

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

WO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Amy Patterson,

Plaintiff,

v.

Two Fingers LLC, et al.,

Defendants.

No. CV-15-00494-PHX-NVW

ORDER

Before the court is Defendants’ Motion to Strike Portions of Plaintiff Amy Patterson’s Complaint (Doc. 12). For the following reasons, the Motion will be granted in part and denied in part.

I. BACKGROUND

Plaintiff alleges that sometime in late 2013, Defendant Joseph Popo, the “managing member” of three restaurants at which Plaintiff worked, began engaging in “systematic and continuous sexual harassment of Plaintiff.” (Doc. 1 at 2, 4.) According to the Complaint, Popo also “repeatedly and aggressively treated her in a derogatory manner” by “using swear words toward Plaintiff” and “yelling” at her. (*Id.* at 7.) Despite repeated requests to desist, Popo allegedly refused to do so. (*Id.* at 6.) Plaintiff alleges the abuse and harassment became so severe that she eventually quit working for Defendants in December 2014. (*Id.* at 5-6.) She then filed this suit, which charges Popo

1 and the three restaurants he manages with Title VII sexual harassment, intentional
2 infliction of emotional distress, battery, assault, and defamation. (*Id.* at 10-13.)

3 Two weeks later, Defendants filed a Counterclaim and Third-Party Complaint
4 against Plaintiff and her attorney, Peter K. Strojnik, seeking damages and injunctive relief
5 on ten causes of action, including business disparagement, wrongful interference with
6 business relationships, libel per se, and trade libel. (Doc. 8.) The fine details of
7 Defendants' allegations are not important to the pending Motion. In sum, Defendants
8 allege that Plaintiff welcomed and reciprocated Popo's sexual advances, that she resigned
9 in December 2014 because a customer had complained about her on Yelp, and that she
10 and Strojnik subsequently "conspired with one another to extort money from Popo by
11 threatening the disclosure of work related communications, potential criminal activity,
12 and alleged affairs to the public at large." (Doc. 8 at 4-6.)

13 Plaintiff's defamation cause of action and one of her intentional infliction of
14 emotional distress causes of action are grounded in the following allegations in her
15 Complaint:

16 40. During the pre-litigation to this matter, in an effort to warn other
17 women of the alleged predatory nature of Popo, Plaintiff distributed flyers
18 advising of the allegations in this matter. Only a few hours after the flyers
19 were distributed, Popo and the corporate Defendants directly or indirectly
20 published the following defamatory statements about Plaintiff on a public
21 forum called thedirty.com:

22 41. Statement No. 1: A person who calls himself
23 "Amypattersonisawhore" defamed Plaintiff as follows: "This girl Amy
24 Patterson is such a whore. Everyone knows she fucks anything and
25 everything, she sends nude photos to everyone. I'll have to dig some out,
26 Amy. I still have them. I heard you filed this BS. . . Nice try looking for a
27 payday but everyone in Scottsdale knows you're a lying whore. Stop
28 spreading your STDs while you are at it. There's enough herpes and genital
warts. Thank God the one you gave me was curable. GTFO here. Everyone
is laughing at your fake shit."

42. Statement No. 2: A person who calls himself "Anonymous" defamed
Plaintiff as follows: "Just another slut trying to lie and get some money out
of it. . .not surprised if she knew exactly what she was doing the whole
time."

1 43. Statement No. 3: A person who calls himself
2 "Amypattersonisawhore" defamed Plaintiff as follows: "Of course she
3 knew. She was looking for a payday the whole time. The only problem is
4 Amy Patterson is huge whore with the std's to prove it. Typical Scottsdale
5 whore looking for free money and tired of 'working.' Well, if Amy
6 Patterson does score some cash, she should spend every dollar on Valtrex
7 and plastic surgery." Valtrex is a drug used to treat certain sexually
8 transmitted diseases.

9 ...

10 71. The corporate Defendants and Popo, directly or indirectly, upon
11 information and belief, published or caused to be published the defamatory
12 statements referenced herein.

