

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

SHELLY L. FLOOD, a/k/a)
Shelly O'Donnell-Flood, et al.,)
)
Plaintiffs)
)
v.) 1:12-cv-00105-GZS
)
BANK OF AMERICA CORPORATION)
Et al.,)
)
Defendants)

**ORDER RE: PLAINTIFF'S MOTION TO
AMEND COMPLAINT (ECF NO. 19)**

Plaintiffs Shelly O'Donnell-Flood and Keri Flood have sued their prior employers, Bank of America/FIA Card Services, N.A. and ABM Janitorial Services-Northeast, Inc., respectively, alleging employment discrimination based on sexual orientation under the Maine Human Rights Act. Additionally, Keri Flood has brought a count alleging that Bank of America interfered with her employment relationship with ABM. The matter was removed to this Court by ABM with the consent of Bank of America based upon diversity jurisdiction. (Notice of Removal, ECF No. 1.) Plaintiffs request leave to amend their Complaint pursuant to Rule 15(a) of the Federal Rules of Civil Procedure to add FIA Card Services as a Defendant and to add claims for defamation. Keri Flood also seeks leave to add claims for alleged violations of 26 M.R.S. § 630 and § 631. I now grant Plaintiff's Motion for Leave to Amend, in the main, with the exception of that portion of proposed Count VI which incorporates a defamation claim by Keri Flood against her former employer, ABM. As to that portion of the motion to amend, the request is denied because the allegations are not pled with the requisite specificity.

APPLICABLE STANDARD

Under Rule 15(a), leave to amend a complaint should be freely given “when justice so requires.” Fed. R. Civ. P. 15(a). A motion for leave to amend should be granted absent “undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment.” Foman v. Davis, 371 U.S. 178, 182 (1962). A complaint is futile if, as amended, it “would fail to state a claim upon which relief can be granted.” Glassman v. Computervision Corp., 90 F.3d 617, 623 (1st Cir. 1996). In determining whether an amended complaint is futile, a court “applies the same standard of legal sufficiency as applies to a [Federal Rules of Civil Procedure] Rule 12(b)(6) motion.” Id. In order to survive a motion to dismiss, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic v. Twombly, 550 U.S. 544, 570 (2007)). As part of this examination, the Court must accept as true all well-pleaded factual allegations in the complaint and draw all reasonable inferences in the plaintiff’s favor. Gargano v. Liberty Int’l Underwriters, Inc., 572 F.3d 45, 48 (1st Cir. 2009).

DISCUSSION

Defendants object in part to the motion for leave to amend, arguing that the amended complaint is futile. In particular, defendants argue that each plaintiff has failed to allege facts sufficient to state a claim for defamation which would survive a Rule 12(b)(6) motion and ABM argues that the proposed amended complaint does not state a claim under 26 M.R.S. § 630 or § 631. Neither defendant appears to object to the addition of FIA Card Services, N.A. as a defendant, indeed Bank of America claims it has been improperly named as a defendant from the

beginning of the case and that FIA is the proper defendant. (Resp. to Mot. to Amend at 1, ECF No. 23.)

The plaintiffs' proposed amended complaint would consist of six counts. In counts one and two Shelly Flood alleges that Bank of America/FIA Card Services, N.A. discriminated against her under the Maine Human Rights Act and defamed her by terminating her for "job abandonment." In the third count of the proposed amended complaint Keri Flood alleges that ABM discriminated against her under the Maine Human Rights Act and in the fourth count she claims that ABM failed to comply with statutory duties regarding the provision of a copy of her personnel file and the written reasons for her termination. The fifth and sixth counts involve common law claims by Keri Flood alleging tortious interference with employment relationship by Bank of America/FIA Card Service, N.A. and defamation claims against both the Bank of America entities and ABM.

