

deciding a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the court must “accept as true the facts alleged in the complaint and all reasonable inferences that can be drawn from them.” *Markowitz v. Northeast Land Co.*, 906 F.2d 100, 103 (3d Cir.1990). In particular, the court looks to “whether sufficient facts are pleaded to determine that the complaint is not frivolous, and to provide defendants with adequate notice to frame an answer.” *Colburn v. Upper Darby Tp.*, 838 F.2d 663, 666 (3d Cir.1988). However, the court need not “credit a complaint’s ‘bald assertions’ or ‘legal conclusions’ when deciding a motion to dismiss.” *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3rd Cir.1997). The court will only dismiss a complaint if “it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 249-50 (1989) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)). Thus, in order to prevail, a moving party must show “beyond doubt that the plaintiff can prove no set of facts in support of his claim [that] would entitle him to relief.” *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

III. BACKGROUND

On October 5, 1998, the state defendants contracted with FuturTech for computer programming services until June 30, 1999. FuturTech entered into a subcontract with Cork Screw, which would allow Cork Screw’s employee Castetter to work on FuturTech’s computer programming services contract with the state. Castetter was assigned to work on the Department of Labor’s Y2K project. Cimino alleges that Castetter had the power to hire and fire the employees he supervised on that project. In accordance with that alleged power, Castetter hired Cimino, and PCS to work on the Y2K project until September 1999. However, Castetter terminated Cimino and PCS on August 6, 1999. Castetter also laid off three additional subcontractors on August 6, 1999. Two of these individuals were black and the other white. Cimino is

also white.

In his complaint, Cimino alleges that the defendants terminated him solely because of his race. Specifically, he alleges that the state defendants delegated the job of terminating the two black employees to Castetter. The state defendants, including MacPherson, then allegedly conspired to terminate Cimino and the other white employee because the state defendants feared that the two black employees would sue them.

FuturTech filed a motion to dismiss on August 22, 2001. The state defendants filed a motion to dismiss on November 5, 2001. Cork Screw and Castetter filed a motion to dismiss on November 30, 2001. The court will now address each of these motions in turn.

IV. DISCUSSION

A. FuturTech's Motion to Dismiss

Cimino's complaint does not allege any active role on FuturTech's part in depriving him of his rights. Rather, the complaint alleges liability on FuturTech's part based on actions taken by its subcontractor, Castetter.

For the following reasons, the court will grant FuturTech's motion with regard to the Section 1983, 1985(3) and Third-Party Beneficiary claims. It will deny the motion with regard to the Section 1981 and breach of an implied covenant of good faith and fair dealing claims.

1. Section 1981 Liability

The first issue the court must address with respect to FuturTech is whether Section 1981 supports a respondeat superior theory of liability for non-government defendants.

The Supreme Court has suggested that, in order to impose liability on a defendant under Section

1981 for the actions of a third party, an agency relationship between the defendant and the third party must exist. *See General Building Contractors Assoc. v. Pennsylvania United Engineers and Constructors*, 458 U.S. 375, 394 (1982); *see also Blair v. Philadelphia Housing Authority*, 609 F. Supp. 276, 279 (E.D. Pa. 1985); *Choice v. Easton Hospital* 1988 U.S. Dist. LEXIS 1319, at *2 (E.D. Pa. Feb. 22 1988); *Malone v. Schenk*, 638 F. Supp. 423, 425 (C.D. Ill. 1985). Agency is a fiduciary relationship which results in the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control. *See General Building Contractor's Assoc.*, 458 U.S. at 391. Therefore, to establish an agency relationship between Castetter and FuturTech, Cimino must allege that FuturTech gave its consent for Castetter to act on its behalf, and that Castetter is in FuturTech's control.

Cimino has alleged that FuturTech paid Castetter directly, and that Castetter had full authority to manage personnel for FuturTech.¹ Based on these allegations, the court concludes that Cimino has alleged sufficient information to establish the possibility of an agency relationship. Accordingly, it will not grant FuturTech's motion to dismiss the 1981 claim.

2. Section 1983 Liability

Cimino's complaint purports to hold FuturTech liable for Section 1983 violations as well. However, in defending his Section 1981 claims, Cimino acknowledges that the theory of respondeat superior cannot support a Section 1983 claim. *See Gibbs v. Hargett*, 1986 WL 12129, at *2 (D. Del. Oct. 27, 1986) (noting that Section 1983 claims require "willful participation or joint action."); *see also Powell v. Shopco Laurel Co.*, 678 F.2d 504, 506 (4th Cir. 1982) (holding that neither municipal nor

¹The court recognizes that FuturTech denies that Castetter was their agent. However, when deciding a motion to dismiss, the court will not examine the merits of the claims.

private corporations may be held liable on the theory of respondeat superior under Section 1983). Thus, because Cimino has not alleged any active role that FuturTech played in the alleged discrimination, the court will dismiss the Section 1983 claim against it.

