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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

JENNIFER WOLF,)	
)	
Plaintiff,)	No. CV-10-296-HU
v.)	
)	
RON WILSON CENTER FOR)	
EFFECTIVE LIVING, INC., an)	
Oregon non-profit corporation,)	OPINION & ORDER
)	
Defendant.)	
)	

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1 - OPINION & ORDER

1 HUBEL, Magistrate Judge:

2 Plaintiff Jennifer Wolf brings this employment-related action
3 against her former employer, defendant Ron Wilson Center for
4 Effective Living, Inc. Defendant moves to dismiss three of
5 plaintiff's claims for failure to state a claim.

6 Both parties have consented to entry of final judgment by a
7 Magistrate Judge in accordance with Federal Rule of Civil Procedure
8 73 and 28 U.S.C. § 636(c). I grant the motion in part and deny it
9 in part.

10 BACKGROUND

11 The facts are taken from the Complaint. Defendant is a non-
12 profit corporation which operates various facilities providing
13 services to adults with developmental disabilities, including
14 residential care. Compl. at ¶ 6. Plaintiff was employed by
15 defendant as support staff in defendant's "supportive living"
16 department, from February 22, 2007, until December 30, 2009. Id.
17 at ¶ 7. She was assigned to one or more of defendant's residential
18 care facilities and generally worked full time. Id. at ¶ 7.

19 In 2008, plaintiff took medical leave protected by the Family
20 and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601-2654, and Oregon's
21 Family Leave Act (OFLA), Oregon Revised Statutes §§ (O.R.S.)
22 659A.150-659A.186, due to a broken ankle. Id. at ¶ 9. That leave
23 ended on or about November 17, 2008. Id.

24 When plaintiff returned to work on November 17, 2008, she was
25 not reinstated to her job. Id. at ¶ 10. Her work hours were
26 sharply reduced. Id.

27 In response to what plaintiff believed to be a violation of
28 her rights under FMLA and OFLA, plaintiff retained an attorney who

1 contacted defendant about the alleged violation. Id. at ¶ 11. In
2 January 2009, plaintiff and defendant resolved plaintiff's claim
3 for the FMLA and OFLA violations arising from plaintiff's 2008
4 medical leave. Id. at ¶ 12.

5 On or about March 17, 2009, plaintiff commenced a second
6 medical leave protected by FMLA and OFLA related to her pregnancy.
7 Id. at ¶ 13. Defendant terminated her on December 30, 2009. Id.
8 at ¶ 13.

9 Based on these facts, plaintiff brings the following claims:

10 (1) Interference with FMLA rights, in which plaintiff contends
11 that defendant discharged her in retaliation for taking medical
12 leave to which she was entitled, and in retaliation for exercising
13 her right to reinstatement under FMLA; she further alleges that
14 defendant opposed her attempts to obtain unemployment benefits in
15 retaliation for taking medical leave to which she was entitled
16 under FMLA and in retaliation for exercising her right to
17 reinstatement under FMLA; Id. at ¶¶ 15-18;

18 (2) Retaliation for engaging in protected FMLA activity, in
19 which plaintiff contends that she requested and took leave
20 protected by FMLA, and opposed conduct made unlawful under FMLA
21 when she opposed violation of her FMLA right to reinstatement;
22 defendant allegedly retaliated against her for engaging in this
23 protected activity, both when defendant fired her and when it
24 opposed her attempt to obtain unemployment benefits; Id. at ¶¶ 19-
25 21;

26 (3) Violation of OFLA in which, based on the prior alleged
27 facts, plaintiff contends that defendant terminated her in
28 retaliation for taking medical leave to which she was entitled

1 under OFLA and for opposing defendant's violation of her rights as
2 well as opposing her application for unemployment benefits; Id. at
3 ¶¶ 22-24;

4 (4) Common law wrongful discharge, in which plaintiff
5 contends she was discharged for exercising job-related rights that
6 reflect an important public policy; Id. at ¶¶ 25-27;

