

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

SANDRA ROBBINS,)
) C.A. No. 09C-08-044 (JTV)
 Plaintiff,)
)
 v.)
)
 TAMMY E. CARTER, and HAPPY)
 HARRY’S, INC., a Delaware)
 corporation,)
)
 Defendants.)

Submitted: May 14, 2010
Decided: August 31, 2010

Charles E. Whitehurst, Jr., Esq., Young, Malmberg & Howard, Dover, Delaware.
Attorney for Plaintiff.

Stephen F. Dryden, Esq., Robinson, Grayson, Dryden & Ward, Wilmington,
Delaware. Attorney for Defendant Happy Harry’s.

Upon Consideration of Defendant Happy Harry’s
Motion to Dismiss

DENIED as to Count VI
GRANTED as to Count VII

VAUGHN, President Judge

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ORDER

Upon consideration of Defendant Happy Harry's, Inc., ("Happy Harry's") motion to dismiss, the plaintiff's opposition thereto, and the record of this case, it appears that:

1. The events in question here occurred on two separate days: August 31, 2007 and a September date thereafter.¹

2. On August 31, 2007, the plaintiff, Sandra Robbins, was a customer at the Happy Harry's located in Harrington, Delaware. That day, she used the pharmacy drive-through window to drop off prescriptions. There, she had contact with the other defendant in this case, Tammy Carter ("Defendant Carter"). Defendant Carter was employed by Happy Harry's, working as the drive-through attendant.

3. Defendant Carter and her husband, Larry Carter, had separated in 2007. As outlined in the complaint, the plaintiff and Larry Carter were "engaged in a romantic relationship" during the events in question.² After the August 31, 2007 contact between the two women, the complaint alleges that Defendant Carter telephoned Larry Carter. During this phone call, Defendant Carter purportedly insulted, defamed, and threatened to assault the plaintiff. Defendant Carter then allegedly disclosed the plaintiff's confidential medical information to Larry Carter without the plaintiff's permission.

¹ The complaint alleges the events occurred on August 31, 2007 and September 12, 2009. However, since the complaint was filed on August 28, 2009, I infer that all of the facts alleged in the complaint must have occurred prior to August 28, 2009.

² Plaintiff's Complaint at ¶ 4.

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4. Subsequently, the plaintiff went to Happy Harry's to complain about Defendant Carter's phone call. She spoke to an assistant manager, who stated that she would speak with the pharmacist and manager about the incident.

5. The plaintiff then left Happy Harry's and went to the Food Lion grocery store, which was located in the same shopping center as Happy Harry's. There, she was confronted by Defendant Carter and an argument ensued. During the argument, Defendant Carter allegedly made reference to the plaintiff's sensitive medical information. After the argument, Defendant Carter was arrested and charged with offensive touching, disorderly conduct, and terroristic threatening.

6. The plaintiff filed suit on August 28, 2009. She listed seven counts in her complaint: Count I - Battery; Count II - Breach of Confidentiality; Count III - Invasion of Privacy; Count IV - Intentional Infliction of Emotional Distress; Count V - Negligent Infliction of Emotional Distress; Count VI - Negligent Supervision of Employee; and Count VII - Respondent Superior. The first five counts allege liability against Defendant Carter. Counts VI and VII allege liability against Happy Harry's. Before the Court is Happy Harry's motion to dismiss Counts VI and VII pursuant to Superior Court Rule 12(b)(6).

7. The standard of review under Rule 12(b)(6) is a familiar one. Upon a motion to dismiss for failure to state a claim upon which relief can be granted, a complaint is subjected to a broad test of sufficiency.³ Dismissal is appropriate only

³ See *C & J Paving, Inc. v. Hickory Commons, LLC*, 2006 WL 3898268, at *1 (Del. Super.).

