THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Merrimack Superior Court
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NOTICE OF DECISION

File Copy

Case Name: **Katherine Frederick v State of New Hampshire Department of Health and Human Services**
Case Number: **217-2018-CV-00255**

Enclosed please find a copy of the court's order of December 05, 2018 relative to:

ORDER

December 05, 2018

Catherine J. Ruffle
Clerk of Court

(485)

C: Benjamin T. King, ESQ; Lindsey B. Courtney, ESQ; Francis C. Fredericks, ESQ

The State of New Hampshire

MERRIMACK, SS **SUPERIOR COURT**

Katherine Frederick

v.

State of New Hampshire Department of Health and Human Services

No. 217-2018-CV-255

ORDER

Plaintiff, Katharine Frederick has brought a claim of wrongful discharge against her former employer, Defendant, State of New Hampshire Department of Health and Human Services. Defendant moves to dismiss. Plaintiff objects. A hearing was held on November 20, 2018. For the following reasons, Defendant's Motion is DENIED.

I

The following facts are drawn from the Complaint. For purposes of a Motion to Dismiss, a court must assume the allegations, as all reasonable inferences to be taken therefrom, are true. Hilario v. Reardon, 158 N.H. 56, 61 (2008). Defendant hired Plaintiff in November 2011. (Complaint ¶ 6). In 2012, Plaintiff became pregnant. (Id. ¶ 7). Later that year, she was diagnosed with gestational diabetes and anemia. (Id. ¶ 9). She advised her supervisor, Ms. Hebert, about her diagnosis and pregnancy, and, on March 19, 2012, provided her with a letter from her medical provider recommending that Plaintiff "work with her employer to modify her work schedule" in order to accommodate her diagnosis. (Id. ¶¶ 10-11). Ms. Hebert allegedly responded hostilely, pressuring Plaintiff to work "harder and faster," and insinuating that Plaintiff simply "did not want to be at work." (Id. ¶ 12). Her behavior indicated a "discriminatory animus

towards [Plaintiff] due to [Plaintiff's] pregnancy." (Id. ¶ 12).

On April 11, 2012, Plaintiff met with Human Resources ("HR") to report Ms. Hebert's conduct and to request accommodations for her impairments. (Id. ¶ 13). HR proposed an accommodation plan that Plaintiff found unsatisfactory. Ultimately, the parties were unable to come to an agreement. (Id.)

Beginning on May 14, 2012, Plaintiff went on FMLA leave for the duration of her pregnancy. (Id. ¶ 14). She gave birth on May 22, 2012. (Id. ¶ 16). She was advised by medical personnel that, given the state of her health, breastfeeding her child would be important for his health and her own. (Id. ¶ 17). As time went on, Plaintiff discovered that the infant refused to take any nutrition by bottle. (Id. ¶ 18).

On July 25, 2012, after receiving permission from her medical provider, Plaintiff notified Ms. Hebert that she was ready to return to work on a modified schedule. (Id. ¶ 19-20). Plaintiff told Ms. Hebert that her medical provider suggested she work a four hour work day with a thirty minute break to breast feed her child. (Id. ¶ 19). Plaintiff asked Ms. Hebert's permission to use that break time, and possibly some additional time, to breastfeed her son at his daycare facility located near the office. (Id. ¶ 20). Ms. Hebert refused the request, instead responding that she would make a lactation room available on site such that Plaintiff could pump breastmilk into a bottle for the infant. (Id.¶ 21). Plaintiff protested, but Ms. Hebert was unmoved. (Id.)

Later, HR advised Plaintiff that she could only return to work if she "were able to work the complete 4 hours of work and not leave during this time." (Id.¶ 22). Plaintiff reached out to the Director of HR, detailing her unique situation and that the restriction was unreasonable. Her protestations were unavailing. (Id.¶ 25).

Due to the disagreement, Plaintiff did not return to work by the time her FMLA

leave expired on August 5, 2012. (Id.¶ 24, 29). Defendant summoned Plaintiff to a disciplinary hearing on August 23, 2012. At the hearing, Plaintiff again argued that she be allowed to breastfeed her son in the on-site lactation room or that she be allowed extended break time to breastfeed her son off-site. (Id. ¶ 33). She was unsuccessful. Plaintiff was fired by letter dated September 21, 2012. (Id. ¶ 35).

