

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

RITA ABSHER :
v. : CIVIL NO. 3:02CV171(AHN)
FLEXI INTERNATIONAL SOFTWARE, :
INC., ET AL. :

RULING ON MOTION TO DISMISS & MOTION TO AMEND COMPLAINT

The plaintiff, Rita Absher ("Absher"), brings this Title VII action against her former employer, defendant Flexi International, Inc. ("Flexi"), and its officers and employees Frank Grywalski ("Grywalski"), Kevin Nolan ("Nolan"), Jay Belsky ("Belsky"), and Stefan Bothe ("Bothe"). Absher also alleges claims under the Connecticut Fair Employment Practices Act ("CFEPA"), Conn. Gen. Stat. § 46a-60 et seq., and Connecticut common law.

Presently pending is the defendants' motion to dismiss counts six, seven, fourteen, fifteen and sixteen of the complaint [doc. # 9], and Absher's motion to amend the complaint [doc. # 21]. For the following reasons, the motion to dismiss is GRANTED in part, DENIED in part and DENIED in part as moot. The motion to amend the complaint is GRANTED in part and DENIED in part.

FACTS

Absher alleges that during her employment with Flexi she

was subjected to a hostile work environment, gender discrimination, sexual harassment and retaliation in violation of Title VII and CFEPa. She also asserts state law claims of breach of contract, breach of implied contract, breach of the covenant of good faith and fair dealing, promissory estoppel, battery, negligent infliction of emotional distress, intentional infliction of emotional distress, and negligent supervision.

PROCEDURAL BACKGROUND

Flexi and the individual defendants moved to dismiss five counts of the complaint: (1) count six, which alleges discrimination in violation of CFEPa against all defendants, (2) count seven, which alleges breach of contract against Flexi, (3) count fourteen, which alleges negligent infliction of emotional distress against all defendants, (4) count fifteen, which alleges intentional infliction of emotional distress against all defendants, and (5) count sixteen, which alleges negligent supervision against Flexi, Nolan, Grywalski and Bothe.

At the time the defendants filed the motion to dismiss, they also filed an answer to the remaining eleven counts of the complaint.

Absher opposed the motion to dismiss. However, while the

motion was pending, Absher moved to file an amended complaint. In the proposed amended complaint, Absher realleges and rewords her original Title VII claims of hostile work environment, gender discrimination, and retaliation, her original CFEPA claims of discrimination and retaliation, and her original state law claims of breach of implied contract, breach of the covenant of good faith and fair dealing, promissory estoppel, and assault and battery.

The defendants oppose the proposed rewording of these counts on the grounds that their answer has been filed and Absher has not satisfied the requirements of Fed. R. Civ. P. 15(a).

Further, the proposed amended complaint addresses the five counts of the original complaint that the defendants moved to dismiss. The proposed amended complaint eliminates two counts in their entirety and certain defendants from the other three counts. Specifically, the proposed amended complaint (1) eliminates counts six and seven in their entirety, (2) alleges negligent infliction of emotional distress against Flexi (proposed count thirteen), as opposed to all defendants (original count fourteen), (3) alleges intentional infliction of emotional distress against Belsky (proposed count fourteen), as opposed to all defendants

(original count fifteen), and (4) alleges negligent supervision against Flexi (proposed count twelve), and eliminates Nolan, Grywalski and Bothe (original count sixteen).

Insofar as the proposed changes cure the deficiencies alleged in the motion to dismiss, the defendants do not object to them. Specifically, the defendants do not object to (1) eliminating counts six and seven of the original complaint, (2) eliminating all defendants except Flexi with regard to the negligent infliction of emotional distress and negligent supervision claims, and (3) restating the intentional infliction of emotional distress claim against Belsky. However, the defendants claim that the re-alleged claims of negligent infliction of emotional distress and negligent supervision against Flexi still fail to state viable claims on which relief may be granted. Thus, Flexi argues that the proposed amendments to these two counts would be futile and should not be allowed.

