

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

<i>JON ADAMS, et al.,</i>)	
)	
<i>Plaintiffs</i>)	
)	
v.)	<i>Civil No. 95-384-P-DMC</i>
)	
<i>C.N. BROWN COMPANY, et al.,</i>)	
)	
<i>Defendants</i>)	

**MEMORANDUM DECISION ON PLAINTIFFS’ MOTION FOR REVISION OF
MEMORANDUM DECISION ON DEFENDANTS’ MOTION FOR SUMMARY
JUDGMENT OR IN THE ALTERNATIVE FOR ENTRY OF JUDGMENT AS TO FEWER
THAN ALL CLAIMS AND ON DEFENDANT LECLAIR’S MOTION FOR SUMMARY
JUDGMENT ON COUNT VI**

The plaintiffs, Jon Adams and Joseph Henry, have moved this court to revise its Memorandum Decision (Docket No. 24) issued August 16, 1996 on the defendants’ Motion for Summary Judgment, asking specifically that the court revise certain “findings” concerning allegedly material facts, that it adopt three legal arguments allegedly at odds with its summary judgment conclusions, that it reverse its ruling on four specific claims, and that, in the alternative, it certify the partial summary judgment entered in August as final for purposes of appeal. The plaintiffs cite Fed. R. Civ. P. 54(b) as authority for all of the relief requested in their motion, which was filed on October 18, 1996.

Defendant Don LeClair, an employee of Defendant C.N. Brown Company, has moved for summary judgment on Count VI of the plaintiffs’ Complaint, a count alleging tortious interference

with their employment relationships with C.N. Brown. This count was added to the complaint with leave of this court on June 26, 1996 (Docket No. 21). The motion for summary judgment was filed on November 19, 1996 (Docket No. 33).

This employment discrimination action arises out of alleged sexual harassment and retaliation. In August, this court entered summary judgment for defendant LeClair on plaintiffs' claims under 42 U.S.C. § 2000e-2(a)(1) (Title VII of the Civil Rights Act of 1964) and under the Maine Human Rights Act, 5 M.R.S.A. § 4551 *et seq.*, and on plaintiff Adams's claim for retaliation under the Maine Whistleblowers' Protection Act, 26 M.R.S.A. § 831 *et seq.* The Motion for Revision does not address any of the claims against defendant LeClair. The August decision also granted the motion for summary judgment on Adams's claims against defendant C.N. Brown for *quid pro quo* sexual harassment and hostile environment sexual harassment under Title VII and Maine law, Henry's claim for hostile environment sexual harassment under Title VII and Maine law and both plaintiffs' claims for retaliatory termination. This left the plaintiffs with claims against defendant C.N. Brown for retaliatory transfer of Adams and for *quid pro quo* sexual harassment against Henry, as well as claims for interference with contractual relations against defendant LeClair. The plaintiffs now ask this court to reverse its ruling on plaintiff Adams's claims for retaliatory termination, hostile environment sexual harassment and *quid pro quo* sexual harassment, and plaintiff Henry's claim for retaliatory termination.

MOTION FOR REVISION

A. Procedural Issues

The defendants contend that the plaintiffs' motion is untimely because it was filed two

months after the decision which it seeks to “correct.” The defendants cite no authority for this position, although their argument is cast in terms applicable to consideration of motions to amend a judgment brought under Fed. R. Civ. P. 59 or 60. However, the August decision granted summary judgment to the defendants in this action on fewer than all claims raised in the Amended Complaint, and there has thus been no entry of final judgment. Under these circumstances, the court retains the inherent power to revise its interlocutory August order at any time before the entry of judgment. Fed. R. Civ. P. 54(b); *Farr Man & Co. v. M/V Rozita*, 903 F.2d 871, 874-75 & n.2 (1st Cir. 1990). The plaintiffs’ motion is not untimely. However, the court’s inherent power will not be exercised indiscriminately when parties seek reconsideration. Motions for reconsideration are granted to correct manifest errors of law or fact, *Hodge v. Parke Davis & Co.*, 833 F.2d 6, 8 (1st Cir. 1987), and counsel should limit their use of such motions to situations where errors are manifest and material to the outcome of the judgment or order that is the subject of the motion.

