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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2019-3935-G

OCTAVIUS ROWE

vs.

CITY OF BOSTON and others[1]

MEMORANDUM OF DECISION AND ORDER ON MOTIONS TO DISMISS OF ALL DEFENDANTS

Plaintiff Octavius Rowe was a Boston firefighter. According to his Complaint, his employer, Defendant City of Boston, became concerned about what he was posting online. The City asked Defendant Dominguez Investigations, Inc. ("DII") to investigate Mr. Rowe's social media postings for inappropriate content. DII apparently reported back to the City about 149 social media postings. In 2018, the City terminated Mr. Rowe's employment. Mr. Rowe appealed his termination to the Massachusetts Civil Service Commission, which affirmed it.

In this case, plaintiff sues the City, its Fire Commissioner Joseph E. Finn, and DII, essentially for damages.[2] His Complaint contains nine counts. He sues the City and Commissioner Finn for race discrimination in connection with administrative leave and termination (Count I); race discrimination in connection with disparate treatment and discipline (Count II); religious discrimination (Count III); retaliation (Count IV); and breach of contract (Count V). He sues Commissioner Finn and DII for defamation (Count VI); and negligence (a

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[1]Joseph E. Finn and Dominguez Investigations, Inc.

[2]Mr. Rowe also seeks a declaratory judgment that Defendants have violated his rights, and an injunction preventing Defendants from discriminating against him or violating his rights. These subsidiary prayers for relief do not change the essential nature of this case as a suit for damages.

second count labeled Count V).[3] He sues DII for invasion of privacy (a second count labeled Count VI); and tortious interference with advantageous contractual relationship (Count VII).

Before me are two motions to dismiss portions of the Complaint, one filed by the City and Commissioner Finn and the other filed by DII. I heard oral argument on both motions on November 10, 2020. I will now allow DII's motion to dismiss, and allow in part and deny in part the motion to dismiss filed by the City and Commissioner Finn, as described below. At the request of Plaintiff Rowe, I will also allow Mr. Rowe to file a motion to amend his Complaint, which defendants will be free to oppose, also as described below.

Background

1. The Materials to Be Considered

Although motions to dismiss are generally decided based on the contents of the complaint alone, all parties have submitted many documents in support of their arguments. Rather than converting this motion into a summary judgment motion as would be permitted by Mass. R. Civ. P. 56, I will follow the usual Mass. R. Civ. P. 12(b)(6) practice in deciding these motions to dismiss: I will focus on the allegations of the Complaint, to determine whether those allegations are sufficient under *Iannacchino* v. *Ford Motor Co.*, 451 Mass. 623 (2008). In making that decision, I may also consider any documents attached to the complaint, see Mass. R. Civ. P. 10(c)(a "copy of any written instrument which is an exhibit to a pleading is part thereof for all purposes") and *Schaer* v. *Brandeis University*, 432 Mass. 474, 477 (2000), as well as any documents specifically referenced in the complaint. See *Marram* v. *Kobrick Offshore Fund, Ltd.*, 442 Mass. 43, 45 n.4 (2004). I may not consider documents later created by Plaintiff Rowe to supplement the allegations of his Complaint, such as, for instance, the Affidavit of Octavius

[3]Because Mr. Rowe has misnumbered these two counts, and because Mr. Rowe has numbered the paragraphs in each of the nine counts so that each count begins with a new paragraph "1," I will employ page numbers when referring to these counts, and to allegations made in the counts themselves, but not when referring to allegations made in the "Statement of Facts" section of the Complaint, which contains allegations numbered 1 through 154.

Rowe that he filed with his oppositions. I can consider a document submitted by Defendants only if Plaintiff Rowe had notice of that document and relied in it in framing the Complaint. See *id.*

2. The Legal Standard

The standard I am required to apply is well-known. I must deem all allegations in the Complaint to be true, *Iannacchino,* 451 Mass. at 623, and I must consider those allegations generously and in Plaintiff's favor. *Vranos* v. *Skinner*, 77 Mass. App. Ct. 280, 287 (2010). "While a complaint attacked by a ... motion to dismiss does not need detailed factual allegations ... a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions." *Iannacchino,* 451 Mass. at 636, quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 555 (2007). Ultimately, these "[f]actual allegations must be enough to raise a right to relief above the speculative level ... [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Iannacchino*, 451 Mass. at 636, quoting *Bell Atl. Corp.*, 550 U.S. at 555. A court, however, does not accept "legal conclusions [in the complaint] cast in the form of factual allegations." *Schaer*, 432 Mass. at 477. Therefore, "What is required at the pleading stage are factual allegations plausibly suggesting (not merely consistent with) an entitlement to relief." *Iannacchino*, 451 Mass. at 636, quoting *Bell Atl. Corp.*, 550 U.S. at 573.

