Durkee v. Rutland Mental Health Services, Inc., No. 54-1-05 Rdcv (Corsones, J., July 8, 2008)

STATE OF VERMONT
RUTLAND COUNTY

DONNA M. DURKEE	)	
	)	Rutland Superior Court
v.	)	Docket No. 54-1-05 Rdcv
	)	
RUTLAND MENTAL HEALTH SERVICES, INC., MARK MONSON, LESLIE H. MCINTYRE, DEBORAH BETHEL, LAWRENCE BALLOU, MARIAN KURATH, JEFFREY McKEE, and DAVID LONG.	)	

DECISION
Cross-Motions for Reconsideration

Plaintiff Donna Durkee, a clinical social worker, contends that defendants Rutland Mental Health Services, Inc. and its named employees wrongfully reported her to the Office of Professional Regulation for suspected unprofessional conduct. She seeks recovery for pain and suffering, emotional injuries, and mental health problems with physical manifestations, along with legal and medical expenses.

In a decision filed October 25, 2007, this court held that Defendants were not legally responsible in tort for Plaintiff's injuries, based on the general rule that a person who merely provides information to a professional licensing board is not the legal cause of any subsequent disciplinary proceedings if the licensing board independently investigated the allegations and determined that further disciplinary action was warranted. *Vandall v. Trinity Hospitals*, 676 N.W.2d 88, 96 (N.D. 2004); *Davis v. Bd. of Educ.*, 963 S.W.2d 679, 686 (Mo. Ct. App. 1998). As a result, the court granted summary judgment to all Defendants on the claims for negligence, negligent supervision, vicarious liability, and civil conspiracy.

Both parties moved for reconsideration of this decision. Defendants argued that the court should have granted summary judgment on the contractual claim for breach of the implied covenant of good faith and fair dealing for the same reason as the tort claims. Plaintiff argued that the rule of legal causation applied by the court was limited to claims for malicious prosecution, and should not have been applied to her negligence-based

claims. Plaintiff further argued in the alternative that there were questions of material fact as to whether Defendants were a proximate cause of the disciplinary proceedings by failing to disclose exculpatory information during the administrative investigation.

Oral argument was heard May 12, 2008. Ms. Durkee was present and was represented by attorneys Lisa Chalidze and Kevin Volz. Defendant Lawrence Ballou was present on behalf of Rutland Mental Health, and all Defendants were represented by attorneys Harry Ryan and John Serafino. For the following reasons, the court concludes that (1) the rule of legal causation stated above applies to the facts of this case, (2) Plaintiff has not demonstrated a genuine issue of material fact as to whether Defendants' failure to disclose information influenced OPR's investigation or decision to pursue disciplinary action, and (3) Plaintiff has not demonstrated a genuine issue as to whether Defendants breached the implied covenant of good faith and fair dealing. Summary judgment is accordingly granted in favor of Defendants.

Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, referred to in the statements required by Rule 56(c)(2), show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." V.R.C.P. 56(c)(3). The party moving for summary judgment has the burden of proof, and the opposing party must be given the benefit of all reasonable doubts and inferences in determining whether a genuine issue of material fact exists. *Price v. Leland*, 149 Vt. 518, 521 (1988). However, summary judgment is mandated where, after an adequate time for discovery, a party fails to make a showing sufficient to establish the existence of an element essential to his or her case, and on which she has the burden of proof at trial. *Poplaski v. Lamphere*, 152 Vt. 251, 254–55 (1989) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

Background

The following background facts provide context for this opinion, and are taken from Ms. Durkee's amended complaint unless otherwise noted. These facts are not contested for the purposes of the present motion for summary judgment.

Ms. Durkee was employed by Rutland Mental Health as a full-time, licensed clinical social worker between February 1998 and November 2001. During the relevant times, her supervisors were Douglas Norford and Deborah Bethel. In 1999, Mr. Norford asked Ms. Durkee to help "bring on board" a new employee named Barbara Darshan. This informal request resulted in Ms. Durkee participating in a number of group meetings between herself, Ms. Darshan, and Ms. Bethel. According to the company's organizational chart, Ms. Bethel was the supervisor for both Ms. Darshan and Ms. Durkee.