B. Alleged Factual Errors

The plaintiffs first contend that the court erred concerning certain statements made by LeClair to the investigator hired by C.N. Brown to look into Adams’s complaint against LeClair in 1994. A careful review of the summary judgment record¹ reveals that only one of the statements in the

¹ Several of the references to the record upon which the plaintiffs rely in this portion of their Motion for Revision were not included in their Statement of Material Facts and Response to Defendants’ Statement (Docket No. 11) submitted pursuant to this court’s Local Rule 19(b) in connection with the motion for summary judgment. “A trial judge cannot comb through every deposition, affidavit, pleading, and interrogatory answer in search of disputed factual issues. The parties are bound by their Rule 19 Statements of Fact and cannot challenge the court’s summary judgment decision based on facts not properly presented therein.” *Pew v. Scopino*, 161 F.R.D. 1, 1 (D. Me. 1995).

summary judgment opinion challenged by the plaintiffs could be considered to be erroneous. On page 19 of the Memorandum Decision, I stated: “Next, LeClair’s representation that there was a \$2,000 cash loss at the Turner store, in contrast to losses of under \$500 at seven of the nine locations that LeClair supervised, *id.* [Report of Interviews Conducted in the Investigation of Alleged Sexual Harassment, Exh. B to Affidavit of Gail A. Wright, Exh. A to Defendants’ Reply to Plaintiffs’ Memorandum in Opposition to Motion for Summary Judgment (Docket No.16)] at 6, is confirmed by the deposition testimony of Bergeron-Kelley, Bergeron-Kelley Dep. at 51-52.” In fact, Bergeron-Kelley’s testimony confirms that while there initially appeared to be a \$2,000 cash loss at the Turner store, he found that there was a “paperwork error” in that amount, rather than an actual loss. Deposition of Edward Bergeron-Kelley at 29. This clarification of the summary judgment evidence requires no change in my analysis of the hostile environment sexual harassment claim by Adams against C.N. Brown.

The plaintiffs also argue that the record presents a disputed issue of material fact concerning whether Craig Frazier, the supervisor who terminated Adams’s employment with C.N. Brown, knew about Adams’s allegations of harassment against LeClair when he terminated Adams. None of the record evidence cited by the plaintiffs in this regard raises even a suggestion that Frazier knew about these allegations before the termination; Frazier’s sworn statement that he had no such knowledge, Affidavit of Craig Frazier ¶ 7, Exh. F to Defendants’ Statement of Material Facts Not in Dispute (Docket No. 9), is not called into question by speculation and conjecture about the content of conversations between Frazier and other C.N. Brown employees, particularly when those employees have been deposed by the plaintiffs’ counsel. The plaintiffs’ allegation that a conversation between LeClair and Frazier that was reported by Bergeron-Kelley took place “at a management meeting

before Adams was terminated,” Plaintiffs’ Memorandum of Law in Support of Their Motion for Revision or for Final Judgment (“Plaintiffs’ Mem.”) (Docket No. 27) at 7, is totally without support in the cited portions of the record. In fact, Bergeron-Kelley testified that LeClair stated during a conversation Bergeron-Kelley overheard that he was scared about “[t]he harassment suit that Jon had filed against him.” Bergeron-Kelley Dep. at 35-36. The lawsuit was filed after Adams was fired, not before. This is a factual issue concerning Frazier’s knowledge, not a question of his or C.N. Brown’s state of mind, as the plaintiffs contend. There is no error in the summary judgment decision on this point.

C. Legal Arguments

The plaintiffs contend that summary judgment should not have been entered on Adams’s hostile work environment sexual harassment claim because C.N. Brown’s investigation of Adams’s complaint against LeClair was inadequate as a matter of law. This issue was fully briefed by the parties and considered by the court at the time of the motion for summary judgment, and the plaintiffs offer no compelling reason why the court should revisit it now.² The plaintiffs’ next argument is based on the assertion that an employer should be strictly liable for hostile environment

