

8. At no time was the Plaintiff told her performance was unsatisfactory.

9 There was no legitimate reason for the Plaintiff's layoff.

(Complaint at ¶¶ 3-9, attached to Removal Petition, Docket No. 1.)

Plaintiff opposes the Defendant's motion to dismiss by, *inter alia*, complaining that it was Defendant's choice to "remove[] the case from Maine State Court [sic] where it was appropriately brought." Plaintiff insists that these seven allegations are sufficient to meet the liberal requirements of notice pleading for all of her six claims. I recommend that the Court **GRANT** the motion, **IN PART**, and dismiss Counts III, IV, and VI, but permit further proceedings on Counts I, II, and V.

RULE 12(b)(6) STANDARD

In considering a motion to dismiss under Rule 12(b)(6), the Court must accept as true the well-pleaded factual allegations of the complaint, draw all reasonable inferences in the plaintiff's favor, and determine whether the complaint, when taken in the light most favorable to the non-movant, sets forth sufficient facts to support the claims for relief. Clorox Co. v. Proctor & Gamble Commercial Co., 228 F.3d 24, 30 (1st Cir. 2000); LaChapelle v. Berkshire Life Ins. Co., 142 F.3d 507, 508 (1st Cir. 1998).

DISCUSSION

Pursuant to Rule 8 of the Federal Rules of Civil Procedure, "A pleading which sets forth a claim for relief . . . shall contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief" Clearly, a plaintiff need not set forth every conceivable fact known by or potentially knowable to her. However, she must at least set forth those facts that, if true, would tend to prove each element of the claims alleged. Although the notice-pleading requirement of Rule 8 is permissive, it is not so permissive as to eviscerate Rule 12(b)(6).

1. *Family and Medical Leave Act, 29 U.S.C. §§ 2601-2654 (Count I).*

The Family and Medical Leave Act of 1993 (FMLA) entitles eligible employees to up to twelve weeks of unpaid leave per year for, among other things, “a serious health condition that makes the employee unable to perform the functions of the position of such employee.” 29 U.S.C. § 2612(a)(1)(D). *See also* 29 U.S.C. § 2611(11) (defining “serious health condition”). Pursuant to 29 U.S.C. § 2615(a)(1), “It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under [§§ 2611—2619].” If the employer violates Section 2615, the employee may bring a claim for compensatory damages, interest, liquidated damages, and equitable relief. 29 U.S.C. § 2617(a)(1)-(2).

A prima facie case of FMLA leave retaliation consists of the following three elements: (1) the plaintiff availed herself of a protected right under the FMLA; (2) she was adversely affected by an employment decision; and (3) there was a causal connection between the employee’s protected activity and the employer’s adverse employment action. Hodgens v. Gen. Dynamics Corp., 144 F.3d 151, 161 (1st Cir. 1998). *See also* Duckworth v. Pratt & Whitney, Inc., 152 F.3d 1, 3 (1st Cir. 1998) (taking “it as given that the [plaintiff]’s leave was covered by the FMLA” at the dismissal stage).

Defendant complains that Plaintiff has not indicated that she qualifies for protection under the Act. (Motion to Dismiss at 5.) Based on Hodgens and Duckworth, it appears that it is not necessary for Plaintiff to allege the specific facts that make her eligible for protection under the FMLA in order to state a claim. Plaintiff’s allegations minimally set forth a prima facie case for violation of the FMLA. Accordingly, I recommend that the Court deny Defendant’s motion with respect to Count I.

2. *Maine Family Medical Leave Requirements, 26 M.R.S.A. §§ 843—848 (Count II).*

The Maine Family Medical Leave Requirements statute (FMLR) provides eligible employees in the State of Maine with rights comparable to those provided by the FMLA. One modification on the federal law is that the remedies provided by the FMLR are limited to equitable relief and \$100 in liquidated damages “for each day the violation continues.” 26 M.R.S.A. § 848. It appears that the Law Court has not reviewed a single action brought pursuant to the FMLR. Thus, there is no clearly prescribed prima facie standard against which to judge the Plaintiff’s claim. I see no principled basis for dismissing this claim under circumstances where the parallel federal claim survives the motion to dismiss. I consider this result to be particularly reasonable given the absence of any developed argumentation on this point by the Defendants. Accordingly, I recommend that the Court deny the Defendant’s motion to dismiss Count II.