3. Section 1985(3) Liability

Cimino finally alleges that FuturTech violated Section 1985(3). While the Third Circuit has not addressed this issue, district courts in this Circuit have held that Section 1985(3) liability may not be premised on a respondeat superior theory. *See Hankins v. City of Philadelphia*, 1998 WL 175600, at * 14 (E.D. Pa. April 9, 1998); *see also Gant v. Aliquippa Borough*, 612 F. Supp. 1139, 1142 (W.D. Pa. 1985) (holding that “an employer may not be subject to a conspiracy claim by the doctrine of respondeat superior.”). Nor may an employer be held to conspire with one of its own employees acting in his official capacity. *See Gant*, 612 F. Supp. at 1142. Moreover, even to the extent that Cimino could argue that there was a conspiracy between Castetter and the other named defendants in which FuturTech acquiesced, this argument must also fail. Cimino has clearly stated that, “Castetter testified that he complained to a FuturTech employee . . . that there had been this racially motivated layoff.” Thus, while FuturTech may have had knowledge of the alleged conspiracy after the fact, that is insufficient to hold it responsible for the actual conspiracy.

Accordingly, the court will dismiss Cimino’s Section 1985(3) claim against FuturTech.

4. State Law Claim: Breach of the Covenant of Good Faith and Fair Dealing

Cimino argues that the defendants breached his contract with them by engaging “in fraud, deceit and misrepresentation in their administration of and termination of [his] employment [] contract.”

The Delaware Supreme Court has strictly limited the application of the implied covenant in the

employment context, holding that a plaintiff must establish that he or she falls into one of four exclusive categories. *See Lord v. Souder*, 748 A.2d 393, 401 (Del. 2000). The four categories are: (1) where the termination violates public policy and no other remedial scheme exists; (2) where the employer misrepresented an important fact and the employee relied thereon to either accept a new position or remain in a present one; (3) where the employer used its superior bargaining power to deprive an employee of clearly identifiable compensation earned through the employee's past service; and (4) where the employer falsified or manipulated employment records to create fictitious grounds for termination. *See E.I. duPont de Nemours & Co. v. Pressman*, 679 A.2d 436, 442-44 (Del. 1996). The implied covenant of good faith and fair dealing does, however, permit a cause of action against an employer for the deceitful acts of its agent when the latter manufactures false grounds to cause an employee's dismissal. *See id.* at 437.

Finally, irrespective of the category implicated, a claim for the breach of duty of good faith and fair dealing requires employer conduct amounting to fraud, deceit, or misrepresentation. *See Peterson v. Beebe Med. Ctr., Inc.*, 1992 WL 354087, at *5 (Del. Nov. 13, 1992), *aff'd*, 623 A.2d 142 (Del. 1993). Thus, the traditional elements of fraud must be present in a claim for breach of an implied covenant of good faith. *See Hudson v. Wesley College, Inc.*, 1998 WL 939712, at *13 (Del. Ch. Dec. 23, 1998) *aff'd* 734 A.2d 641 (Del. 1999).

As discussed *supra* in Section IVA1, the court concludes that Cimino has alleged sufficient facts demonstrating that Castetter may have been FuturTech's agent. Cimino further points to the deposition testimony of Nicholas P. Marica ("Marica"). In that deposition, Marica testified that Castetter admitted to firing Cimino due to his race. Accordingly, the court declines to dismiss this state law claim against FuturTech.

5. State Law Claim: Third-Party Beneficiary Rights

Cimino finally alleges that he and PCS were third-party beneficiaries of the contract between the Division of Unemployment Insurance and FuturTech.

The Delaware Supreme Court has noted that it is axiomatic that either party to an agreement may enforce its terms if it is breached. *See Triple C Railcar Service v. Wilmington*, 630 A.2d 629, 633 (Del. 1993). “Equally well-settled is the principle that a third-party who is, in effect, a stranger to the agreement, may enforce a contractual promise in his own right if the contract has been made for his benefit.” *Id.* However, essential to a third-party’s right of enforceability, is the contracting parties’ intention to view the stranger as either a creditor or donee beneficiary. *See id.* Thus, a third party has no rights under a contract that did not, by itself, manifest an intention to benefit the third party. *See id.*

In the present case, Cimino has failed to allege any language in the Division of Unemployment Insurance/FuturTech contract that manifests an intention to benefit strangers to their contract. As the court cannot assume that Cimino will prove facts which he has not alleged, it will dismiss this count as to all the named defendants. *See City of Pittsburgh v. West Penn Power Co.*, 147 F.3d 256 (3d Cir. 1998).