Analysis

The City and Commissioner Finn have moved to dismiss Mr. Rowe's claims against one or both of them for breach of contract, defamation, and negligence.[4] DII has moved to dismiss all claims against it, namely for defamation, negligence, invasion of privacy, and tortious

[4]These Defendants are also the targets of Counts I through IV, for race discrimination (in two counts), religious discrimination, and retaliation. They have not moved to dismiss these claims.

interference with advantageous contractual relationship. I will consider these claims in the order in which they appear in the Complaint.

1. Count V on page 17: Breach of Contract against City and Commissioner Finn

The City and Commissioner Finn move to dismiss this claim because, they say, the employment contract between Mr. Rowe and the City is a collective bargaining agreement, which sets out a grievance and arbitration procedure, and Mr. Rowe does not allege that he followed that procedure. However, Mr. Rowe does not mention the collective bargaining agreement in the Complaint, nor did he rely on it in framing the Complaint. I have little doubt that there was such an agreement. Nonetheless, I decline the invitation of the City and Commissioner Finn to apply the terms of that contract at the motion to dismiss stage, because Mr. Rowe has not yet had the opportunity to argue about the effect of its grievance and arbitration provisions in this case, if any. The summary judgment stage, when the court can consider facts beyond those alleged in the Complaint, would be an appropriate time for the City to press the theory that the collective bargaining agreement bars Mr. Rowe from suing for breach of contract.

The City and Commissioner Finn also argue that, even putting aside the existence of a binding collective bargaining agreement – as the Complaint does – the Complaint still fails to allege all the elements of a breach of contract claim. I disagree. Reading its allegations in the light most favorable to Mr. Rowe, the Complaint alleges that the City entered into a contract with Mr. Rowe by adopting rules and regulations providing for a policy of progressive discipline, and the City then breached that contract by failing to apply that policy in his case, thereby causing financial damage to Mr. Rowe.

On the other hand, the Complaint does not allege that Commissioner Finn entered into any contract with Mr. Rowe. Therefore I will allow the motion to dismiss this claim as to Commissioner Finn, but deny it as to the City.

2. Count VI on page 18: Defamation against Commissioner Finn

Defamation is "a traditionally disfavored action" that requires "plaintiffs to plead the elements of their claim with specificity." *Eyal* v. *Helen Broadcasting Corp.*, 411 Mass. 426, 432 n.7 (1991). To survive a motion to dismiss brought under Rule 12(b)(6), a defamation plaintiff must plead "(1) the general tenor of the libel or slander claim, along with the precise wording of at least one sentence of the alleged defamatory statements; (2) the means and approximate dates of publication; and (3) the falsity of those statements." *Pattison* v. *S. Hadley*, 1993 U.S. Dist. LEXIS 12302 at *7 (D. Mass. 1993), citing *Eyal*, 411 Mass. 426; accord, *Dorn* v. *Astra USA*, 975 F. Supp. 388, 396 (D. Mass. 1997) (applying Massachusetts law).

The Complaint fails to allege any of these three elements of a defamation claim. Indeed, in its 156-paragraph Statement of Facts, the Complaint mentions Commissioner Finn only once, identifying him as the Commissioner of the Fire Department and as an agent of the City. The Complaint says nothing about anything that Commissioner Finn ever did or said. Therefore this claim must be dismissed as to Commissioner Finn.[5]

3. Count VII on page 19: Negligence against Commissioner Finn

In this count, Mr. Rowe alleges that Finn breached a duty "to exercise reasonable care towards Plaintiff by conducting a fair and objective investigation into his social media postings

[5]Because I dispose of this claim in this fashion, I do not reach Commissioner Finn's arguments about privilege.

[and] to exercise due care in safeguarding the privacy and professional reputation of Plaintiff." Complaint ¶ 2 on page 19.

As against Commissioner Finn, this claim contains at least two fatal deficiencies. First, the Complaint alleges no particular actions taken by Commissioner Finn concerning the investigation of Mr. Rowe's social media postings. Without any factual allegations supporting what Plaintiff says about Commissioner Finn in this count, the words of the Complaint that I quote in the preceding paragraph are no more than "legal conclusions cast in the form of factual allegations," which are insufficient to state a claim, according to *Iannacchino,* 451 Mass. at 636, and *Schaer*, 432 Mass. at 477.