Ms. Darshan was seeking her professional licensure. At some point, she became aware that, for technical reasons, the licensing board would not accept a number of supervised hours for which Ms. Bethel had been the supervisor. Ms. Darshan then allegedly asked Ms. Durkee to complete the licensing form as her supervisor. Ms. Durkee agreed, and completed a form entitled "Report of Supervised Experience." On the form, Ms. Durkee certified that she had provided fifty hours of individual supervision, and provided a written description of the supervision, an assessment of performance, and a recommendation for independent practice. See *Report of Supervised Experience*. Ms. Durkee did not complete a blank certifying the total number of employment hours that Ms. Darshan had worked. Plaintiff alleges that Ms. Bethel was aware of the arrangement, and that Ms. Bethel later filled in the blank.

Two years later, allegations surfaced that Ms. Darshan had fabricated her licensing application by having Ms. Durkee, who was not her formal supervisor, sign the application.[1] By this time, Ms. Durkee had left full-time employment with Rutland Mental Health and worked only on a per-diem basis. The allegations were brought to light by another Rutland Mental Health employee, who advised her supervisor that Ms. Darshan admitted the fabrication to her at the time the licensing application was signed. The allegation was referred to the personnel director, Lawrence Ballou, who in turn reported the allegations to the Office of Professional Regulation. The report contained the following statement:

> According to our records and to supervisors in charge of Ms. Darshan's and Ms. Durkee's work, we are not aware of any formal process in place wherein Ms. Durkee would have provided the required one-on-one clinical supervision which would have been required for Ms. Darshan to meet the licensure requirements.

The Office of Professional Regulation began its investigation after receiving the report, and interviewed a number of people, including Ms. Durkee in June 2003. She told investigators that Mr. Norford had assigned her the task of providing supervision and mentoring for Ms. Darshan's group practice. In November 2003, OPR charged Ms. Durkee with (1) fraudulently or deceptively procuring a license, (2) willfully making or filing a false report or record in the practice of her profession, and (3) failing to comply with state statutes or rules governing the practice of the profession. See *In re Donna Marie Durkee, Specification of Charges* (11/5/03).

After a hearing, the administrative law officer found "no evidence" that Ms. Durkee had acted willfully or otherwise engaged in intentional fraud or deception, but also found that the licensing form was "not properly filled out" and that a technical violation had occurred. Accordingly, the hearing officer concluded that Ms. Durkee's license should be reprimanded for signing an inaccurate document, as charged by count

[1] Plaintiff has not alleged that she was Ms. Darshan's employment supervisor. See Plaintiff's Amended Complaint ¶¶ 35–36; see also *In re Donna Marie Durkee*, *Specification of Charges*, ¶¶ 9–13 (Nov. 5, 2003).

(3), but that she did not engage in fraud or deception, and did not intend to file a false report, as charged by counts (1) and (2). See *Findings of Fact, Conclusions of Law, and Order of the Administrative Law Officer* at 7–9 (Sep. 8, 2004).

Defendant's Motion for Summary Judgment

Defendants contend that they are not legally responsible for the administrative proceeding because the Office of Professional Regulation independently investigated the report and determined that disciplinary action was warranted. Pursuant to V.R.C.P. 56(c)(2), Defendants filed a separate statement of the material facts as to which no genuine issue existed for trial. Defendants asserted that the Office of Professional Regulation initiated the investigation into Ms. Durkee's role in the licensing of Ms. Darshan after receiving the report from Rutland Mental Health, that the investigation was independent and consisted of interviews with a number of people including Ms. Durkee, and that the subsequent charges were derived from the result of the OPR investigation.

