Caution
As of: Feb 17, 2012

KEVIN MORRIS and OTHER UNNAMED INDIVIDUALS, Plaintiffs, -against- FORDHAM UNIVERSITY, Rev. Joseph A. O'Hare, President, Fordham University, Defendant.

No. 03 Civ. 0556 (CBM)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2004 U.S. Dist. LEXIS 7310*; *93 Fair Empl. Prac. Cas. (BNA) 1364

April 27, 2004, Decided
April 28, 2004, Filed

DISPOSITION: [*1] Defendant's motion to dismiss plaintiff's complaint granted in part and denied in part. Plaintiff granted leave to amend complaint.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant college filed a motion, pursuant to *Fed. R. Civ. P. 12(b)(1)* and *12(b)(6)*, to dismiss plaintiff former college coach's action, which alleged claims of sex discrimination, pursuant to Title IX of the Education Amendments of 1972 (Title IX), *20 U.S.C.S. § 1681 et seq.*, and the Equal Pay Act, *29 U.S.C.S. § 206(d)*, as well as various state common law claims. The coach sought leave to file a more definitive statement as to his state claims.

OVERVIEW: The coach, a male, was the head coach of the college's women's basketball team. He alleged disparate treatment and impact in relation to allegedly inferior resources and opportunities available for the women's basketball team in comparison to the men's basketball team. The court held that, although the coach lacked standing to bring a Title IX claim on behalf of the women's basketball program, he did have standing to bring a claim individually. The court held that the prohibition of discrimination "on the basis of sex" was broad enough to encompass a prohibition of discrimination against the coach on the basis of the sex of the players whom he coached. In dismissing the Equal Pay Act claim, the court held that the coach failed to show a disparity between his wage and the wage of a female coach. The court dismissed a breach of contract claim because it was based on an unenforceable oral promise of continued employment and dismissed a fraud claim because the coach failed to allege facts that gave rise to a strong inference of fraudulent intent. The court dismissed a claim of breach of covenant of good faith because there was such claim independent of a claim for breach of contract.

OUTCOME: The court granted the college's motion as to each of the coach's claims except the Title IX claim.

The court granted the coach leave to amend his complaint to re-plead his claim of breach of contract.

LexisNexis(R) Headnotes

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Failures to State Claims
Civil Procedure > Pleading & Practice > Pleadings > Complaints > Requirements
[HN1] On a motion to dismiss, a court must read the complaint generously, and draw all inferences in favor of the pleader. The court must accept as true the material facts alleged in the complaint. The court must not dismiss the action unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Thus, a plaintiff need only plead a short and plain statement of the claim that will give defendant fair notice of what plaintiff's claim is and the grounds upon which it rests. This standard is applied in employment discrimination lawsuits, where the complaint need not contain specific facts establishing a prima facie case under the McDonnell Douglas framework.

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Failures to State Claims
[HN2] In deciding a motion to dismiss, the issue is not whether a plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims. The court must limit itself to a consideration of the facts alleged on the face of the complaint, and to any documents attached to the complaint as exhibits or incorporated in it by reference. Even where a document is not incorporated by reference, the court may nevertheless consider it where the complaint relies heavily upon its terms and effect, which renders the document integral to the complaint. If extraneous material is presented by one or more of the parties, the court must exclude it from consideration. *Fed. R. Civ. P. 12(b)(6)*.

Education Law > Discrimination > Gender & Sex Discrimination > Title IX > Coverage
[HN3] See *20 U.S.C.S. § 1681(a)*.

Civil Rights Law > Implied Causes of Action
Education Law > Discrimination > Gender & Sex Discrimination > Title IX > Enforcement
Labor & Employment Law > Discrimination > Gender & Sex Discrimination > Enforcement
[HN4] There is an implied private right of action for gender-based discrimination under Title IX of the Education Amendments of 1972 (Title IX), *20 U.S.C.S. § 1681 et seq.* Gender-based employment discrimination by educational programs receiving federal financial support comes within the prohibition of Title IX. Additionally, the remedy of damages is available to an individual in an action to enforce Title IX.

Civil Procedure > Justiciability > Standing > Injury in Fact
Constitutional Law > The Judiciary > Case or Controversy > Standing > General Overview
[HN5] The irreducible constitutional minimum of standing contains three elements. First, plaintiff must have suffered an injury in fact, an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. The party invoking federal jurisdiction bears the burden of establishing these elements. Particularized means that the injury must affect plaintiff in a personal and individual way. At the pleading stage, general factual allegations of injury resulting from defendant's conduct may suffice, for on a motion to dismiss a court presumes that general allegations embrace those specific facts that are necessary to support the claim. A plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. The rare exceptions to this rule generally involve situations in which plaintiff has a close relation with the third party and there exists some hindrance to the third party's ability to protect his or her own interests.

