UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ROBERT HONECK, Plaintiff,	:	
v.	:	Civil No. 3:04cv1577 (JBA)
NICOLOCK PAVING STONES OF NEW ENGLAND, LLC, Defendant	:	

RULING ON DEFENDANT'S MOTION TO DISMISS [DOC. # 13]

Plaintiff Robert Honeck ("Honeck") filed this employment discrimination action against Nicolock Paving Stones of New England ("Nicolock"). See Am. Compl. [Doc. # 12] at ¶ 1. The amended complaint alleges violations of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq., and the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq. Plaintiff also asserts common-law claims for wrongful discharge and intentional infliction of emotional distress ("IIED"). The defendant now moves to dismiss [Doc. # 13] the two common-law claims. For the reasons that follow, the defendant's motion will be granted.

I. FACTUAL BACKGROUND

The amended complaint alleges the following facts, which must be presumed to be true for the purposes of this motion. See Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984); Hernandez v. Coughlin, 18 F.3d 133, 136 (2d Cir. 1994). Honeck, a sixty-year-old male, started working for Nicolock on March 3, 1997, as a

salesman. Am. Compl. at ¶ 5. In 2000, he began experiencing chest pains, which his doctors attributed to work-related stress. Id. at ¶¶ 6-7. Honeck was promoted to General Manager the following March, but was soon demoted and asked by Nicolock to train his younger successor. Id. at ¶¶ 5, 8. During this time, he was also treated for depression. Id. at ¶ 9. Plaintiff further alleges that defendant's employees harassed him because of his health problems, specifically by "subjecting him to condescending and harassive [sic] remarks regarding his work performance and ongoing health issues including referring to his medication as 'happy pills'." Id. In January 2003, Honeck resigned at the defendant's request, after which the defendant hired a younger replacement. Id. at ¶ 10.

II. STANDARD

The defendant moves pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss Counts Two and Four for failure to state a claim upon which relief may be granted. To survive a motion to dismiss, "a complaint must include only 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002) (quoting Fed. R. Civ. P. 8(a)(2)). A claim should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

III. DISCUSSION

A. Wrongful Discharge

Count Two alleges that the defendant wrongfully discharged the plaintiff in contravention of the public policy against discrimination. The defendant asserts that this claim is barred by the existence of statutory remedies for the plaintiff under the ADEA and ADA. Mem. of Law in Support of Mot. to Dismiss [Doc. # 14] at 1. Nicolock argues that, because the ADEA and ADA promote the same public policies as those alleged to have been violated in the wrongful discharge common-law claim, the latter is precluded. Id. at 3. In his Opposition, Honeck responds that, notwithstanding the existence of his federal claims, his claim of wrongful discharge should be allowed to proceed in order to effectuate the public policy against workplace discrimination. Opp'n. Br. [Doc. # 16] at 4. The plaintiff further argues that under Fed. R. Civ. P. 8(e)(2), he should be allowed to alternatively plead both his statutory and common-law claims. Id.

Under Connecticut common law, the general rule is that "contracts of permanent employment, or for an indefinite term, are terminable at will." Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471, 474, 427 A.2d 385, 386 (1980). However, the Connecticut Supreme Court in Sheets adopted an exception to the at-will employment rule which "imposes some limits" on the

employer's otherwise "unbridled discretion to terminate" an employee. Id. at 476, 427 A.2d at 387. Nevertheless, this exception is quite narrow. Parsons v. United Technologies Corp., 243 Conn. 66, 79, 700 A.2d 655, 662 (1997). So long as the plaintiff has a remedy available under either state or federal law which serves to protect the public policy alleged to have been violated, the common-law cause of action for wrongful discharge is precluded. Burnham v. Karl & Gelb, P.C., 252 Conn. 153, 159-60, 745 A.2d 178, 182 (2000).

In Sheets, the plaintiff, who was employed by the defendant as a quality control manager, alleged that he was discharged in retaliation for attempting to comply with state food labeling requirements. 179 Conn. at 478, 427 A.2d at 388. Recognizing that such conduct is contrary to the policies embodied in the state food safety law, and that the law contained no provisions for private enforcement, the court concluded that the plaintiff had properly stated a claim for wrongful discharge. Id. at 480, 427 A.2d at 389; see also Parsons, 243 Conn. at 79-80, 700 A.2d at 663 (plaintiff relied on state laws requiring employers to maintain a reasonably safe workplace); Faulkner v. United Technologies Corp, 240 Conn. 576, 584-86, 693 A.2d 293, 297 (1997) (employee could maintain claim of wrongful discharge contrary to policy expressed in Major Frauds Act).

