

motion to dismiss under Rule 12(b)(1) only, the moving party may use affidavits and other matter to support the motion. The plaintiff may establish the actual existence of subject matter jurisdiction through extra-pleading material. 5A C. Wright & A. Miller, *Federal Practice and Procedure* § 1350 at 213 (2d ed. 1990); see *Hawes v. Club Ecuestre el Comandante*, 598 F.2d 698, 699 (1st Cir. 1979) (question of jurisdiction decided on basis of answers to interrogatories, deposition statements and an affidavit).

“When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they appear in the complaint, extending the plaintiff every reasonable inference in his favor.” *Pihl v. Massachusetts Dep’t of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993). However, the court need not accept “bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like.” *Aulson v. Blanchard*, 83 F.3d 1, 3 (1st Cir. 1996). The defendant is entitled to dismissal for failure to state a claim “only if it clearly appears, according to the facts alleged, that the plaintiff cannot recover on any viable theory.” *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 52 (1st Cir. 1990); see also *Jackson v. Faber*, 834 F. Supp. 471, 473 (D. Me. 1993). Review is limited to allegations in the complaint; the court may not consider factual allegations, arguments, and claims that are not included therein. *Doyle v. Hasbro, Inc.*, 103 F.3d 186, 190 (1st Cir. 1996).

II. Analysis

The amended complaint alleges that Richard Breton was injured on November 29, 1989 in the course of his employment with Maine/Sysco, Inc. Amended Complaint (Docket No. 2) ¶ 6. Travelers was then the workers’ compensation insurance carrier for the employer. *Id.* ¶ 8. On August 20, 1990 Travelers filed a Notice of Controversy in response to Richard Breton’s timely

notice of injury. *Id.* During the period between August 1990 and the payment of the final workers' compensation benefits to Richard Breton, Travelers "engaged in a pattern of intentional tortuous [sic] conduct designed to inflict severe emotional distress and physical injury upon the Plaintiff [presumably Richard Breton] by continuously refusing to pay and delaying payment of legitimate claims for worker's [sic] compensation benefits." *Id.* ¶ 11. The amended complaint identifies the alleged tortious activity as including, "but . . . not limited to:"

- (a) repeatedly failing to write a letter, at the request of Plaintiff, denying claims so that Plaintiff could submit medical bills to his personal health insurance carrier;
- (b) tortuously [sic] obstructing and delaying the payment of medical bills;
- (c) tortuously [sic] obstructing Plaintiff's receipt of necessary medical care;
- (d) obstructing judicial administration resulting in the delay of Plaintiff receiving appropriate medical care;
- (e) delaying payment of Worker's [sic] Compensation Commission ordered payment of medical bills;
- (f) failure to perform the most basic functions, including communications with Plaintiffs' counsel and responding to Plaintiffs' counsel's inquiries relating to the claim for benefits.

Id.

The amended complaint further alleges that this conduct was intentional and/or recklessly designed to inflict injury on the plaintiffs and did in fact inflict such injury. *Id.* ¶ 12. The amended complaint alleges the elements of the tort of intentional infliction of emotional distress under Maine law, *id.* ¶¶ 14-17, loss of consortium by Candace Breton, *id.* ¶ 23, and grounds for an award of punitive damages, *id.* ¶ 19.

Travelers' motion to dismiss is based upon the assertion that the exclusive remedy for these

claims is provided by the Maine Workers' Compensation Act. The relevant provision of the Act is found at 39-A M.R.S.A. § 104:

An employer who has secured the payment of compensation in conformity with sections 401 to 407 is exempt from civil actions, either at common law or under sections 901 to 908 . . . involving personal injuries sustained by an employee arising out of and in the course of employment.

The Act defines “employer” at section 102 in relevant part as follows: “If the employer is insured, ‘employer’ includes the insurer, self-insurer or group self-insurer unless the contrary intent is apparent from the context or is inconsistent with the purposes of this Act.”¹ The Bretons argue vigorously that their emotional distress, the injury alleged in the instant action, did not arise out of and was not sustained “in the course of employment.”

The Bretons rely on *Gibson v. National Ben Franklin Ins. Co.*, 387 A.2d 220 (Me. 1978), a case decided before the 1993 amendment of the Act. In that case, the Law Court allowed an action by an employee against her employer’s workers’ compensation carrier for severe emotional distress allegedly resulting from violation of a duty to continue to pay benefits and medical expenses “under a duly approved agreement.” *Id.* at 221. The Law Court construed the claim to arise “out of [the claimant’s] relationship to the insurance carrier after her basic remedies as an injured employee had been settled through procedures provided by the Act.” *Id.* at 222. “Her complaint may be deemed to allege . . . that the appellees had willfully deprived her of the benefits she had become entitled to under an approved compensation agreement.” *Id.* The complaint in this action does not allege the existence of any such agreement.