13 72. The statements made were false and were published in a public
14 forum for millions of persons to view.

15 73. The corporate Defendants' and Popo's defamatory statements were
16 done with malice, and evil heart, and were so outrageous and so likely to
17 cause tremendous harm to Plaintiff thereby entitling her to punitive
18 damages. Defendants first subjected Plaintiff to sexual harassment and
19 sexual assault only to follow by calling her a whore and accusing her of
20 having sexually transmitted diseases after she sought to protect her rights.

21 ...

22 74. Plaintiff incorporates by reference all allegations heretofore set forth.

23 75. In directly or indirectly publishing the defamatory statements
24 mentioned herein, the corporate Defendants' and Popo's conduct were
25 extreme and outrageous, beyond all possible bounds of decency, and utterly
26 intolerable in a civilized community in any setting, e.g. characterizing
27 Plaintiff as a whore who carries and transfers sexually transmitted diseases
28 after she sought to protect her rights.

76. The corporate Defendants' and Popo's conduct were intended to
cause and/or was done with reckless disregard of the near certainty that
Plaintiff would suffer severe emotional distress.

(Doc. 1 at 9-10, 13.) In addition, the Complaint's "Factual Background" section contains
the following allegation:

38. Popo's and the corporate Defendants' disregard for the law is a
pattern and not simply limited to Title VII and common law. On strong
information and belief, the corporate Defendants employ 35-40
undocumented workers in violation of federal law. On strong information
and belief, Popo has instructed managers and consultants for the corporate
Defendant restaurants to not E-verify kitchen staff.

(*Id.* at 9.)

1 Defendants' Motion asks the court to strike the above paragraphs of the Complaint
2 under Federal Rule of Civil Procedure 12(f), which provides, "The court may strike from
3 a pleading an insufficient defense or any redundant, immaterial, impertinent, or
4 scandalous matter."

5 6 **II. LEGAL ANALYSIS**

7 "The function of a 12(f) motion to strike is to avoid the expenditure of time and
8 money that must arise from litigating spurious issues by dispensing with those issues
9 prior to trial." *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010).
10 Nevertheless, "Motions to strike are generally disfavored and are not granted unless it is
11 clear that the matter sought to be stricken could have no possible bearing on the subject
12 matter of the litigation. Consequently, when a court considers a motion to strike, it 'must
13 view the pleading in a light most favorable to the pleading party.'" *Kosta v. Del Monte*
14 *Corp.*, No.: 12-cv-01722-YGR, 2013 U.S. Dist. LEXIS 69319, at *11-12 (N.D. Cal. May
15 15, 2013) (citations omitted).

16 Rule 12(f) is primarily concerned with relevance. Matter is "immaterial" if it "has
17 no essential or important relationship to the claim for relief or the defenses being
18 pleaded" and is "impertinent" if it "consists of statements that do not pertain, and are not
19 necessary, to the issues in question." *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th
20 Cir. 1993), *rev'd on other grounds, Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994). The
21 Rule is not a mechanism for challenging the factual accuracy of a complaint's allegations.
22 A "disputed question of fact cannot be decided on motion to strike." *Morell v. United*
23 *States*, 185 F.R.D. 116, 118 (D.P.R. 1999) (quoting *Augustus v. Bd. of Pub. Instruction*,
24 306 F.2d 862, 868 (3d Cir. 1962)); *see also Bennett v. Spoor Behrins Campbell & Young,*
25 *Inc.*, 124 F.R.D. 562, 563 (S.D.N.Y. 1989) ("The general policy is that the pleadings
26 should be treated liberally, and that a party should have the opportunity to support his
27 contentions at trial."). Accordingly, "As with motions to dismiss, when ruling on a
28 motion to strike, the Court takes the plaintiff's allegations as true and must liberally

1 construe the complaint in the light most favorable to the plaintiff.” *Baughman v.*
2 *Roadrunner Commc’ns, LLC*, No. CV-12-565-PHX-SMM, 2013 U.S. Dist. LEXIS
3 114865, at *4 (D. Ariz. Aug. 13, 2013).