Finally, Absher's proposed amended complaint adds five entirely new counts: (1) an additional Title VII hostile work environment claim against Flexi (proposed count three), (2) a CFEPa sexual harassment claim against Flexi (proposed count five), (3) an ERISA count against FLEXI (proposed count

fifteen), (4) wanton and wilful conduct against Flexi and Belsky (proposed count sixteen), and (5) respondeat superior against Flexi (proposed count seventeen.)

The defendants object to the addition of these new counts. They assert that they are untimely and their addition would cause them undue prejudice.

The defendants conducted some discovery before the motion to amend was filed. On September 13, 2002, they served interrogatories and requests for production on Absher. Absher responded to that discovery on November 13, 2002. Absher served the defendants with interrogatories and requests for production on three separate occasions, October 3, 2002, November 26, 2002, and December 12, 2002. The defendants responded on December 24, 2002 and January 10, 2003. The motion to amend was filed on January 9, 2003, almost four months before the discovery deadline of April 30, 2003. After the motion to amend was filed, the defendants began, but did not complete, Absher's deposition.

DISCUSSION

Fed. R. Civ. P. 15(a) provides that in cases such as this where a responsive pleading has been served, a party may amend its pleading only by leave of court or consent of the adverse party. The rule further provides that leave "shall be freely

given when justice so requires." Id. In Foman v. Davis, 371 U.S. 178 (1962), the Supreme Court explained that:

if the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason--such as 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 the allowance of the amendment, futility of the amendment etc. --the leave should, as the rules require, be `freely given.'

Foman, 371 U.S. at 182. The decision whether to grant leave to amend is within the court's sound discretion. See id.

Undue prejudice may require denial of an amendment when the new claim would require the opponent to expend significant resources to conduct additional discovery and prepare for trial and when it would significantly delay the resolution of the dispute. See Richardson Greenshields Sec., Inc. v. Lau, 825 F.2d 647, 653 n.6 (2d Cir. 1987); Encarnacion v. Barnhart, 180 F. Supp. 2d 492, 498-99 (S.D.N.Y. 2002). Permitting a proposed amendment also may be unduly prejudicial where discovery has been completed, but that consideration may be mitigated if the new claim arises from a similar set of operative facts and a similar time as the existing claims. See Ansan Assocs., Inc. v. Cola Petroleum, Ltd., 760 F.2d 442,

446 (2d Cir. 1985); see also State Teachers Ret. Bd. v. Fluor Corp., 654 F.2d 843, 856 (2d Cir. 1981).

An amendment is futile if it could not withstand a motion to dismiss under Fed. R. Civ. P. 12(b)(6). See Nettis v. Levitt, 241 F.3d 186 n.4 (2d Cir. 2001). In other words, a proposed amendment need not be allowed if it does not state a claim on which relief can be granted. See Ricciuti v. New York City Transp. Auth., 941 F.2d 119, 123 (2d Cir. 1991).

With these principles in mind, the court turns to each of Absher's proposed amendments and the defendants' objections.

A. The Negligent Infliction of Emotional Distress Claim

Flexi maintains that the proposed amended claim for negligent infliction of emotional distress should not be allowed because it does not cure the deficiencies raised in the motion to dismiss and thus would be futile. Specifically, Flexi argues that the Connecticut Supreme Court's recent decision in Perodeau v. City of Hartford, 259 Conn. 729 (2002), bars this claim in the context of an ongoing employment relationship. Flexi further maintains that the claim should be dismissed with regard to the alleged conduct surrounding the termination of Absher's employment because the facts do not rise to the level of extreme and outrageous conduct that "transgresses the bounds of socially tolerable

behavior." Parsons v. United Tech. Corp., 243 Conn. 66, 88-89 (1997); Moniz v. Kravis, 59 Conn. App. 704, 709 (2000). The court agrees.

In Perodeau, the Connecticut Supreme Court held that an employer may not be found liable for negligent infliction of emotional distress arising out of conduct occurring within a continuing employment context as distinguished from conduct occurring in the termination of employment. 259 Conn. at 762-63.

However, the mere termination of employment, even if wrongful, is not, by itself enough to sustain a claim for negligent infliction of emotional distress. Parsons, 243 Conn. at 88-89. To support a cause of action for negligent infliction of emotional distress in the context of terminating an employee, the employer's conduct must involve an unreasonable risk of emotional distress that might result in illness or bodily harm. Id. at 88.

