19-P-392 Appeals Court

PAMELA KELLEHER vs. LOWELL GENERAL HOSPITAL & others.[1]

No. 19-P-392.

Middlesex. January 9, 2020. - July 15, 2020.

Present: Maldonado, Singh, & Englander, JJ.

Employment, Constructive discharge, Termination. Libel and Slander. Contract, Interference with contractual relations. Practice, Civil, Motion to dismiss.

Civil action commenced in the Superior Court Department on December 14, 2017.

The case was heard by C. William Barrett, J., on a motion to dismiss the complaint.

Helen G. Litsas for the plaintiff.
Jessica S. Jewell for the defendants.

ENGLANDER, J. The plaintiff, Pamela Kelleher, appeals from a judgment dismissing her employment-based claims for failure to state a claim. Kelleher was an at-will employee at defendant Lowell General Hospital (hospital) until she resigned from her

[1] Kathy Mireault and Richard Birkhead.

position as a cardiac sonographer in 2016. The gist of her claims is that her supervisor at the hospital was intentionally abusive towards her, and thereby created "intolerable working conditions" that caused her severe emotional distress, and ultimately, compelled her to resign. Kelleher brought claims for, among other things, defamation, intentional interference with advantageous business relations, and "constructive discharge." The motion judge granted the defendants' motion under Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974). We affirm.

Background. The facts are taken from the well-pleaded allegations of the amended complaint, and for present purposes must be accepted as true. See Calixto v. Coughlin, 481 Mass. 157, 158 (2018). Kelleher had worked at the hospital for several years. Her immediate supervisor was the lead sonographer, defendant Kathy Mireault. Mireault's supervising physician was defendant Dr. Richard Birkhead. Kelleher alleged that "[f]or numerous months prior to her termination" in April 2016, Mireault inflicted intolerable working conditions on her, which conditions were "ratified" by Birkhead. In particular, Kelleher alleges that Mireault targeted her with "daily, unprovoked angry and humiliating outbursts," which became an "almost daily occurrence." Mireault's behavior led to Kelleher's physical and emotional distress, a medical leave, and

ultimately, to Kelleher's resignation, which Kelleher alleges constituted a constructive discharge.

The above allegations were made generally, and in conclusory fashion. In addition, the complaint refers to three more specific occurrences:

> (1) In October of 2015, Mireault came into the office on her day off "to berate" Kelleher, in the presence of other employees and patients, regarding a scheduling issue. Mireault's statements cast Kelleher's work "in a negative light." Thereafter, Mireault brought Kelleher into Birkhead's office and continued to impugn Kelleher's work. Mireault threw her hands in the air and said, "I'm done with her."
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> (2) In December of 2015, Mireault "exploded" at Kelleher about another scheduling issue, in the presence of coworkers and patients.
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> (3) In March of 2016, Mireault requested Kelleher's assistance with respect to taking a patient. When Kelleher responded that she could not assist because she had other work to complete, Mireault shouted at Kelleher in front of patients and coworkers, "You never help!"

As to defendant Birkhead, the complaint alleges that he took no steps to remedy Mireault's treatment of Kelleher, despite Kelleher's repeated requests for assistance.

The complaint contains five counts: (1) "constructive discharge," (2) defamation, (3) intentional interference with advantageous business relations, (4) intentional infliction of emotional distress, and (5) breach of the implied covenant of good faith and fair dealing. After a hearing, the motion judge

entered a thoughtful decision that dismissed each count as legally untenable on the facts alleged.

Discussion. 1. Standard of review. We review an order on a motion to dismiss de novo, accepting the allegations as true and drawing all reasonable inferences in the plaintiff's favor. Edwards v. Commonwealth, 477 Mass. 254, 260 (2017). To survive a motion to dismiss, the factual allegations must "plausibly suggest[]," and not merely be "consistent with," an "entitlement to relief." Id., quoting Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008). Allegations plausibly suggest a right to relief where they allow the judge reasonably to infer that the defendant is liable for the alleged misconduct, and raise a reasonable expectation that discovery will reveal evidence of same. Trychon v. Massachusetts Bay Transp. Auth., 90 Mass. App. Ct. 250, 251 (2016), and cases cited. While "detailed factual allegations" are not necessary, to be sufficient a complaint must nevertheless provide "more than labels and conclusions." Iannacchino, supra, quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). Importantly for present purposes, we need not accept as true "legal conclusions cast in the form of factual allegations" (quotation omitted). Edwards, supra. The plausibility analysis is "context-specific," and guided by "[our] judicial experience and common sense" (citation omitted). Trychon, supra.