¹ The Act was amended in 1993, after Richard Breton’s injury in 1989, but the current version of the statutory sections relevant to the plaintiffs’ claims applies in this action, which was filed after the amendments took effect. *Baker v. Klein*, 655 A.2d 367, 368 n.2 (Me. 1995) (sections of 1993 Act are applied retroactively unless legislature specifically provided otherwise).

The Law Court in *Gibson* also held that the sanctions provided in the Act at that time against a carrier for failure to make timely payments under the Act were “not intended to exclude every other remedy in a case of intentional wrongdoing” because the penalties provided by the Act were payable to the State rather than to the claimant. *Id.* Under the current version of the Act, applicable to this claim, penalties are payable to the claimant as well as to the State. 39-A M.R.S.A. § 324. The Bretons argue that the penalties payable to the claimant are inadequate to compensate for their claimed damages.

The Law Court dealt with another claim against a workers’ compensation carrier for alleged infliction of emotional distress in *Procise v. Electric Mut. Liab. Ins. Co.*, 494 A.2d 1375 (Me. 1985), holding that the claim was a common-law cause of action within the meaning of the immunity provision of the Act. *Id.* at 1382. The Law Court distinguished *Gibson* as involving the relationship between the insurer and the claimant “after his basic remedies as an employee have been settled.” *Id.* at 1383. Where the allegations “involve the handling of [a claimant’s] initial benefit claims,” *id.*, a different result obtains. In *Procise*, the result was a holding that the claims against the insurer were barred by a lump-sum settlement agreement under the Act between the claimant and his employer. *Id.* In the case at hand, Travelers argues that the claims alleged in the amended complaint involve the handling of Richard Breton’s initial benefit claims, and it is therefore entitled to the immunity provided by section 104.²

In *Li v. C. N. Brown Co.*, 645 A.2d 606, 608 (Me. 1994), the Law Court held that there is no exception to the immunity provided to the employer by the predecessor to section 104, in which the

²“Although Maine has revised portions of its workers’ compensation act over the past several years, the exclusivity and immunity provisions have remained substantively intact.” *International Paper Co. v. A & A Brochu*, 899 F. Supp. 715, 718 n.1 (D. Me. 1995).

relevant language was identical, 39 M.R.S.A. § 4, reprinted in *Li*, 645 A.2d at 607 n.1, for intentional torts. *Li* did not mention *Gibson*, presumably because the insurer was not a party to that action. However, *Li* has value as an interpretation of the current version of the Act. This court has also held that “[c]ommon law tort claims such as intentional infliction of emotional distress fall within the exclusivity and immunity provisions of the Act.” *Reed v. Avian Farms, Inc.*, 941 F. Supp. 10, 14 (D. Me. 1996) (claim against employer based on alleged sexual harassment).

The fact that the amended complaint in this case alleges that the tortious conduct began “[f]rom Defendant’s initial involvement” in the workers’ compensation claim, Amended Complaint ¶ 11, and the claim was controverted by Travelers in the appropriate administrative manner, *id.* ¶ 8; that the amended complaint does not allege any settlement or agreement approved by the Workers’ Compensation Board, *see* 39-A M.R.S.A. § 305 (formerly 39 M.R.S.A. § 94; relevant language identical); and that a remedy for actions such as those alleged against Travelers in the amended complaint is now available under the Act³ all distinguish the instant case from *Gibson*. Given the basis for distinguishing *Gibson* set forth in *Procise*, Travelers appears entitled to immunity under the Workers Compensation Act for the claim of intentional infliction of emotional distress set forth in the amended complaint. Because Candace Breton’s claim for loss of consortium is derivative of the tort allegedly inflicted on Richard Breton, *Gillchrest v. Brown*, 532 A.2d 692, 693 (Me. 1987), it too must be dismissed.

³ The fact that the remedy, \$50 per day, 39-A M.R.S.A. § 324(2)(A)(1), may be inadequate compensation, as argued by the Bretons, Plaintiffs[’] . . . Memorandum of Law in Opposition to Defendant[’s] . . . Motion to Dismiss (Docket No. 7) at 9, does not mean that there is no remedy in violation of Article I, Section 19 of the Maine Constitution. The adequacy of the statutory remedy is a matter for the legislature to determine, not the courts.

III. Conclusion

For the foregoing reasons, I recommend that the defendant's motion to dismiss be **GRANTED.**

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 28th day of October, 1997.

David M. Cohen
United States Magistrate Judge