² The plaintiffs filed an unauthorized Supplemental Memorandum of Law in Support of Their Motion for Revision or for Final Judgment (Docket No. 29) on October 31, 1996, in which they cite section 615.4(a)(9)(iii) of the EEOC Compliance Manual in support of their argument on this point. This authority was not brought to the court’s attention by the plaintiffs during its consideration of the motion for summary judgment, and this regulatory argument was not made at that time. “It is settled law that, once a motion to dismiss or a motion for summary judgment has been granted, the district court has substantial discretion in deciding whether to reopen the proceedings in order to allow the unsuccessful party to introduce new material or argue a new theory.” *Mackin v. City of Boston*, 969 F.2d 1273, 1279 (1st Cir. 1992). I see no reason to allow the plaintiffs to argue a new theory at this time.

sexual harassment by a plaintiff's supervisor. After considering this argument in connection with the summary judgment motion, I applied the standard set forth in *Harris v. International Paper Co.*, 765 F. Supp. 1509, 1516 (D. Me. 1991), that liability attaches if "an official representing [the employer] knew, or in the exercise of reasonable care, should have known, of the harassment's occurrence, *unless* that official can show that he or she took appropriate steps to halt it." Decision at 18 (emphasis in original). The only authority cited by the plaintiffs on this issue, *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178 (6th Cir.), *cert. denied* 113 S. Ct. 831 (1992), involved *quid pro quo* sexual harassment. *Id.* at 185-86. Recent circuit case law upholding strict liability does so only in the context of *quid pro quo* claims. *E.g.*, *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 431-32 (7th Cir. 1995). The claim for hostile environment sexual harassment differs conceptually from the *quid pro quo* claim in ways that make it inappropriate to apply a strict liability standard.

Finally, the plaintiffs challenge the conclusion that Adams's claim for *quid pro quo* sexual harassment must fail because Adams's rejection of LeClair's advances did not affect a tangible aspect of his employment. The plaintiffs rely on Adams's statement that he feared that he would lose his job if he did not have sex with LeClair. This argument was raised by the plaintiffs in opposition to the motion for summary judgment and fully considered by the court. There is no evidence in the summary judgment record that a tangible aspect of Adams's employment by C.N. Brown was affected by his rejection of LeClair's advances.

D. The Four Claims

The plaintiffs request this court to reverse its grant of summary judgment to the defendants on Adams's claims for retaliation based on his termination, hostile work environment sexual

harassment, and *quid pro quo* sexual harassment. As discussed above, none of the plaintiffs' arguments in support of this request has merit. The plaintiffs also request this court to reverse its grant of summary judgment to the defendants on Henry's claim for retaliation. However, the plaintiffs present no argument at all in support of this request, and the request therefore deserves no consideration.

E. Motion for Entry of Judgment

The plaintiffs assert that justice requires that the summary judgment entered by this court in August as to fewer than all of their claims "be certified as final for purposes of appeal," Plaintiffs' Mem. at 8, due to the risk of multiple trials and separate appeals. The defendants respond that this request is actually one for certification of an interlocutory ruling under 28 U.S.C. § 1292(b), which requires that such motions be filed within ten days of the date of the order for which certification is sought, making this motion untimely.

Section 1292 does not apply to the plaintiffs' motion.

Section 1292(b) and Rule 54(b) address two different situations. The former applies only to orders that would be considered interlocutory even if presented in a simple single-claim, two-party case. Rule 54(b) applies only to adjudications that would be final under Section 1291 if they occurred in an action having the same limited dimensions. Therefore, if an order is final under Section 1291, Section 1292(b) cannot apply and resort must be had to Rule 54(b) in the multiple-party or multiple-claim situation. Conversely, if an order inherently is interlocutory, Rule 54(b) has no bearing on any determination that might be made under Section 1292(b).

10 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2658.2 at 81-82 (1983).

Since the summary judgment in this case would be considered final if it were not for the presence of other claims, Rule 54(b) applies to the plaintiffs' request.