2. Constructive discharge. Kelleher's claim for constructive discharge fails because there is no such independent cause of action under Massachusetts law. An employee does not have a right not to be "constructively" discharged. Rather, the employee must first have a right not to be discharged, which may arise, for example, from some established common-law right, such as a contractual right, see Fortune v. National Cash Register Co., 373 Mass. 96, 101 (1977), from "a well-defined public policy," Wright v. Shriners Hosp. for Crippled Children, 412 Mass. 469, 472 (1992), or from statute -- for example, a right under G. L. c. 151B to be free from employment discrimination. Constructive discharge, on the other hand, is merely a doctrine used to prove an element of a wrongful discharge claim -- that is, that the employee was in fact discharged, rather than left voluntarily. Such is the context in which the doctrine has been applied in the Massachusetts courts. See, e.g., GTE Prods. Corp. v. Stewart, 421 Mass. 22, 33-34 (1995) (wrongful discharge); Rubin v. Household Commercial Fin. Servs., Inc., 51 Mass. App. Ct. 432, 438-440 (2001) (breach of contract and breach of fiduciary duty). Compare Simpson v. Federal Mine Safety & Health Review Comm'n, 842 F.2d 453, 461 (D.C. Cir. 1988) (Ginsburg, J.) (under Federal employment statutes, "[c]onstructive discharge doctrines simply extend liability to employers who indirectly effect a

discharge that would have been forbidden by statute if done directly"); Joliet v. Pitoniak, 475 Mich. 30, 41 (2006) ("constructive discharge is not a cause of action").

Here Kelleher had no contractual right to continued employment at the hospital -- she was an employee at will. In Massachusetts an at-will employee can be terminated at any time, "for almost any reason or for no reason at all" (quotation omitted). Wright, 412 Mass. at 472. Since Kelleher could be terminated at any time, for almost any reason or no reason, she cannot advance a claim that working conditions of the type alleged here rendered it such that she could no longer continue. The constructive discharge claim was properly dismissed.

3. Defamation. Kelleher's defamation claim is based upon two separate statements by Mireault: (1) "I'm done with her," stated in Birkhead's office, and (2) "You never help," stated in the general office space, with coworkers and patients present.

To establish a claim for defamation, Kelleher needs to show that (1) Mireault made a false statement to a third party, (2) of and concerning Kelleher, that (3) is capable of damaging Kelleher's reputation in the community, and (4) either caused Kelleher economic loss or is actionable without proof of economic loss. See Ravnikar v. Bogojavlensky, 438 Mass. 627, 629-630 (2003); Van Liew v. Eliopoulos, 92 Mass. App. Ct. 114,

120 (2017). Here neither statement is actionable in defamation, as a matter of law.[2]

A statement that is claimed to be defamatory must reasonably be understood either as a statement of actual fact, or one that implies defamatory facts.[3] See Lyons v. Globe Newspaper Co., 415 Mass. 258, 262-267 (1993). Statements that are merely "rhetorical hyperbole," or which express a "subjective view," are not statements of actual fact. See Scholz v. Delp, 473 Mass. 242, 251 (2015); Fleming v. Benzaquin, 390 Mass. 175, 185 (1983); Tech Plus, Inc. v. Ansel, 59 Mass. App. Ct. 12, 25 (2003). Whether a statement is of actual fact must be evaluated in light of what an objectively reasonable person would have understood, hearing the statement in the

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[2] To properly allege defamation, a plaintiff must specifically identify the allegedly false statement. See Flagg v. AliMed, Inc., 466 Mass. 23, 37-38 (2013). The plaintiff's allegation that the defendant made statements that "cast the plaintiff in a negative light," but that does not identify a specific statement, is not sufficient.

