UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Radesky	:	
	:	
v.	:	**No. 3:02cv1304(JBA)**
	:	
First American Title Insurance Co., et al.	:	

Ruling on Motions to Dismiss [Docs. ##24, 28]

Defendants First American Title Insurance Co. ("First American"), Stephen Maggiola and Corrine McManus have moved [Doc. #24] to dismiss certain common law claims in Plaintiff Laura Radesky's complaint, which principally charges sexual harassment and retaliation. Defendant James Kavanagh has moved [Doc. #28] to dismiss the portion of Radesky's complaint alleging retaliation by Kavanagh for Radesky's report of sexual harassment. For the reasons set out below, (1) the motion of First American, Maggiola and McManus is granted as to the intentional and negligent infliction of emotional distress and invasion of privacy counts against those defendants (Counts 12-15) and denied as to the negligence count (Count 18), and (2) Kavanagh's motion is denied.

I. Factual Background[1]

Radesky was employed at First American from 1996 through August 10, 2001, initially in the Data Entry department and subsequently as Policy Control Supervisor. Radesky alleges that her supervisor, James Kavanagh, "aggressively attempted to initiate a personal relationship" with her (Am. Compl. ¶ 6) from 1999 until May 2001, when Kavanagh's employment was terminated. These aggressive attempts allegedly included inappropriate physical touching, "relentless[] . . . pursuit" of a personal relationship outside of work, and "flirtatious comments." (Id.) After Radesky reported Kavanagh's behavior to First American Vice President Stephen Maggiola in September 2000, Maggiola told her that he had met with Kavanagh and told him to conduct himself more professionally, but Maggiola "refused to document the incident or make [Regional Vice President Peter Norden] aware of the situation," id. ¶ 8, despite Radesky's belief that First

[1]The following recitation is taken from plaintiff's Amended Complaint [Doc. #16], the facts of which are taken as true for the purposes of this motion. See Cooper v. Parsky, 140 F.3d 433, 440 (2d Cir. 1998). While plaintiff has attached a series of documents to her opposition brief, only the allegations in the complaint have been considered by the Court in ruling on this motion. See Fed. R. Civ. P. 12(b) ("If, on a motion asserting the defense [of failure] to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.") (emphasis added).

American's sexual harassment policy required such documentation and reporting.

After a subsequent multi-day episode of alleged pursuit of a personal relationship, Radesky met with First American Office Manager Corrine McManus on November 25, 2000 and informed her of this episode. Radeksy "confided to McManus that she was not comfortable reporting Kavanagh's actions because she feared retaliation," id. ¶ 12, and McManus assured her that she would not be penalized.

> After speaking to Maggiola, McManus informed [Radesky] that Maggiola was going to discuss [Radesky's] complaint with Kavanagh. As [Radesky] was feeling ill, she left work early. Later that day, Kavanagh arrived at [Radesky's] home and began pressuring her to let him into her home.

Id. Radesky reported the incident to Maggiola, who did not speak to Kavanagh until several days later (November 29, 2000), when Maggiola warned Kavanagh not to contact Radesky or visit her home.

In December 2000, Radesky was promoted to Policy Control Supervisor "and she attempted to limit her contact with Kavanagh," but Kavanagh "continued to insist that [Radesky] assist him, which made [Radesky] extremely uncomfortable." (Id. ¶ 14.) In February 2001, Kavanagh told Radesky that he had spoken with Maggiola and Radesky was to act as Kavanagh's assistant and resume working closely with him, although Maggiola never gave Radesky this instruction himself. From March 2001 to

May 2001, Kavanagh "blatantly and openly continued his relentless pursuit of a relationship" with Radesky, id. ¶ 16, and made another uninvited visit to her home in April 2001.

In May 2001, Radesky again reported Kavanagh's behavior to McManus, and told McManus "that she could no longer continue working for [First American] in such a hostile working environment." (Id. ¶ 18.) McManus assured Radesky that she would speak to Maggiola, and Maggiola subsequently informed Radesky that he had forwarded her complaint to First American's regional manager, and that Kavanagh's employment had been terminated, but that Radesky was not to reveal the reasons for Kavanagh's termination to anyone. After Kavanagh's termination,

> Maggiola and McManus treated [Radesky] in a condescending manner. Many of the employees refused to interact with [Radesky] and socially isolated her. The managers in the office ostracized [Radesky] and refused to assign her work[,] thereby reducing [her] workload and duties.

Id. ¶ 20.