When a trial court is asked to direct the entry of final judgment as to fewer than all of the claims for relief in an action under Rule 54(b) upon the express determination that there is no just reason for delay, so that an appeal may be taken, the First Circuit requires a two-step analysis. *Maldonado-Denis v. Castillo-Rodriguez*, 23 F.3d 576, 580 (1st Cir. 1994). First, “the ruling underlying the proposed judgment must itself be final in the sense that it disposes completely either of all claims against a given defendant or of some discrete substantive claim or set of claims against the defendants generally.” *Id.* The August ruling in this case meets this requirement. Second, the court must strike a balance between the desirability of immediate review and the undesirability of promoting piecemeal appeals, after comparing the legal and factual basis of the claims underlying the proposed judgment with that of the remaining claims. *Id.* “District courts should go very slowly in employing Rule 54(b) when . . . the factual underpinnings of the adjudicated and the unadjudicated claims are intertwined.” *Id.*

That is the case here. Further, in addition to the intertwining of the factual underpinnings of the adjudicated and unadjudicated claims, the plaintiffs offer no urgent need for immediate review. The possibility of additional trials, if an entry of summary judgment is overturned, is present in every action in which summary judgment is granted as to fewer than all claims. This is the only reason given by the plaintiffs for their request, and it is not enough. *See generally Spiegel v. Trustees of Tufts College*, 843 F.2d 38, 42 (1st Cir. 1988).

LECLAIR’S MOTION FOR SUMMARY JUDGMENT

A. Timeliness

The plaintiffs have moved to dismiss LeClair’s motion for summary judgment on Count VI

of their amended complaint as untimely. They rely on the motion deadline of May 2, 1996 that was set by the court in this action. Count VI was added to the amended complaint with permission on June 26, 1996, and the defendant cannot be expected to move for summary judgment on that claim before a reasonable time after that date. The plaintiffs note that the defendants' motion for summary judgment as to the other claims in this action was pending when Count VI was added, suggesting that the pending motion should have been supplemented to address Count VI at that time. The plaintiffs also point out that LeClair did not seek leave of court to file this motion. LeClair has not responded to the motion to dismiss his motion.³ See Local Rule 19(c).

Despite these procedural lapses, which I expect counsel will scrupulously avoid in the future, I discern no prejudice to the plaintiffs by the allowance of this motion and therefore will consider it on the merits. *Lovell v. One Bancorp, Maine Savings Bank*, 755 F. Supp. 466, 466 n.1 (D. Me. 1991).

B. Summary Judgment Standards

As noted in the Memorandum Decision, 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 over it is resolved favorably to the nonmovant. By like token, ‘genuine’ means that ‘the

³ A motion to dismiss a motion for summary judgment as untimely may be treated as an objection to the motion for summary judgment. *DeVore v. Federal Sav. Bank of Dover, N.H.*, 822 F. Supp. 31, 32 (D. Me. 1993).

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 that 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.), *cert. denied*, 132 L.Ed.2d 255 (1995); Fed. R. Civ. P. 56(e); Local Rule 19(b)(2).

C. The Merits

In Count VI of the second amended complaint (Docket No. 21) the plaintiffs assert a claim of tortious interference by LeClair with their employment relationships with C.N. Brown. LeClair argues that the plaintiffs did not have an employment contract with C.N. Brown, so that he cannot be held liable for interference with contract; that he acted at all times as an agent of C.N. Brown within the scope of his authority and therefore there is no third party against whom a claim for interference would lie; that he did not commit fraud or intimidation against C.N. Brown, a necessary element of the state law action; and that he is immune from liability under the doctrine of “manager’s privilege.”

On the first issue, the plaintiffs respond that, despite the reference in paragraph 57 of the

second amended complaint to breach of contract, their claim in Count VI is for interference with economic relations, and that tortious interference with an at-will employment relationship has been recognized in Maine since *Perkins v. Pendleton*, 90 Me. 166 (1897). Maine law does recognize a cause of action for tortious interference with a plaintiff's employment relationship with a third party. *E.g., Taylor v. Pratt*, 135 Me. 282, 285, 195 A. 205, 207 (1937). However, the Law Court has not dealt with a claim like that of Adams and Henry, where the party charged with interference works for the same employer and has supervisory authority over the plaintiffs.

Whether LeClair acted at all relevant times within the scope of his authority is not clear from the summary judgment record presented by LeClair; it is certainly not established by his Statement of Undisputed Material Facts (Docket No. 35). Similarly, the "manager's privilege," which has not been adopted in Maine, is generally held inapplicable when the manager-employee acts outside the scope of his authority, *e.g., Varrallo v. Hammond Inc.*, 94 F.3d 842, 849 n.11 (3d Cir. 1996) (New Jersey law), *Stafford v. Puro*, 63 F.3d 1436, 1442 (7th Cir. 1995) (Illinois law), or with improper intent, *e.g., Los Angeles Airways, Inc. v. Davis*, 687 F.2d 321, 326 (9th Cir. 1982) (California law). Neither of these exceptions can be established at this stage of this proceeding, and the privilege cannot serve as the basis for summary judgment.