A. The Title 26 Count

Keri Flood wants to amend the complaint to assert an additional claim against ABM in Count IV alleging failure to provide her with a copy of her personnel file and a written statement of reasons for termination within statutory timeframes established in 26 M.R.S. §§ 630 and 631, respectively. Flood has combined these allegations that ABM violated two separate statutory duties in one count. This dispute appears to be much ado about nothing. The statutes both speak in terms of equitable relief, civil forfeitures, and the recovery of costs and attorney fees.¹ These

¹ Section 630 provides:

An employer shall, upon written request of the affected employee, give that employee the written reasons for the termination of that person's employment. An employer who fails to satisfy this request within 15 days of receiving it may be subject to a forfeiture of not less than \$ 50 nor more than \$ 500. An employee may bring an action in the District Court or the Superior Court for such equitable relief, including an injunction, as the court may consider being necessary and proper. The employer may also be required to reimburse the employee for the costs of suit, including a reasonable attorney's fee if the employee receives a judgment in the employee's favor. . . .

sections make clear that the only private right of action that is provided for concerning alleged violations of these statutes is for equitable relief, such as an injunction ordering the production of a personnel file or written reasons for termination. Neither statute creates a private right of action for monetary damages. Moreover, attorneys' fees and costs are only provided for to the extent they are incurred in bringing a lawsuit seeking such equitable relief.²

ABM has attached two documents to its response to the motion, suggesting that it has complied with its statutory duties. (See Letter Dated November 29, 2010 (ECF No. 24-1) and Answers to Requests for Production (ECF No. 24-2)). Flood, for her part, denies that ABM has complied with the statute (Pl.'s Reply at 5, ECF No. 25), but concedes that she is only entitled to injunctive relief and attorney fees if successful. It appears that she has stated a claim under both of these statutory provisions and only time will tell whether she is entitled to any injunctive relief or other equitable relief if she can prove her claim. Flood suggests that ABM's untimely provision of the required information might entitle her to some relief (*id.*), but does not suggest what form that sort of injunctive relief might take. If ABM has fully complied with the statute,

26 M.R.S. § 630. Section 631 provides:

. . . . Any employer who, following a request pursuant to this section, without good cause fails to provide an opportunity for review and copying of a personnel file, within 10 days of receipt of that request, is subject to a civil forfeiture of \$ 25 for each day that a failure continues. The total forfeiture may not exceed \$ 500. An employee, former employee or the Department of Labor may bring an action in the District Court or the Superior Court for such equitable relief, including an injunction, as the court may consider being necessary and proper. The employer may also be required to reimburse the employee, former employee or the Department of Labor for costs of suit including a reasonable attorney's fee if the employee or the department receives a judgment in the employee's or department's favor, respectively. . . .

26 M.R.S. § 631.

² In 1984, the Law Court held that 26 M.R.S. § 630 does not authorize a private right of action to enforce the civil forfeiture provision, observing that the legislature had not indicated in plain language that a private party action was available. *Larrabee v. Penobscot Frozen Foods, Inc.*, 486 A.2d 97, 101 (Me. 1984). In 1997, the Legislature amended both § 630 and § 631 of the statute to add language authorizing private actions for "such equitable relief, including an injunction, as the court may consider to be necessary and proper," with a cost- and fee-shifting provision. P.L. 1997, c. 356, § 1; P.L. 1997, c. 420, § 1. See also *Boylan v. Foster Carpenter Black & Co., LLP*, 2002 WL 1023514, at *1 (Me. Super., April 16, 2002) (holding that 26 M.R.S. § 631 does not create a private right of action to enforce a civil forfeiture, which can only be sought by the Maine Department of Labor).

as suggested by the exhibits, I am unsure where this count is headed. However, at this juncture, based on the complaint allegations and the memoranda of the parties I will allow the count to proceed.

B. The Defamation Counts

There are four requirements to establish a claim for defamation under Maine law: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault amounting at least to negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. Gomes v. Univ. of Me. Sys., 365 F. Supp. 2d 6, 44 (D. Me. 2005); Rippett v. Bemis, 672 A.2d 82, 86 (Me. 1996). Certain categories of defamatory statements, such as statements relating to an individual's business or profession or statements alleging a punishable criminal offense, are considered defamation per se and do not require proof of special harm. Sandler v. Calcagni, 565 F. Supp. 2d 184, 192 (D. Me. 2008); Rippett, 672 A.2d at 86.