However, if a relevant state or federal law contains a

private right of action, a wrongful discharge claim will fail. In Burnham, for example, the plaintiff alleged that she was wrongfully discharged in retaliation for reporting unsanitary working conditions to the state dental association. 252 Conn. at 155, 745 A.2d at 179. The Connecticut Supreme Court concluded that her common-law claim was precluded by the private enforcement procedures in both OSHA and its state-law counterpart. Id. at 158-164, 745 A.2d at 181-84. In a race discrimination case, the court in Napoleon v. Xerox Corp., 656 F. Supp. 1120, 1125 (D. Conn. 1987), concluded that the plaintiff's wrongful discharge claim was barred because he had an "explicit state statutory remedy for the defendant's alleged misconduct under the comprehensive procedural provisions of the Connecticut Fair Employment Practices Act." Similarly, courts in Connecticut have also concluded that the ADEA and ADA contain private remedies sufficient to preclude wrongful discharge claims. For instance, in Friel v. St. Francis Hospital, No. 3:97cv803 (DJS), 1997 WL 694729, at *3 (D. Conn. Oct. 31, 1997), the plaintiff's gender- and disability-based discharge claims were dismissed due to her available remedies under the ADA, Title VII, and CFEPA. The same result was reached in Esdaile v. Hill Health Corp., No. CV-98-0262401-S, 2001 WL 1479115, at *2 (Conn. Super. Nov. 9, 2001), where the plaintiff's common-law age and disability discrimination claims were barred by the existence of enforcement

provisions in the ADEA and ADA. The court reasoned that "[a]llegations of employment discrimination are 'adequately enforceable through statutory remedies and [do] not warrant judicial recognition of an independent cause of action.'" Id. (quoting Atkins v. Bridgeport Hydraulic Co., 5 Conn. App. 643, 648, 501 A.2d 1223, 1226 (1985)). Accordingly, because the ADEA and ADA provide Honeck with private enforcement procedures through which he may seek compensatory damages and equitable relief, he fails to state a cognizable common-law wrongful discharge claim.[1]

Plaintiff also cites Rule 8(e)(2), under which "a plaintiff may plead two or more statements of a claim, even within the same count, regardless of consistency." Henry v. Daytop Village, Inc., 42 F.3d 89, 94 (2d Cir. 1994). However, in this case, the common-law discharge claim is not a valid theory of recovery that

[1] The plaintiff takes a slightly different position in his Opposition Memorandum, arguing for the first time that his discharge also violated the implied covenant of good faith and fair dealing. Opp'n. Br. at 5-6. There are two problems with this position. First, there was no contract on which to base a tort action for breach of good faith since the plaintiff was an at-will employee. See Magnan v. Anaconda Indus., Inc., 193 Conn. 558, 572, 479 A.2d 781, 789 (1984) ("[w]here employment is clearly terminable at will, a party cannot ordinarily be deemed to lack good faith in exercising this contractual right").

Second, even if there were an employment contract, under Connecticut law there still must be some public policy which would otherwise be unredressed if the plaintiff could not maintain a wrongful dismissal claim. Carbone v. Atl. Richfield Co., 204 Conn. 460, 470, 528 A.2d 1137, 1142 (1987). The plaintiff has not asserted any such policy; instead, he argues that good faith alone suffices as a policy. Opp'n. Br. at 5-6. According to Carbone, "absent a showing that the discharge involves an impropriety which contravenes some important public policy, an employee may not challenge a dismissal based upon an implied covenant of good faith and fair dealing." 204 Conn. at 470-71, 528 A.2d at 1142.

the plaintiff could "fall back" on should his ADEA and ADA claims fail: "[t]he wrongful discharge cause of action is not intended to be a catch-all for those who either procedurally or on the merits fail to establish a claim under existing discrimination statutes." Kilduff v. Cosential, Inc., 289 F. Supp. 2d 12, 18 (D. Conn. 2005). Rather, "the plaintiff's claim is precluded by virtue of the existence of a statutory remedy under" the ADEA and ADA. Burnham, 252 Conn. at 161-62, 745 A.2d at 183 (emphasis added).

As a result, Honeck's common-law wrongful discharge claim is barred by the remedies available under the ADEA and ADA, and accordingly it will be dismissed.