Defendants' statement of material facts was supported by the affidavit of Edward Adrian, the prosecuting attorney for the OPR. Mr. Adrian's affidavit stated that "[t]he decision to prosecute or not prosecute any alleged violation rests with the Investigative Team" and that prosecutions are "only initiated by OPR when the Investigating Team feels that a rule or statute governing the profession has been violated and that the violation can be proven by a preponderance of the evidence." The affidavit also affirmed that the charges against Ms. Durkee had been "derived from the results of the State's investigation."

As set forth in more detail below, Plaintiff's response contended that a genuine issue existed as to whether the charges had been derived from the results of the State's investigation. She asserted that the charges could not have been derived from any investigation conducted after the charges were filed, and that RMH had influenced the charging decision by "withholding exculpatory evidence before, during and after the State's investigation." The first assertion was supported by deposition testimony of Ms. Durkee, which established that OPR had conducted a second interview with Ms. Durkee in April 2004 but which did not show any dispute over whether the OPR charging decision had been based upon the results of its investigation conducted prior to November 5, 2003. The second assertion was supported by deposition testimony of Mr. Ballou, which established that he had not reviewed Ms. Durkee's personnel file prior to making the report, and that he had never provided the personnel file to the OPR. Plaintiff asserted that this was material because the personnel file contained a notation indicating that she had "mentor[ed] B.D. to groups." The primary issue in this decision is whether this latter assertion and its supporting evidence show that there is a genuine issue for trial. V.R.C.P. 56(e).

Discussion

Defendants contend that the undisputed evidence shows that OPR assumed full responsibility for the administrative proceedings by independently investigating the

report and determining that charges of unprofessional conduct were supported by a preponderance of the evidence, and should be filed. Defendants accordingly seek a ruling that they are not legally responsible for initiating or continuing the disciplinary proceedings against Ms. Durkee.

Plaintiff argues that Defendants' proposed rule of legal causation is derived from cases applying the tort of malicious prosecution, and that the rule does not apply to her negligence-based claims. In the alternative, she argues that there are genuine issues of material fact regarding whether Defendants influenced the OPR investigation by failing to provide exculpatory information that could have affected the OPR's decision to pursue disciplinary action. In particular, she contends that Defendants withheld her personnel file, which contained information tending to show that she had provided supervision to Ms. Darshan. Finally, she argues that her contractual claim for breach of the implied covenant of good faith and fair dealing should be analyzed independently from her tort claims. The Court addresses these arguments in turn.

A.

The first question is whether Defendants' proposed rule of legal causation should be applied to the facts and claims in this case. As set forth by Defendants, the proposed rule is derived from four modern cases from other jurisdictions discussing the tort of wrongful initiation of administrative proceedings, and a 1923 Vermont case discussing the tort of malicious prosecution. *Ryan v. Orient Insurance Co.*, 96 Vt. 291 (1923); *Vandall v. Trinity Hospitals*, 676 N.W.2d 88 (N.D. 2004); *Davis v. Bd. of Educ*., 963 S.W.2d 679 (Mo. Ct. App. 1998); *Lindenman v. Umscheid*, 875 P.2d 964 (Kan. 1994); *Stanwyck v. Horne*, 194 Cal. Rptr. 228 (1983).

It is unusual to permit the defendant to name and define the plaintiff's cause of action. But malicious prosecution and wrongful initiation of administrative proceedings are part of a special class of torts involving misuse of the judicial process. These torts require special attention because they involve competing, and important, public and private interests, balanced by a "well-reasoned" set of elements. See *Jacobsen v. Garzo*, 149 Vt. 205, 209 (1998) ("If the well-reasoned balance thereby struck between free access and remedy for serious abuse 'is really to mean anything then we must not permit . . . circumvention by affording an . . . unrestricted action under a different label.'") (quoting *Rainier's Dairies v. Raritan Valley Farms, Inc.*, 117 A.2d 889, 895 (N.J. 1955)).

