

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JEFFREY JORDAN,	:	
Plaintiff,	:	
	:	
	:	
v.	:	Civil No. 3:04V02079 (AVC)
	:	
UNITED STATES OF AMERICA,	:	
DEPARTMENT OF THE TREASURY,	:	
INTERNAL REVENUE SERVICE,	:	
Defendants	:	

RULING ON THE DEFENDANTS' MOTION TO DISMISS

This is an action for damages brought pursuant to the Federal Tort Claims Act, 28 U.S.C. §1346 (b)¹. The plaintiff, Jeffrey Jordan, formerly employed by the Internal Revenue Service ("IRS"), alleges that the government, through the secretary of the treasury's designee, the director of practice, intentionally, recklessly, and negligently inflicted emotional distress on him, tortiously interfered with his contractual relationships, and negligently misreported information.

The defendants, the United States of America, the Department of the Treasury, and the Internal Revenue Service ("the government") now move for: (1) dismissal of the complaint

¹Title 28 §1346 (b): Subject to the provisions of chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

pursuant to Fed. R. Civ. P. 12(b)(1) for lack of federal subject matter jurisdiction on grounds that the complaint is barred by the discretionary exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(a); and (2) in the alternative, for dismissal of count IV alleging tortious interference with contractual relations and count V alleging libel on grounds that the court does not have subject matter jurisdiction to hear the claims under 28 U.S.C. § 2680(h); and for dismissal of counts I through III pursuant to Fed. R. Civ. P. 12(b)(6) on grounds that claims for intentional, reckless, or negligent infliction of emotional distress have not been stated.

For the reasons hereinafter set forth, the court concludes that: (1) the discretionary exception to the Federal Tort Claims Act does not bar the action; and (2) dismissal is required with respect to counts IV and V under 28 U.S.C. § 2680(h), and with respect to count I on grounds that a claim for relief has not been stated. Claims for relief, however, have been stated in counts II and III alleging negligent and reckless infliction of emotional distress. The motion to dismiss is therefore GRANTED in part and DENIED in part.

FACTS

Examination of the complaint, the motion to dismiss, the memorandum in support thereof, the opposition memorandum and attached affidavit, discloses the following undisputed facts:

From 1991 to 2001, the plaintiff, Jeffrey Jordan, worked for the IRS in Norwalk, Connecticut. On February 9, 2001, Jordan resigned from the IRS. Jordan thereafter sued the IRS, claiming that the IRS constructively terminated his employment on account of inaccurate performance reviews. In April 2001, Jordan filed an application with the IRS seeking Enrolled Agent Status in accordance with 31 C.F.R. § 10.4(b). An Enrolled Agent is a tax professional who is authorized to represent taxpayers in any conferences, hearings or meetings with the IRS, and may communicate with the IRS for a taxpayer regarding the taxpayer's rights, privileges, or liabilities under law and regulations administered by the IRS. (See Practice Before the IRS and Power of Attorney, IRS Publication 947, May 2004).

On March 21, 2001, the director of practice requested information from Jordan's former IRS supervisors in connection with the application. On April 10, 2001, a former supervisor, one Patrick Spinola, responded with a letter that enumerated inaccuracies in Jordan's application and offered negative comments concerning Jordan's work performance. On March 13, 2002, the director of practice denied Jordan's application based on this adverse information.

In August of 2003, Jordan appeared as a private tax preparer for a client at the Poughkeepsie, New York, IRS office using IRS Form 2848. As part of that form, a declarant must state whether

he/she is an attorney, an enrolled agent, or an un-enrolled tax return preparer under Treasury Department Circular No. 230, 31 C.F.R. § 10.7 (c)(1)(viii)², among others. The IRS claims that Jordan falsely represented himself as an enrolled agent. Jordan, however, maintains that he represented that he was an un-enrolled tax preparer under IRS Circular 230 (31 C.F.R. §10.7(viii)). The particular Form 2848 submitted by Jordan has not been included in the record. On August 23, 2003, group manager Gerry Ennis of the Poughkeepsie, New York IRS office reported the incident to the inspector general of the IRS.