4 In this case, Defendants do not contest that paragraphs 40-43 and 71-76 of the
5 Complaint are relevant to Plaintiff’s defamation and intentional infliction of emotional
6 distress claims. The statements made by “Anonymous” and “Amypattersonisawhore”
7 plainly have an “essential or important relationship” to Plaintiff’s claim that she was
8 defamed, as those statements constitute the alleged defamation. Instead, Defendants
9 assert that Plaintiff lacks a basis for alleging it was Defendants who authored the
10 anonymous comments in paragraphs 41-43. “Without information as to the source of the
11 alleged statements,” Defendants argue, “Plaintiff should not be allowed to assert
12 prejudicial allegations without a shred of evidence as to the identity of the individual
13 authoring such statements.” (Doc. 12 at 6.) But a plaintiff is under no obligation to
14 explain in her complaint how she formed a belief in the facts she alleges. And as
15 explained above, Rule 12(f) is not designed to address factual disputes. Plaintiff has
16 alleged, “upon information and belief,” that Defendants “directly or indirectly . . .
17 published or caused to be published” the statements in question. (Doc. 1 at 13.) At this
18 stage of the proceedings, that is sufficient for purposes of Rule 12(f). Accordingly, the
19 court cannot strike paragraphs 40-43 or 71-76 under that rule.

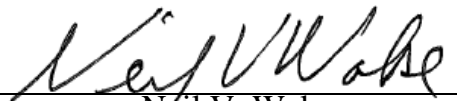
20 Of course, independent of Rule 12(f), an attorney is prohibited from pleading facts
21 that he lacks a good faith basis for alleging. Federal Rule of Civil Procedure 11(b)
22 provides that an attorney who files a pleading thereby “certifies that to the best of [his]
23 knowledge, information, and belief, formed after an inquiry reasonable under the
24 circumstances: . . . (3) the factual contentions have evidentiary support or, if specifically
25 so identified, will likely have evidentiary support after a reasonable opportunity for
26 further investigation or discovery.” Disregard of this rule may result in sanctions. Fed.
27 R. Civ. P. 11(c). If Defendants believe Plaintiff’s counsel has violated his ethical
28 obligations, they may file a motion for sanctions, as long as they first comply with the

1 “safe harbor” provision of Rule 11(c)(2). But that motion is not currently before the
2 court.

3 Defendants also move to strike allegations that they employ undocumented
4 workers and refuse to participate in the E-Verify system. Plaintiff has brought claims
5 relating only to Popo’s treatment of her personally; she does not seek relief on any cause
6 of action even remotely connected to immigration law. Nevertheless, Plaintiff contends
7 the allegations in paragraph 38 are relevant because they “show[] a pattern of violating
8 federal law and mistreatment of employees” as well as Defendants’ propensity to “take
9 illegal actions in the face of perceived risk that its actions will violate federal law.” (Doc.
10 23 at 5-6.) Even assuming this allegation could be proved through admissible evidence,
11 *see* Fed. R. Evid. 404, the purpose for which Plaintiff hopes to offer it is wildly
12 overbroad. The fact that a party may have violated one law in the past simply does not
13 bear on the likelihood that he has violated an entirely different law. Defendants’ alleged
14 hiring of undocumented workers is unconnected to Popo’s alleged harassment of
15 Plaintiff. In the language of Rule 12(f), paragraph 38 is “immaterial” and “impertinent”
16 and must therefore be stricken from the Complaint.

17
18 IT IS THEREFORE ORDERED that Defendants’ Motion to Strike Portions of
19 Plaintiff Amy Patterson’s Complaint (Doc. 12) is granted to the extent that paragraph 38
20 is stricken from the Complaint. The Motion is otherwise denied.

21 Dated this 15th day of May, 2015.

22
23 
24 Neil V. Wake
25 United States District Judge
26
27
28