Despite his termination, Kavanagh "continued to maintain a close relationship" with First American, id. ¶ 21, driving a First American company car and coming into frequent contact with Radesky by virtue of his new employment with an agent of First American. In June 2001, Radesky received a new job description that included fewer duties, and after a medical leave from late June through early July, her work duties were again reduced. Radesky asked Maggiola for an explanation, and Maggiola "assured

[her] that there was no problem with her work and that [First American] had big plans for the policy department and that [Radesky] would have 'a big part in this.'" (Id. ¶ 24.)

On August 10, 2001, McManus prepared and Maggiola gave Radesky her annual performance review. Despite prior consistently positive evaluations, this review charged that Radesky's "working relationships are frequently unsatisfactory," and that

> too often Laura has exhibited a lack of tact or consideration to others. She can be difficult to work with because she displays negative and rude behavior . . . she would understand others better if she did not take things personally. Her attitude in meetings has been unsatisfactory.

Id. ¶ 28 (internal quotation omitted; alterations in original). When Radesky went to discuss her evaluation with Maggiola, she was informed that her position had been eliminated effective that day. After exhausting her administrative remedies, Radesky commenced this suit against First American, McManus, Maggiola and Kavanaugh.

II. Standard

When deciding a motion to dismiss, the Court must accept all well-pleaded allegations as true and draw all reasonable inferences in favor of the pleader. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the

plaintiff can prove no set of facts in support of his or her claim which would entitle him or her to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

III. First American's, Maggiola's and McManus's Motion to Dismiss

A. Intentional Infliction of Emotional Distress

In order to establish the tort of intentional infliction of emotion distress, Radesky must allege:

> (1) that the actor intended to inflict emotional distress or that he knew or should have known that emotional distress was a likely result of his conduct; (2) that the conduct was extreme and outrageous; (3) that the defendant's conduct was the cause of the plaintiff's distress and (4) that the emotional distress sustained by the plaintiff was severe.

Petyan v. Ellis, 200 Conn. 243, 253 (1986) (citations omitted). With respect to the requirement that the alleged conduct be extreme and outrageous, "[w]hether a defendant's conduct is sufficient to satisfy the requirement that it be extreme and outrageous is initially a question for the court to determine . . . . Only where reasonable minds disagree does it become an issue for the jury." Appleton v. Board of Educ., 254 Conn. 205, 211

(2000) (citation omitted). Because the element of intent is separate from the requirement that the behavior be extreme and outrageous, the question is whether the defendants' conduct, not the motive behind such conduct, is itself extreme and outrageous:

> It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.

Restatement (Second) of Torts § 46, cmt d; accord Miner v. Town of Cheshire, 126 F. Supp. 2d 184, 195 (D. Conn. 2000).

McManus and Maggiola (and by extension First American) are alleged to have: (1) taken insufficient action in response to Radesky's complaints about Kavanagh, (2) lessened her job duties, and (3) terminated her employment. With the motivation behind this conduct irrelevant to the extreme and outrageous inquiry, Radesky's allegations against First American, McManus and Maggiola do not rise to the level of extreme and outrageous conduct. See Miner, 126 F. Supp. 2d at 195 (employer's alleged refusal to protect employee from supervisor's sexual harassment not sufficiently extreme or outrageous to support intentional infliction claim); Newtown v. Shell Oil Co., 52 F. Supp. 2d 366, 375 (D. Conn. 1999) (negligent failure to prevent sexual

harassment and wrongfully-motivated termination of employment insufficient to support a claim of intentional infliction of emotional distress); Hill v. Pinkerton Sec. & Investigation Servs., 977 F. Supp. 148, 160 (D. Conn. 1997) (no extreme and outrageous conduct where employee was transferred to two other locations, disciplined, and reprimanded for complaining of race discrimination); Venterina v. Cummings & Lockwood, 117 F. Supp. 2d 114, 120 (D. Conn. 1999) (mere termination of employment, even if wrongfully-motivated, not extreme and outrageous). Accordingly, this claim against First American, Maggiola and McManus must be dismissed.