Second, under the Massachusetts Tort Claims Act, Commissioner Finn, a "public employee," is immune from suit for negligence in his personal capacity. See M.G.L. c. 258, § 2. Mr. Rowe purports to sue Commissioner Finn in his official and personal capacities, see Complaint ¶ 4, and a complaint against a public employee in his official capacity is the equivalent of a suit against his employer, which would not be barred by the Tort Claims Act. But Mr. Rowe has already sued Commissioner Finn's employer, the City, and so there is no need to retain Commissioner Finn as a defendant as to this negligence claim.[6]

For these two reasons, this claim will be dismissed as against Commissioner Finn.

4. Count VI on page 18: Defamation against DII

In this Count the Complaint alleges, in conclusory fashion, that DII "made statements about Plaintiff's social media postings to Finn and the general public that were untrue and demeaning to plaintiff's character and reputation." Complaint ¶ 5 on page 18. The complaint

[6]Because I decide the motion as to this count in this manner, I do not reach Commissioner Finn's argument that any claim against the Commissioner would have been subject to a grievance and arbitration under the collective bargaining agreement, and therefore Mr. Rowe cannot bring such a claim in the Superior Court in the first instance.

alleges that these were "statements of discriminatory conduct and violence." Complaint ¶ 6 on page 18.

The problem with this claim is that, as with Commissioner Finn, the Complaint nowhere describes any particular statement made by any employee of DII to any other person at any time. Thus this claim as against DII must be dismissed.

5. Count V on page 19: Negligence against DII

In this Count, Mr. Rowe asserts that DII breached a duty "to exercise reasonable care towards Plaintiff by conducting a fair and objective investigation into his social media postings [and] to exercise due care in safeguarding the privacy and professional reputation of Plaintiff." Complaint ¶ 2 on page 19. This accusation leapfrogs the first step in any negligence analysis: whether the defendant had a duty to the plaintiff in the first place.

The Complaint alleges that some unnamed person, presumably a City employee, told the principal of DII "to look into whatever seemed problematic," Complaint ¶ 88, without giving DII "any standards or rules to follow in carrying out his [sic] investigation of Firefighter Rowe's postings." Complaint ¶ 91. The Complaint does not allege any direct relationship between Mr. Rowe and DII. In fact, it alleges that DII never spoke to Mr. Rowe as part of its investigation. Complaint ¶ 93. The only other substantive mention of DII in the Statement of Facts in the Complaint is that the principal of DII "used his 'opinions' in concluding that some of Firefighter Rowe's postings were discriminatory." Complaint ¶ 92.

In the absence of a direct relationship, Mr. Rowe must be contending that, by the mere fact of engaging in an investigation, an investigator has a duty to the subject of the investigation. DII argues that this theory "appears to be essentially attempting to invent the tort." DII's Brief at 8. In response, Mr. Rowe has cited no legal authority for the proposition that there is such a tort,

or that an investigator owes a duty to the person he is investigating. Because the Complaint does not allege (and as a matter of law probably could not allege) the existence of a duty, this negligence claim must be dismissed.

6. Count VI on page 20: Invasion of Privacy against DII

In this count, Mr. Rowe alleges that DII "communicated personnel and private information to the public concerning Plaintiff's employment at BOSTON in violation of the Massachusetts Privacy Act and the Fair Information Practices Act." Complaint ¶ 3 on page 20 (capitalization in original). However, the Complaint contains no allegations about any information, private or otherwise, that DII "communicated . . . to the public." Moreover, the only information that DII could have communicated to anyone, as far as the Complaint alleges, is the information that Mr. Rowe himself had already made public by posting it on his social media accounts.

Without factual allegations to support this claim, this count fails to state a claim.

7. Count VII on page 20: Tortious Interference with Contract against DII

In this Count, Mr. Rowe sues DII for intentionally interfering with his contractual relations with the City, his employer. To plead a *prima facie* case of intentional interference with contractual relations, a plaintiff must allege that:

> (1) he had a contract with a third party; (2) the defendant knowingly induced the third party to break that contract; (3) the defendant's interference, in addition to being intentional, was improper in motive or means; and (4) the plaintiff was harmed by the defendant's actions.

G.S. Enters., Inc. v. *Falmouth Marine, Inc.*, 410 Mass. 262, 272 (1991). See also *United Truck Leasing Corp.* v. *Geltman*, 406 Mass. 811, 812-817 (1990).

DII's offense here, the Complaint alleges, was that it "consented to investigate Plaintiff

on behalf of Boston without being given any written or oral standards to guide his [sic] investigation." Complaint ¶ 4 on page 21. Then, the Complaint alleges, DII "made a recommendation to Boston about Plaintiff's social media postings that [was] based upon these subjective standards." Complaint ¶ 7 on page 21. DII's use of subjective standards, or no standards at all, constitutes the improper motive or means required for this tort, according to Mr. Rowe.