In the proposed amended claim of negligent infliction of emotional distress, Absher does not allege any conduct pertaining to the termination of her employment. Accordingly, she has not stated a viable claim, and the proposed amended claim set forth in proposed count thirteen is not allowed.

B. The Intentional Infliction of Emotional Distress

Claim

In the proposed amended claim of intentional infliction of emotional distress against Belsky, Absher alleges that she suffered and will continue to suffer emotional distress as a result of Belsky's sexually offensive language, conduct, and touching.

To sustain a claim for intentional infliction of emotional distress under Connecticut law, a plaintiff must allege that (1) the defendant intended to inflict emotional distress or knew or should have known that emotional distress was a likely result of his conduct, (2) his conduct was extreme and outrageous, (3) his conduct was the cause of the plaintiff's distress, and (4) the emotional distress that the plaintiff sustained was severe. See Appleton v. Board of Ed. of Stonington, 254 Conn. 205, 210 (2000). With respect to the second element, the court must determine in the first instance if the alleged conduct is sufficiently extreme and outrageous. See id.

Conduct is extreme and outrageous if it "exceed all bounds usually tolerated by decent society." Id. Liability has been found where the conduct is atrocious and utterly intolerable in a civilized community. For example, conduct has been found sufficient to meet this standard where there

was repeated public ridicule based on race. See Knight v. Southeastern Council, 2001 Conn. Super Lexis 2732 (Conn. Super. Ct. Sept. 21, 2001).

The conduct Absher alleges, even if offensive, is simply not sufficiently extreme and outrageous as a matter of law. Accordingly, this claim, as alleged in proposed amended count fourteen, is not allowed.

C. The Negligent Supervision Claim

Flexi asserts that the proposed amended claim for negligent supervision does not cure the defects alleged in the motion to dismiss because Absher still alleges facts that demonstrate that once Absher notified it of Belsky's conduct, it took action to remedy her concerns. Flexi also maintains that it cannot be liable for any alleged conduct that occurred prior to the time it became aware of it. They maintain that in order to state a claim of negligent supervision, a plaintiff must allege that the employer knew or had reason to know that the employee had a propensity to engage in tortious conduct. See Shanks v. Walker, 116 F. Supp.2d 311, 314 (D. Conn 2000); Farricielli v. Bayer Corp., 116 F. Supp.2d 280, 286 (D. Conn. 1999).

The proposed amendment alleges that Flexi knew of Belsky's offensive conduct because in November, 2000, and

several times thereafter, including April 5, 2001, she reported it to Flexi's Director of Human Resources, that other employees had filed claims of sexual harassment, that she complained to Nolan on April 6, 2001, that on April 9, 2001, Grywalski told her that Flexi would not tolerate such conduct, and that she repeatedly complained to Belsky about his offensive conduct, yet Flexi failed to investigate, address or stop his conduct.

These allegations sufficiently allege that Flexi knew or had reason to know that Belsky had a propensity to engage in the alleged offensive conduct. Thus, assuming these allegations are true, it does not appear that Absher cannot prove any set of facts in support of her claim that would entitle her to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957); see also Still v. DeBuono, 101 F.3d 888 (2d Cir. 1996). She thus is entitled to offer evidence to support her claim. See United States v. Yale New Haven Hosp., 727 F. Supp. 784, 786 (D. Conn. 1990).

Accordingly, the proposed amended count twelve is allowed.

D. The Proposed Reworded Counts

The defendants object to the proposed amended counts that merely reword and reorganize the original counts because (1)

they do not change or add anything of substance, (2) significant discovery has been completed and (3) although the facts were known to Absher when the complaint was filed, she has not offered any explanation for the delay in seeking the amendments.

None of the defendants' claims demonstrate undue prejudice or reason to deny the proposed reworded counts. The right to amend pleadings encompasses the right to make changes in phraseology. See United States v. United States Trust Co. 106 F.R.D. 474, 476 (D. Mass. 1985); Farrell v. Hollingsworth, 43 F.R.D. 362 (D. S.C. 1968).

