

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

<i>ELEANOR JORDAN,</i>	)	
	)	
<i>Plaintiff</i>	)	
	)	
<i>v.</i>	)	<i>Docket No. 97-111-P-H</i>
	)	
<i>PORTLAND COUNTRY CLUB,</i>	)	
	)	
<i>Defendant</i>	)	

**RECOMMENDED DECISION ON DEFENDANT’S MOTION  
FOR PARTIAL SUMMARY JUDGMENT**

The defendant, Portland Country Club, moves for summary judgment on Count V of the complaint, which alleges intentional infliction of emotional distress, and on the plaintiff’s demand for back-pay and front-pay damages as well as reinstatement. This action arises out of the plaintiff’s employment by the defendant and asserts claims under the Age Discrimination in Employment Act and the Maine Human Rights Act, as well as various state-law torts. An additional issue has arisen in the course of the submission of legal memoranda in connection with the motion for summary judgment concerning the failure of the defendant to plead an affirmative defense. I recommend that the court grant the motion as to Count V, deny the motion as to remedies, and allow the defendant to proceed with its affirmative defense.

**I. Summary Judgment Standard**

Summary judgment is appropriate only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .’” *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and “give the party the benefit of all reasonable inferences to be drawn in its favor.” *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, “the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue.” *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). “This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof.” *International Ass’n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

## **II. Factual Background**

The summary judgment record reveals the following undisputed material facts. The plaintiff

worked as a waitress at the Portland Country Club for approximately 31 years. Affidavit of Eleanor Jordan (“Plaintiff’s Aff.”), attached to Plaintiff’s Statement of Disputed Material Fact (“Plaintiff’s SMF”) (Docket No. 14), ¶ 1. She is currently 76 years old. *Id.* On January 27, 1996 Garrett Fitzgerald, the defendant’s manager, placed the plaintiff on a “forced vacation” and told her to call him in two or three weeks about returning to work. *Id.* ¶ 2; Deposition of Garrett Fitzgerald (“Fitzgerald Dep.”), filed with the defendant’s Statement of Undisputed Material Facts (“Defendant’s SMF”) (Docket No. 11), at 37-38. Fitzgerald wrote the plaintiff a letter dated April 17, 1996 that was actually mailed two or three weeks later than that date in which he asked the plaintiff to let him know when she wanted to return to work. Fitzgerald Dep. at 71 & Exh. 2.

After receiving this letter, the plaintiff went to the Portland Country Club to see Fitzgerald, who was busy when she arrived. Deposition of Eleanor Jordan (“Plaintiff’s Dep.”), filed with Defendant’s SMF, at 23. She left after waiting half an hour, without seeing him. *Id.* Fitzgerald again wrote to the plaintiff on June 15, 1996 stating that he understood that she had decided to retire and offering to continue through April 1997 her insurance and the payment of \$100 per week that the defendant had been making to the plaintiff since January 27. Exh. 3 to Fitzgerald Dep.

The plaintiff filed a charge against the defendant with the Maine Human Rights Commission on June 27, 1996. Plaintiff’s Aff. ¶ 9. A clinical psychologist identified as an expert witness for the plaintiff concluded that the results of his psychological evaluation of the plaintiff “are consistent with the presence of a moderate to severe depressive disorder that includes pronounced anxiety symptoms and is superimposed on markedly passive-dependent and self-deprecating personality features.” Affidavit of Greg Carbone, Ph.D., attached to Plaintiff’s SMF, ¶ 6. He also concluded that the plaintiff “has experienced severe emotional distress which is largely attributable to the loss of her

employment status at the Portland Country Club and possibly to the handling of her separation,” *id.* ¶ 8, while noting that her “extreme emotional reaction [is] beyond what is to be expected in normal circumstances of retirement or termination,” *id.* ¶ 7.

### **III. Discussion**

#### **A. Damages**

The defendant bases its motion for summary judgment as to the plaintiff’s demands for back pay, front pay or reinstatement on a theory of failure to mitigate damages, specifically in that she allegedly did not return to work when requested to do so by the defendant. Motion for Partial Summary Judgment (Docket No. 10) at 6. After reviewing the materials submitted by the plaintiff in opposition to this portion of its motion, the defendant concedes that this issue has “become inappropriate for summary judgment.” Reply Brief of Defendant Portland Country Club (Docket No. 15) (“Reply Brief”) at 1.