On one hand, there is a substantial interest in public safety that encourages citizens to report suspected crimes, and suspected improprieties by licensed professionals, to the relevant authorities without fear of liability. See *Ryan*, 96 Vt. at 297 ("It is of public concern that a citizen having reason to believe, or even suspect, that a crime has been committed be permitted to direct the attention of the prosecuting officer towards its investigation, without exposure to the peril of being held liable for malicious prosecution in case of a failure of conviction."). In Vermont, the professional licensing boards have broad authority to investigate and prosecute charges of unprofessional conduct by

licensees as part of the protection of the general welfare. *Perry v. Vermont Medical Practice Bd.*, 169 Vt. 399, 403 (1999). Facilitating the public interest in the discovery and prosecution of unprofessional conduct and crime requires permitting citizens "a large degree of freedom to make mistakes and misjudgments without being subjected to liability." Prosser & Keeton, The Law of Torts § 119, at 871 (5th ed. 1984).

The degree of freedom to report suspected improprieties is not unfettered, however. There is a significant private interest in remaining free from unjustified criminal, quasi-criminal, administrative, and civil proceedings, and the law provides remedies to those who are harmed by abuses of the right of court access. *Jacobsen*, 149 Vt. at 208. These remedies are "carefully limited" so as to "provide protection against the more egregious abuses of the justice system" while "not needlessly chill[ing] the fundamental right of access to the courts." *Id*.

In light of the significant public and private interests at stake, courts require plaintiffs who assert harm resulting from litigation to prove a difficult series of elements. Plaintiffs must show that the defendant (1) took an active part in the initiation, continuation, or procurement of proceedings against another before an administrative board, (2) acted without probable cause, and (3) acted primarily for a purpose other than securing appropriate action by the board, as well as showing that (4) the proceedings terminated in favor of the person against whom they brought. Restatement (Second) of Torts § 680; Prosser & Keeton, *supra*, § 119, at 871. "It is difficult to prove all four of the required elements and it is meant to be, since those who report a perception of crime should not be led by fear of liability to withhold information from police and prosecutors." 2 Dan B. Dobbs, The Law of Torts § 430, at 1215–16 (2001).

In order to give effect to the "well-reasoned balance" struck between the competing public and private interests, courts "will not permit litigants to circumvent the balance by allowing an action brought under a different label." *Kollar v. Martin*, 167 Vt. 592, 594 (1997) (mem.); *Jacobsen*, 149 Vt. at 209. Therefore, when a plaintiff alleges facts showing that her claim is that she was wrongfully subjected to a legal proceeding by another, "[t]he appropriate remedy, if any, lies in an action for malicious prosecution because this tort operates to protect the counter-policy of free access to the courts." *Jacobsen*, 149 Vt. at 209. "[I]t is important to recognize straightforwardly that no alternative theory can be permitted to subvert the rules by permitting liability for maintaining a suit when the conduct involved would not show [wrongful initiation of an administrative proceeding]." 2 Dobbs, *supra*, § 436, at 1229.

The central allegation in this case is that Defendants negligently failed to investigate the licensing matter before reporting it to the Office of Professional Regulation. This allegation squarely implicates the two competing interests described above. Ms. Durkee has an interest in remaining free from unjustified and wrongful administrative actions taken against her, but the public interest favors disclosure of unprofessional conduct among the licensed professions, and Defendants maintain that the imposition of liability in this case would have a chilling effect upon the reporting of suspected improprieties to the Office of Professional Regulation. In light of the policies

set forth by *Jacobsen* and *Kollar*, the court concludes that the law has struck a "well-reasoned balance" in this situation that "successfully accommodates these two competing societal interests," *Jacobsen*, 149 Vt. at 208–209, and that the competing interests are best resolved by applying the well-established limitations on liability set forth above. "[T]he plaintiff cannot avoid the burden of proving these elements by claiming on a theory of negligence." 2 Dobbs, *supra*, § 436, at 1229. Therefore, in this case, it is appropriate to consider whether Defendants were legally responsible for reporting suspected improprieties to the Office of Professional Regulation under the rules applicable to the tort of wrongful initiation of administrative proceedings.[2]

B.

