

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

TODD C. HOMI,

08-CV-754-BR

Plaintiff,

OPINION AND ORDER

v.

GEORGIA PACIFIC, LLC,
and RICHARD PAUL LAMMERS,

Defendants

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BROWN, Judge.

This matter comes before the Court on the Motion (#21) for Summary Judgment filed by Defendant Georgia Pacific, LLC.

Defendants Georgia Pacific and Richard Paul Lammers each filed Motions for Summary Judgment on February 27, 2009. The Court heard oral argument on both Motions on June 4, 2009. At oral argument, the Court denied Georgia Pacific's Motion as to Plaintiff Todd C. Homi's Claim One against Georgia Pacific for workers' compensation retaliation and Homi's Claim Two against Georgia Pacific for retaliation for making a criminal complaint. The Court granted Georgia Pacific's Motion as to Homi's Claim Three against Georgia Pacific for battery, and Homi conceded Georgia Pacific's Motion as to his Claim Five against Georgia Pacific for negligent supervision. In addition, the Court denied Lammers's Motion. The only remaining issue before the Court is Georgia Pacific's Motion as to Homi's Claim Four against Georgia Pacific for wrongful discharge.

For the reasons that follow, the Court **GRANTS** the Motion of Georgia Pacific as to Homi's Claim Four against Georgia Pacific for wrongful discharge.

BACKGROUND

The following facts are not disputed unless otherwise noted.

Homi worked for Georgia Pacific in its Wauna Mill manufacturing plant from December 1996 to May 9, 2007. The Wauna Mill plant makes facial tissues, napkins, toilet tissue, and paper towels.

During the graveyard shift on May 7, 2007, Homi and Lammers, who was also a Georgia Pacific employee working at the Wauna Mill plant, had a physical altercation. Homi had been instructed to "blow down" the area where Lammers was working. Lammers told Homi not to do so, but to use a broom instead. In response, Homi made a comment and a rude gesture. A fight ensued.

The parties do not agree about the details, but it is undisputed that Homi was cut on the arm during the fight. Lammers reported the incident to supervisors, and Homi received medical care at the mill. Homi was released from work and taken to the hospital by ambulance for follow-up care.

The hospital provided Homi with a Form 827 to initiate the workers' compensation process, which Homi completed at the hospital. Georgia Pacific also provided Homi with workers' compensation paperwork.

Homi notified the Clatsop County Sheriff's Department about the fight and filed a police report on May 8, 2007. Lammers also

contacted the Sheriff's Department about the altercation at the mill.

On May 9, 2007, Georgia Pacific terminated both employees for violating the company's workplace violence policy. Both Homi and Lammers filed grievances through their union in which they each alleged the other was at fault. The union determined Lammers was telling the truth and recommended to Georgia Pacific that Lammers's employment be reinstated. Georgia Pacific reinstated Lammers on July 27, 2007, but it did not reinstate Homi.

In the meantime, Homi filed for workers' compensation on May 20, 2007.

On October 1, 2007, Lammers was indicted on the charge of Assault III based on forensic evidence that indicated Homi's cut was caused by one of Lammers's utility knives. Lammers's criminal matter has been resolved.

On May 8, 2008, Homi filed a complaint in Clatsop County Circuit Court. In his complaint, Homi asserted five claims against Georgia Pacific: (1) workers' compensation discrimination and retaliation in violation of Oregon Revised Statute § 659A.040, (2) retaliation for making a criminal complaint in violation of Oregon Revised Statute § 659A.230, (3) battery under Oregon common law, (4) wrongful discharge under Oregon common law, and (5) negligent hiring and supervision under

Oregon common law. Homi also asserted a claim against Lammers for battery.

On June 20, 2008, Defendants removed the matter to this Court on the basis of federal-question jurisdiction, asserting that Homi's Claim Five was preempted by § 301 of the Labor Management Relations Act, 29 U.S.C. § 185a.