[3] Under Massachusetts law, "[a] statement cast in the form of an opinion may imply the existence of undisclosed defamatory facts on which the opinion purports to be based, and thus may be actionable." Driscoll v. Board of Trustees of Milton Academy, 70 Mass. App. Ct. 285, 296 (2007), quoting King v. Globe Newspaper Co., 400 Mass. 705, 713 (1987), cert. denied, 485 U.S. 940 (1988). In light of our conclusion that the statements at issue here were mere "rhetorical hyperbole," we need not address the distinctions between actionable and nonactionable statements of opinion. See Lyons v. Globe Newspaper Co., 415 Mass. 258, 266 (1993) (rhetorical hyperbole "unquestionably exclude[d] from defamation liability" [citation omitted]).

context in which it is made, including the make-up of the audience. See Fleming, supra at 189; Cole v. Westinghouse Broadcasting Co., 386 Mass. 303, 309 (1982), cert. denied, 459 U.S. 1037 (1982) ("the court must consider all of the circumstances surrounding the statement, including . . . the audience").

As to the first of the two statements alleged in the complaint, Mireault's exclamation "[y]ou never help" is not actionable. The statement was made in frustration, only moments after Mireault had asked Kelleher for help. A reasonable person observing the exchange would not have understood Mireault to be asserting a fact -- that is, that Kelleher "never" helped. Indeed, Mireault had just asked for Kelleher's help, and "experience and common sense" tell us that Mireault would not have done so unless she reasonably expected that help might be forthcoming (citation omitted). Trychon, 90 Mass. App. Ct. at 251. Rather, a reasonable observer would have understood the statement as rhetorical hyperbole -- a nonfactual figure of speech borne of frustration that is sometimes heard around the office and indeed, around the home. Accord Fleming, 390 Mass. at 183 (in context, defendant "used the word 'attack' figuratively," which would not reasonably have been understood as assertion of fact).

Mireault's statement "I'm done with her," made in Birkhead's office with only the plaintiff present, also is not defamatory. Once again, the statement is reasonably understood as a statement of subjective state of mind or rhetorical hyperbole -- not a statement of actual fact. Indeed, in the context in which it was made, "I'm done with her" is most reasonably understood as a statement by Mireault to her supervisor that she no longer wished to work with Kelleher. That is a statement of Mireault's subjective state of mind, which is not "objectively verifiable," and thus not actionable (citation omitted). Piccone v. Bartels, 785 F.3d 766, 771 (1st Cir. 2015). See, e.g., id. at 772 (in light of context, statements to plaintiffs' supervisor characterizing plaintiffs' conduct as "unprofessional" and lacking in "professional courtesy," reflected a "quintessential 'expression[] of personal judgment' which is 'subjective in character'" [citation omitted]).[4]

4. Intentional interference with advantageous business relations. There are four elements to a claim for intentional interference with contract or advantageous business relations: (1) the plaintiff had a contract or advantageous business

[4] In light of our conclusion, we need not address whether Kelleher's defamation claim failed because it did not allege special damages and thus was not actionable per se.

relationship with a third party, (2) the defendant knowingly induced the third party to break the contact or to forego the business relations, (3) the defendant's interference was improper in motive or means, and (4) the plaintiff was harmed by the interference. Psy-Ed Corp. v. Klein, 459 Mass. 697, 715-716 (2011).[5] The tort has an additional requirement in the employment context; to satisfy the element of improper motive or means, a plaintiff claiming that a supervisor or coworker has interfered with her employment must also show that a corporate official acted with "actual malice." Alba v. Sampson, 44 Mass. App. Ct. 311, 314 (1998). The actual malice requirement provides a measure of protection to corporate supervisors, who must necessarily make adverse employment decisions from time to time and who otherwise would be unduly exposed to the tortious interference claims of disgruntled former employees. Id. at 315, citing Gram v. Liberty Mut. Ins. Co., 384 Mass. 659, 664 (1981), S.C., 391 Mass. 333 (1984). In this case, for example, Kelleher has no contract claim, because she is an at-will employee. The actual malice requirement prevents such an employee from simply recasting a nonexistent wrongful discharge

[5] The Massachusetts courts "'have not consistently distinguished' interference torts, and, in general, 'we need not make any such distinction'" (citation omitted). Blackstone v. Cashman, 448 Mass. 255, 260 n.9 (2007).

claim as a tort claim for wrongful interference with advantageous business relations.