The next question is whether Defendants took an active part in the initiation, continuation, or procurement of administrative proceedings against Ms. Durkee. To satisfy this element, Plaintiff is required to prove that a proceeding actually commenced, and that Defendants were legally responsible for it. 2 Dobbs, *supra*, § 430, at 1215 n.1. There is no dispute in this case that disciplinary proceedings actually commenced against Ms. Durkee. As to the second component, the general rule is that a person who provides information to an administrative agency is not legally responsible for subsequent disciplinary proceedings when the agency independently investigated the allegations and determined that further disciplinary action was warranted. Under those circumstances, the agency is deemed to have accepted full responsibility for the proceedings, and the reporter is relieved from liability. The general rule recognizes that when an administrative agency investigates a complaint and determines that agency action is warranted, it is the "agency, not the complainant, who issues legal process and initiates, continues, or procures the administrative proceeding." *Vandall v. Trinity Hospitals*, 676 N.W.2d 88, 94 (N.D. 2004). See also *Davis v. Bd. of Educ.*, 963 S.W.2d 679, 686 (Mo. Ct. App. 1998) ("[W]hen an agency official has sole authority to initiate the action, persons who have provided information to that official are not held to have initiated or taken an 'active part' in initiating the action. The general rule is that an individual who merely provides facts concerning the conduct of another to an officer possessing the authority to issue charges is not liable for malicious prosecution.").

The general rule disposes of a large portion of Plaintiff's case, including the assertions that Defendants negligently failed to investigate the licensure allegations

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[2] Though the Vermont Supreme Court has never expressly adopted Restatement (Second) of Torts § 680, which sets forth the tort of wrongful initiation of administrative proceedings, it has long applied the rules of malicious prosecution, which are essentially the same, and which are based upon the same policy concerns. Under these circumstances, this court finds that Vermont law would recognize the tort of wrongful initiation of administrative proceedings.

Plaintiff has also contended in the alternative that her complaint shows abuse of process, which is another tort involving the misuse of judicial proceedings. She has taken this position because abuse of process does not require the plaintiff to show a favorable termination of the proceedings, which is a required element of malicious prosecution. See *Jacobsen*, 149 Vt. at 208. However, abuse of process involves the abuse of an actual court process, such as subpoenas, summonses, discovery requests, and the like. *Id.*; 2 Dobbs, *supra*, § 438, at 1235–36. There has never been any allegation in this case that Defendants abused an actual court process, and the tort is therefore not properly asserted here.

before reporting them to the Office of Professional Regulation. As the general rule makes clear, such a negligent failure alone is not enough to establish liability when the responsible administrative agency conducts its own investigation of the report and determines that disciplinary action is warranted. The independent nature of the agency investigation and determination insulates from liability those who merely provide facts concerning the conduct of another to the professional licensing board.

Plaintiff contends that there are genuine issues of material fact as to whether Defendants did more than merely provide information concerning her conduct to the Office of Professional Regulation. She asserts that Defendants assumed full responsibility for "maliciously putting the law in motion" by failing to disclose exculpatory information in the form of her personnel file, which contained a notation tending to show that she provided some mentoring to Ms. Darshan. She also contends that Defendants continued to "withhold" the "exculpatory information" from the OPR during its investigation.

