

II. Factual Background

The complaint includes the following relevant factual allegations. The plaintiff was first employed by the defendant in its Falmouth, Maine store on October 14, 1998. Complaint (Docket No. 1) ¶ 5. She worked four days per week as a member of a restocking and receiving crew. *Id.* ¶ 6. During her employment, managerial employees of the defendant made remarks in her presence including a statement that a certain task was “a man’s job” and referring to two male employees who were late for a meeting as “ladies.” *Id.* ¶ 8. Male co-employees were allowed to make sexually-based remarks and engage in behavior that the plaintiff found offensive. *Id.* The plaintiff reported this conduct to the appropriate personnel at the store, but no changes occurred. *Id.* ¶ 9.

On or about December 18, 1998 the plaintiff reported this conduct to the store manager, who told her to document the events and to meet with him on December 21, 1998. *Id.* ¶ 10. When the plaintiff reported for this meeting, she was informed that her employment was terminated. *Id.* ¶ 11. The defendant negligently published false and defamatory statements about the plaintiff’s work performance. *Id.* ¶ 38.

III. Discussion

The defendant contends that counts V-VIII, which raise common-law tort claims, are barred by the exclusivity provisions of Maine’s workers’ compensation statutes. Defendant’s Motion to Dismiss Counts I, III, and V-VIII, etc. (“Motion”) (Docket No. 4) at 1-4. Specifically, “[a]n 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 [certain specified statutes], involving personal injuries sustained by an employee arising out of and in the course of employment.” 39-A M.R.S.A. § 104. The Maine Law Court held in *Li v. C.N. Brown Co.*, 645 A.2d 606, 608 (Me. 1994), that intentional torts are included in the statutory bar. It upheld the entry of summary judgment for the employer on claims

of intentional tort and negligence. *Id.* at 607, 609. This holding was re-emphasized in *Gordan v. Cummings*, 756 A.2d 942, 945 (Me. 2000). In *Knox v. Combined Ins. Co. of Am.*, 542 A.2d 363, 365-66 (Me. 1988), the Law Court held that injuries resulting from sexual harassment are covered by the exclusivity provision. This court has applied the Law Court's holdings to bar claims of negligent and intentional infliction of emotional distress, *Williams v. Healthreach Network*, 2000 WL 760742 (D.Me. Feb. 22, 2000), at *13, negligent training and supervision, *Earnhardt v. University of New England*, 1996 WL 400455 (D.Me. July 3, 1996), at *2, and false imprisonment, *Sylvester v. Wal-Mart Stores, Inc.*, 1995 WL 788206 (D.Me. Dec. 21, 1995), at *3-4.

In *Cole v. Chandler*, 752 A.2d 1189, 1196 (Me. 2000), the Law Court held that claims for defamation, invasion of privacy and interference with advantageous economic relations “are broad enough to include recovery for economic injuries, as well as mental or physical injuries,” and to the extent that an employee alleges that her employer caused economic or reputational injuries, such claims are not barred by the exclusivity provision. The defendant relies on *Kilroy v. Husson College*, 959 F. Supp. 22 (D. Me. 1997), a case decided before *Cole*, in support of its contention that the plaintiff may not recover on her defamation claim — Count VIII of the complaint — because she does not allege that any such injury was caused by conduct distinct from and unrelated to the conduct that allegedly violated Title VII and the MHRA. Motion at 3. However, *Kilroy* clearly addresses Maine law as it existed before *Cole*, 959 F. Supp. at 23-24, and cannot be read to bar recovery for economic or reputational injury caused by the same conduct as that which allegedly violated the federal and state antidiscrimination statutes.

The plaintiff points out that she has asserted a claim for defamation that fits within the *Cole* exception to the exclusivity provision, Plaintiff's Objection to Defendant Wal-Mart Stores, Inc.'s Motion to Dismiss (“Plaintiff's Objection”) (Docket No. 5) at 2-3, and goes on to argue that her

claims for negligence, “intentional/reckless infliction of emotional distress” and negligent infliction of emotional distress — Counts V-VII of the complaint — should not be dismissed because each includes an allegation of economic and reputational injuries,¹ *id.* at 3. The former argument is valid; the latter is not. The plaintiff can only recover once for such injuries, which are fairly included within the allegations in Count VIII of her complaint, the defamation count. She cannot rescue the claims clearly barred under Maine law by claiming that she suffered the same economic damages under those theories that she claims to have suffered due to defamation.