Education Law > Discrimination > Gender & Sex Discrimination > Title IX > Coverage
Education Law > Discrimination > Gender & Sex Discrimination > Title IX > Remedies
Labor & Employment Law > Discrimination > General Overview
[HN6] The legislative history of Title IX of the Education Amendments of 1972 (Title IX), *20 U.S.C.S. § 1681 et seq.*, demonstrates an intent on the part of Congress to

have Title IX serve as an additional protection against gender-based discrimination in educational programs receiving federal funding regardless of the availability of a remedy under Title VII, and the U.S. Supreme Court and U.S. Court of Appeals for the Second Circuit interpretations of the statute do not permit the contrary conclusion.

Labor & Employment Law > Equal Pay > Equal Pay Act > General Overview

[HN7] The Equal Pay Act, *29 U.S.C.S. § 206(d)*, is violated if an employer of a covered employee pays wages to that employee: (1) at a rate less than the rate at which he pays wages to employees of the opposite sex; (2) for equal work on jobs the performance of which requires equal skill, effort, and responsibility; and (3) which are performed under similar working conditions. A violation occurs when an employer pays lower wages to an employee of one gender than to substantially equivalent employees of the opposite gender in similar circumstances.

Contracts Law > Formation > Execution
Contracts Law > Statutes of Frauds > Requirements > Performance
Contracts Law > Statutes of Frauds > Requirements > Signatures

[HN8] See *N.Y. Gen. Oblig. Law § 5-701(1).*

Civil Procedure > Pleading & Practice > Pleadings > Heightened Pleading Requirements > Fraud Claims
Evidence > Inferences & Presumptions > Inferences
Torts > Business Torts > Fraud & Misrepresentation > General Overview

[HN9] The elements of common law fraud are a material, false representation, an intent to defraud thereby, and reasonable reliance on the representation, causing damage to plaintiff. In order to plead fraud, plaintiff must comply with *Fed. R. Civ. P. 9(b)*, which states: In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally. A complaint containing allegations of fraud must: (1) specify the statements that plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent. In order to satisfy the requirements of *Rule 9(b)*, plaintiffs must allege facts that give rise to a strong inference of fraudulent intent. The requisite strong inference of fraud may be established either (a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness. An inference that defendants knew their statements to be false cannot be based on allegations which are themselves speculative.

Contracts Law > Breach > General Overview
Contracts Law > Contract Interpretation > Good Faith & Fair Dealing
Contracts Law > Types of Contracts > Express Contracts

[HN10] Under New York law, parties to an express contract are bound by an implied duty of good faith, but breach of that duty is merely a breach of the underlying contract.

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > Leave of Court

[HN11] *Fed. R. Civ. P. 15(a)* provides that leave to amend a complaint shall be freely given when justice so requires. It is the usual practice upon granting a motion to dismiss to allow leave to replead. In the absence of any apparent or declared reason, such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendments, etc., the leave sought should, as the rules require, be freely given.

COUNSEL: For Kevin Morris, Plaintiff: Peter J. Cresci, LEAD ATTORNEY, Cresci & Black LLC, Bayonne, NJ.

JUDGES: CONSTANCE BAKER MOTLEY, United States District Judge.

OPINION BY: CONSTANCE BAKER MOTLEY

OPINION

MEMORANDUM OPINION & ORDER

Motley, J.

Plaintiff Kevin Morris brings claims of sex discrimination, pursuant to Title IX of the Education Amendments of 1972 ("Title IX"), *20 U.S.C. § 1681 et seq.*, and the Equal Pay Act, *29 U.S.C. 206(d)*, as well as various common law claims, against defendant Fordham University ("Fordham").

Plaintiff, a former Head Coach of Women's Basketball at Fordham University, alleges disparate treatment and disparate impact in relation to allegedly inferior resources and opportunities [*2] available for the women's basketball team in comparison to the men's basketball team. Plaintiff alleges that defendant subjected him to "disproportionate funding for the women's basketball team, both individually (salary and benefits), as a women's basketball coach, and collectively (assistant coaches, equipment, uniforms, supplies, recruitment funds, team travel, post-season opportunities, and tutoring)." Plaintiff alleges that "in violation of federal and state law," defendant "base[d] the Plaintiff's salary, benefits, career development, and the funding of the women's athletic programs (specifically the women's basketball team) on the Plaintiff's gender and the gender of the student athletes Plaintiff coached." Plaintiff also alleges that defendant breached a contract with plaintiff by terminating him prior to the end date of his contract, and that, by failing to provide plaintiff with a promised long term contract, defendant committed fraud. [1] Finally, plaintiff alleges in his complaint that, "by virtue of the existence of a hostile work environment," defendant breached the implied covenant of good faith and fair dealing. Plaintiff seeks compensatory and punitive damages, as [*3] well as injunctive relief, including "100% compliance with Title IX."

> 1 Plaintiff's complaint also contains a claim of negligent misrepresentation, but plaintiff has subsequently "averred" that this claim is barred by the New York Worker's Compensation statute. Consequently, this claim will not be addressed in the instant opinion.

Plaintiff filed a complaint on January 24, 2003, and an amended complaint on May 7, 2003. On June 13, 2003, defendant moved to dismiss plaintiff's complaint, pursuant to *Rule 12(b)(1)* and *Rule 12(b)(6) of the Federal Rules of Civil Procedure*. For the reasons that follow, defendant's motion is granted in part, and denied in part.

I. BACKGROUND

Fordham is a Jesuit institution of higher learning located in New York City. Fordham is a member of the National Collegiate Athletic Association Division I and competes in the Atlantic 10 Conference in, among other sports, women's and men's basketball. Plaintiff held the position of Head Coach [*4] of Women's Basketball at Fordham from 1993 until in or about March 2000.

II. Discussion

A. MOTION TO DISMISS STANDARD

[HN1] On a motion to dismiss, a court must read the complaint generously, and draw all inferences in favor of the pleader. *Cosmas v. Hassett, 886 F.2d 8, 11 (2d Cir. 1989)*. The court must accept as true the material facts alleged in the complaint. *Grandon v. Merrill Lynch, 147 F.3d 184, 188 (2d Cir. 1998)*. The court must not dismiss the action unless "'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Cohen v. Koenig, 25 F.3d 1168, 1172 (2d Cir. 1994)* (quoting *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957)*); *Sims v. Artuz, 230 F.3d 14, 20 (2d Cir. 2000)*. Thus, a plaintiff need only plead "'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley, 355 U.S. at 47* (quoting *Fed.R.Civ.P. 8(a)(2)*). This standard [*5] is applied in employment discrimination lawsuits, where the complaint need not contain specific facts establishing a prima facie case under the *McDonnell Douglas* framework. *Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512, 122 S. Ct. 992, 998, 152 L. Ed. 2d 1 (2002)*. [HN2] In deciding such a motion, the "issue is not whether a plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims." *Bernheim v. Litt, 79 F.3d 318, 321 (2d Cir. 1996)* (internal quotations omitted). The court must limit itself to a consideration of the facts alleged on the face of the complaint, and to any documents attached to the complaint as exhibits or incorporated in it by reference. *Cosmas, 886 F.2d. at 13*. Even where a document is not incorporated by reference, the court may nevertheless consider it where the complaint "relies heavily upon its terms and effect," which renders the document "integral" to the complaint. *Chambers v. Time Warner, Inc., 282 F.3d 147, 153 (2d Cir. 2002)*. If, as in the present case, extraneous material is presented by one or more of the parties, the court must exclude [*6] it from

consideration. *See Fed.R.Civ.P. 12(b)*.

B. PLAINTIFF'S DISCRIMINATION CLAIMS

1. TITLE IX

Title IX provides, in part:

> [HN3] No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.

20 U.S.C. § 1681(a). [HN4] There is an implied private right of action for gender-based discrimination under Title IX. *Cannon v. Univ. of Chicago, 441 U.S. 677, 99 S. Ct. 1946, 60 L. Ed. 2d 560 (1979)*. Gender-based employment discrimination by educational programs receiving federal financial support comes within the prohibition of Title IX. *North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 102 S. Ct. 1912, 72 L. Ed. 2d 299 (1982)*. Additionally, the remedy of damages is available to an individual in an action to enforce Title IX. *Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 76, 112 S. Ct. 1028, 1038, 117 L. Ed. 2d 208 (1992)*.

Defendant claims that plaintiff lacks standing for his Title IX claim, [*7] on the grounds that plaintiff seeks, in part, to adjudicate the interests of third parties, namely former members of the Fordham women's basketball team, and that, in any event, plaintiff's Title IX employment discrimination claim is preempted by Title VII. Defendant also claims that plaintiff's Title IX claim is premised not on plaintiff's gender, but on the gender of the students he coached.

Plaintiff claims that he has standing to assert a claim under Title IX "because he seeks to enforce his own rights and that of the program for which he was an integral part-Head coach," and that "as a federal taxpayer, Plaintiff has an implied right to insure that an entity receiving federal funding properly dispenses such funds in a non-discriminate [sic] manner." Plaintiff argues that his Title IX claim is not preempted by Title VII, because defendant never advised plaintiff of the procedure and right to file a Title VII claim, and because plaintiff "wished to rectify the discriminatory animus practiced by the Defendant in its distribution of federal funding, both individually and for the Women's Basketball program; these are remedies Title VII cannot provide." Similarly, plaintiff claims [*8] that "Title VII could not address the discriminatory nature in which the Defendant ran its athletic department or dispensed federal funding." He "brought claims of enforcement of Title IX provisions, enforcement that cannot be remedied under Title VII."

"It is by now well settled that [HN5] 'the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an 'injury in fact' - an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of ... Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *United States v. Hays, 515 U.S. 737, 742-43, 115 S. Ct. 2431, 2435, 132 L. Ed. 2d 635 (1995)* (quoting *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)* (citations omitted). The party invoking federal jurisdiction bears the burden of establishing these elements. *Lujan, 504 U.S. at 561*. Particularized "mean[s] that [*9] the injury must affect the plaintiff in a personal and individual way." *Lujan, 504 U.S. at 560 n.1* (internal quotation marks omitted). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presume that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan, 504 U.S. at 561* (quoting *Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 889, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990))*. A plaintiff "'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 474, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982)* (quoting *Warth v. Seldin, 422 U.S. 490, 499, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975))*. The rare exceptions to this rule generally involve situations in which the plaintiff has a close relation with the third party and "there exists some hindrance to the third party's ability to protect his or her own [*10] interests." *Edmonson v. Leesville Concrete Co., 500 U.S. 614, 629, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991)*.

Plaintiff purports to bring his Title IX claim both individually and on behalf of the program. We note at the

outset that plaintiff lacks standing to bring a claim on behalf of the program. *Valley Forge Christian Coll., 454 U.S. at 474*. We further note that payment of federal taxes does not give plaintiff an "implied right" to regulate federal spending. *See id. at 477*. We disagree, however, with defendant's argument that because plaintiff lacks standing for that part of the claim that is made on the program's behalf his claim must therefore be dismissed *in toto*. Neither the Supreme Court nor the Second Circuit has resolved the question whether Title IX provides a cause of action to employees of federally funded educational programs who bring claims of sex discrimination against their employers. We agree with our sister court's determination in *Henschke* that it does. *SeeHenschke v. New York Hospital-Cornell Medical Ctr., 821 F. Supp. 166, 172 (S.D.N.Y. 1993)* (finding that "[HN6] the legislative history of Title [*11] IX demonstrates an intent on the part of Congress to have Title IX serve as an additional protection against gender-based discrimination in educational programs receiving federal funding regardless of the availability of a remedy under Title VII, and the Supreme Court and Second Circuit interpretations of the statute do not permit the contrary conclusion."). "Overlapping jurisdiction in the area of employment discrimination is well recognized." *North Haven Bd. of Education v. Hufstedler, 629 F.2d 773, 784 (2d Cir. 1980), aff'd sub nom. North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 102 S. Ct. 1912, 72 L. Ed. 2d 299 (1981)* (citations omitted).

We are also unpersuaded by defendant's argument that dismissal of plaintiff's Title IX claim is required because the claim is premised not on plaintiff's gender, but on the gender of the students he coached. The prohibition of discrimination "on the basis of sex" is broad enough to encompass a prohibition of discrimination against plaintiff on the basis of the sex of the players whom he coached. *20 U.S.C. § 1681(a)*. Defendant's motion is, therefore, denied as to plaintiff's Title IX claim.

[*12] 2. EQUAL PAY ACT

[HN7] The Equal Pay Act is violated if an employer of a covered employee pays wages to that employee:

> [(1)] at a rate less than the rate at which he pays wages to employees of the opposite sex ...
>
> [(2)] for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and
>
> [(3)] which are performed under similar working conditions...

29 U.S.C. § 206(d).

In other words, "[a] violation occurs when an employer pays lower wages to an employee of one gender than to substantially equivalent employees of the opposite gender in similar circumstances." *Pollis v. New Sch. for Soc. Research, 132 F.3d 115, 118 (2d Cir. 1997)*.

Plaintiff claims that defendant "subordinated the Plaintiff's pay wage to his comparative counterpart (Bob Hill, Head Coach of the men's basketball team) who was less or equally experienced on the college level and performed the same duties and functions." Plaintiff states that he seeks relief under the Equal Pay Act "under the well established principle that associational rights give rise to cognizable discrimination claims," and asks that the court "grant [*13] Plaintiff protective status under the Equal Pay Act as the holder of a traditionally female position who associates with female athletes."

Defendant asserts that plaintiff cannot make out a claim under the Equal Pay Act, because he does not compare himself to any other similarly situated employee who is female. Defendant also argues that plaintiff's associational claim finds no support in the law.

Under the plain language of the statute, and as interpreted by this Circuit, the identification of a comparator employed by the same employer and of the opposite gender is an indispensable requirement for a plaintiff bringing an Equal Pay Act Claim. Plaintiff's claim rests upon alleged disparities between his wage and that of another *male* coach. As a matter of law, this will not suffice, and plaintiff's Equal Pay Act claim is therefore dismissed.

C. PLAINTIFF'S STATE LAW CLAIMS

1. BREACH OF CONTRACT

Plaintiff's complaint alleges that "defendant breached contract [sic] with Plaintiff by terminating him prior to the end date of his contract." Plaintiff claims in his memorandum opposing the instant motion that he had a three-year contract from July 1, 1997, to June 30, 2000,

which [*14] was to be rolled over, and that defendant terminated him on March 27, 2000, "and did not honor the rest of the terms of the contract."

Defendant claims that plaintiff has failed to plead the elements necessary to make out his claim, and that plaintiff does not assert that the contract at issue abrogated the legal presumption that employees are employed at will and can be terminated at any time for any legal reason.

[HN8] Under the Statute of Frauds, "every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged ... if such agreement, promise or undertaking by its terms is not to be performed within one year from the making thereof." *N.Y. Gen. Oblig. Law § 5-701(1)*. The complaint makes no allegation that plaintiff's contract with defendant was memorialized in writing. Regardless of that fact, plaintiff's claim for breach of contract cannot stand because plaintiff has not pleaded any facts which suggest any abrogation of the general employment law that employees are employed at will. *See Yaris v. Arnot-Ogden Mem'l Hosp., 891 F.2d 51, 52 (2d Cir. 1989)*. [*15] Therefore, defendant's motion is granted as to plaintiff's breach of contract claim.

2. FRAUD

Plaintiff lays out his fraud claim in the following paragraph of his complaint:

> Beginning in June of 1997, Athletic Director Frank McLaughlin on behalf of Defendant promised Plaintiff that a long term contract would be given to Plaintiff. Mr. McLaughlin requested a copy of a three (3) year contract that had been offered to Plaintiff by St. Mary's College in California to use as a draft for the contract that Defendant would offer Plaintiff. Defendant and its employees made a promise of providing Plaintiff with a new, extended contract that would be comparable to the one offered by St. Mary's with the intent that Plaintiff would rely on such a promise. As long as a year after this promise was made, the contract was not provided. As a result, Plaintiff missed the opportunity to accept St. Mary's contract as he was relying on Defendant's promise of a new contract, which he never received.

Defendant asserts that plaintiff's fraud claim fails under *Rule 9(b) of the Federal Civil Rules of Procedure*, as well as under the Statute of Frauds. Defendant [*16] also claims that plaintiff's fraud claim arises out of defendant's alleged intent to breach a contract with plaintiff, and therefore states no independent cause of action.