7 (5) Reckless infliction of emotional distress, in which
8 plaintiff alleges she had an employee-employer relationship with
9 defendant, that defendant recklessly engaged in the previously
10 alleged acts causing severe mental or emotional distress in various
11 forms, and that defendant's actions constituted an extraordinary
12 transgression of the bounds of socially tolerable conduct and
13 exceeded any reasonable limit of social toleration; Id. at ¶¶ 28-
14 31; and

15 (6) Intentional infliction of emotional distress, in which
16 plaintiff alleges that defendant knew the previously alleged
17 conduct would cause severe mental or emotional distress or acted
18 despite a high degree of probability that the mental or emotional
19 distress would result, that defendant's conduct in fact caused
20 plaintiff severe mental or emotional distress from the various
21 foreseeable highly unpleasant emotional reactions, and that
22 defendant's conduct was an extraordinary transgression of the
23 bounds of socially tolerable conduct or exceeded any reasonable
24 limit of social toleration. Id. at ¶¶ 32-35.

25 STANDARDS

26 On a motion to dismiss, the court must review the sufficiency
27 of the complaint. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).
28 All allegations of material fact are taken as true and construed in

1 the light most favorable to the nonmoving party. American Family
2 Ass'n, Inc. v. City & County of San Francisco, 277 F.3d 1114, 1120
3 (9th Cir. 2002). However, the court need not accept conclusory
4 allegations as truthful. Holden v Hagopian, 978 F.2d 1115, 1121
5 (9th Cir. 1992).

6 A motion to dismiss under Rule 12(b)(6) will be granted only
7 if plaintiff alleges the "grounds" of his "entitlement to relief"
8 with nothing "more than labels and conclusions and a formulaic
9 recitation of the elements of a cause of action[.]" Bell Atlantic
10 Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal quotation
11 omitted). "Factual allegations must be enough to raise a right to
12 relief above the speculative level, . . . on the assumption that
13 all the allegations in the complaint are true (even if doubtful in
14 fact)[.]" Id. at 1965 (citations and internal quotations omitted).

15 To survive a motion to dismiss, the complaint "must contain
16 sufficient factual matter, accepted as true, to state a claim to
17 relief that is plausible on its face[.]" meaning "when the
18 plaintiff pleads factual content that allows the court to draw the
19 reasonable inference that the defendant is liable for the
20 misconduct alleged." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949
21 (2009) (internal quotation and citation omitted). Additionally,
22 "only a complaint that states a plausible claim for relief survives
23 a motion to dismiss." Id. at 1950. The complaint must contain
24 "well-pleaded facts" which "permit the court to infer more than the
25 mere possibility of misconduct." Id.

26 DISCUSSION

27 Defendant moves to dismiss the three non-statutory claims of
28 wrongful discharge, reckless infliction of emotional distress, and

1 intentional infliction of emotional distress.

2 I. Wrongful Discharge

3 Defendant moves to dismiss this claim on the basis that
4 plaintiff has adequate statutory remedies under FMLA and OFLA.
5 Many cases from this Court recognize that under Oregon law, there
6 is no right to a common law wrongful discharge claim if existing
7 statutory remedies adequately protect the employment-related right.
8 E.g., Whitley v. City of Portland, 654 F. Supp. 2d 1194, 1224 (D.
9 Or. 2009). Thus, generally, if an adequate statutory remedy
10 exists, a common law wrongful discharge claim based on the same
11 conduct is precluded. Reid v. Evergreen Aviation Ground Logistics
12 Enters., No. CV-07-1641-AC, 2009 WL 136019, at *16 (D. Or. Jan. 20,
13 2009).

14 Defendant argues that plaintiff's wrongful discharge claim is
15 precluded by FMLA and OFLA because the statutory relief provided by
16 those statutes is as broad as the relief provided by the common law
17 wrongful discharge claim.