On February 27, 2009, Georgia Pacific moved for summary judgment on all of Homi's claims. On the same day, Lammers also moved for summary judgment as to all of Homi's claims even though Homi only asserts a claim of battery against Lammers.

On April 8, 2009, Homi filed a Motion to Supplement the Record in which he requested the Court to consider the Arbitration Decision and Award issued March 31, 2009 (Exhibit 9) in which the arbitrator found in Homi's favor. On April 23, 2009, the Court instructed Homi to submit a supplemental memorandum explaining the effect, if any, Exhibit 9 could have on Defendants' Motions. On May 6, 2009, Homi filed his Supplemental Memorandum. On May 20, 2009, Georgia Pacific filed its Opposition to Homi's Supplemental Memorandum.

At oral argument on June 4, 2009, the Court denied Homi's Motion to Supplement the Record for purposes of determining the then-pending summary judgment motions. As noted, at oral argument the Court also denied Georgia Pacific's Motion as to Homi's Claims One and Two, granted Georgia Pacific's Motion as to

Homi's Claims Three and Five, took Georgia Pacific's Motion under advisement as to Homi's Claim Four, and denied Lammers's Motion.

STANDARDS

Federal Rule of Civil Procedure 56(c) authorizes summary judgment if no genuine issue exists regarding any material fact and the moving party is entitled to judgment as a matter of law. The moving party must show the absence of an issue of material fact. *Rivera v. Philip Morris, Inc.*, 395 F.3d 1142, 1146 (9th Cir. 2005). In response to a properly supported motion for summary judgment, the nonmoving party must go beyond the pleadings and show there is a genuine issue of material fact for trial. *Id.*

An issue of fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002)(quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The court must draw all reasonable inferences in favor of the nonmoving party. *Id.* "Summary judgment cannot be granted where contrary inferences may be drawn from the evidence as to material issues." *Easter v. Am. W. Fin.*, 381 F.3d 948, 957 (9th Cir. 2004)(citing *Sherman Oaks Med. Arts Ctr., Ltd. v. Carpenters Local Union No. 1936*, 680 F.2d 594, 598 (9th Cir. 1982)).

A mere disagreement about a material issue of fact, however, does not preclude summary judgment. *Jackson v. Bank of Haw.*, 902 F.2d 1385, 1389 (9th Cir. 1990). When the nonmoving party's claims are factually implausible, that party must "come forward with more persuasive evidence than otherwise would be necessary." *Wong v. Regents of Univ. of Cal.*, 379 F.3d 1097 (9th Cir. 2004), as amended by 410 F.3d 1052, 1055 (9th Cir. 2005) (citing *Blue Ridge Ins. Co. v. Stanewich*, 142 F.3d 1145, 1149 (9th Cir. 1998)).

The substantive law governing a claim or a defense determines whether a fact is material. *Miller v. Glenn Miller Prod., Inc.*, 454 F.3d 975, 987 (9th Cir. 2006). If the resolution of a factual dispute would not affect the outcome of the claim, the court may grant summary judgment. *Id.*

DISCUSSION

Georgia Pacific contends it is entitled to summary judgment on Homi's Claim Four for wrongful discharge because, among other things, (1) Homi has an adequate statutory remedy and (2) there is not any evidence Homi was exercising a job-related right of important public interest or that Homi was fulfilling an important public duty. See *Babick v. Or. Arena Corp.*, 333 Or. 401, 407 (2002).