The matter does not end there, however. The plaintiff has taken the position that failure to mitigate damages is an affirmative defense that has been waived by the defendant’s failure to state it in its answer. Plaintiff’s Memorandum of Law in Opposition to Defendant’s Motion for Partial Summary Judgment (Docket No. 13) (“Plaintiff’s Opposition”) at 7-8. The defendant responds that no waiver exists under the circumstances present here and joins the plaintiff in submitting this issue to the court for resolution, Reply Brief at 2-5, even though the issue has been raised only indirectly in the context of a motion for summary judgment, *see* 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1278 at 491-94 (1990) (substance of many unpleaded affirmative defenses may be asserted by pretrial motions, particularly in the absence of prejudice).

Fed. R. Civ. P. 8(c) establishes the requirement that affirmative defenses must be pleaded in the answer. The First Circuit has said that Rule 8(c)'s "core purpose" is "to act as a safeguard against surprise and unfair prejudice." *Williams v. Ashland Eng'g Co.*, 45 F.3d 588, 593 (1st Cir. 1995). In that case, the court held that "[w]here . . . a plaintiff clearly anticipates that an issue will be litigated, and is not unfairly prejudiced when the defendant actually raises it, a mere failure to plead the defense more particularly will not constitute a waiver." *Id.* Unlike the answer at issue in *Williams*, the defendant's answer here raised no affirmative defenses at all. Answer of Defendant to Plaintiff's First Amended Complaint (Docket No. 7). However, it is clear that the plaintiff in this case was on notice that the defendant intended to assert that it had offered to bring her back to work and that she had refused the offer — the basis of its claim that she failed to mitigate her damages — from the defendant's response to the claim that the plaintiff filed with the Maine Human Rights Commission before she filed this action. Affidavit of Joel C. Martin (Docket No. 16) and Exh. A thereto.

The plaintiff claims that she will be unfairly prejudiced if the defendant is allowed to press this defense because she has not designated an expert witness on this issue "to conduct, among other things, a labor market survey." Plaintiff's Opposition at 8. She cites no authority for this position and does not explain why a labor market survey would be necessary to oppose the affirmative defense. The defense is based on a letter from Fitzgerald which the plaintiff does not deny receiving well before this action was initiated. The defendant responds that it will not argue that the plaintiff should have looked for work elsewhere when she stopped working at the Portland Country Club, rendering any such survey irrelevant. Reply Brief at 4. It points out that the plaintiff's counsel questioned Fitzgerald concerning the letter at his deposition. Fitzgerald Dep. at 71-74. The plaintiff

has produced evidence in the summary judgment record to dispute the defendant's position on this issue, as the defendant has acknowledged. The plaintiff refers generally to "further delay" caused by the assertion of this defense at this time, Plaintiff's Opposition at 8, but does not explain how such delay would occur, and there is nothing in the summary judgment record to suggest that any delay is necessary.

In this context, prejudice occurs when the assertion of an unpleaded affirmative defense will substantially change the theory on which the case has been proceeding "and is proposed late enough so that the opponent would be required to engage in significant new preparation." *Wolf v. Reliance Standard Life Ins. Co.*, 71 F.3d 444, 450 (1st Cir. 1995) (quoting 6 Wright & Miller § 1487 at 623). The plaintiff's objection in this case does not meet this standard. The *Williams* standard is met in this case. The defendant should be allowed to assert the defense of failure to mitigate damages. *See Camarillo v. McCarthy*, 998 F.2d 638, 639 (9th Cir. 1993) (affirmative defense may be raised by motion for summary judgment in absence of showing of prejudice or amendment of pleadings); *cf. Harris v. Secretary, U. S. Dep't of Veterans Affairs*, 1997 WL 621114, \*1 (D. D. C. Oct. 10, 1997) (unpleaded affirmative defense may not be asserted in dispositive motion until motion for leave to amend answer has been made and granted).

## **B. Emotional Distress**

The defendant continues to seek summary judgment on Count V of the amended complaint, which alleges intentional infliction of emotional distress. Under Maine law, in order to prevail on such a claim, a plaintiff must show

that (1) [the defendant] acted intentionally or recklessly or [was] substantially certain that severe emotional distress would result from [its] conduct, (2) [the defendant's] conduct was so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious and utterly intolerable in a civilized community, (3) [the defendant's] conduct caused [the plaintiff] emotional distress, and (4) the emotional distress suffered by [the plaintiff] was so severe that no reasonable person could be expected to endure it.