18 Defendant's position is not supported by other cases from this
19 Court. Most recently, Judge Papak, in a Findings & Recommendation
20 adopted by Judge Brown, noted that under FMLA, a plaintiff is not
21 entitled to emotional distress damages and that the lack of such
22 damages "makes the statutory remedy inadequate because it fails to
23 'capture the personal nature of the injury done to a wrongfully
24 discharged employee as an individual.'" Maxwell v. Kelly Servs,
25 Inc., No. CV-09-405-PK, 2010 WL 2720730, at *13-14 (D. Or. July 7,
26 2010) (quoting Earnest v. Georgia-Pacific Corp., No. CV-07-1559-KI,
27 2008 WL 5111104, at *9 (D. Or. Nov. 25, 2008)). Thus, because the
28 plaintiff was seeking emotional distress damages, Judge Papak

1 allowed the plaintiff to pursue a wrongful termination claim
2 arising from the allegations that her former employer terminated
3 her employment in retaliation for taking family medical leave, or
4 for demanding reinstatement following her leave. Id. at *14.

5 In Earnest, the case relied on by Judge Papak, Judge King in
6 turn relied on an earlier case by Judge Ashmanskas to conclude that
7 the lack of emotional distress damages under FMLA and OFLA made the
8 statutory remedies inadequate. Earnest, 2008 WL 5111104, at *9
9 (citing Rush v. Oregon Steel Mills, No. CV-06-1701-AS, 2007 WL
10 2417386 (D. Or. Aug. 17, 2007)). Judge King agreed with the
11 analysis in Rush and adopted it as his own. Id.

12 Defendant argues that no court has ever specifically held that
13 a statute must provide for every single kind of remedy that would
14 be available at common law and that in fact, the Oregon Court of
15 Appeals found the statutory remedy under O.R.S. 659.410(1),
16 prohibiting worker's compensation retaliation, to be exclusive
17 because the legislature's adoption of "virtually all remedies that
18 would have been available at common law lead us to conclude that it
19 intended the statutory remedy to be exclusive." Farrimond v.
20 Louisiana-Pacific Corp., 103 Or. App 563, 567, 798 P.2d 697, 699
21 (1990). Here, defendant argues, because FMLA and OFLA provide
22 "virtually all" remedies that would have been available under
23 common law, that is sufficient to preclude her wrongful discharge
24 claim.

25 At the relevant time, the statute at issue in Farrimond capped
26 punitive damages at \$2,500. Id. at 567 n.4, 798 P.2d at 699 n.4.
27 The statute still entitled the plaintiff to a jury trial, to obtain
28 equitable remedies of injunction and reinstatement with back pay,

1 and to obtain compensatory and punitive damages (up to the limit).
2 Id. at 567, 798 P.2d at 699. Thus, the statute provided "virtually
3 all" the remedies available at common law.

4 Notably, the statute at issue in Farrimond allowed the
5 plaintiff to recover emotional distress damages, which, as the
6 cases from this Court note, "capture the personal nature of the
7 injury." Thus, Farrimond is easily distinguishable.

8 I agree with the other judges in this Court and conclude that
9 because FMLA and OFLA do not allow for emotional distress damages,
10 which is a component of the damages plaintiff seeks in this case,
11 her common law wrongful discharge claim is not precluded. Thus, I
12 deny the motion to dismiss this claim.

13 II. Reckless Infliction of Emotional Distress (RIED)

14 Defendant moves to dismiss this claim contending that Oregon
15 courts do not recognize it. In Davis v. Pacific Saw & Knife Co.,
16 No. CV-08-676-HU, 2008 WL 4319981, at *3 (D. Or. Sept. 16, 2008),
17 I held that "[t]here is no cognizable claim under Oregon law for
18 reckless infliction of emotional distress." Id. (citing Snead v.
19 Metropolitan Property and Cas. Co., 909 F. Supp. 775, 779 (D. Or.
20 1996)).

