Motion to Dismiss

²⁴See *Pub. Serv. Comm’n v. Diamond State Tel. Co.*, 468 A.2d 1285, 1300 (Del. 1983).

²⁵2006 WL 1067275, at *4 (Del. Super.).

Counts I (Violation of Delaware's Whistleblowers' Protection Act) and IV (Violation of the Workers' Compensation Retaliation Act), as to individual Defendants Sheridan and James-Roberts, is hereby **GRANTED**. Defendants' Motion to Dismiss Count VII (Violation of 42 USCA § 1983) is hereby **DENIED AT THIS TIME**. Defendants' Motion to Dismiss Count III (Public Policy Violation/City Whistleblower Ordinance) is hereby **DENIED**. Defendants' Motion to Dismiss Count V (age discrimination) is hereby **GRANTED** as unopposed. Defendants' Motion to Dismiss Plaintiff's claim for punitive damages is hereby **GRANTED**.

IT IS SO ORDERED.

The Honorable Mary M. Johnston