I. Standards.

Under Oregon law, an employer may discharge an employee at any time for any reason unless doing so violates a contractual, statutory, or constitutional requirement. *Id.* (citing *Patton v. J. C. Penney Co.*, 301 Or. 117, 120 (1986)). The tort of wrongful discharge is a narrow exception to this general rule. *Id.*

Oregon courts have recognized two circumstances that give rise to the common-law tort of wrongful discharge: (1) discharge for "exercising a job-related right of important public interest" and (2) discharge for "fulfilling some important public duty." *Babick*, 333 Or. at 407. Examples of the first category include discharge for filing a worker's compensation claim (*Brown v. Transcon Lines*, 284 Or. 597 (1978)) and resisting sexual harassment by a supervisor (*Holien v. Sears, Roebuck & Co.*, 298 Or. 76 (1984)). Examples of the second category include discharge for serving on jury duty (*Nees v. Hocks*, 272 Or. 210 (1975)), for reporting patient abuse at a nursing home (*McQuary v. Bel Air Convalescent Home, Inc.*, 69 Or. App. 107 (1984)), and for refusing to sign a false report regarding a fellow employee's work-related conduct (*Delaney v. Taco Time Int'l Inc.*, 297 Or. 10 (1984)).

The tort of wrongful discharge, however, was not intended to be a tort of general application but rather an interstitial tort to provide a remedy when the conduct in question is unacceptable

and no other remedy is available. *Cantley v. DSMF, Inc.*, 422 F. Supp. 2d 1214, 1220 (D. Or. 2006)(citing *Draper v. Astoria School Dist.*, 995 F. Supp. 1122, 1128 (D. Or. 1998))(internal quotation omitted). See also *Walsh v. Consolidated Freightways, Inc.*, 278 Or. 347, 351-52 (1977). "The underlying purpose of that tort in this state is not to vindicate individual interests of the employee by assuring that he or she receives the maximum possible recovery, but rather to protect important public policies by punishing conduct that thwarts those interests." *Draper v. Astoria School Dist.*, 995 F. Supp. 1122, 1130 (D. Or. 1998). Thus, the court in *Draper* concluded a claim for common-law wrongful discharge is not available in Oregon if (1) an existing remedy adequately protects the public interest in question or (2) the legislature has intentionally abrogated the common-law remedies by establishing an exclusive remedy regardless whether the courts perceive that remedy to be adequate. *Id.* at 1130-31.

II. Analysis.

In his Complaint, Homi alleges wrongful discharge with respect to his claims for retaliation for exercising his rights under the workers' compensation system and for reporting criminal activity. Homi also alleges he was wrongfully discharged for exercising a job-related right of important public interest as well as for fulfilling an important public duty. In his Response

and at oral argument, however, Homi conceded his wrongful-discharge claim was not based on the exercise of a job-related right of important public interest. At oral argument, he also conceded his claims for wrongful discharge with respect to exercising his workers' compensation rights are precluded by the existence of adequate statutory remedies. Accordingly, the only basis for Homi's wrongful-discharge claim before this Court is his assertion that he was fulfilling an important public duty with respect to his report of criminal activity. As noted, Georgia Pacific argues Homi cannot bring a claim of wrongful discharge on the grounds that (1) Homi has an adequate statutory remedy available and (2) there is not any evidence to support Homi's assertion that he was fulfilling an important public duty.

A. Adequate statutory remedy.

Georgia Pacific contends Oregon Revised Statute § 659A.230 provides Homi with an adequate statutory remedy and, therefore, precludes Homi's wrongful-discharge claim.

As noted, the court in *Draper* concluded a claim for common-law wrongful discharge is not available in Oregon if (1) an existing remedy adequately protects the public interest in question or (2) the legislature has intentionally abrogated the common-law remedies by establishing an exclusive remedy regardless whether the courts perceive that remedy to be adequate. *Draper*, 995 F. Supp. at 1130-31. In addition,

§ 659A.230 has been held to provide an adequate statutory remedy under the first *Draper* factor above. See *Lively v. Wash. Inventory Srvs., Inc.*, No. 02-CV-1363, WL 3090165, at *5 (D. Or. Dec. 31, 2004).

Homi contends, however, that Oregon courts have held the above factors are conjunctive, and, therefore, a wrongful discharge claim cannot be dismissed on the ground that an available statutory remedy exists unless the legislature intentionally abrogated the common-law remedy. See *Olsen v. Deschutes County*, 204 Or. App. 7, 13-17 (2006). See also *Love v. Polk County Fire Dist.*, 149 Or. App. 474, 482-88 (2006).