On September 21, 2014, Plaintiff commenced a lawsuit against Defendant for wrongful termination in the United States District Court for the District of New Hampshire. (Id. ¶ 36). The federal court dismissed the action on May 5, 2017 based on Eleventh Amendment immunity. (Id.¶ 39). Pursuant to RSA 508:10, Plaintiff refiled her claim for wrongful discharge in this Court on May 2, 2018.

II

In ruling on a Motion to Dismiss, the Court must determine "whether the plaintiff's allegations are reasonably susceptible of a construction that would permit recovery." Hobin v. Coldwell Banker Residential Affiliates, Inc., 144 N.H. 626, 628 (2000) (quoting Miami Subs Corp. v. Murray Family Trust & Kenneth Dash P'ship, 142 N.H. 501, 516 (1997)). This threshold inquiry involves testing the facts alleged in the pleadings against the applicable law. See Williams v. O'Brien, 140 N.H. 595, 598 (1995). Dismissal is appropriate "[i]f the facts as pled cannot constitute a basis for legal relief." Hobin, 144 N.H. at 628 (quoting Buckingham v. R.J. Reynolds Tobacco Co., 142 N.H. 822, 825 (1998)). When the Court tests the pleadings, it "assume[s] the truth of the facts alleged in the plaintiff's (petitioners') pleadings and construes all reasonable inferences in the light most favorable to him." Hobin, 144 N.H. at 628 (citation omitted). However, the Court "need not accept allegations in the writ that are merely conclusions of law." Konefal v. Hollis/Brookline Coop. Sch. Dist., 143 N.H. 256, 258 (1998).

III

The Court will approach Defendant's three arguments for dismissal in turn.

A

As a general proposition, the State enjoys a sovereign immunity that insulates it from suit and every claim against the State requires a statutory waiver of that sovereign immunity. State v. Brosseau, 124 N.H. 184, 189 (1983). Such a statutory waiver exists for certain intentional tort claims against the State. See RSA 541:B. However, in order to avail herself of this statutory waiver, Plaintiff is obligated to bring her claim "within 3 years of the date of the alleged [injury]." RSA 541-B: 14, IV.

Plaintiff filed her claim in *this* Court in May 2018, six years after her September 2012 firing. But she filed in federal court in September 2014, two years after the "injury" and within the three year statute of limitations set forth in RSA 541-B: 14, IV. So, Plaintiff in fact *did* timely file her action under RSA 541-B; she simply did so in the wrong court. RSA 508:10 permits "an action to be brought after the general limitation[1] has run, where a prior action, seasonably brought, should be dismissed for reasons not barring the right of action or determining it upon the merits." Berg v. Kelley, 134 N.H. 255, 257 (1991). The second action must be filed within one year of the first judgment dismissing the case. RSA 508:10.

Defendant concedes that the federal court never reached a decision on the merits.[2] It also concedes that Plaintiff did file this state court action within the requisite one year after the May 2017 order dismissing the case. But Defendant argues that cases of sovereign immunity are unique and outside the purview of the savings statute.

[1] The general statute of limitations is also three years, the same as that set forth in RSA 541-B. RSA 508:4.
[2] Dismissal of a claim based on Eleventh Amendment immunity does not go towards the "legal and factual sufficiency of a claim," and therefore shall not be considered a dismissal "on the merits." See 18 James Wm. Moore, Moore's Federal Practice § 131.30[3][a] (3d ed.2014).

Defendant maintains that applying the savings statute here would inappropriately "confer rights independent of the underlying action." In other words, applying the savings statute in this case would not *just* allow a tort action to go forward, it would imply that the savings statute serves as a statutory waiver of immunity just like RSA 541:B. Defendant maintains that RSA 508:10 does not explicitly mention whether it is applicable to sovereign immunity cases, but the fact that it *does* mention "general limitations" counsels against applying it to RSA 541: B's unique statute of limitations. In substance, Defendant asserts that the Legislature never intended the savings statute to be applicable in cases involving the waiver of sovereign immunity.