Plaintiff seeks an application of the rule that a person who knowingly provides false or inaccurate information to an administrative agency may be found to have initiated, procured, or continued an administrative proceeding if the inaccurate presentation influenced the agency's decision to pursue or continue disciplinary action. Restatement (Second) of Torts § 653, cmt. *g*; 2 Dobbs, *supra*, § 431, at 1217–18. This exception to the general rule is based upon the reasoning that "a person who provides false information cannot complain if a prosecutor acts on it; he cannot be heard to contend that the prosecutor should have known better." *King v. Graham*, 126 S.W.3d 75, 78 (Tex. 2003) (quoting *Browning-Ferris Indus., Inc. v. Lieck*, 881 S.W.2d 288, 294 (Tex. 1994)). The Vermont Supreme Court referenced this exception in *Ryan* by discussing whether the insurance adjuster had "fairly and truthfully disclose[d] to the prosecuting attorney all matters within his knowledge which, as a man of ordinary intelligence, he is bound to suppose would have a material bearing upon the question of the innocence or guilt of the person suspected." 96 Vt. at 301. Other courts have cited the exception by asking whether the defendant was the proximate cause of "maliciously putting the law in motion." *Malloy v. Chicago, Milwaukee & St. Paul Railway Co.*, 148 N.W. 598, 600 (S.D. 1914).

Defendants argue that the exception is "wholly immaterial" when "the action of the prosecuting attorney was uninfluenced by the disclosure." *Ryan*, 96 Vt. at 301–02. In other words, Defendants have focused their motion for summary judgment upon the question of whether Plaintiff has produced any evidence showing that OPR's decision to pursue or continue disciplinary action was influenced by a knowing presentation of false or inaccurate information by Defendants, or by the knowing omission of material information. See *Graham*, 126 S.W.3d at 78 (explaining that "the plaintiff has the burden of proving that the decision would not have been made but for the false information supplied by the defendant").

In support of their motion for summary judgment, Defendants have offered the affidavit of Mr. Adrian, the prosecuting attorney for the OPR. As discussed in more

detail above, the affidavit established that the OPR investigated the issues raised in the report and determined that unprofessional conduct could be proven by a preponderance of the evidence. The affidavit also established that the disciplinary charges were derived from the results of the State's investigation.

Defendants contend that this showing is essentially identical to the showing made in *Ryan*, where the prosecutor testified that he "started his investigations from the information received" from the insurance adjuster but that "in his official action in making the complaint did not act upon what [the defendants] said or did." 96 Vt. at 300. The Vermont Supreme Court considered this to be "conclusive" evidence that the prosecutor had not been influenced by any inaccurate or incomplete information provided by the insurance adjuster, noting that the prosecutor "alone could know what influenced his action." *Id*. Defendants accordingly seek a ruling, based upon *Ryan*, that Plaintiff has not come forward with sufficient evidence to show that the OPR prosecutors were influenced by information contained in or omitted from Defendants' report, rather than by the results of the OPR investigation.

In response, Plaintiff has produced deposition testimony from RMH personnel director Lawrence Ballou establishing that he did not review Ms. Durkee's personnel file before making the report, and that he did not provide the personnel file to the investigators during the course of the investigation. Plaintiff contends that this evidence would have provided proof of the mentoring arrangement, and that only this evidence could have influenced OPR's decision to pursue disciplinary action.

Plaintiff's argument is not supported by any evidence, however, to prove that the decision to prosecute was influenced by the failure to disclose the personnel file (or even the fact of peer supervision itself). Instead, the evidence shows that Ms. Durkee herself informed the OPR investigators that she had been assigned to provide mentoring and peer supervision to Ms. Darshan. Despite having access to this information, there is no evidence that the investigators followed up on it by requesting more information from Defendants about the peer-supervision arrangement, or that the peer supervision was in any way material to the charging decision. It is ultimately the responsibility of the investigating agency to determine the material facts in an investigation and, as Plaintiff admitted during oral argument, there is no evidence that OPR ever requested production of the personnel file. In other words, Plaintiff's case is centered upon the allegation that Defendants failed to affirmatively provide certain information, even though the information was never requested by the investigators and was otherwise available during the investigation. This allegation is insufficient to support Plaintiff's contention that only the production of the personnel file by Defendants themselves could have influenced the decision to pursue disciplinary action. "It is a basic principle of summary judgment that mere allegations of counsel unsupported by documented evidence are not enough to create a genuine issue of material fact." *Progressive Insurance Co. v. Wasoka*, 2005 VT 76, ¶ 25, 178 Vt. 337.