The Court, however, need not reach this argument because the Court concludes herein that Homi was not fulfilling an important public duty. *Georgia Pacific*, therefore, is entitled to summary judgment on Homi's claim for wrongful discharge.

B. Fulfillment of an important public duty.

1. Unsafe or illegal workplace conditions.

Homi asserts he was fulfilling an important public duty by reporting unsafe or illegal workplace conditions to his employer. Oregon courts have held such conduct to be an important public duty in certain circumstances. *McQuary*, 69 Or. App. at 109. See also *Dalby v. Sisters of Providence of Or.*, 125 Or. App. 149, 151 (1993)(raising concerns about noncompliance with Oregon Administrative Rules regarding

prescription-drug inventory records constituted fulfillment of public duty). Here, however, there is not any dispute that Lammers rather than Homi reported the incident to supervisors. Accordingly, Homi did not "fulfill[] some important public duty" by reporting unsafe working conditions or illegal activity to his employer. *Babick*, 333 Or. at 407.

2. Police report.

Homi also asserts he was fulfilling an important public duty when he filed the police report about an illegal activity (the fight) to authorities.

To determine whether there is a public duty that has been frustrated by Georgia Pacific's alleged conduct, the task of the Court is to "find a public policy, not to create one." See *Dunwoody v. Handskill Corp.*, 185 Or. App. 605, 616 (2003)(citing *Babick*, 333 Or. at 409). The Court looks for evidence of such a duty in constitutional and statutory provisions as well as in the case law of this and other jurisdictions. See *Dunwoody*, 185 Or. App. at 605.

Homi does not identify any statute or constitutional provision that compelled him to file a police report. A "public duty[, however,] may arise from evidence of a substantial public policy that would be thwarted if an employer were allowed to discharge its employee without liability." *Babick*, 333 Or. at 408 (quotation omitted). Homi asserts he was fulfilling the

substantial public policy of helping to ensure public safety by filing the police report.

In *Babick*, the defendant discharged a group of security guards after some of them arrested concert patrons that were engaging in illegal activity. *Id.* at 404. The plaintiffs alleged their employer wrongfully discharged them on the theory that they were fulfilling the important public duty of ensuring public safety by arresting lawbreakers. *Id.* at 405. The Oregon Supreme Court determined Oregon Revised Statutes chapters 131-70, which reflect a public policy against crime and in favor of community safety, were "far too general to support plaintiffs' public duty theory." *Id.* at 409. The court concluded there was not any "support in the statutes that have been brought to our attention . . . for a conclusion that some substantial public policy requires the kinds of acts that allegedly triggered plaintiffs' discharge." *Id.* at 410. The court stated it was "concerned here with a duty to perform a specific act (the arrest of lawbreakers by private citizens or private security personnel) and the statutes cited have nothing to say about that kind of act." *Id.* at 409.

Here, similarly, Homi alleges his filing of the police report fulfilled the important public duties of ensuring public safety and preventing crime. As noted, however, the Oregon Supreme Court rejected similar arguments in *Babick*. Accordingly,

the Court concludes Homi did not fulfill a "substantial public policy" when he filed the police report that allegedly triggered his discharge. *Id.* at 410.

In summary, the Court concludes on this record that Georgia Pacific did not discharge Homi for fulfilling some important public duty, and, therefore, the Court grants Georgia Pacific's Motion for Summary Judgment as to Homi's Claim Four for wrongful discharge.

CONCLUSION

For these reasons, the Court **GRANTS** Georgia Pacific's Motion (#21) for Summary Judgment as to Homi's Claim Four for wrongful discharge.

IT IS SO ORDERED.

DATED this 24th day of June, 2009.

/s/ Anna J. Brown

ANNA J. BROWN
United States District Judge