On January 26, 2004, the director of practice sent letters to third party accountants who were receiving assistance from Jordan. The letters advised the third parties that working with Jordan would subject them to potential disbarment³ before the IRS. In June of 2004, Jordan filed this action.

STANDARD

A court must grant a motion to dismiss brought pursuant to Fed. R. Civ. P. Rule 12(b)(1) where a plaintiff has failed to

²31 C.F.R. § 10.7(viii) states, in relevant part: "An individual who prepares and signs a taxpayer's tax return as the preparer, or who prepares a tax return but is not required (by the instructions to the tax return or regulations) to sign the tax return, may represent the taxpayer before revenue agents, customer service representatives or similar officers and employees of the Internal Revenue Service during an examination of the taxable year or period covered by that tax return."

³The parties do not define the meaning of the term "disbarment" beyond suspension from appearing before the IRS.

establish subject matter jurisdiction. Golden Hill Paugussett Tribe of Indians v. Weicker, 839 F.Supp. 130, 136 (D.Conn.1993). In analyzing a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1), the court must accept as true and must draw inferences in favor of the plaintiff. Capitol Leasing Co. v. F.D.I.C., 999 F.2d 188, 191 (7th Cir.1993). Where a defendant challenges the district court's subject matter jurisdiction, the court may resolve disputed factual issues by reference to evidence outside the pleadings, such as affidavits. Antares Aircraft, L.P. v. Federal Republic of Nigeria, 948 F.2d 90, 96 (2d Cir.1991).

A motion to dismiss pursuant to Rule 12 (b)(6) of the Federal Rules of Civil Procedure, on the other hand, "merely. . . assess[es] the legal feasibility of the complaint, [it does] not assay the weight of the evidence which might be offered in support thereof." Ryder Energy Distribution Corp. v. Merrill Lynch Commodities, Inc., 748 F.2d 774, 779 (2d Cir. 1984). When ruling on a motion to dismiss, the court must presume that the well pleaded facts alleged in the complaint are true and draw all reasonable inferences from those facts in favor of the plaintiff. See Sykes v. James, 13 F.3d 515, 519 (2d Cir. 1993). A court may dismiss a complaint at this stage only where "it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim." Id.

DISCUSSION

1. Federal Tort Claims Act and Immunity

The government first argues that any cause of action arising from the director's issuance of disciplinary letters is barred by the discretionary function exception to the Federal Tort Claims Act. In response, Jordan maintains that his claims are not barred because the acts complained of were "not discretionary conduct on the part of the IRS," because at all times he was authorized to appear before the IRS as a private tax preparer under 31 C.F.R. § 10.7 (c)(1)(viii) and hence, the government had no discretion to contact third party accountants and agents and inform them "that interaction with [him] would subject them to potential disbarment before the IRS." The court agrees with Jordan.

The Federal Tort Claims Act provides that "the United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674 (emphasis added). However, there are exceptions to the government's liability. Specifically,

[t]he provisions of [the Federal Tort Claims Act do] not apply to:

a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the

exercise [of] . . . a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C.A. § 2680(a) (emphasis added).

Federal regulations governing the Department of the Treasury authorize the Secretary of that department to discipline practitioners that have been found to be incompetent or disreputable. In this regard, under 31 C.F.R. §10.50 (a), "the Secretary of the Treasury, or his or her delegate, after notice and an opportunity for a proceeding, may:

censure, suspend, or disbar any practitioner from practice before the Internal Revenue Service if the practitioner is shown to be incompetent or disreputable, fails to comply with any regulation in this part, or with intent to defraud, willfully and knowingly misleads or threatens a client or prospective client. Censure is a public reprimand.

Id. (emphasis added). Further, under 31 C.F.R. § 10.51(j), incompetence and disreputable conduct includes:

Knowing aiding and abetting another person to practice before the Internal Revenue Service during a period of suspension, disbarment, or ineligibility of such other person.

Id.