B. The State Defendants’ Motion to Dismiss

Cimino’s complaint also names the Delaware Department of Labor, the Division of Unemployment Insurance and W. Thomas MacPherson (MacPherson), Director of the Division of Unemployment Insurance, in his official, as well as individual, capacity, as defendants.

1. Eleventh Amendment Immunity Against Damages

The state defendants, including MacPherson in his official capacity, assert that the Eleventh Amendment deprives the court of jurisdiction to adjudicate Cimino’s civil rights claims for damages

pursuant to 42 U.S.C. §§ 1981, 1983, and 1985(3). The court agrees.

Cimino's complaint alleges that the Delaware Department of Labor, Division of Unemployment Insurance, a state agency, violated his civil rights. As a result, he requests both monetary and injunctive relief. However, under the Eleventh Amendment, private parties cannot sue states in federal court for monetary damages. *See Board of Trustees of University of Alabama v. Garrett*, 121 S.Ct. 955, 962 (2001). A state is not entitled to this immunity if it has waived its immunity or if Congress has abrogated the state's immunity through a valid exercise of its power. *See Lavia v. Comm. of Pennsylvania*, 224 F.3d 190, 195 (3d Cir. 2000).

Neither of the two above conditions are met here. First, the state has not waived its Eleventh Amendment immunity. A waiver will be found only where it has been stated "by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction." *Space Age Products, Inc. v. Gilliam*, 488 F.Supp. 775, 780 (D. Del. 1980) (citing *Edelman v. Jordan*, 415 U.S. 651, 673 (1974)). Such an express waiver may be made through clear constitutional or statutory language. *See Lavia*, 224 F.3d at 195. Neither the constitution nor the code of Delaware expressly waives Delaware's Eleventh Amendment sovereign immunity. *See Ospina v. Department of Corrections*, 749 F. Supp. 572, 579 (D. Del. 1990). Therefore, Delaware has not clearly waived its immunity.

Moreover, Congress has not abrogated the states' immunity for claims under Sections 1981, 1983 and 1985(3). *See Quern v. Jordan*, 440 U.S. 332, 345 (1979); *Henry v. Texas Tech Univ.*, 466 F. Supp. 141, 146 (N.D. Texas 1979); *Carmen v. San Francisco Unified School Dist.*, 982 F. Supp. 1396, 1404 (N.D. Cal. 1997). Since Delaware's immunity has not been waived or abrogated, Cimino

cannot sue the State agency for money damages.

Furthermore, Cimino may not assert a claim for injunctive relief against the state. In *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy*, the Supreme Court noted that, although prospective (injunctive) relief is available against state officials, it is not available against state agencies. 506 U.S. 139, 146 (1993). Since the Delaware Department of Labor, Division of Unemployment Insurance, is a state agency, it cannot be sued for injunctive relief under the Eleventh Amendment.

It is clear, however, that a claim for injunctive relief would be available against MacPherson. *See Green v. Mansour*, 474 U.S. 64, 68-69 (1985). The state defendants do not dispute this.

Accordingly, the court will dismiss each of the claims against the Delaware Department of Labor, Division of Unemployment Insurance and MacPherson in his official capacity.

2. MacPherson's Individual Liability Under Section 1981

MacPherson claims that he cannot be individually liable under Section 1981 because he was not a party to a contract with Cimino and PCS. The court finds this argument unpersuasive.

A third party may be liable under Section 1981 if that party “intentionally interferes, on the basis of race, with another’s right to make and enforce contracts, regardless of whether the employer or anyone else may also be liable.” *Olumuyiwa v. Harvard Protection Servs, Inc.*, 2000 U.S. Dist. LEXIS 6364, at * 14 (E.D.N.Y. May 12, 2000); *see also Daniels v. Pipefitters’ Ass’n Local Union No. 597*, 945 F.2d 906, 914 (7th Cir. 1991) (holding that “[t]his kind of race-based impediment to contract formation constitutes exactly the sort of racially discriminatory interference with the right to contract that remains actionable under § 1981.”); *Pryor v. National Collegiate Athletic Ass’n*, 153 F. Supp. 2d 710, 718 (E.D. Pa. 2001).

In the present action, Cimino has alleged that MacPherson was directly involved with the decision to terminate Cimino because of his race. He further alleges that MacPherson's intentional involvement actually resulted in Cimino's termination, thus interfering with his employment contract. Accordingly, the court will not dismiss the Section 1981 claim against MacPherson in his individual capacity.

3. MacPherson's Individual Liability Under Section 1983

To establish personal liability in a Section 1983 action, the plaintiffs must show that MacPherson: (1) was acting under color of state law; and (2) caused the deprivation of a federal constitutional right enjoyed by the plaintiffs. *See Kentucky v. Graham*, 473 U.S. 159, 166 (1985). The state defendants argue that Cimino was an at-will employee, and thus could be fired at any time. Thus, they contend that he has failed to allege any constitutional deprivation.² However, Cimino clearly alleges that he was denied equal protection of the laws due to discrimination. Accordingly, the court will not dismiss the Section 1983 claim against MacPherson in his individual capacity.