To accept the State's argument, the Court would need to adopt a narrow construction of the savings statute which would be inconsistent with the long-standing principle of New Hampshire jurisprudence that that the "liberal purpose of the [savings] statute is not to be frittered away by any narrow construction. Berg v. Kelley, 134 N.H. 255, 257 (1991). The savings statute has existed in some form in New Hampshire since 1791 when a statute of limitations identical to the English statute was enacted. Milford Quarry Company v. Boston and Maine Railroad, 78 N.H. 176, 177 (1916), citing N.H. Laws 1791, page 158 and 21 Jac. . I, ch. 16 § 4 (1623). The statute appears in the first codification of New Hampshire law, the Revised Statutes in 1842. Milford Quarry Company v. Boston and Maine Railroad, 78 N.H. at 177. As the Court noted in Milford Quarry:

> The only changes since 1842 are verbal, apparently made to satisfy the literary taste of the revisers of 1867 and 1891. Under this section the sole test of the right to bring a new action within one year after the judgment against the plaintiff and one brought in the time limited is whether the right of action is or is not barred by the first judgment.

Milford Quarry at 177.

The State's argument requires the Court to, in substance, decide that a remedial provision of Anglo-American Jurisprudence in effect for almost 400 years should not be applied in cases involving a waiver of sovereign immunity because an explicit waiver is not included within the statute- even though the original statute effectuating this remedial provision preexisted the demise of sovereign immunity for about 350 years. It is hard to imagine that the Legislature so intended.

First, it is a bedrock principle of New Hampshire jurisprudence that cases must be decided on the merits. In the 19th century Chief Justice Doe stated that "judgment, and any necessary process for carrying it into effect, being directed to the ends of justice, cannot be obstructed by imaginary barriers of form". Walker v. Walker, 63 N.H. 321, 328 (1885). As the Court more recently noted in rejecting the view of other courts to the contrary, and holding that RSA 508:10 should be liberally interpreted to allow multiple successive filings under it, "New Hampshire procedure has focused on "what justice requires" not on "strict precision in form". Roberts v. General Motors, 140 N.H. 723, 728 (1996). The State has provided no authority for the proposition that enactment of a statute providing for waiver of sovereign immunity would somehow limit application of the 400-year-old common-law principle articulated by the savings statute. Defendant's Motion to Dismiss on this ground is unavailing.

B

Defendant contends that Plaintiff has not pled sufficient facts to overcome the State's general sovereign immunity from suit for intentional torts. "Sovereign immunity protects the State itself from suit in its own courts without its consent, and shields it from liability for torts committed by its officers and employees." Everitt v. Gen. Elec.

Co., 156 N.H. 202, 209 (2007). The State is specifically immune from intentional torts "provided that the employee whose conduct gives rise to the claim reasonably believes, at the time of the acts or omissions complained of, that [her] conduct was lawful, and provided further that the acts complained of were within the scope of official duties of the employee of the state." RSA 541-B:19. The question for the Court, therefore, is whether Plaintiff sufficiently alleged that Defendant "lacked a reasonable belief in the lawfulness of [its] conduct." Chalmers v. Harris Motors, 104 N.H. 111, 116 (1962).[3].

Plaintiff alleges that she had a health condition that necessitated her breastfeeding her child. Supported by letters from her medical provider, Plaintiff asked her supervisor and HR for reasonable accommodations to ensure she could properly care for her child and uphold her work obligations. No agreement was ever reached as to these accommodations. Rather she was fired. Citing to her supervisors outward hostility towards the idea of her breastfeeding, Plaintiff presents a cognizable theory that she was fired for seeking to breastfeed her child per her medical provider's recommendation. It is at least a jury question whether as plaintiff alleges, "public policy encourages a mother to breastfeed her child, particularly where breastfeeding is imperative for the child's health." (Obj. Mot. to Dismiss, at 14). Drawing all inferences in favor of Plaintiff, a plausible theory that Plaintiff was fired for a reason contravening public policy is sufficient for her claim to pass muster at the Motion to Dismiss stage. See Lacasse v. Spaulding Youth Ctr., 154 N.H. 246, 248 (2006). Moreover, the question of what

[3] The Court acknowledges Plaintiff's contention that RSA 541:B-19(d) should not apply to wrongful discharge claims because, in short, it was not included in the "exhaustive list of the intentional torts covered in the statute." However, the Court declines to take that position. For one, RSA 541:B-19(d) was enacted before Porter, the Supreme Court case finding that wrongful discharge is an action in tort. Thus, even if the list were designed to be "exhaustive," the legislature would not have considered mentioning wrongful discharge. Moreover, Plaintiff points to no language in the statute suggesting the list was meant to be exhaustive.

constitutes public policy is general a question of fact for the jury. Id. For now, Plaintiff's allegations are sufficient.