Upon review of the above, it appears entirely appropriate for the Secretary's delegate, the director of practice, to notify third party accountants that they could face disbarment for knowingly aiding Jordan in his unauthorized practice before the IRS. However, if Jordan was indeed authorized to practice before

the IRS, as he claims that he was, then it is not within the director's discretion to so notify third parties. No regulation gives the director of practice the discretion to reprimand third parties for working with a representative who is properly registered with the IRS and otherwise does not engage in misconduct. Consequently, assuming Jordan's claim to be true, the government is not entitled to immunity under the discretionary function exception because this case concerns the issue of whether a government employee has acted without due care and has nothing to do with an exercise of discretion.

2. Count IV - Tortious Interference

The government next argues that the court lacks subject matter jurisdiction with respect to the claim of tortious interference with Jordan's contractual relationships. Jordan does not respond to this argument. The court agrees with the government.

28 U.S.C. § 2680(h) provides that the Federal Tort Claims Act shall not apply to "[a]ny claim arising out of . . . interference with contract rights." As Count IV states a cause of action for tortious interference with contract rights, the court concludes that the claim is barred by 28 U.S.C. § 2680(h).

3. Count Five - Libel and Slander

The government next argues that the court lacks subject matter jurisdiction with respect to the claim of libel as stated

in count V. In response, Jordan agrees with the government that a claim of libel is barred by 28 U.S.C. § 2680(h), but maintains that in this case, count V actually alleges a cause of action for negligence and not libel. To the extent a claim of negligence is stated, the government argues that the claim is properly dismissed as a claim resounding in the heartland of the tort of defamation. The court agrees with the government.

"The United States is immune from suit absent an express waiver of its sovereign immunity." United States v. Testan, 424 U.S. 392, 399 (1976). "Although Congress has waived the government's immunity with respect to damages or injuries caused by the 'negligent or wrongful act or omission of a government employee acting within the scope of employment' it has not waived immunity for every type of tort." Kugel v. United States, 947 F.2d 1504, 1505 (D.C. Cir. 1991). "One of the exceptions contained in the [Federal Tort Claims Act] is the 'intentional tort' exception." Id. "It provides that immunity is not waived as to:

Any claim arising out of assault, battery,
false arrest, malicious prosecution, abuse of
process, libel, slander, misrepresentation,
deceit or interference with contract rights. . .

28 U.S.C. § 2680(h)." Id. (emphasis added). "Section 2680(h) does not merely bar [the intentional torts stated in that section]; in sweeping language it excludes any claim arising out of [those claims]." Guccione v. United States, 847 F.2d 1031, 1034 (2d Cir.

1988)(quoting United States v. Shearerm, 478 U.S. 52, 55 (1985)). The tort of libel is specifically stated in § 2680(h). "The essence of the tort of libel is the publication of a statement about an individual that is both false and defamatory. Brian v. Richardson, 87 N.Y.2d 46, 50, 660 N.E.2d 1126, 1128, 637 N.Y.S.2d 347, 349 (1995). "A defamatory statement is defined as a communication that tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating with him." Gambardella v. Apple Heath Care, Inc., 86 Conn.App. 842, 848, 863 A.2d 735, 740 (2005). The publication of the statement must be through negligence or some greater fault. Jones v. United States, 207 F.2d 563, 564 (2d Cir. 1953); see also Wilkinson v. Russell, 182 F.3d 89, 99 (2d Cir. 1999).

Count V of the complaint, captioned as a claim for negligence, states:

The [governments] employees negligently misreported information concerning [Jordan's] conduct and experience which, in fact, the [government] was under a duty to report such information truthfully and accurately. As a result of the [government's] employees negligence, [Jordan] was damaged.

The essence of this claim is that government employees, through negligence, published a false statement that injured Jordan. As such, the gravamen of the claim is that of libel arising through negligence and is therefore barred by section 2680(h). See

Jones v. United States, 207 F.2d 563, 564 (2d Cir. 1953).