Accordingly, the proposed amendments to original counts one through five and eight through thirteen, as reworded in proposed counts one, two, four, and six through eleven, are allowed.

E. The Five Proposed New Counts

As previously stated, Absher's proposed amended complaint seeks to add an additional Title VII hostile work environment claim, a CFEPA sexual harassment claim, an ERISA claim, a claim of wanton and wilful conduct, and a claim of respondeat superior.

The defendants object to these new claims because substantial discovery has been conducted and because none of the counts

state claims on which relief may be granted.

1. The New Title VII Hostile Work Environment Claim

Flexi objects to the addition of a second Title VII hostile work environment claim as alleged in proposed count three on the ground that significant discovery has already been completed.

However, it appears that this claim arises from the same set of operative facts and the same time frame as set forth in the original complaint. See Ansan Assoc., 760 F.2d at 446. Although the defendants assert that some discovery has been conducted, the request to amend was made well in advance of the discovery deadline, and before the defendants completed Absher's deposition. Thus, this new Title VII claim would not require the defendant to expend significant additional resources on discovery and trial preparation and would not significantly delay resolution of the case. See Marsh v. Sheriff of Cayuga County, 36 Fed. Appx. 10 (2d Cir. 2002).

In the absence of undue prejudice, the addition of this Title VII hostile work environment as alleged in proposed count three is allowed.

2. The CFEPa Sexual Harassment Claim

Flexi also objects to the addition of another CFEPa claim of sexual harassment as alleged in proposed count five on the

grounds that substantial discovery has already been completed.

As is the case with the new Title VII claim, it also appears that this claim arises from the same set of operative facts and the same time frame as set forth in the original complaint. See Ansan Assoc., 760 F.2d at 446. Also, the request to add this claim was made well in advance of the discovery deadline, and before the defendants completed Absher's deposition. Thus, this new CFEPA claim would not require the defendant to expend significant additional resources on discovery and trial preparation and would not significantly delay resolution of the case. See Marsh, 36 Fed. Appx. at 10.

Thus, in the absence of undue prejudice, the addition of the CFEPA claim of sexual harassment as alleged in proposed count five is allowed.

3. The ERISA Claim

In proposed count fifteen, Absher alleges that Flexi's actions and conduct deprived her of her right to exercise her options under Flexi's January 22, 2001, "Incentive Stock Option Agreement" in violation of ERISA. Flexi maintains that these allegations do not state a claim under ERISA because a stock option agreement is not an employee benefit plan.

ERISA applies only to employee welfare benefit plans,

employee pension benefit plans, or plans which are both. See 29 U.S.C. § 1002(3). A welfare benefit plan is one that provides medical, unemployment, disability, death, vacation, and other specified benefits. See 29 U.S.C. § 1002(1). An employee pension benefit plan is any program or plan that provides retirement income to employees or results in a deferral of income by employees for periods extending to the termination of covered employment or beyond. See 29 U.S.C. § 1002(2). The words "provides retirement income" refer only to plans designed for the purpose of paying retirement income. See Murphy v. Inexco Oil Co., 611 F.2d 570, 575 (5th Cir. 1980). However, payments made by an employer to some or all employees as bonuses for work performed, unless systematically deferred to the termination of covered employment or beyond, or provide retirement income to employees, are excluded from the definition of pension plans. See 29 C.F.R. § 2510, 3-2(c).

A bonus plan is one that does not provide retirement income, but instead serves some other purpose such as providing increased compensation as an incentive or reward for a job well done. See Hahn v. National Westminster Bank, N.A., 99 F. Supp. 2d 275, 279 (E.D.N.Y. 2000) (citing Murphy, 611 F.2d at 575). However, a bonus plan may fall within ERISA's

definition of pension benefit plans if it provides that payments are systematically deferred to the termination of covered employment or beyond or are designed to provide retirement income. See id.; see also Emmenegger v. Bull Moose Tube Co., 197 F.3d 927, 932 (8th Cir. 1999) (holding that a phantom stock plan was a bonus plan not covered by ERISA where its stated purpose was to provide incentives and compensation for industry and efficiency); International Paper Co. v. Suwyn, 978 F. Supp. 508 (S.D.N.Y. 1997) (holding that plan was a bonus plan where its stated purpose was to motivate and reward a group of executives).