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if it is reasonably certain “that the plaintiff could not prove any set of facts that would entitle [her] to relief.”⁴ The complaint will not be dismissed unless it clearly lacks factual or legal merit.⁵ When considering a motion to dismiss, the court will accept all well-pleaded allegations as true.⁶ In addition, every reasonable factual inference will be drawn in favor of the plaintiff.⁷ The complaint must, however, contain “sufficient facts to state a cognizable claim.”⁸

8. Count VI is entitled “Negligent Supervision of Employee.” The plaintiff alleges in this count that:

Defendant Carter, acting in the scope of her employment with Happy Harry’s, committed tortuous acts resulting in injuries to the [plaintiff. Defendant Happy Harry’s knew or had reason to know of Defendant Carter’s propensity to engage in tortuous acts of intentional and negligent infliction of emotional distress, harassment, invasion of privacy, breach of confidentiality, and other torts against the [plaintiff. Defendant Happy Harry’s failed to exercise due care to supervise and to take steps to prevent Defendant Carter from committing and continuing her tortuous course of conduct, and failed to exercise due care to correct the injuries [sic] caused by Defendant Carter’s

⁴ *Ramayana v. Crawley*, 705 A.2d 1029, 1034 (Del. 1998) (citing *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978)).

⁵ *Diamond State Tel. Co. v. Univ. of Del.*, 269 A.2d 52, 58 (Del. 1970).

⁶ *Spence*, 396 A.2d at 968.

⁷ *Doe v. Cahill*, 884 A.2d 451, 458 (Del. 2005).

⁸ *In re Walt Disney Co. Deriv. Lithog.*, 825 A.2d 275, 285 (Del. Ch. 2003).

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tortuous acts. Defendant [sic] Happy Harry's breach of its duty to supervise proximately cause [sic] injuries to the [plaintiff, including irreparable reputational harm, severe emotional distress, economic injuries, and other injuries.⁹

9. "An employer is liable for negligent hiring or supervision where the employer is negligent in giving improper or ambiguous orders or in failing to make proper regulations, or in the employment of improper persons involving risk of harm to others, or in the supervision of the employee's activity."¹⁰

10. While the allegations of negligent supervision are somewhat conclusory, the complaint does seem at least to allege that Happy Harry's failed to take steps to prevent the disclosure of confidential medical information. Under the liberal pleading requirements relating to a motion to dismiss, I conclude that the plaintiff's complaint sufficiently alleges a claim of negligent supervision upon which relief can be granted.

11. Count VII is entitled "Respondent Superior" and alleges:

At all times material to this cause of action, [Defendant Carter] was an agent and employee of Defendant Happy Harry's, Inc., and was at such times acting within the full course, scope, and authority of [Defendant Carter's] position with Defendant

⁹ Plaintiff's Complaint at ¶¶ 36-40.

¹⁰ *Simms v. Christina Sch. Dist.*, 2004 WL 344015, at *8 (Del. Super.) (citing *Knerr v. Gilpin, Van Trump & Montgomery, Inc.*, 1998 WL 40009 (Del. Super.)).

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Happy Harry's Inc., therefore imputing liability for her *negligent* acts and resulting damages as outlined above under the principles of respondeat superior and the law of agency.¹¹

12. The parties have agreed that *Respondent superior* does not apply to Count I - Battery or to Count III - Invasion of Privacy. Whether *Respondent superior* applies to Count II - Breach of Confidentiality, Count IV- Intentional Infliction of Emotional Distress, and Count V - Negligent Infliction of Emotional Distress remains in dispute.

13. Happy Harry's contends that the plaintiff's complaint fails to state a claim against it based on *Respondent superior*. In substance, Happy Harry's contends that the allegations of Counts II, IV and V, which reference Defendant Carter's actions, were in no way motivated by a purpose to serve Happy Harry's. In support of this argument, Happy Harry's cites *Drainer v. O'Donnell*.¹² In that case, a married female sued two of her co-workers and their employer.¹³ In her complaint, she alleged that one of the co-workers had circulated a harassing story about her which caused her mental distress and physical injury.¹⁴ She imputed liability upon the employer via

¹¹ Plaintiff's Complaint at ¶ 42 (emphasis added).