3. *Americans with Disabilities Act, 42 U.S.C. §§ 12101—12117 (Count III)*

To set forth a prima facie case of employment discrimination based on disability, Plaintiff must allege facts sufficient to satisfy three elements: (1) that she was disabled, as that term is defined by the ADA; (2) that despite her disability she was able to perform the essential functions of her job, either with or without reasonable accommodation; and (3) that her employer discharged her because of her disability. Velazquez-Rivera v. Danzig, 234 F.3d 790, 795 (1st Cir. 2000) (citing Oliveras-Sifre v. Puerto Rico Dep’t of Health, 214 F.3d 23, 25-26 & 27 (1st Cir. 2000) (affirming dismissal of ADA employment discrimination claim based on failure to allege covered disability)).

Section 12117 of the ADA provides that the remedies and procedures of Title 42, Section 2000e-5 govern plaintiff’s remedies and procedures under the ADA. Pursuant to Section 2000e-

5(f), a plaintiff must file an administrative charge with the EEOC as a prerequisite to commencing a civil action. Lattimore v. Polaroid Corp., 99 F.3d 456, 464 (1st Cir. 1996) (discussing Section 2000e-5 in the context of Title VII).

Defendant argues that this count must fail because a “serious health issue” is not a sufficient basis for a claim under the Americans with Disabilities Act (ADA). (Motion to Dismiss at 5.) Defendant also argues that this claim is barred because the Plaintiff has supplied no evidence that she complied with the administrative prerequisites to filing the claim. (Id. at 6.) Plaintiff responds, tautologically, that she has stated a claim for employment discrimination because “§ 12112 forbids discrimination” and because “employees can sue for retaliation under . . . the Americans with Disabilities Act.” (Response at 4.)

Plaintiff’s failure to allege the existence of a disability or compliance with the requisite administrative procedures is fatal to her ADA claim. Accordingly, the Court should grant Defendant’s motion to dismiss Count III.

4. *Maine Human Rights Act, 5 M.R.S.A. §§ 4551—4572 (Count IV)*

Subchapter III of the Maine Human Rights Act (MHRA) creates a statutory civil right to be free from discrimination in employment based on, *inter alia*, physical or mental disability. 5 M.R.S.A. § 4571 (Pamph. 2000). See also id. § 4572 (defining employment discrimination). Section 4621 of Title 5 authorizes civil actions to enforce this right. Sections 4613 and 4614 permit the recovery of penal damages, compensatory damages, punitive damages, and attorney fees, as well as additional remedies. However, pursuant to Section 4622 of the MHRA,

“Attorneys’ fees under section 4614 and civil penal damages or compensatory and punitive damages under section 4613 may not be awarded to a plaintiff in a civil action under this Act unless the plaintiff *alleges* and establishes that, prior to filing of the civil action, the plaintiff first filed a complaint with the [Maine Human Rights Commission”

5 M.R.S.A. § 4622(1) (emphasis added). See also Gordon v. Cummings, 2000 ME 68, ¶¶ 11-12, 756 A.2d 942, 944-45 (observing that although Section 4622 precludes only the recovery of damages but not the civil action itself, the action becomes moot because a decision on the merits would not afford the plaintiff any real or practical relief); Lund v. Pratt, 308 A.2d 554, 559 (Me. 1973) (holding that recovery of costs alone is an insufficient basis to permit claim to go forward).

The parties' arguments do not discriminate between the federal and state disability claims. Plaintiff's MHRA claim for damages is moot. I note that because Defendant is not merely an individual defendant, Plaintiff could potentially obtain equitable relief such as reinstatement of her position. 5 M.R.S.A. § 4613(2)(B). However, Plaintiff's claim for relief seeks only "compensatory damages, civil penal damages, punitive damages, and legal fees and costs." (Complaint at ¶ 23.) Plaintiff has not sought leave to amend her complaint concerning this claim. Accordingly, I recommend that the Court grant the Defendant's motion to dismiss Count IV.