*Wytrwal v. Mowles*, 886 F. Supp. 128, 150 (D. Me. 1995) (citing *Gray v. State*, 624 A.2d 479, 484 (Me. 1993). “[I]t is for the Court to determine, in the first instance whether the Defendant’s conduct may reasonably be regarded as so extreme and outrageous [as] to permit recovery, or whether it is necessarily so.” *Dempsey v. National Enquirer*, 702 F. Supp. 927, 930 (D. Me. 1988).

The plaintiff offers the following as evidence of the extreme and outrageous nature of the conduct of Fitzgerald, who is the only person whose actions toward the plaintiff are put in issue by the plaintiff. After the plaintiff received Fitzgerald’s letter dated April 17, 1996 a member of the defendant who attempted to mediate on her behalf informed the defendant that the plaintiff “was suffering from severe emotional distress and anxiety,” Plaintiff’s Aff. ¶ 6.<sup>1</sup> Fitzgerald then sent another letter to the plaintiff, dated June 15, 1996, in which he “falsely assert[ed]” that she had agreed to retire and that her vacation was “self-imposed” and offered her a retirement party for which she would be required to pay. Plaintiff’s Opposition at 14. After the defendant was served with the complaint in this action, Fitzgerald notified the plaintiff that the defendant would no longer be sending her a check for \$100 a week and would terminate her health insurance within two weeks. Exh. 6 to Plaintiff’s Aff. In fact, the plaintiff was allowed under the defendant’s group health

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<sup>1</sup> This factual assertion is presented in the plaintiff’s affidavit in the form of hearsay, but the defendant has not objected to it on that or any other ground. I therefore will consider it, but only bearing in mind its somewhat limited evidentiary value.

insurance policy to continue her coverage with the defendant paying 25% of the premium. Plaintiff's Aff. ¶ 11.

The plaintiff's factual assertions are not entirely accurate. The June 15 letter does not necessarily require the plaintiff to pay for her own retirement party, but suggests that she designate a host to put together a committee to plan the party at "the most reasonable prices." Exh. 4 to Plaintiff's Affidavit. The fact that the \$100 weekly payment expired on May 14, 1997 was in accordance with Fitzgerald's promise in his June 1996 letter to continue such payments "through April, 1997." *Id.*

The summary judgment record reveals no contact between the member who attempted to mediate on the plaintiff's behalf with the defendant and Fitzgerald. The record shows only that the member contacted the defendant's president. Exhs. 4 & 5 to Plaintiff's Aff. In order to suggest that Fitzgerald's June 1996 letter was written with knowledge of the plaintiff's severe emotional distress, so that his conduct might be found by a jury to be outrageous and extreme, it is necessary that the plaintiff show, at least, that it is likely that such information was conveyed to Fitzgerald by the defendant's president. In the absence of such knowledge, nothing in the letter could be considered outrageous or extreme to a degree that would allow a finding of intentional infliction of emotional distress. Even with such knowledge, it is unlikely that the falsehoods and reference to a retirement party in the letter could rise to this level. Similarly, the defendant's provision of misinformation to the plaintiff concerning her health insurance coverage cannot survive initial court review as a foundation for a finding of intentional infliction of emotional distress.

In *Staples v. Bangor Hydro-Electric Co.*, 561 A.2d 499, 501 (Me. 1989), the Law Court held that a supervisor's conduct in humiliating the plaintiff at staff meetings and demoting him without

cause did not warrant submitting a claim of intentional infliction of emotional distress against the employer to the jury. That case is more similar on its facts to the instant case than is *Latremore v. Latremore*, 584 A.2d 626, 630 (Me. 1990), upon which the plaintiff relies. In *Latremore*, the Law Court upheld a jury finding for the plaintiffs on a claim of intentional infliction of emotional distress where the defendant, the aged plaintiffs' son, after agreeing that his parents could live rent-free for life in property they deeded to him, knowing that his mother was ill, demanded \$3,000 in rent and threatened to evict them, attempted to have his father declared mentally incompetent, and made vicious remarks to his father about his father's mental condition. *Id.* Those facts go far beyond what is present in this summary judgment record. The defendant is entitled to summary judgment on the claim for intentional infliction of emotional distress.

#### **IV. Conclusion**

For the foregoing reasons, I recommend that the defendant's motion for summary judgment be **GRANTED** as to Count V of the amended complaint and otherwise **DENIED**, with the understanding that the defendant is not precluded from raising the defense of failure to mitigate damages in connection with a proposal that she return to work at the defendant's premises.

#### **NOTICE**

*A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.*

*Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.*

*Dated this 18th day of November, 1997.*

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*David M. Cohen*  
*United States Magistrate Judge*