21 Opinions issued by other judges in this Court have recognized
22 a narrow set of circumstances in which a RIED claim is, in fact,
23 cognizable. Judge Aiken recently explained that:

24 Oregon law allows recovery of damages for reckless
25 infliction of emotional distress under three specific
26 circumstances. See, e.g., Navarette v. Nike, Inc., No.
27 05-1827, 2007 WL 221865, at *4 (D. Or. Jan. 26, 2007)
28 (discussing when damages may be recovered for RIED in
Oregon). First, a plaintiff may recover under RIED when
accompanied by physical injury. Drake v. Mut. of
Enumclaw Ins. Co., 167 Or. App. 475, 487, n. 3, 1 P.3d
1065 (2000). Second, "Oregon allows recovery for

1 emotional distress without accompanying physical injury
2 under narrow circumstances, including when a defendant's
3 conduct infringes on a plaintiff's legally protected
4 interest." Rathgeber v. Hemenway, Inc., 335 Or. 404,
5 414, 69 P.3d 710 (2003). Third, a plaintiff may recover
6 under either reckless or negligent infliction of
7 emotional distress in circumstances where there is a duty
8 to protect against psychological harm. See Id.
9 (discussing duty to protect from emotional harm in
10 malpractice context) (citing Curtis v. MRI Imaging
11 Servs., 327 Or. 9, 14-15, 956 P.2d 960 (1998)); Simons v.
12 Beard, 188 Or. App. 370, 376, 381-82, 72 P.3d 96 (2003);
13 Shin v. Sunriver Preparatory Sch., Inc., 199 Or. App.
14 352, 368-69, 111 P.3d 762 (2005) (school owed a
15 heightened duty of care to student to protect from
16 negligently inflicted emotional harm).

17 Dawson v. Entek Int'l, 662 F. Supp. 2d 1277 (D. Or. 2009).

18 Here, plaintiff fails to identify her theory of recovery for
19 the RIED claim. There is no allegation of physical injury. The
20 Complaint alleges no "legally protected interest." Moreover, cases
21 discussing RIED claims in Oregon, such as Rathgeber, Drake, and
22 Hammond v. Central Lane Commc'ns Ctr., 312 Or. 17, 816 P.2d 593
23 (2003) do not provide guidance for interpreting "legally protected
24 interest," and so, do not discuss the required type of such an
25 interest or any limits on such an interest. In fact, while these
26 three cases note the existence of the "legally protected interest"
27 prong of a RIED claim, none found a basis to support it.
28 Furthermore, I agree with Judge Ashmanskas's discussion in
Navarette that "[i]n the wake of McGanty [v. Staudenraus, 321 Or.
532, 901 P.2d 841 (1995)], a special relationship between the
parties, such as employer-employee, is no longer a basis upon which
recovery may be had for RIED." Navarette, 2007 WL 221865, at *3.
Finally, there is no allegation of a duty to protect against
psychological harm.

A RIED claim without physical injury is allowed under a very

1 particular set of facts and is recognized only in very narrow
2 circumstances. The facts as asserted by plaintiff in support of
3 this claim are do not state a recognized basis for the claim. I
4 grant defendant's motion as to the RIED claim.

5 III. Intentional Infliction of Emotional Distress (IIED)

6 Defendant moves to dismiss this claim on the basis that
7 plaintiff fails to establish that defendant's acts constitute an
8 extraordinary transgression of the bounds of socially tolerable
9 conduct.

10 To sustain an IIED claim, plaintiff must show that defendant
11 intended to inflict severe emotional distress, that defendant's
12 acts were the cause of plaintiff's severe emotional distress, and
13 that defendant's acts constituted an extraordinary transgression of
14 the bounds of socially tolerable conduct. McGanty, 321 Or. at 563,
15 901 P.2d at 849; see also Babick v. Oregon Arena Corp., 333 Or.
16 401, 411, 40 P.3d 1059, 1063 (2002) (to state an IIED claim under
17 Oregon law, plaintiff must prove, inter alia, that defendants'
18 actions "constituted an extraordinary transgression of the bounds
19 of socially tolerable conduct.") (internal quotation omitted).