C

Defendant finally moves to dismiss Plaintiff's claim for wrongful discharge on the ground that she was not an "at-will" employee, which Defendant maintains is necessary in order to avail herself of this cause of action. Defendant concedes that the Supreme Court has never expressly addressed the question of "whether a person who is not an at-will employee may maintain an action for wrongful termination." Conkey v. Town of Dorchester, 2015 WL 11077804, at *3 (N.H. March 16, 2015). Rather, Defendant argues that a plain reading of past cases establishes that a cause of action for wrongful termination is clearly available *only* to at-will employees, citing Cloutier v. Great Atlantic & Pacific Tea Co., 121 N.H. 915 (1981) and Censullo v. Brenka Video, Inc., 989 F.2d 40, 42 (1st Cir. 1993).

It is true that both Cloutier and Consullo speak in terms of the protection afforded to at will employees. Cloutier, 121 N.H. at 919; Consullo, 989 F.2d at 42. Defendant's citations to Cloutier and Consuello ignore the fact that in Porter v. City of Manchester, 151 N.H. 30, 38 (2014), the New Hampshire Supreme Court specifically stated that "wrongful termination is a cause of action in tort." 151 N.H. at 38. While a contract action "protects [one's] interest in having [specific] promises performed," a tort action, more broadly, "protects [one's] interests in freedom from various kinds of harm." Id. existence of the tort of wrongful termination specifically imposes a duty on the employer to "not terminate an employee for performing an act public policy would encourage." Id. The duty is independent of the employment contract. Id. ("the facts constituting the breach of contract also constitute a breach of duty owed by the

defendant to the plaintiff *independent* of the contract, a separate claim for tort will lie").

Nothing in Porter confines the availability of this tort to at-will employees alone. Moreover, the Court agrees with the reasoning in Barry v. State of New Hampshire Department of Health and Human Services that, absent clear legislative intent, legislative remedies do not displace common-law remedies. Hillsborough North, No. 216-2013-CV-00553 (May 20, 2015) (Order, Brown, J.).[4] In this case, there is no language in RSA 21-I and RSA 273-A, the statutes governing state employees, evincing a legislative intent to foreclose contract employees the ability to pursue common-law claims of wrongful discharge. Id.; compare RSA 281-A:8 (expressly providing, in the workers' compensation context, a statutory waiver of "all rights of action whether at common law or by statute or provided by the laws of any other state"). Thus, Defendant's reasoning that access to common-law tort remedies should be foreclosed to contract employees merely because they enjoy a "comprehensive set of protections" not afforded at-will employees, alone, is unconvincing. The opinion of the Washington Supreme Court in Smith is persuasive:

> The theoretical reason for labeling a discharge 'wrongful' is not based on the terms and conditions of the employment contract, but rather arises out of the employer's duty to conduct its affairs in compliance with public policy. . . . It logically follows when *any* employee is terminated in violation of a clear mandate of public policy, the employee should be permitted to recover for the violation of his or her legal rights. . . . [Thus,] while the contractual remedies available to certain employees redress violations of the underlying employment contact, these remedies do not protect an employee who is fired not only 'for cause,' but also in violation of public policy. [Defendant's] position thus illogically grants at-will employees *greater* protection from these tortious terminations due to an erroneous presumption the contractual employee does not 'need' such protection.

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[4] The Court in Barry relies on the reasoning set forth in Smith v. Bates Technical Coll., 991 P.3d 1135, 1140-42 (Wash. 2000). The Court likewise agrees with the reasoning of the Washington Supreme Court.

991 P.3d at 1141-42 (emphasis in original).

As in Smith, the Porter Court reasoned that the purpose of the tort of wrongful dischargeis to protect "employees from the harms that result from a wrongful discharge," and to encourage employees to act and report in a way commensurate with public policy. 151 N.H. at 138. There is no reasoned distinction why this protection should not be available to employees who have a written contract with the employer.

For the foregoing reasons, Defendant's Motion to Dismiss is DENIED.

SO ORDERED

12/5/18
DATE

Richard B. McNamara,
Presiding Justice