5. Breach of Contract (Count V)

"In Maine, it has long been the rule that a contract of employment for an indefinite length of time is terminable at the will of either party." Larrabee v. Penobscot Frozen Foods, 486 A.2d 97, 99 (Me. 1984). An employer maintains the common law right to terminate an employee at will unless its employment contract clearly provides otherwise. Taliento v. Portland West N'hood Planning Council, 1997 ME 194, ¶ 9, 705 A.2d 696, 699. Provisions found in personnel policies and handbooks may be sufficient to limit an employer's right to terminate an employee hired for an indefinite period of time if they clearly establish that the employment contract is terminable only pursuant to express terms found therein, such as for cause. Id.; Libby v. Calais

Reg'l Hosp., 554 A.2d 1181, 1183 (Me. 1989); Larrabee, 486 A.2d at 99.

Defendant argues that Plaintiff has failed to state a claim for breach of an employment contract because the complaint fails to set forth the existence of an employment contract restricting Defendant's right to terminate Plaintiff at will. (Motion to Dismiss at 7.) Plaintiff responds that sufficient facts are pleaded when the allegation found in paragraph 25 of the complaint is added to the general allegations. (Response at 4.) Paragraph 25 provides, "The Plaintiff's discharge violated her employment agreement with the Defendant and violated the Defendant's policies and procedures." This is a conclusory allegation and does not set forth any facts supportive of Plaintiff's breach of contract claim.

Plaintiff has not set forth basic facts required for her breach of contract claim. However, Plaintiff has asked for leave to amend her complaint with respect to this claim. I recommend that the Court permit Plaintiff to move to amend her complaint to properly set forth the existence of an employment contract that prohibited her termination under the circumstances alleged.

6. Emotional Distress

Compensation under the Workers' Compensation Act is the exclusive remedy available to covered employees for "personal injuries . . . arising out of and in the course of employment." 39-A M.R.S.A. § 104 (Supp. 1999); Cole v. Chandler, 2000 ME 104, ¶ 9, 752 A.2d 1189, 1195. Because "mental injuries constitute personal injuries within the meaning of the exclusivity provision of the Workers' Compensation Act," Cole, 2000 ME 104, ¶ 13, 752 A.2d at 1196 (citing Knox v. Combined Ins. Co. of America, 542 A.2d 363 (Me. 1988)), a claim for emotional damages that arises out of and in the course of employment may not be maintained against an insured employer. Id. This exclusivity provision extends to intentional tort claims as well. Li v. C.N. Brown Co., 645 A.2d 606 (Me. 1994).

Defendants argue that Plaintiff's exclusive avenue for emotional distress recovery based on her termination is through the Maine Workers' Compensation Act. (Motion to Dismiss at 7-9.) Plaintiff responds that her claim does not arise out of and in the course of employment, but from the cessation of employment. (Response at 4-5.) I am not persuaded by the Plaintiff's argument that her emotional distress claim does not arise out of and in the course of employment simply because it relates to her termination. The justification for Plaintiff's termination, whether valid or invalid, and the termination itself, whether legal or illegal, clearly arose out of and in the course of Plaintiff's employment. Sylvester v. Wal-Mart Stores, Inc., No. 95-166-P, 1995 WL 788206, at *4, 1995 U.S. Dist. LEXIS 19987, at * 13-*15 (D. Me. December 21, 1995) (unpublished order) (discussing 39-A M.R.S.A. § 201(3) and holding that claims for emotional injury arising out of and in the course of employment were subject to the exclusivity provision of Maine Workers' Compensation Act even though they related to employee discipline); Vieira v. Wal-Mart Stores, Inc., No. 00-272-P, 2000 WL 1840081, at *2 (D. Me. December 15, 2000) (recommended decision of Magistrate Cohen) ("Termination of employment arises out of and in the course of employment; it could not arise out of anything else."). Accordingly, I recommend that the Court grant Defendant's motion to dismiss this claim.

CONCLUSION

Although Plaintiff's allegations are sparse, they appear to be sufficient to set forth claims for relief pursuant to both the state and federal family and medical leave laws (Counts I and II). However, Plaintiff's allegations are clearly insufficient to maintain either of her disability discrimination claims (Counts III and IV) or her breach of contract claim (Count V). Additionally, Plaintiff's emotional distress claim is barred by the exclusivity provision of the Maine Workers' Compensation Act (Count VI). Thus, based on my assessment of the

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