Here, the complaint does not set forth the terms or the purpose of Flexi's stock option agreement. Without any information about the plan, the court is unable to determine whether it is a pension benefit plan that is covered by ERISA or a non-ERISA bonus or incentive plan. Thus, looking to the allegations of the complaint, it does not appear that they are insufficient to state a claim under any theory. The ERISA claim, as alleged in proposed count fifteen, is not futile as a matter of law and will be allowed.

4. The Wanton & Wilful Conduct Claim

Flexi and Belsky maintain that the proposed new count sixteen, which alleges wanton and wilful misconduct, should

not be allowed because Absher does not identify the rights she alleges were violated by the alleged conduct, fails to identify the legal theory of liability underlying the claim, and fails to allege the elements of any specific cause of action.

Under Connecticut law, the mere use of the words "wanton conduct" is insufficient to state an actionable claim of reckless and wanton misconduct. See Kostivk v. Queally, 159 Conn. 91, 94 (1970). Wanton misconduct is reckless misconduct. It is conduct that involves a reckless disregard of the rights of others or the consequences of one's actions. See Craig v. Driscoll, 64 Conn. App. 699, 720-21 (2001). Wilful, wanton or reckless conduct is highly unreasonable conduct that is more than thoughtlessness or inadvertence. See id. Moreover, to be legally sufficient, a claim based on wanton or reckless conduct must allege some duty running from the defendant to the plaintiff. See Sheiman v. Lafayette Bank & Trust Co., 4 Conn. App. 39, 44 (Conn. App. Ct. 1985).

In the proposed claim of wanton and wilful conduct, Absher does not allege any facts from which such a duty may be proven. Rather, the claim merely alleges a conclusion of law. In the absence of sufficient alleged facts to support a duty and conduct involving a reckless disregard of others, the

claim is insufficient as a matter of law. See id.

Accordingly, the count purporting to allege a cause of action for wilful and wanton misconduct, as alleged in proposed count sixteen, is not allowed.

5. The Respondeat Superior Claim

Flexi asserts that the proposed new count seventeen, entitled "Respondeat Superior," should not be allowed because it does not invoke any specific law, does not allege the elements of any cause of action, and does not identify any specific conduct supporting the claim. The court agrees.

Under Connecticut law, an employer is liable under the doctrine of respondeat superior for the intentional torts of an employee only if the employee is acting both within the scope of his employment and in furtherance of the employer's business. See Larsen Chelsey Realty Co. v. Larsen, 232 Conn. 480, 500 (1995). This principle applies whether the plaintiff asserts either willful or negligent tortious conduct. See Rappaport v. Rosen Film Delivery Sys., Inc., 127 Conn. 524, 526 (1941). For respondeat superior to apply, the affairs of the employer must be furthered by the objectionable acts. See Larsen, 232 Conn. at 501. "A master is liable only for those torts of his servant . . . which have for their purpose the execution of the master's orders or the doing of the work

assigned to him to do." Bradlow v. American Dist. Tel. Co., 131 Conn. 192, 196 (1944). Unless the employee was actuated at least in part by a purpose to serve the employer, the employer is not liable. See A-G Foods, Inc. v. Pepperidge Farm, Inc., 216 Conn. 200, 210 (1990).

Here, Absher has not alleged that Belsky's acts were within the scope of his employment and in furtherance of Flexi's business interests. Accordingly, she has not stated a claim for relief under the doctrine of respondeat superior, and the proposed new count seventeen is not allowed.

CONCLUSION

For the foregoing reasons, the defendants' motion to dismiss the complaint is GRANTED in part, DENIED in part, and DENIED in part as moot. The plaintiff's motion to amend the complaint is GRANTED in part and DENIED in part. The plaintiff shall file an amended complaint consistent with this ruling by May 2, 2003. Thereafter, the parties shall meet and agree to a revised case management plan setting forth a new discovery deadline that will accommodate any additional discovery the defendants deem necessary as a result of the allegations in the amended complaint.

SO ORDERED this day of April, 2003, at Bridgeport,
Connecticut.

Alan H. Nevas
United States District Judge