1. Count II (Shelly O'Donnell-Flood v. Bank of America)

The proposed amended complaint makes the following allegation against Shelly O'Donnell-Flood's former employer, defendant Bank of America/FIA Card Services:

The Bank has published false statements tending to harm Shelly Flood's reputation and deter third persons from associating or dealing with her . . .

[T]he Bank has published and forced Shelly Flood to publish false statements defaming her occupational and professional fitness, including statements that her employment was terminated for 'job abandonment' or for reasons relating to her lack of fitness for her position.

(Am. Compl. ¶¶ 20-21, ECF No. 19-1.) The complaint does not allege any other statements were made by the former employer nor does it contain any allegations concerning the nature of the publication that allegedly occurred.

While the Maine Supreme Judicial Court has not directly addressed the issue, this Court has previously concluded that the theory of compelled self-publication defamation claims would be recognized in Maine law. See Carey v. Mt. Desert Island Hosp., 910 F. Supp. 7, 13 (D. Me. 1995). To determine liability under the self-publication doctrine, courts must “inquire as to whether the employer-defendant knew or could have foreseen that the plaintiff would be compelled to repeat the defamatory statement.” Id. at 11; see also Lynch v. Christie, 815 F. Supp. 2d 341, 352 n. 20 (D. Me. 2011) (“This also satisfies Maine law of defamation.”).

Bank of America argues first that the complaint fails to identify the precise statements that O’Donnell-Flood claims are defamatory. However, the plaintiff does precisely identify, at minimum, the statement given by defendant as reason for plaintiff’s termination, “job abandonment,” as being defamatory. Such a statement has been held sufficiently precise to sustain a claim for defamation. See, e.g., Swift v. Bank of America, 1:08-cv-00035-JAW, 2009 U.S. Dist. LEXIS 22499, 2009 WL 723521 (D. Me. Mar. 16, 2009) (Mag. J. Recommended Decision on Mot. for Summ. J.) (case settled prior to district judge review). Because it also is a statement regarding the plaintiff’s employment or profession, it would be considered defamation per se and would not require proof of any special harm to satisfy the claim. See Sandler, 565 F. Supp. 2d at 192.

It should be noted, however, that barring further amendment of the complaint, plaintiff will likely be limited in her claim to the statement regarding job abandonment and this statement only. Under federal pleading rules for defamation actions,³ “the pleadings in a defamation case need to be sufficiently detailed to the extent necessary to enable the defendant to respond.” Bishop v. Costa, 495 F. Supp. 2d 139, 141 (D. Me. 2007). The First Circuit has noted in that

³ The Maine Supreme Judicial Court long ago adopted a similar pleading standard. True v. Plumley, 36 Me. 466 (1853).

regard that “a defendant is entitled to knowledge of the precise language challenged as defamatory, and the plaintiff is therefore limited to its complaint in defining the scope of the alleged defamation.” Phantom Touring v. Affiliated Publ’ns, 953 F.2d 724, 728 n.6 (1st Cir. 1992). However, defamation claims are not subject to the heightened pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure. Bishop, 495 F. Supp. 2d at 140. So while the pleaded statement of “job abandonment” is sufficient, it will also define the limits of plaintiff’s defamation claim.

Bank of America counters the job abandonment statement by noting that this particular statement cannot be defamatory because it is true, and because O’Donnell-Flood does not allege any facts to the contrary. Under Maine law, for a statement to be defamatory, the alleged statement must be false. Lester v. Powers, 596 A.2d 65, 69 (Me. 1991). In the amended complaint, however, plaintiff alleges that she was terminated by the Bank as a result of unlawful discrimination based on her sexual orientation. Assuming this to be true for purposes of the 12(b)(6) standard, the Bank’s claim that O’Donnell-Flood was terminated for job abandonment would have to be false. Thus, it can be inferred that the complaint alleges the job abandonment statement to be pretextual, and therefore false.