Furthermore, the evidence does not establish that the omission of the personnel file was knowing. The deposition testimony showed that Mr. Ballou did not review the

personnel file prior to making his report, and did not know that it contained a reference to peer supervision or mentoring. Moreover, as discussed above, there is no evidence that OPR ever requested production of the personnel file. Therefore, even taken in the light most favorable to the non-moving party, Plaintiff's evidence does not establish that Mr. Ballou was aware of the contents of the personnel file, or that he knowingly "withheld" the file from the OPR, or that this omission influenced the OPR. See *Matthews v. Blue Cross and Blue Shield of Michigan*, 572 N.W.2d 603, 613 (Mich. 1998) ("Unless the information furnished was known by the giver to be false and was the information on which the prosecutor acted, the private person has not procured the prosecution."). There is likewise no evidence that any other Defendant knowingly presented inaccurate information to the OPR investigators or knowingly omitted material information that influenced the decision to prosecute.

Imposing liability for mistaken or negligent omissions would burden the complainant with the responsibility for anticipating in advance all of the facts pertinent to the report, even though it is ordinarily the responsibility of the prosecuting authorities to determine the material facts in an investigation. It is for this reason that the exception to the general rule requires evidence of a knowing omission that influenced the decision to prosecute. See, e.g., *McCraney v. Barberi*, 677 So.2d 355 (Fla. Ct. App. 1996) (store owner filed a police affidavit accusing a customer of passing a bad check, but omitted the detail that the customer promptly paid the bill with a money order upon learning that the check had not cleared; this knowing omission created a genuine issue for trial where the assistant district attorney testified that he relied upon the store owner's affidavit when commencing criminal action). In this case, Plaintiff has argued that summary judgment should not be granted, but has not produced evidence sufficient to demonstrate a genuine issue for trial as to whether the exception applies. See *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986) (explaining that the purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial"). For these reasons, the court concludes that Plaintiff's evidence, when considered along with the record as a whole and taken in the light most favorable to Plaintiff, does not create a genuine issue for trial as to whether Defendants initiated, procured, or continued the administrative proceedings against Ms. Durkee. Summary judgment in favor of Defendants is therefore appropriate.

C.

The final question is whether summary judgment should be granted as well on the claim for breach of the implied covenant of good faith and fair dealing. Plaintiff has argued that this claim is different because it involves the breach of a contractual relationship between herself and her employer.

Plaintiff has not offered any proof that an express term of the contract was breached, however. She has asserted vaguely that the Defendants breached promises made under the Rutland Mental Health disciplinary rules by reporting her to the Office of Professional Regulation without first conducting an investigation, and that the disciplinary rules should be considered express terms of her contract. But these rules

have never been submitted to the court as evidence, and Plaintiff has never articulated which of the rules was allegedly breached. Moreover, Plaintiff has never alleged that she was disciplined by Rutland Mental Health within the meaning of the rules or otherwise shown that the rules applied in this situation. For these reasons, the Court cannot conclude that there is any genuine issue of material fact as to whether the disciplinary rules were breached.

Similarly, Plaintiff has asserted that the statutory requirements set forth in 3 V.S.A. § 128(a) formed a part of her contract. Section 128(a) requires community mental health centers to report "any disciplinary action taken by it or its staff, after an initial investigation or hearing in which the licensee has been afforded the opportunity to participate." Plaintiff suggests that Defendants could have breached this "term" of the contract by not conducting an initial investigation before reporting her to the OPR, but again has not produced any evidence to show that any disciplinary action was taken against her, or that the statutory requirements applied in her case.