Maine law provides relief in damages wherever a person, by means of fraud or intimidation, procures the discharge of a plaintiff from an employment which, but for such wrongful interference, would have continued. *MacKerron v. Madura*, 445 A.2d 680, 683 (Me. 1982). There is no evidence in the summary judgment record, and the plaintiffs do not argue, that LeClair intimidated C.N. Brown in any way in connection with Adams's employment. In order to establish fraud under Maine law, a plaintiff must prove by clear and convincing evidence that the defendant (1) made a false

representation (2) of a material fact (3) with knowledge of its falsity or in reckless disregard of whether it was true or false (4) for the purpose of inducing another to act or to refrain from acting in reliance on it, and (5) the other person justifiably relied on the representation as true and acted upon it to the damage of the plaintiff. *Grover v. Minette-Mills, Inc.*, 638 A.2d 712, 716 (Me. 1994).

LeClair bases his motion on alleged insufficiencies in the evidence to support the second, fourth and fifth elements. I have already determined, in granting summary judgment to the defendants on Adams's claim for retaliatory dismissal, that the summary judgment record does not support any causal connection between LeClair's alleged false statements to the investigator hired by C.N. Brown and his termination. Memorandum Decision at 21 n.12. In the absence of evidence that C.N. Brown relied on these statements in terminating the plaintiff, summary judgment on Count VI as to Adams's termination is warranted. However, as to Adams's claim based on his transfer to the Gray store, which he characterizes as a demotion, the summary judgment record provides sufficient evidence on each of the elements of fraud challenged by LeClair to enable Count VI to survive the motion for summary judgment: LeClair's allegedly false statements to the investigator may have been material to her recommendation that he and Adams not work together, leading C.N. Brown to decide to transfer Adams to a location where his income was significantly reduced. It is important to note in this regard that agents or employees of C.N. Brown other than LeClair made the decision to transfer Adams.

As to Henry, the issue is simpler. There is no dispute that LeClair had the authority to fire Henry and that he directed Bergeron-Kelley to do so. While he may also have directed Bergeron-Kelley to include false statements about Henry in the documents prepared in connection with that discharge, the fact remains that Henry was an employee at will. The plaintiffs have presented no

evidence that suggests otherwise. Under Maine law, an employer may discharge an employee at will without reason and even negligently and in bad faith, unless the termination is to deprive the employee of past due compensation or in violation of a public policy clearly enunciated by statute for which no civil remedy is provided. *Bard v. Bath Iron Works Corp.*, 590 A.2d 152, 156 (Me. 1991). There is no evidence in the summary judgment record to suggest that either exception is applicable to Henry. If an agent of an employer who actually does the firing of an employee can be held personally liable for the termination of a relationship which the employer may end with impunity, then the employer's right to so terminate the relationship rings hollow. Moreover, in such circumstances an individual employee would be chary at best about assuming the risk of carrying out the act of termination on behalf of the employer. Henry is not without redress for the injuries he claims in this action; the cause of action asserted against LeClair in Count VI is simply not available to him as a means to that end. *See Leslie v. St. Vincent New Hope, Inc.*, 873 F. Supp. 1250, 1257 (S. D. Ind. 1995) (Indiana law).

CONCLUSION

For the foregoing reasons, the plaintiffs' Motion for Revision of Memorandum Decision on Defendants' Motion for Summary Judgment or in the Alternative for Entry of Judgment as to Fewer than All the Claims is ***DENIED***. Defendant LeClair's Motion for Summary Judgment is ***GRANTED*** as to plaintiff Henry; ***GRANTED*** as to plaintiff Adams insofar as Count VI raises claims concerning the termination of his employment by Defendant C.N. Brown; and otherwise ***DENIED***.

Dated this 23rd day of December, 1996.

David M. Cohen
United States Magistrate Judge