4. Count I- Intentional Infliction of Emotional Distress

The government next argues that the claim of intentional infliction of emotional distress is properly dismissed because the complaint fails to allege that the government engaged in extreme and outrageous conduct. The court agrees.

To sustain a claim for the intentional infliction of emotional distress, a plaintiff must allege: "(1) that the actor intended to inflict emotional distress; or that he knew or should have known that the 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) (quoting Murray v. Bridgeport Hosp., 40 Conn. Supp. 56, 62 (Conn. Super. Ct. 1984)); see also Reed v. Signode Corp., 652 F. Supp. 129, 136 (D. Conn. 1986). The Connecticut supreme court has defined "extreme and outrageous conduct" as conduct that exceeds "'all bounds usually tolerated by decent society, of a nature which is especially calculated to cause, and does cause, mental distress of a very serious kind.'" Petyan, 200 Conn. at 254 n.5 (1986) (quoting Prosser & Keeton, Torts § 12 at 60 (5th ed. 1984)). A defendant is liable "'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 civilized community.'" Reed v. Signode Corp., 652 F. Supp. 129, 137 (D. Conn. 1986) (quoting 1 Restatement (Second) of Torts, § 46 (1965)).

The complaint alleges that Jordan suffered severe emotional distress when government employees wrongfully contacted third parties and informed them that interaction with Jordan would subject them to potential disbarment before the IRS. Although the court agrees with Jordan that, if true, the conduct is disturbing, as a matter of law, it does not rise to the level of being so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in civilized community.

5. Negligent/Reckless Infliction of Emotional Distress

The government next argues that the claims of negligent and reckless infliction of emotional distress are subject to dismissal because Jordan has failed "to plead facts sufficient to establish [those claims]." The pleading fails, the government avers, because "the conduct alleged here could not have created an unreasonable risk of emotional distress to the degree that it might cause bodily harm [and even if it did,] the alleged conduct would be unforeseeable." In response, Jordan argues that dismissal is inappropriate with respect to the claim of negligent infliction of emotional distress because the complaint alleges

that the government "employees knew or should have known that emotional distress would be a likely outcome of their efforts to prevent [Jordan] from finding employment."

In order to prevail on a claim of negligent infliction of emotional distress, Jordan must show: "(1) [the government's] conduct created an unreasonable risk of causing [Jordan] emotional distress; (2) [Jordan's] distress was foreseeable; (3) the emotional distress was severe enough that it might result in illness or bodily harm; and (4) [the government's] conduct was the cause of [Jordan's] distress." Carrol v. Allstate Ins. Co., 262 Conn. 433, 444, 815 A.2d 119 (Conn. 2003). This test essentially requires that the fear or distress experienced by the plaintiff be reasonable in light of the conduct of the defendants. Larobina v. McDonald, 274 Conn. 394, 410, 876 A. 2d 522 (2005).

For the tort of reckless infliction of emotional distress, the elements are identical except that, with respect to the first requirement, Jordan must show that the government knew or had reason to know that its conduct would create an unreasonable risk of bodily harm with a high degree of probability that substantial harm would result. Craig v. Driscoll, 64 Conn.App. 699, 721, 781 A.2d 440, 454 (2001).

The complaint alleges that "the IRS [] issued letters [containing false accusations] which were not based upon facts to

third parties, informing them that affiliation with Jordan was reason to suspend their right to practice before the IRS." Further, the complaint alleges that the government acted with intent to inflict emotional distress on Jordan or knew or should have known that emotional distress was the likely result of their conduct, and as a result, Jordan suffered emotional distress, and lost income, employment opportunities, and business profits.

The court is not convinced that Jordan has failed to plead facts sufficient to establish either a claim for negligent or reckless infliction of emotional distress. Dismissal of these claims is therefore denied.

CONCLUSION

For the foregoing reason, the government's motion to dismiss (document no. 11) is GRANTED with respect to counts I, IV, V, and and DENIED with respect to counts II, and III.

It is so ordered this 12th day of December, 2005 at Hartford, Connecticut.

Alfred V. Covello
United States District Judge