The plaintiff next argues that the injuries giving rise to her tort claims other than defamation did not occur in the scope of her employment because they arose, at least in part, out of the circumstances surrounding her termination. *Id.* at 3-4. Termination of employment arises out of and in the course of employment; it could not arise out of anything else. *See, e.g., Gordan, 756 A.2d at 943* (termination of employment).

The defendant is entitled to dismissal of Counts V-VII.

The defendant contends that Count VIII must be dismissed because the complaint fails to plead sufficient facts to support the defamation claim. Motion at 3-4.² The plaintiff’s response is minimal: “Vieira has sufficiently plead [sic] these injuries in her Complaint. . . . Since Vieira has plead [sic] sufficient facts under Rule 8(a) of the Federal Rules of Civil Procedure, her defamation claim should not be dismissed.” Plaintiff’s Objection at 3. The only paragraph in Count VIII cited by the plaintiff in connection with this statement, Paragraph 39, would not be sufficient, standing alone, to support her defamation claim. However, she also alleges in Paragraph 38 that the defendant

¹ Actually, in the paragraphs cited by the plaintiff, the only allegation that could conceivably fit within the parameters of *Cole* is an assertion that she has suffered and continues to suffer “injury to representation.” Complaint ¶¶ 27, 32, 36. I assume that the plaintiff intended to allege injury to reputation. *See id.* ¶ 17.

² The defendant cites Me.R.Civ.P. 8(a) in this regard. Motion at 4. The federal rules of civil procedure govern this issue in this action. However, the rules are substantially the same.

has negligently published false and defamatory statements defaming Ms. Vieira's business, occupational or professional performance, including statement [sic] that her conduct, characteristics or condition was incompatible with the proper conduct of her occupation and that she was discharged for reasons relating to her lack of competence or competent performance.

Coupled with the allegations in Paragraph 39 that this conduct has caused her economic injury, the plaintiff has provided sufficient factual allegations, although barely, to survive a motion to dismiss under Rule 8(a). *See Lester v. Powers*, 596 A.2d 65, 69 (Me. 1991) (setting out elements of defamation claim); *Rodriguez v. Doral Mortgage Corp.*, 57 F.3d 1168, 1171 (1st Cir. 1995) (courts should construe pleadings generously, paying more attention to substance than form, aware of defendant's right to know nature of claim asserted). Count VIII is sufficient to give the defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Boston & Maine Corp. v. Town of Hampton*, 987 F.2d 855, 865 (1st Cir. 1993). The defendant is not entitled to dismissal of Count VIII.

The defendant bases its motion to dismiss Counts I and III, which allege federal Title VII violations, on the allegation in Paragraph 14 of the complaint: "Ms. Vieira is entitled to a right to sue letter from the EEOC authorizing her to file suit against the Defendant." It contends that a plaintiff may not bring suit under Title VII until she has received a right-to-sue letter, citing 42 U.S.C. § 2000e-5(f). Motion at 4-5. The First Circuit has noted that "[i]n a Title VII case, receipt of a right to sue letter is a requirement that must be satisfied before a plaintiff may bring suit," although it specifically found that receipt of such a letter was irrelevant in that case. *Tang v. State of Rhode Island*, 163 F.3d 7, 14 n.8 (1st Cir. 1998). The plaintiff has appended to her objection a copy of a right-to-sue letter from the EEOC dated November 29, 2000, Plaintiff's Objection Exh. B, some two months after the complaint was filed, Docket. The defendant continues to seek dismissal of Counts I and III despite the appearance of this document in the record, suggesting that the plaintiff's failure to provide a reason

“why she did not obtain the notice before proceeding to court” requires dismissal. Defendant’s Reply to Plaintiff’s Objection to Defendant Wal-Mart Stores, Inc.’s Motion to Dismiss (Docket No. 6) at 3-4. The practical effect of such a dismissal would be the filing of a separate action based on the Title VII claims, an unnecessary duplication of time and effort under the circumstances. While the plaintiff should not have filed her complaint before receiving the letter, there is no prejudice to the defendant under the present circumstances and no need to require her to engage in an essentially empty exercise. *See Perdue v. Roy Stone Transfer Corp.*, 690 F.2d 1091, 1093 (4th Cir. 1982) (entitlement to right-to-sue letter rather than actual receipt is prerequisite to suit in federal court). The defendant is not entitled to dismissal of Counts I and III on this basis.

Conclusion

For the foregoing reasons, I recommend that the defendant’s motion to dismiss be **GRANTED** as to Counts V, VI and VII of the complaint and otherwise **DENIED**.

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 15th day of December, 2000.

David M. Cohen
United States Magistrate Judge

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