Bank of America further claims that the defamation claim would fail because it does not allege to whom the statements were made or under what circumstances. However, as noted above, the only statement plaintiff has argued with the required specificity is the statement relating to her claim of self-publication regarding job abandonment. In jurisdictions that have adopted the theory of compelled self-publication as a means of establishing a claim of defamation, the analysis hinges not on specific allegations of when the statements *were* made and to whom, but rather on the foreseeability that self-publication *will* be made. See e.g. Theisen

v. Covenant Med. Ctr., 636 N.W.2d 74, 83 (Iowa 2001) (noting that liability under the doctrine is appropriate “if the person making the statement can reasonably foresee that the person defamed will be compelled to repeat the defamatory statement to a third party.”)

Shelly O’Donnell-Flood’s proposed defamation claim survives a Rule 12(b)(6) motion to the extent of the “job abandonment” statement and self-publication theory. However, her claim is limited by federal pleading rules and court precedent to just that portion of her defamation claim. Any other statements or theories of the claim cannot be asserted because the complaint fails to allege precisely what other statements were made and to whom and under what circumstances those additional statements were made.

2. Count VI (Keri Flood v. Bank of America and ABM)

The amended complaint makes the following allegation against Keri Flood’s former employer, defendant ABM Janitorial Services, as well as defendant Bank of America/FIA Card Services (collectively, “Bank”):

[T]he Bank has made false statements to ABM, and both the Bank and ABM have made false statements to third parties defaming Keri Flood’s occupational and professional fitness, including statements that she had assaulted and was “bullying” Bank personnel.

(Am. Compl. ¶ 55.) Beginning with Flood’s claim against the Bank, the Bank repeats the argument that the complaint does not contain the precise statements alleged to be defamatory. Keri Flood does allege that the Bank made statements to ABM and that both the Bank and ABM made statements to third parties that she had assaulted and was “bullying” bank personnel. False statements that an individual has engaged in criminal activity, such as assault, are considered defamation per se and do not require proof of special harm. Sandler, 565 F. Supp. 2d at 192.

Similar to O’Donnell-Flood’s defamation claim, a portion of Flood’s claim would survive a hypothetical 12(b)(6) motion. Her claim that the Bank communicated to ABM the false

statements that she had assaulted and was bullying bank personnel is sufficiently precise and concrete to satisfy the pleading requirements. It identifies the alleged false statements, to whom the statements were made, and under what circumstances they were made. However, as discussed above, her claim would be limited in scope to these statements, as any other potential statements are not sufficiently alleged to allow the defendants to appropriately respond.

Flood's defamation claim against ABM is more unclear. The complaint fails to identify which defamatory statements are attributable to ABM or to whom or under what circumstances those statements were made. Flood does not allege compelled self-publication, as her fellow plaintiff does, but that ABM actually made defamatory statements to third parties. Without further specific information, Flood's claim against ABM must fail and I will not allow the proposed amended complaint to include a defamation claim against ABM.

CONCLUSION

Plaintiffs' Motion for Leave to Amend (ECF No. 19) is GRANTED IN PART and DENIED IN PART consistent with the foregoing discussion. Plaintiffs will file an amended complaint that complies with this order by August 14, 2012.

CERTIFICATE

Any objections to this ORDER shall be filed in accordance with Federal Rule of Civil Procedure 72.

So Ordered.

August 1, 2012

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

FLOOD et al v. BANK OF AMERICA CORPORATION
et al

Assigned to: JUDGE GEORGE Z. SINGAL
Referred to: MAGISTRATE JUDGE MARGARET J.
KRAVCHUK

Case in other court: Maine Superior Court, Waldo
County, CV-12-00009

Date Filed: 03/29/2012
Jury Demand: Plaintiff
Nature of Suit: 442 Civil Rights: Jobs
Jurisdiction: Diversity

Cause: 28:1441 Petition for Removal - Employment
Discrim

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