20 Conduct that is merely "rude, boorish, tyrannical, churlish,
21 and mean" does not support an IIED claim. Patton v. J.C. Penney
22 Co., 301 Or. 117, 124, 719 P.2d 854, 858 (1986). "[T]he tort does
23 not provide recovery for the kind of temporary annoyance or injured
24 feelings that can result from friction and rudeness among people in
25 day-to-day life even when the intentional conduct causing
26 plaintiff's distress otherwise qualifies for liability." Hall v.
27 The May Dep't Stores Co., 292 Or. 131, 135, 637 P.2d 126, 129
28 (1981); see also Watte v. Maeyens, 112 Or. App. 234, 237, 828 P.2d

1 479, 480-81 (1992) (no claim where employer threw a tantrum,
2 screamed and yelled at his employees, accused them of being liars
3 and saboteurs, then fired them all); Madani v. Kendall Ford, Inc.,
4 312 Or. 198, 205-06, 818 P.2d 930, 934 (1991) (no claim where
5 employee terminated for refusing to pull down pants).

6 In a 2008 case, the Oregon Court of Appeals explained the
7 following parameters of the tort:

8 A trial court plays a gatekeeper role in evaluating
9 the viability of an IIED claim by assessing the allegedly
10 tortious conduct to determine whether it goes beyond the
11 farthest reaches of socially tolerable behavior and
12 creates a jury question on liability. . . .

11 * * *

12 The classification of conduct as "extreme and outrageous"
13 depends on both the character and degree of the conduct.
14 As explained in the Restatement at § 46 comment d:

15 "Liability has been found only where the conduct
16 has been so outrageous in character, and so extreme
17 in degree, as to go beyond all possible bounds of
18 decency, and to be regarded as atrocious, and
19 utterly intolerable in a civilized community."

20 Whether conduct is an extraordinary transgression is
21 a fact-specific inquiry, to be considered on a
22 case-by-case basis, based on the totality of the
23 circumstances. We consider whether the offensiveness of
24 the conduct exceeds any reasonable limit of social
25 toleration, which is a judgment of social standards
26 rather than of specific occurrences.

21 House v. Hicks, 218 Or. App. 348, 358-60, 179 P.3d 730, 737-39
22 (2008) (internal quotations and citations omitted), rev denied, 345
23 Or. 381 (2008).

24 Plaintiff argues that the following allegations meet the
25 standard: (1) she was discharged in retaliation for taking medical
26 leave to which she was entitled under FMLA, and in retaliation for
27 exercising her right to reinstatement under FMLA; (2) defendant
28 opposed her attempts to obtain unemployment benefits in retaliation

1 for taking medical leave to which she was entitled under FMLA, and
2 in retaliation for exercising her right to reinstatement under
3 FMLA; and (3) she settled a previous FMLA dispute with defendant
4 and was subject to retaliation as a result of the exercise of her
5 rights that led to that settlement.

6 Plaintiff argues that her allegations show "long-term"
7 discriminatory and retaliatory conduct that continued beyond the
8 date of plaintiff's discharge and included not only an attempt to
9 deprive her of her livelihood, but also an attempt to deprive her
10 of the unemployment benefits she needed to survive. Moreover, she
11 notes, defendant did so with the full knowledge that she was a new
12 mother, just back from OFLA and FMLA protected leave, and in the
13 context of what she alleges is a recognized "special" employer-
14 employee relationship. Plaintiff contends that these allegations
15 state a claim for IIED because these are special circumstances
16 which amount to more than "they discharged me because of my
17 protected status."