"[A]ctual malice," requires a showing by Kelleher of "a spiteful, malignant purpose unrelated to a legitimate corporate interest." Blackstone v. Cashman, 448 Mass. 255, 270 (2007). The malice must be the "controlling factor" in the defendant's conduct. Id. Our appellate courts have applied the actual malice standard in several cases, with varying results. Thus, in O'Brien v. New England Tel. & Tel. Co., 422 Mass. 686 (1996), the Supreme Judicial Court held that the plaintiff's evidence of actual malice was sufficient at trial, under circumstances where the plaintiff had successfully filed a grievance against the supervisor, and thereafter the supervisor, among other things, intentionally denied the plaintiff work when work was available, and failed to follow the mandatory directive that resulted from the plaintiff's grievance procedure. Id. at 687-690.

In contrast, in Alba, this court held that the evidence at summary judgment was insufficient to show actual malice, even though the defendant had launched a profanity-laden tirade at the plaintiff, and thereafter had acted to delete the plaintiff from a list of employees to be retained after a corporate restructuring. 44 Mass. App. Ct. at 312, 314-317. We held that the plaintiff needed to show that the defendant's purpose was "unrelated to any corporate interest," and that the plaintiff's

evidence was not sufficient where the evidence showed that at least some of defendant's motivations -- such as a concern that the defendant had difficulty working with the plaintiff -- were animated by the interests of the company. Id. at 316. See Gram, 384 Mass. at 663-665 (evidence insufficient to support tortious interference claim even though there was evidence that defendants did not like plaintiff, and defendants had initiated complaint that led to plaintiff's discharge).

Here Kelleher's allegations do not support an inference that the defendants had a malignant purpose, "unrelated to any corporate interest." Indeed, all the specific allegations in the complaint show actions by Mireault that are animated (at least in material part) by a corporate interest -- that is, concerns about the quality or usefulness of the plaintiff's work. For example, the "[y]ou never help" episode arose from Mireault's frustration over Kelleher's refusal to take a patient. And each of the other two episodes specifically identified in the complaint -- including the "I'm done with her" episode -- arose out of work-related "scheduling issues" involving Kelleher.

The remaining allegations in this count are mere "legal conclusions cast in the form of factual allegations" (citation omitted), Edwards, 477 Mass. at 260, which cannot suffice under Iannacchino. It is true, of course, that direct evidence of

malice is not required, Gram, 384 Mass. at 664, but the plaintiff must allege specific facts from which a plausible inference of malice can be drawn. A bare allegation that the defendant's interference was "improper in motive or means" is not sufficient. Anzalone v. Administrative Office of the Trial Court, 457 Mass. 647, 660-661 (2010) ("the talismanic invocation in the complaint" of particular conclusory phrases, "standing alone and unsupported, [does not] prove or even imply malice"). Here, as in Alba, "[w]e are of [the] opinion that the instant case falls closer to" the facts of Gram, than to those of O'Brien. 44 Mass. App. Ct. at 317.

5. Remaining claims. Kelleher's remaining claims also were properly dismissed. Kelleher makes no argument in support of her claim for breach of the covenant of good faith and fair dealing. As for her claim of intentional infliction of emotional distress, that claim requires that the defendants' actions were so extreme and outrageous as to be "beyond all possible bounds of decency" (citation omitted). Agis v. Howard Johnson Co., 371 Mass. 140, 145 (1976). The allegations in the complaint do not plausibly state such a claim, as a matter of law. The actions alleged are not beyond the bounds of human decency; they are not different in kind from many actions encountered in the workplace that, while regrettable, are a not uncommon expression of the human condition.

Judgment affirmed.