4. MacPherson's Individual Liability Under Section 1985(3)

In order to establish a claim under Section 1985(3), the Supreme Court requires the following elements: (1) that two or more defendants conspired; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws or of equal privileges and immunities under the law; (3) that one or more of the conspirators acted in furtherance of the conspiracy; and (4) that such an act injured a person or his property or deprived him of exercising any right or privilege of a citizen of the United States. *See Griffin v. Breckenridge*, 403 U.S. 88, 102-103 (1971).

²MacPherson does not state that he takes exception with a finding that he was acting under color of state law. Accordingly, the court will not discuss this element.

In his complaint, Cimino pled that “McPherson [sic] and Castetter agreed to fire the two white employees . . . to make it look like the terminations [of the two black employees] were not because of the race of the black employees.” Cimino further alleges that Castetter subsequently terminated him.

Based on these allegations, the court concludes that dismissal for failure to state a claim would be inappropriate.

5. State Law Claim: Breach of Implied Covenant of Good Faith and Fair Dealing

Castetter, perhaps as an agent of FuturTech, entered into a contract with Cimino. MacPherson was not a party to this contract. Accordingly, his actions could not have breached an implied covenant of good faith and fair dealing in the Castetter/Cimino contract. This claim will be dismissed.

C. Castetter’s and Cork Screw’s Motion to Dismiss

As an initial matter, the court will dismiss all of Cimino’ claims against Cork Screw. Cimino has alleged only that FuturTech subcontracted with Castetter, through Castetter’s employer Cork Screw. Cork Screw was not a party to the FuturTech/Division of Unemployment Insurance contract. It had no involvement with the type of work Castetter performed, how he performed the work, the hours he worked, or the amount he was paid for his work. Indeed, Cork Screw’s only involvement was to receive a set payment from FuturTech for the number of hours that Castetter worked. Cimino has not alleged any facts from which the court can assume the existence of an agency relationship,³ or that Cork Screw itself engaged in any intentional discrimination, or a conspiracy to commit intentional discrimination. Accordingly, as Cimino’s complaint alleges nothing more, there can be no basis under any of the theories he has

³Notably, Cimino has failed to allege facts demonstrating that Cork Screw in any way controlled Castetter.

advanced for Cork Screw's liability.

Cimino does not state that he is suing Castetter in an official capacity as a representative of the state. The following analysis thus addresses only Castetter's personal liability.

1. Castetter's Section 1981 Liability

Cimino alleges that Castetter terminated his employment due to his race. These allegations are sufficient to withstand a motion to dismiss for failure to state a claim. Accordingly, the court will not dismiss Cimino's Section 1981 claim.

2. Castetter's Section 1983 Liability

Cimino next alleges that Castetter acted at the "express direction of the Department and the Division through MacPherson" when Castetter terminated him due to his race. The court thus concludes that, for the purposes of a motion to dismiss, Cimino has alleged that Castetter was acting under color of state law when he deprived him of a constitutional right. *See Kentucky v. Graham*, 473 U.S. 159, 166 (1985).

3. Castetter's Section 1985(3) Liability

Cimino's complaint alleges that Castetter and MacPherson conspired to terminate Cimino due to his race, and that they did in fact terminate him. As discussed above in conjunction with MacPherson's individual liability, this allegation will suffice for the purpose of a motion to dismiss.

4. State Law Claim: Breach of Implied Covenant of Good Faith and Fair Dealing

It is undisputed that Cimino and Castetter entered into an employment contract. Cimino now alleges that Castetter fired him because of his race, and falsified the reasons for that termination. Accordingly, the court declines to dismiss this claim against Castetter.

V. CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED that:

1. FuturTech's motion to dismiss (D.I. 9) is GRANTED with respect to the Section 1983, 1985(3) and Third-Party Beneficiary claims. It is DENIED with respect to all other claims;
2. The Department of Labor, Division of Unemployment Insurance, and MacPherson's motion to dismiss (D.I. 24) is GRANTED on all claims with respect to the Department of Labor, Division of Unemployment Insurance and MacPherson in his official capacity. It is GRANTED with respect to MacPherson in his individual capacity as to both of the state law claims. It is DENIED with respect to MacPherson in his individual capacity as to all other claims, including claims for injunctive relief;
3. Cork Screw's and Castetter's motion to dismiss (D.I. 30) is GRANTED with respect to Cork Screw on all claims. It is GRANTED with respect to Castetter on the Third-Party Beneficiary claim. It is DENIED with respect to Castetter as to all other claims.

Date: February 25, 2002

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE