IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JUDITH HUCKE,	:	
Plaintiff,	:	Case No. 3:07CV096
vs.	:	JUDGE WALTER HERBERT RICE
MARRIOTT HOTEL SERVICES, INC.,	:	
Defendant.	:	

DECISION AND ENTRY ADOPTING, IN PART, AND REJECTING, IN PART, MAGISTRATE JUDGE'S REPORT AND RECOMMENDATIONS (DOC. #37); OVERRULING, IN PART, AND SUSTAINING, IN PART, DEFENDANT'S OBJECTIONS THERETO (DOC. #40); SUSTAINING DEFENDANT'S MOTION TO DISMISS COUNT TWO OF PLAINTIFF'S AMENDED COMPLAINT (DOC. #33) AND DISMISSING THE SAME, WITH PREJUDICE; SUSTAINING DEFENDANT'S MOTION TO STRIKE COUNT ONE AND COUNT THREE OF PLAINTIFF'S AMENDED COMPLAINT (DOC. #33) AND DISMISSING THE SAME, WITHOUT PREJUDICE; AND OVERRULING, AS MOOT, DEFENDANT'S ALTERNATIVE MOTION TO STRIKE PLAINTIFF'S JURY DEMAND (DOC. #33); INSTRUCTIONS TO PLAINTIFF

Plaintiff Judith Hucke brings this action against her former employer, Marriott Hotel Services, Inc. Hucke's original Complaint asserted a single claim for wrongful termination, "in violation of the State of Ohio's public policy requiring an employer to exercise reasonable care to provide employees with a reasonably safe place to work," and did not include a jury demand. Doc. #2. The Court previously sustained the Defendant's Motion to Dismiss that Complaint (Doc. #15), concluding that the same did not allege why the Plaintiff was discharged and,

specifically, that it "[did] not allege that the Defendant fired her because she had complained about [a co-worker's] behavior . . . or otherwise expound upon that question." Doc. #29 at 6. The Court afforded the Plaintiff time to file an Amended Complaint to correct the pleading deficiency. Id. The Plaintiff responded by filing an Amended Complaint asserting three claims: termination in violation of the Ohio Age Discrimination in Employment Act (Count One); termination in violation of Ohio public policy (Count Two); and intentional infliction of severe emotional distress (Count Three). Doc. #30. The Complaint also includes a jury demand. Id.

Subsequently, the Defendant filed a Motion to Strike Counts One and Three of the Plaintiff's Amended Complaint and to Dismiss Count Two, with an alternative Motion to Strike the Plaintiff's jury demand. Doc. #33. The Magistrate Judge issued a Report and Recommendations, wherein she recommended that the Defendant's Motion be denied, *in toto*. Doc. #37. The Defendant having now objected to the Magistrate Judge's Report and Recommendations (Doc. #40), the Court will rule upon the same.

I. Motion to Dismiss Count Two

The Defendant asserts that Count Two in the Amended Complaint (termination in violation of public policy) must be dismissed, because it suffers from the same deficiency as the original Complaint, which this Court dismissed. Specifically, the Defendant argues that the Plaintiff has still not sufficiently pled

that her termination was caused by a violation of Ohio public policy. The Court will begin with a review of the standard that guides its decisions on motions to dismiss and then consider the specifics of the Motion that is presently before it.

A. Motion to Dismiss Standard

In Prater v. City of Burnside, Ky., 289 F.3d 417 (6th Cir. 2002), the Sixth Circuit reiterated the fundamental principles which govern the ruling on a motion to dismiss under Rule 12(b)(6):

> The district court's dismissal of a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure is also reviewed de novo. Jackson v. City of Columbus, 194 F.3d 737, 745 (6th Cir. 1999), overruled on other grounds by Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002). When deciding whether to dismiss a claim under Rule 12(b)(6), "[t]he court must construe the complaint in a light most favorable to the plaintiff, and accept all of [the] factual allegations as true." Id. (citation omitted).

Id. at 424. In Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002), the Supreme Court noted that Rule 8(a)(2) of the Federal Rules of Civil Procedure merely requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Id. at 212. Therein, the Court explained further:

> Such a statement must simply "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Conley v. Gibson, 355 U.S. 41, 47 (1957). This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims. See id., at 47-48; Leatherman v. Tarrant

> County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 168-169 (1993). "The provisions for discovery are so flexible and the provisions for pretrial procedure and summary judgment so effective, that attempted surprise in federal practice is aborted very easily, synthetic issues detected, and the gravamen of the dispute brought frankly into the open for the inspection of the court." 5 C. Wright & A. Miller, Federal Practice and Procedure § 1202, p. 76 (2d ed. 1990).

Id. at 512-13. In Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), the Supreme Court rejected the standard established in Conley v. Gibson, 355 U.S. 41, 45-46 (1957), that a claim should not be dismissed "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." The Supreme Court recently expounded upon Twombly in Ashcroft v. Iqbal, __U.S. __, 129 S.Ct. 1937 (2009), writing:

> Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." As the Court held in Twombly, 550 U.S. 544, the pleading standard Rule 8 announces does not require "detailed factual allegations," but it demands more than an unadorned, the–defendant–unlawfully– harmed–me accusation. Id., at 555 (citing Papasan v. Allain, 478 U.S. 265, 286 (1986)). A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." 550 U.S., at 555. Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement." Id., at 557.
>
> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." Id., at 570. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Id., at 556. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Ibid. Where a complaint

> pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" Id., at 557 (brackets omitted).
>
> Two working principles underlie our decision in Twombly. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. Id., at 555 (Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we "are not bound to accept as true a legal conclusion couched as a factual allegation" (internal quotation marks omitted)). Rule 8 marks a notable and generous departure from the hyper–technical, code–pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. Id., at 556. Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context–specific task that requires the reviewing court to draw on its judicial experience and common sense. 490 F.3d, at 157-158. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged–but it has not "show[n]"–"that the pleader is entitled to relief." Fed. Rule Civ. Proc. 8(a)(2).

Id. at 1949-50.

In sum, on the plausibility issue, the Sixth Circuit explains that the factual allegations in the complaint need to be sufficient "to give notice to the defendant as to what claims are alleged, and the plaintiff must plead 'sufficient factual matter' to render the legal claim plausible, i.e., more than merely possible." Fritz v. Charter Twp. of Comstock, 592 F.3d 718, 722 (6th Cir. 2010) (quoting Iqbal, 129 S. Ct. at 1949-50). Further, "a legal conclusion [may not be] couched as a factual allegation" and mere "recitations of the elements of a cause of action" are

insufficient to withstand a motion to dismiss. Id. (quoting Hensley Mfg. v. ProPride, Inc., 579 F.3d 603, 609 (6th Cir. 2009)).

B. Analysis

At the outset, the Court notes that the Ohio Supreme Court has recognized a tort for wrongful termination in violation of public policy. Collins v. Rizkana, 73 Ohio St. 3d 65, 652 N.E.2d 653 (1995). The elements of this claim are as follows:

1. That a clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law (the clarity element).

2. That dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy (the jeopardy element).

3. The plaintiff's dismissal was motivated by conduct related to the public policy (the causation element).

4. The employer lacked overriding legitimate business justification for the dismissal (the overriding justification element).

Id. at 69-70 (alterations and quotation omitted). The present controversy centers on the third prong of this test, and whether the Plaintiff has adequately pled that her dismissal was motivated by conduct related to the public policy.

The Court now turns to its prior decision on the Defendant's original Motion to Dismiss. Therein, the Court dismissed the Plaintiff's Complaint, upon determining that it did not allege why the Plaintiff was discharged and, specifically,

that the Plaintiff "[did] not allege that the Defendant fired her because she had complained about [a co-worker's] behavior . . . or otherwise expound upon that question." Doc. #29 at 6. Further, the Court found that "[a]bsent an allegation as to why she was discharged, Plaintiff's [Complaint] fails to state a claim upon which relief can be granted" and, thus, "does not even reach the speculative level, a level which is insufficient under Twombly." Id.

Turning now to the Amended Complaint, the factual allegations therein indicate that Hucke suffered from a workplace that was not free and safe from emotional and physical harm, as a result of the actions of co-worker Barbour. Doc. #30 ¶¶ 10-12. Hucke twice complained about Barbour's misconduct to Marriott's Human Resources Department, which appointed Hucke's supervisor, McGaha (who allegedly chaffed at this task), to run interference between Hucke and Barbour. Id. ¶ 13. Eventually, McGaha terminated Hucke and hired his (McGaha's) former classmate to fill her position. Id. ¶¶ 16-17. As to the cause of action for wrongful termination, the entirety of Count Two reads as follows:

> 21. Plaintiff restates each and every allegation raised in the General Allegations set forth in Paragraph One through Twenty-One (1-21) of the Complaint as if fully rewritten herein.
>
> 22. Ohio recognizes a public policy prohibiting [sic] whereby an employer must provide a workplace free and safe from emotional and physical harm, and from retaliation for complaining about such failure to provide a workplace free from such emotional and physical harm.
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> 23. Marriott, through the actions of Barbour set forth above, has violated said public policy by causing emotional harm and

> threatening physical harm to Hucke, and by failing to take reasonable steps to prevent Barbour from acting in such a manner.
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> 24. As a direct and proximate result of said violation of public policy, Hucke has suffered and continues to suffer damages, including the loss of employment and the infliction of shame, embarrassment and emotional harm, in an amount estimated to be in excess of Twenty-Five Thousand Dollars ($25,000.00), to be more fully determined at trial.

Doc. #30 ¶¶ 21-24. As noted, the Plaintiff alleges that the Defendant violated Ohio public policy in two ways, to wit: (1) through Barbour's actions, which both caused her emotional harm and threatened her with physical harm; and (2) by failing to take reasonable steps to prevent Barbour's actions. Id. ¶ 23. The Amended Complaint then goes on to state that, as a result of these actions, Hucke suffered a loss of employment. Id. ¶ 24. However, the Amended Complaint does not link the alleged violation of the public policy with the Plaintiff's termination, in a plausible way. For example, it does not make sense that the Defendant fired the Plaintiff because Barbour harassed her, nor does it make sense that the Defendant fired her because the Defendant failed to take reasonable steps to prevent Barbour's harassment. Yet, this is the only way to interpret the allegations in the Amended Complaint. Further, although the Plaintiff seems to be asserting that Ohio has a public policy that prohibits retaliating against employees for complaining about an employer's failure to provide a workplace free of emotional and physical harm, nowhere does the Plaintiff allege that the Defendant actually fired her in retaliation for complaining about such behavior. Id. ¶ 22; see also id. 23.

As the Defendant states in its objections to the Magistrate Judge's Report and Recommendations, "it would have been simple enough for Plaintiff to state in her Amended Complaint that 'Defendant fired me because I complained about Barbour's behavior.'" Doc. #40 at 2. The Court agrees. Had the Plaintiff done so, she would have satisfied the requirement to plead "sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" Iqbal, 129 S. Ct. at 1949 (quoting Twombly, 550 U.S. at 570). As it stands, however, the Amended Complaint neither alleges that she was terminated for complaining about Barbour's behavior, nor does it plausibly allege that she was terminated for any other reason that was "motivated by conduct related to the public policy", as required by the United States Supreme Court jurisprudence regarding pleading requirements and by Ohio law regarding terminations in violation of public policy. Iqbal, 129 S. Ct. at 1949; Collins, 73 Ohio St. 3d at 69-70.

Given that the Plaintiff has once again failed to properly allege that the Defendant terminated her in violation of Ohio public policy, the Court SUSTAINS the Defendant's Motion to Dismiss Count Two of the Amended Complaint (Doc. #33), and dismisses the same with prejudice.

B. Motion to Strike Counts One and Three

The Defendant also moves to strike Counts One and Three of the Amended Complaint, claiming that the Plaintiff never asked for or received permission to

assert such claims. Doc. #33. Although recognizing that the Plaintiff did not seek leave to expand her Amended Complaint to include these two additional claims, the Magistrate Judge concluded that such was permissible, given that the Plaintiff seemed to be doing so in an attempt to remedy the flaw in the prior Complaint (especially with regard to the new claim for age discrimination) and also because the Defendant did not identify any prejudice it would suffer as a result of the same. Doc. #37 at 5. The Defendant objects, arguing that the Court's original Opinion was not so expansive as to allow the Plaintiff to do anything other than correct the previously asserted public policy claim, and also that "lack of prejudice" is an inappropriate standard for judging the propriety of such pleading alterations. Doc. #40 at 3-6. The Defendant's arguments are well taken.

The Plaintiff's original Complaint pled only one claim, wrongful termination in violation of public policy. Doc. #2. The Court dismissed the Complaint, but gave the Plaintiff leave to amend, in order to correct the flaw in pleading the causation element of that claim. Doc. #29. The Plaintiff did not ask for permission to amend her Complaint in other ways, at that time or otherwise, and the Court did not otherwise give her permission to do so.

The Court's pretrial scheduling order established March 17, 2008, as the cut-off date for filing motions to amend, in this litigation. Doc. #13 ¶ 6. Rule 16 of the Federal Rules of Civil Procedure governs pretrial scheduling orders. That Rule provides that "[a] schedule may be modified only for good cause and with the

judge's consent." Fed. R. Civ. Proc. 16(b). As the Defendant accurately points

out, the Plaintiff in this case neither asked for the Court's consent to amend her Complaint to plead two additional claims, nor demonstrated "good cause" for the same.

Furthermore, although Counts One and Three of the Amended Complaint would have undoubtedly satisfied the pleading standards previously established under Conley v. Gibson, 355 U.S. 41 (1957), they do not contain sufficient factual content that allows the Court to draw the reasonable inference that the Defendant is liable for the alleged misconduct, as is now required under Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949-50 (2009), and Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556 (2007).

Therefore, the Court SUSTAINS the Defendant's Motion to Strike Claims One and Three of the Amended Complaint (Doc. #33), without prejudice to refiling. The Court affords the Plaintiff 10 days from date, in which to file a Motion seeking leave to amend, with proposed Second Amended Complaint attached. Such Motion must demonstrate good cause for the Plaintiff's failure to plead such claims in a timely fashion. The proposed Second Amended Complaint is limited in scope to remedying the pleading flaws in Counts One and Three of the Amended Complaint, as identified herein, and must also comply with the strictures of Federal Rule of Civil Procedure 11.

C. Motion to Strike Jury Demand

Given that the Court has dismissed or stricken all of the claims set forth in

the Amended Complaint, the Defendant's alternative Motion to Strike Jury Demand (Doc. #33) is OVERRULED, as moot.

III. Conclusion

The Magistrate Judge's Report and Recommendations (Doc. #37) are ADOPTED, in part, and REJECTED, in part. The Defendant's objections thereto (Doc. #40) are SUSTAINED, in part, and OVERRULED, in part. The Defendant's Motion to Dismiss Count Two (Doc. #33) is SUSTAINED, and Count Two of the Amended Complaint is dismissed, with prejudice. The Defendant's Motion to Strike Counts One and Three (Doc. #33) is SUSTAINED, and Counts One and Three of the Amended Complaint are dismissed, without prejudice. The Defendant's Alternative Motion to Strike the Plaintiff's Jury Demand (Doc. #33) is OVERRULED, as moot.

The Plaintiff may file a Motion seeking leave to amend, with proposed Second Amended Complaint attached, within 10 days from the date of this Decision, as provided herein.

April 13, 2010

/s/ Walter Herbert Rice
WALTER HERBERT RICE, JUDGE
UNITED STATES DISTRICT COURT

Copies to:
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