These are the only two sources of express contractual terms that Ms. Durkee has alleged. As she has not met her burden of establishing that either term applied in this situation, the court cannot conclude that there is a genuine issue for trial as to whether a breach of contract occurred. Absent a breach of an express contractual term, her claim that Defendants acted in bad faith is not distinguishable from the analysis set forth above, as the elements of malicious prosecution require a showing that the defendants acted maliciously or otherwise acted primarily for a purpose other than securing appropriate action by the board. Accordingly, her "bad faith" claim is subject to the above holding that she has not shown a genuine issue as to whether Defendants initiated, continued or procured the administrative proceeding. See *Kollar*, 167 Vt. at 594 (explaining that courts "will not permit litigants to circumvent the balance by allowing an action brought under a different label").

Moreover, in the alternative, the implied covenant of good faith and fair dealing protects only the express terms of an agreement, and does not "impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." *Guz v. Bechtel National, Inc.*, 8 P.3d 1089, 1110 (Cal. 2000). In this case, Plaintiff cannot maintain her claim for breach of the implied covenant of good faith and fair dealing absent evidence that an express term of the contract was also breached. Plaintiff has also not presented evidence explaining how any actions on the part of Defendants denied her the benefit of the parties' bargain. Thus, to the extent that the court's ruling on the legal causation question does not also dispose of the claim for bad-faith reporting, the court holds that Plaintiff has not shown a genuine issue for trial.

Finally, the court addresses two arguments that Plaintiff has raised throughout the course of this litigation. First, Plaintiff has argued that *Lamb v. Bloom*, 159 Vt. 633, 634 (1993) (mem.) implicitly acknowledges the validity of claims premised on bad-faith reporting to a licensing board. This argument is rendered moot in large part by the above discussion of the general rule and exceptions relevant to claims for malicious prosecution and wrongful initiation of administrative proceedings. Beyond that, *Bloom* is not

persuasive, because the decision involves merely the procedural holding that an appellant had not shown a sufficient basis for interlocutory review of a denial of summary judgment on an official immunity issue. 159 Vt. at 635. The holding is not on point for the purposes of this case, and does not support the existence of an independent "bad faith" cause of action.

Second, Plaintiff argues that 3 V.S.A. § 128(d) provides evidence of a cause of action for bad-faith reporting of another to a licensing board without first conducting an investigation. The statute states that "[a] person who acts in good faith in accord with the provisions of this [reporting] section shall not be liable for damages in any civil action." The court interprets the statute as providing a safe harbor for employers and expressing the public policy that reporting of suspected unprofessional conduct among the licensed professions is encouraged, and should not be chilled by fear of liability. Cf. *Vandall*, 676 N.W.2d at 96 (reaching the same conclusion regarding similar North Dakota "good faith" statute). The statute is consistent with the established common law regarding malicious prosecutions, which provides a defense for reporters who honestly believe the information furnished to prosecutors, even if it turns out to be false. 2 Dobbs, *supra*, § 431, at 1218. Accordingly, the court does not agree that § 128(d) ratifies the existence of an independent action for bad faith, and the court finds nothing inconsistent between § 128(d) and this ruling.

Summary

Based on the arguments of the parties and the evidence presented in support of the motion for summary judgment and in response, and considering the evidence in the light most favorable to Plaintiff as the non-moving party, the court concludes that Plaintiff has not shown evidence sufficient to create a genuine issue of material fact as to whether Defendants initiated, procured, or continued the disciplinary proceedings against her. The court also concludes that Plaintiff has not shown evidence sufficient to create a genuine issue of material fact as to whether Defendants breached the implied covenant of good faith and fair dealing. For these reasons, summary judgment is granted in favor of all Defendants on all claims.

This ruling supersedes the court's previous orders on summary judgment, filed June 21, 2007 and October 25, 2007. The court has determined that reconsideration was necessary in order to arrive at an "ultimately necessary judgment." V.R.C.P. 54(b); *Kelly v. Town of Barnard*, 155 Vt. 296, 307 (1990).

ORDER

Defendants' Motion for Summary Judgment, filed April 2, 2007, is *granted*.

Dated at Rutland, Vermont this ____ day of July, 2008.

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Hon. Nancy S. Corsones
Superior Court Judge