¹² 1995 WL 338700 (Del. Super.).

¹³ *Id.* at *1.

¹⁴ *Id.*

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Respondent superior.¹⁵ The *Drainer* court dismissed the *Respondent superior* claim, pursuant to Rule 12(b)(6), concluding that the co-worker’s harassing story “could [not] be deemed to be within the scope of employment.”¹⁶

14. The plaintiff contends that the complaint does state a claim against Happy Harry’s under *Respondent superior*, and cites in support thereof the case of *Fanean v. Rite Aid Corporation of Delaware, Inc.*¹⁷ In that case, a customer filed a complaint, asserting intentional and negligent infliction of emotional distress, breach of confidentiality, and other causes of action, against a pharmacy in connection with its employee’s unjustified disclosure of a customer’s sensitive medical information.¹⁸ After examining each claim, the *Fanean* court determined that the plaintiff had properly plead her intentional and negligent infliction of emotional distress claims against the pharmacy.¹⁹ The *Fanean* court also concluded that the pharmacy could be held liable, under the doctrine of *Respondent superior*, for the employee’s alleged breach of confidentiality.²⁰

15. “An employer will be liable for the tortuous acts of an employee under

¹⁵ *Id.*

¹⁶ *Id.* at *4.

¹⁷ 984 A.2d 812 (Del. Super. 2009).

¹⁸ *Id.* at 815-16.

¹⁹ *Id.* at 818.

²⁰ *Id.* at 824.

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Respondent superior if those acts are performed within the scope of employment.”²¹
“Conduct is within the scope of employment if it (I) is of the type the employee was hired to perform; (ii) takes place ‘within the authorized time and space limits’; and (iii) is at least partially motivated by a purpose to serve the employer.”²² “The question of whether conduct is within the scope of employment is generally a question for the jury, unless the facts are so clear that they must be decided as a matter of law.”²³

16. In this case, it appears that Defendant Carter’s actions were motivated by a purely personal conflict between her, her former husband, and her former husband’s current girlfriend. It does not appear that her conduct was motivated in any way by a purpose to serve her employer. I therefore conclude that her conduct cannot be found to be within the scope of her employment.

17. I also conclude that the instant case is distinguishable from *Fanean*. While the facts in that case were similar, the *Fanean* court did not have an occasion to examine the doctrine of *Respondent superior* as it related to the intentional and negligent infliction of emotional distress claims. Moreover, the *Fanean* court did not address how the disclosure of the customer’s medical information, regarding the plaintiff’s breach of confidentiality claim, was within the scope of employment.²⁴ In

²¹ *Drainer*, 1995 WL 338700, at *4 (Del. Super.) (emphasis added).

²² *Id.* (citing *Wilson v. Joma, Inc.*, 537 A.2d 187, 189 (Del. 1988)).

²³ *Id.* (citing *Draper v. Olivere Paving & Constr. Co.*, 181 A.2d 565, 570 (Del. 1962)).

²⁴ *Fanean*, 984 A.2d at 824.

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fact, the *Fanean* court noted that the factual allegations concerning the alleged disclosure, and whether it was within the scope of employment, were “dangerously sparse.”²⁵ The parties in that case, therefore, were invited to revisit the issue of *Respondent superior* during discovery.²⁶

18. For the aforementioned reasons, Happy Harry’s Motion to Dismiss is ***denied*** as to Count VI - Negligent Supervision of Employee and ***granted*** as to Count VII - Respondent Superior.

IT IS SO ORDERED.

 /s/ James T. Vaughn, Jr.
President Judge

cc: Prothonotary
Order Distribution
File

²⁵ *Id.* at 815 n.1.

²⁶ *Id.*