B. Negligent Infliction of Emotional Distress

The Connecticut Supreme Court has now clarified that damages for negligent infliction of emotional distress are not recoverable for injury incurring in the context of an ongoing employment relationship. Perodeau v. City of Hartford, 259 Conn. 729, 762-763 (2002). Thus, Radesky's claim of negligent infliction of emotional distress is viable only if based upon unreasonable conduct in the termination process and not based solely on the termination itself: "[A] wrongful termination is neither a necessary nor a sufficient predicate for a claim of negligent infliction of emotional distress." Id. at 751. Thus, the focus is on the method or means employed to effectuate or

give notice of the termination. Here, the only allegedly wrongful conduct related to the termination process is the allegation that Radesky's termination was wrongfully-motivated. Parsons v. United Techs. Corp., 243 Conn. 66, 88-89 (1997) ("The mere termination of employment, even where it is wrongful, is therefore not, by itself, enough to sustain a claim for negligent infliction of emotional distress."); compare Chen v. Pitney Bowes Corp., 195 F. Supp. 2d 368 (D. Conn. 2002) (negligent infliction claim related to termination of employment survived summary judgment because reasonable jurors could find the way the employer conveyed to plaintiff its notice of his termination was unreasonable under the circumstances).

C. Invasion of Privacy

Radesky's complaint also alleges the tort of intrusion upon seclusion (one subset of invasion of privacy) against Kavanagh and derivatively (see Pl.'s Mem. Opp. [Doc. #26] at 22) First American.[2] Because invasion of privacy in the form of intrusion upon seclusion is an intentional tort, Giantis v. American

[2]Plaintiff relies on a line of cases holding that the intrusion upon seclusion variety of invasion of privacy is not limited to inclusions upon physical seclusion. E.g., Phillips v. Smalley Maintenance Services, Inc., 435 So.2d 705 (Ala. 1983) (supervisor's "intrusive and coercive sexual demands upon [employee]" were an "examination into her private concerns, that is, improper inquiries into her personal sexual proclivities and personality," and were actionable as an invasion of privacy) (internal quotations omitted).

Mortgage Services, LP, No. CV000092711S, 2002 WL 1009703 at *6 (Conn. Super. April 24, 2002), First American argues that this claim against it must be dismissed because it cannot be held vicariously liable unless the tort was committed within the scope of Kavanagh's employment.

The Connecticut Supreme Court "ha[s] long adhered to the principle that in order to hold an employer liable for the intentional torts of his employee, the employee must be acting within the scope of his employment and in furtherance of the employer's business." A-G Foods, Inc. v. Pepperidge Farm, Inc., 216 Conn. 200, 208 (1990) (citing Cardona v. Valentin, 160 Conn. 18, 22 (1970); Pelletier v. Bilbiles, 154 Conn. 544, 547 (1967); Antinozzi v. A. Vincent Pepe Co., 117 Conn. 11, 13 (1933); Son v. Hartford Ice Cream Co., 102 Conn. 696, 699 (1925)). While the question is often one of fact for the jury, there are times when conduct is so clearly outside the scope employment that it is a question of law. Id. at 207 (citations omitted). The mere fact that the tortfeasor-employee committed the tortious acts during business hours or at the employer's place of business is not sufficient to impute vicarious liability. See Cardona, 160 Conn. at 22-24 (poolroom owner not vicariously liable for employee's intentional stabbing of patron in poolroom); A-G Foods, 216 Conn. at 209 ("The factual conclusion that Spinelli's fraud occurred during business hours, however, is not sufficient to support the

conclusion that Spinelli was acting within the scope of his employment.") (citations omitted).

Absent special circumstances tending to show otherwise, see infra note 5, sexual harassment and sexual assault are outside the scope of an employee's employment and not in furtherance of the employer's business. See Roberts v. Circuit-Wise, Inc., 142 F. Supp. 2d 211, 217 (D. Conn. 2001) (sexual harassment); Abate v. Circuit-Wise, Inc., 130 F. Supp. 2d 341, 347-348 (D. Conn. 2001) (sexual harassment); Gutierrez v. Thorne, 13 Conn. App. 493, 498-499 (1988) (sexual assault); Girden v. Sandals Int'l, Ltd., 206 F. Supp. 2d 605, 607 (S.D.N.Y. 2002) (applying Connecticut law) (sexual assault); Reynolds v. Zizka, No. CV 950555222S, 1998 WL 123047 at *3 (Conn. Super. Mar. 5, 1998) (sexual exploitation) ("Courts of this state have held as a matter of law that when the tortfeasor-employee's activity with the alleged victim became sexual, the employee abandoned and ceased to further the employer's business.") (citations omitted). The acts that Radesky claims make Kavanagh liable for invasion of privacy appear to be identical to her allegations of acts constituting sexual harassment, see supra note 3, and Radesky's complaint alleges no facts from which it could be concluded that Kavanagh's alleged conduct was in the scope of his employment or

in furtherance of First American's business.[3] Thus, Radesky has failed to state a claim against First American on a respondeat superior theory and the invasion of privacy count against First American must be dismissed.