18 McGanty made clear that the employer-employee relationship was
19 not relevant to the intent element of an IIED claim. McGanty, 321
20 Or. at 547-48, 901 P.2d at 850-51. But, as plaintiff noted at oral
21 argument, post-McGanty cases indicate that the employer-employee
22 relationship is relevant to the element of the claim examining the
23 level of conduct necessary to sustain the tort. E.g., Clemente v.
24 State, 227 Or. App. 434, 442, 206 P.3d 249, 255 (2009) ("the courts
25 are more likely to consider behavior outrageous if it is inflicted
26 on the more vulnerable partner in a 'special relationship' such as
27 employer-employee."); House, 218 Or. App. at 360, 179 P.3d at 737
28 (noting that "precedents identify several contextual factors that

1 guide the court's classification of conduct as extreme and
2 outrageous[,] " the most important of which is "whether a special
3 relationship exists between a plaintiff and a defendant, such as an
4 employer-employee[.]").

5 Nonetheless, it remains that Oregon courts have been "very
6 hesitant to impose liability for IIED claims in employment
7 settings, even in the face of serious employer misconduct."

8 Robinson v. U.S. Bancorp, No. CV-99-1723-ST, 2000 WL 435468, at *8
9 (D. Or. Apr. 20, 2000). As the Clemente court explained:

10 In every case in which this court or the [Oregon] Supreme
11 Court has allowed an IIED claim asserted in the context
12 of an employment relationship to proceed to a jury, the
13 employer engaged in conduct that was not only
14 aggravating, insensitive, petty, irritating, perhaps
15 unlawful, . . . and mean-it also contained some further
16 and more serious aspect. In some cases, the employer
17 engaged in, or credibly threatened to engage in, unwanted
18 physical contact of a sexual or violent nature. E.g.,
19 Lathrope-Olson, 128 Or. App. at 407-08, 876 P.2d 345;
20 Franklin v. PCC, 100 Or. App. 465, 471-72, 787 P.2d 489
21 (1990). Employers in other cases repeatedly used
22 derogatory racial, gender, or ethnic slurs, usually
23 accompanied by some other aggravating circumstance.
24 E.g., Whelan v. Albertson's, Inc., 129 Or. App. 501,
25 504-06, 879 P.2d 888 (1994); Franklin, 100 Or. App. at
26 471-72, 787 P.2d 489. In yet other situations, the
27 employer exposed the plaintiff to actual physical danger.
28 E.g., Babick, 333 Or. at 413-14, 40 P.3d 1059; MacCrone
v. Edwards Center, Inc., 160 Or. App. 91, 100-01, 980
P.2d 1156 (1999), vacated on other grounds, 332 Or. 41,
22 P.3d 758 (2001). In Schoen v. Freightliner LLC, 224
Or. App. 613, 615-20, 629, 199 P.3d 332 (2008), the
employer repeatedly subjected the plaintiff to verbal
abuse, forced her to do work from which she was medically
exempted, and forced her to engage in illegal conduct.

Clemente, 227 Or. App. at 442-43, 206 P.3d at 255 (footnote
omitted).

Here, the allegations fail to establish that any such
extraordinarily outrageous aggravating factors occurred. Plaintiff
was not verbally, sexually, or physically abused or harassed. There

1 was no name-calling. She was not exposed to violence. She was not
2 repeatedly and viciously ridiculed. Instead, according to the
3 Complaint, she was subjected to repeated discriminatory treatment,
4 retaliation, and post-discharge retaliation in the form of the
5 challenge to her application for unemployment benefits. Even in
6 the context of an employment relationship, these allegations are
7 insufficient. I grant the motion to dismiss the IIED claim.

8 CONCLUSION

9 Defendant's motion to dismiss [10] is granted as to the RIED
10 and IIED claims, and is denied as to the wrongful discharge claim.

11 IT IS SO ORDERED.

12 Dated this 8th day of November , 2010.

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15 /s/ Dennis James Hubel
16 Dennis James Hubel
17 United States Magistrate Judge
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