Mr. Rowe provides no authority for the proposition that an investigator who conducts an investigation using "subjective standards," and then reports his findings to his client, has used "improper means" sufficient to impose liability for interference with contractual relations. In fact, in answering a slightly different question in a wrongful termination lawsuit, the Appeals Court has suggested that "even a negligent, sloppy or callous investigation does not produce an inference of spite or personal hostility" sufficient to support a claim of intentional interference with a contract between employer and employee. *Sklar* v. *Beth Isr. Deaconess Med. Ctr.*, 59 Mass. App. Ct. 550, 556 (2003).

Based on appellate language such as this, Mr. Rowe may well be worried that even an investigation more "callous" than the one alleged in this Complaint would be insufficient to support the "improper motive or means" element of a claim of intentional interference with contract. So Mr. Rowe responds to the DII motion by arguing that the principal of DII had personal relationships with high-ranking Fire Department officials (other than Defendant Finn). Plaintiff's Memorandum in Opposition to Dominguez Investigations, Inc.'s Motion to Dismiss at 18. Furthermore, Mr. Rowe argues, "the Chief of the Department [had a] child [who] had been coached by Eddie Dominguez in the Little League." *Id.* at 19. Even assuming that such personal connections could supply the improper motive or means, Mr. Rowe is out of luck, because none

of these facts are alleged in the Complaint. Mr. Rowe acknowledges this, because he does not cite the Complaint as their source, but appears instead to be citing his own later-created affidavit. See *id.* at 17 (in the same section of his argument, citing to his own affidavit as the source of an alleged fact about the amount the City paid DII for its investigation). The law simply does not permit me to consider Mr. Rowe's affidavit at the motion to dismiss stage.

Furthermore, as DII points out, a plaintiff who raises a claim of intentional interference with an employment contract generally must also allege facts showing "that the official acted with actual malice." *Alba v. Sampson*, 44 Mass. App. Ct. 311, 314 (1998). "[A]n inference of malice must be based upon probabilities rather than mere possibilities" and must be grounded on allegations that "spite or malevolence, i.e., a purpose unrelated to any legitimate corporate interest, was the controlling factor in urging the plaintiff's discharge." *Id.* at 315. See also *Sklar*, 59 Mass. App. Ct. at 555 ("Proof by inference, however, will not succeed if the plaintiff can show nothing more than an adverse impact or a 'laundry list' of facts which may or may not indicate the defendant acted out of actual malice . . . . [rather t]o succeed then, the plaintiff should be prepared to demonstrate a link between the defendant's conduct and evidence of a spiteful purpose or personal hostility"). The Complaint contains no allegations of fact sufficient to meet this test.

However, in most of the cases requiring "actual malice," the defendant who allegedly interfered with the employment contract was a fellow employee, often a supervisor. DII has not pointed me toward any case where the defendant was an outside investigator, or anyone other than a fellow employee, so I am not certain that this "actual malice" element should apply here. The parties have not fully briefed this issue, and I need not decide it now, because as currently pled this claim fails for a different reason: the Complaint contains no allegations of fact sufficient

to provide the "improper motive or means" element of this tort.

Conclusion and Order

For these reasons:

1. Dominguez Investigations, Inc.'s Motion to Dismiss is **ALLOWED**.

2. Defendant City of Boston and Joseph E. Finn's Motion to Dismiss Complaint Counts V, VI, and VII is **ALLOWED IN PART**, in that Count V (on page 17 of the Complaint), Count VI (on page 18 of the Complaint), and Count VII (on page 19 of the Complaint) are all **DISMISSED** as to Defendant Finn. This motion is **DENIED IN PART** in that Count V (on page 17 of the Complaint) will not be dismissed as against Defendant City of Boston.

At the hearing on these motions, counsel for Mr. Rowe stated that, if given an opportunity to replead, he would be able to add at least some of the missing factual allegations that have led me to allow the DII motion, and to allow most elements of the motion of the City and Commissioner Finn. For this reason, I will **ALLOW** Mr. Rowe to serve a Motion to Amend the Complaint, accompanied by a proposed Amended Complaint, by January 22, 2021. Defendants can then decide whether to oppose that motion to amend, perhaps on grounds of futility, and can respond to the motion to amend in the manner contemplated by Superior Court Rule 9A.

Paul D. Wilson
Justice of the Superior Court

December 22, 2020