B. Intentional Infliction of Emotional Distress (IIED)

Count Four alleges that the defendant intentionally inflicted emotional distress upon the plaintiff through its employees' discriminatory misconduct in the workplace. According to the amended complaint, Honeck was "humiliatingly" asked to train his replacement, "demeaningly" subjected to the moving of his files, treated in a discriminatory manner, and harassed due to his depression, stress, and age. Am. Compl. ¶¶ 8-11. In its motion, Nicolock asserts that, even if the plaintiff's allegations of age- and disability-based misconduct are true, they do not rise to the level necessary to support a claim of IIED. Mem. of Law in Support of Mot. to Dismiss at 4.

To support an IIED claim under Connecticut law, a plaintiff must show that (1) the defendant intended to cause emotional harm, or knew or should have known that such harm was likely to result; (2) the defendant's misconduct was "extreme and outrageous"; (3) such conduct caused the plaintiff's harm; and (4) the plaintiff sustained "severe" emotional harm. Petyan v. Ellis, 200 Conn. 243, 253, 510 A.2d 1337, 1342 (1986). Initially, whether the defendant's conduct is sufficiently extreme and outrageous is an issue for the court to decide. Appleton v. Bd. of Educ., 254 Conn. 205, 210, 757 A.2d 1059, 1062 (2000). "Only where reasonable minds disagree does it become an issue for the jury." Id.

To defend a motion to dismiss, a plaintiff must show that he will be able to establish conduct which "exceed[ed] all bounds usually tolerated by decent society." Petyan, 200 Conn. at 254, 510 A.2d at 1062, n. 5 (quoting W. Prosser & W. Keeton, Torts § 12, at 60 (5th ed. 1984)). According to Appleton, conduct is sufficiently objectionable when a "recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'" 254 Conn. at 211, 757 A.2d at 1062 (quoting Restatement (Second) Torts § 46, cmt. d (1965)). "Mere insults, indignities, or annoyances that are not extreme or outrageous will not suffice." Brown v. Ellis, 40 Conn. Supp. 165, 167, 484 A.2d 944, 946 (Sup.

Ct. 1984).

Connecticut courts have repeatedly held that even insulting, hurtful, and socially undesirable conduct, without more, is not enough to support a claim of IIED. See e.g. Miner v. Town of Chesire, 126 F. Supp. 2d 184, 195 (D. Conn. 2000); Newton v. Shell Oil Co, 52 F. Supp. 2d 366, 375 (D. Conn. 1999); Appleton, 254 Conn. at 211, 757 A.2d at 1063. In some cases, allegations that the defendant knowingly exploited a particular susceptibility of the plaintiff have survived dismissal. See Mellaly v. Eastman Kodak Co. 42 Conn. Supp. 17, 21, 597 A.2d 846, 848 (Super. Ct. 1991); Brown v. Ellis, 40 Conn. Supp. 165, 166, 484 A.2d 944, 945 (Super. Ct. 1984). In Mellaly, for example, the defendant's motion to strike was denied based on allegations that he egregiously exploited the plaintiff's condition as a recovering alcoholic. 42 Conn. Supp. at 21, 597 A.2d at 848. In his complaint the plaintiff alleged that his supervisor "taunted and harassed" him for years, "yelled and screamed" at him both during work and at home, "frequently threatened" to fire him, and repeatedly attacked his need for medical treatment. Id. (internal quotations omitted).

The specific conduct here is not alleged to be nearly as severe. The only harassment alleged is a reference by a co-worker to the plaintiff's medication as "happy pills." Am. Compl. ¶ 9. Honeck characterizes his co-workers' conduct as

humiliating and demeaning, but fails to describe any behavior directed to either his age or depressive condition which goes beyond insults or indignities. Thus, no conduct is alleged which rises to the level required under Petyan. Furthermore, even if the plaintiff proved his discharge was due to age- or disability-related discrimination, "[t]he mere act of firing an employee, even if wrongfully motivated, does not transgress the bounds of socially intolerable behavior" and therefore is insufficient to state a claim for IIED. Parsons, 243 Conn. at 89, 700 A.2d at 667. Even construing the plaintiff's complaint in the light most favorable to him, proof of allegations of demeaning, humiliating, or harassing conduct alone will not entitle him to relief.

IV. CONCLUSION

Accordingly, defendant's motion is GRANTED. Plaintiff's claims based on wrongful discharge (Count Two) and IIED (Count Four) are dismissed.

IT IS SO ORDERED.
/S/

JANET BOND ARTERTON, U.S.D.J.

Dated at New Haven, Connecticut, this 10th day of June, 2005.