D. Negligence

The last count of Radesky's complaint asserts that First American was negligent in its hiring, supervision and retention of Kavanagh, McManus and Maggiola. While First American claims that the Amended Complaint "does not allege that First American either knew or should have known prior to hiring any individual that [such individual] would allegedly engage in tortious behavior" and fails to allege that First American failed to supervise these individuals, Mem. Supp. [Doc. #25] at 10-11,

[3]For example, in Mullen v. Horton, 46 Conn. App. 759 (1997), the defendant, a priest/psychologist who counseled plaintiff, began to have sexual contact with her during counseling sessions. The court held that the question of whether his employer was vicariously liable was a question of fact for the jury: "a trier of fact could reasonably determine that Horton's sexual relationship with the plaintiff was a misguided attempt at pastoral-psychological counseling, or even an unauthorized, unethical, tortious method of pastoral counseling, but not an abandonment of church business." Id. at 765-66; see also Martinelli v. Bridgeport Roman Catholic Diocesan Corp., 989 F. Supp. 110, 118 (D. Conn. 1997) (plaintiff's allegation that at least one sexual encounter with priest was presented to him as similar to Holy Communion and another incident occurred immediately after plaintiff received the sacrament of reconciliation in an unorthodox fashion was sufficient to create a jury question as to whether church was vicariously liable for priest's abuse).

Radesky's complaint adequately pleads her negligence claims against First American by pleading the four elements of negligence: duty (Am. Compl. ¶ 158), breach (Id. ¶ 160), causation and injury (Id. ¶ 161). See Catz v. Rubenstein, 201 Conn. 39 (1986) ("A breach of duty by the defendant and a causal connection between the defendant's breach of duty and the resulting harm to the plaintiff are essential elements of a cause of action in negligence.") (citations omitted).

Far from being "silent as to the purported fitness or competence of Kavanagh, Maggiola or McManus" (as defendants maintain, see [Doc. #25] at 10) Radesky alleges that First American "knew or should have known that Kavanagh, Maggiola, and McManus had a propensity to engage in the behavior described herein," Am. Compl. ¶ 159, i.e., were unfit or incompetent for their positions. Radesky's complaint is replete with factual allegations that these employees failed to follow First American's established standards of conduct,[4] yet discipline was either tardy (as when Kavanagh was not fired until after Radesky complained several times) or non-existent (as Maggiola and

[4] E.g., the numerous allegations of sexual harassment by Kavanagh throughout the complaint, all allegedly in violation of First American's sexual harassment policy; Am. Compl. ¶ 8 (Maggiola did not follow First American's sexual harassment reporting policy with regard to the September 2000 complaints of sexual harassment); id. ¶ 28 (McManus violated First American's policy on retaliation for sexual harassment complaints by retaliating against her with a negative performance review).

McManus were never disciplined). Thus, Radesky's complaint adequately pleads First American's negligence in the hiring, supervision and retention of Kavanagh, McManus and Maggiola, and the motion to dismiss count eighteen is denied.

IV. Kavanagh's Motion to Dismiss

Kavanagh argues that the retaliation counts against him (Counts Six and Eight) are legally insufficient because the retaliation complained of in the complaint (which he reads as encompassing only Radesky's demotion, negative performance review and discharge) occurred after his employment was terminated in May 2001. In opposition, Radesky points to Kavanagh's directive in February 2001 that Radesky should once again act as his assistant despite her promotion to Policy Control Supervisor as an act of retaliation. Pl.'s Mem. Opp. [Doc. #31] at 9. The facts constituting this alleged act of retaliation are clearly pled in the complaint, see Am. Compl. ¶ 15, and such conduct could be viewed as demoting her to a lower position. Because Radesky's complaint adequately alleges unlawful retaliation, Kavanagh's motion must be denied.

V. Conclusion

For the reasons set out above, (1) the motion [Doc. #24] of First American, Maggiola and McManus is granted as to the

intentional and negligent infliction of emotional distress and invasion of privacy counts against those defendants (Counts 12-15) and denied as to the negligence count (Count 18), and (2) Kavanagh's motion [Doc. #28] is denied.

IT IS SO ORDERED.

/s/

Janet Bond Arterton, U.S.D.J.

Dated at New Haven, Connecticut, this 29th day of August, 2003.