[HN9] The elements of common law fraud are "a material, false representation, an intent to defraud thereby, and reasonable reliance on the representation, causing damage to the plaintiff." *Katara v. D.E. Jones Commodities, Inc., 835 F.2d 966, 970-71 (2d Cir. 1987)*. In order to plead fraud, plaintiff must comply with *Rule 9(b)*, which states: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." *Fed.R.Civ.P. 9(b)*. The Second Circuit has stated that a complaint containing allegations of fraud "must: (1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Acito v. Imcera Group, Inc., 47 F.3d 47, 51 (2d Cir. 1995)* (quoting *Mills v. Polar Molecular Corp., 12 F.3d 1170, 1175 (2d Cir. 1993)*). [*17] In order to satisfy the requirements of *Rule 9(b)*, plaintiffs must allege facts that give rise to a strong inference of fraudulent intent. *San Leandro Emergency Med. Group Profit Sharing Plan v. Philip Morris Cos., Inc., 75 F.3d 801, 812 (2d Cir. 1996)*. "The requisite 'strong inference' of fraud may be established either (a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness." *Shields v. Citytrust Bancorp, Inc., 25 F.3d 1124,1128 (1994)*. The Second Circuit has noted that "clearly, an inference that the defendants knew their statements to be false cannot be based on allegations which are themselves speculative." *Wexner v. First Manhattan Co., 902 F.2d 169, 173 (2d Cir. 1990)*.

Plaintiff has failed to allege facts that give rise to a strong inference of fraudulent intent. *See San Leandro*

Emergency Med. Group, 75 F.3d at 812 .He neither alleges facts to show that defendant had both motive and opportunity to commit fraud nor does he allege facts that constitute strong [*18] circumstantial evidence of conscious misbehavior or recklessness. *See Shields, 25 F.3d at 1128*. Accordingly, defendant's motion is granted as to plaintiff's claim of fraud.

3. BREACH OF COVENANT OF GOOD FAITH

Plaintiff lays out his claim for breach of the implied covenant of good faith and fair dealing in the following paragraph of his complaint:

> Defendant breached its implied covenant of good faith and fair dealing with Plaintiff as the Head Coach, Women's Basketball Team. By virtue of the existence of a hostile work environment against the Plaintiff caused by the actions of Defendant's agents and servants, is [sic] a de facto breach of the Plaintiff's expectation that there be good faith and fair dealing in the contractual relationship.

Defendant asserts that New York law does not recognize a cause of action for breach of an implied covenant independent of a claim for breach of the underlying contract. In his memorandum opposing the instant motion, plaintiff asserts that this claim "is a cause of action recognized part and parcel to the breach of contract."

[HN10] Under New York law, parties to an express contract are bound by an implied duty of good [*19] faith, "but breach of that duty is merely a breach of the underlying contract." *Fasolino Foods Co. v. Banca Nazionale Del Lavoro, 961 F.2d 1052, 1056 (2d Cir. 1992)* (quoting *Geler v. Nat'l Westminster Bank USA, 770 F. Supp. 210, 215 (S.D.N.Y. 1991))*. Given that a claim of breach of the covenant of good faith is, at root, a breach of contract claim, and that plaintiff's complaint includes a breach of contract claim, defendant's motion as to the breach of covenant claim is granted.

D. REQUEST FOR LEAVE TO FILE AMENDED COMPLAINT

Plaintiff makes a request in the alternative, in regard to his claims of breach of contract and breach of the implied covenant of good faith and fair dealing, for leave to "file a more definitive statement under *Fed.R.Civ.P. 12(e)* if the current argument under this response is insufficient." Defendant opposes the granting of such leave, on the grounds that any amendment would be futile.

Federal *Rule 15(a)* [HN11] provides that leave to amend a complaint shall be"... freely given when justice so requires." It is the usual practice upon granting a motion to dismiss to allow leave to replead. [*20] *Cortec Indus., Inc. v. Sum Holding L.P., 949 F.2d 42, 48 (2d Cir. 1991)*. "In the absence of any apparent or declared reason - such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendments, etc. - the leave sought should, as the rules require, be 'freely given.'" *Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962).*

Given the liberal standard for granting leave to file an amended complaint, we hereby permit plaintiff to amend his complaint to the extent of conforming his claim of breach of contract to the requirements of the Federal Rules of Civil Procedure, should he find himself able to do so. Given that, as stated above, a claim of breach of the implied covenant is, at root, a breach of contract claim, we deny plaintiff's request to amend the implied covenant claim. Any allegations of a breach of the implied covenant should be included within the breach of contract claim.

III. CONCLUSION

For the foregoing reasons, defendant's motion [*21] is GRANTED as to each of plaintiff's claims with the exception of plaintiff's Title IX claim, as to which defendant's motion is DENIED. Plaintiff is granted leave to amend his complaint to re-plead his claim of breach of contract. Any such amended complaint must be served within thirty days of receipt of this opinion. The pre-trial conference currently scheduled for May 5, 2004, at 11 am, is adjourned until June 16, 2004, at 11am.

SO ORDERED.

Dated: April 27, 2004

CONSTANCE BAKER MOTLEY

United States District Judge