

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

GEORGE EVERETT, :
 :
 Plaintiff, :
 :
 v. : Civil Action No. 04-049 JJF
 :
 HOSPITAL BILLING AND :
 COLLECTION SERVICE, LTD., :
 et al., :
 :
 Defendants. :

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P.A., Wilmington, Delaware.
Attorney for Plaintiff.

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Wilmington, Delaware.
Attorneys for Defendants.

MEMORANDUM OPINION

March 31, 2005
Wilmington, Delaware


Farnan, District Judge.

Pending before the Court are Defendants' Motion To Dismiss (D.I. 7) and Defendants' Motion To Strike Portions Of Plaintiff's Answering Brief, Or In The Alternative, For Leave To Take Discovery (D.I. 12). For the reasons discussed, the Motion To Dismiss (D.I. 7) will be granted in part and denied in part and the Motion To Strike (D.I. 12) will be granted.

I. Background

On January 23, 2004, Plaintiff filed five-count complaint against his former employer, Hospital Billing and Collection Service, Ltd. ("Hospital Billing"), and two of its employees, President Jack T. Byrnes ("Byrnes") and Director of Information Services and Technology Victoria Ostrow ("Ostrow"). Plaintiff claims that Defendants violated the Americans With Disabilities Act (ADA), Title VII of the Civil Rights Act of 1964, and 42 U.S.C. § 1981. Plaintiff further alleges intentional infliction of emotional distress and conspiracy.

II. Legal Standard

A motion to dismiss tests the legal sufficiency of the complaint. In reviewing a motion to dismiss pursuant to Rule 12(b)(6), courts "must accept as true the factual allegations in the [c]omplaint and all reasonable inferences that can be drawn therefrom." Langford v. Atlantic City, 235 F.3d 845, 847 (3d Cir. 2000). A court will grant a motion to dismiss only when it appears that a plaintiff could prove no set of facts that would

entitle him or her to relief. Id.

III. Discussion

A. Release

Defendants contend that the Court should dismiss Plaintiff's Complaint because Plaintiff knowingly and willingly executed a valid release in which he expressly waived his right to file any and all claims or causes of action arising from his employment or separation from employment against Defendants. In response, Plaintiff contends, first, that the release issue is improperly before the Court because the Complaint does not rely on the release. Further, Plaintiff contends that he signed the release under duress, and that the release lacked consideration because it decreased Plaintiff's benefits. In response, Defendants have filed a Motion To Strike Portions Of Plaintiff's Answering Brief, Or In The Alternative, For Leave To Take Discovery (D.I. 12) asking the Court not to consider, in deciding the Motion to Dismiss, any allegations regarding the alleged release that were made for the first time in Plaintiff's Answering Brief and Affidavit.

As noted above, a motion to dismiss tests the legal sufficiency of the complaint. In this case, the alleged release was not attached to Plaintiff's Complaint, and therefore, the Court concludes that it cannot consider the release in assessing Defendants' motion to dismiss. For this reason, the Court will

grant Defendants' Motion To Strike (D.I. 12).

B. Plaintiff's ADA Claim (Count I)

Defendants contend that Plaintiff's ADA claim (Count I) should be dismissed in its entirety because Plaintiff failed to properly plead a "regarded as" claim. In response, Plaintiff contends that he was "regarded as" having a disability because he has a physical or mental impairment that does not substantially limit major life activities but was treated by Hospital Billing as having such a limitation.

Accepting Plaintiff's factual allegations as true, the Court concludes that Plaintiff has properly pled a "regarded as" claim under the ADA.

C. Plaintiff's ADA Claim (Count I) and Title VII Claim (Count II) regarding Defendants Byrnes and Ostrow

Defendants Byrnes and Ostrow contend that Plaintiff cannot allege individual liability against Byrnes and Ostrow in Count I (ADA claim) and Count II (Title VII claim). In response, Plaintiff contends that Defendants were personally involved in his unlawful termination.

Individual employees cannot be held liable under Title VII or the ADA. See Sheridan v. E.I. DuPont de Nemours & Co., 100 F.3d 1061, 1077 (3d Cir. 1996); Emerson v. Thiel College, 296 F.3d 184, 189 (3d Cir. 2002). Thus, the Court will dismiss Plaintiff's claims against Byrnes and Ostrow pled in Counts I and II.

D. Plaintiff's Section 1981 Claim (Count III) regarding Defendant Byrnes

Defendant Byrnes contends that Count III must be dismissed because Plaintiff's Complaint does not allege that Byrnes committed any discriminatory acts. In response, Plaintiff contends that Byrnes, in his supervisory position, was involved in the scheme to wrongfully discharge Plaintiff. Plaintiff contends that Defendant Ostrow confirmed this allegation when stating to him, regarding the termination, "they made me do it." (D.I. 10 at 15.)

Based on Plaintiff's contested allegations, the Court concludes, at this juncture, that Plaintiff has sufficiently pled a claim against Byrnes.

E. Plaintiff's IIED Claim (Count IV)

Defendants contend that Plaintiff's intentional infliction of emotional distress ("IIED") claim (Count IV) is barred by the Delaware Worker's Compensation Act, which provides the exclusive remedy for employees injured at work. 19 Del. C. § 2304. Further, Defendants contend that Plaintiff failed to plead all the elements of IIED against all Defendants. In response, Plaintiff contends that the "personal dispute exception" of 19 Del. C. § 2301(15)(b) excludes coverage under the Worker's Compensation Act.

The personal dispute exception cited by Plaintiff applies to a "wilful act of another employee directed against the employee

by reasons personal to such employee and not directed against the employee as an employee or because of the employee's employment."

19 Del. C. § 2301(15)(b). In making this determination,

courts generally look to the time, place, and circumstances of the injury, with a focus on three factors: (1) the employee's act causing the injury was willful; (2) the injury must not have been directed against plaintiff as an employee or because of plaintiff's employment; and (3) the assault was directed against the plaintiff because of personal reasons.

Lloyd v. Jefferson, 53 F. Supp. 2d 643, 690 (D. Del. 1999).

Because the reasons for Everett's termination are fact-sensitive, the Court cannot, at this stage of the proceedings, conclude whether Everett was fired for non-personal reasons. Therefore, the Court will not dismiss Plaintiff's IIED claims against Byrnes and Ostrow on the basis of the exclusivity provision of the Delaware Worker's Compensation Act. The Court, however, will dismiss the IIED claim against Hospital Billing because the personal dispute exception applies only to fellow employees. Plaintiff's claim and remedy against Hospital Billing, therefore, can only be pursued pursuant to the Delaware Worker's Compensation Act.

F. Plaintiff's Conspiracy Claim (Count V)

Defendants contend that Plaintiff's conspiracy claim (Count V) fails to plead the required elements of such a claim.

A civil conspiracy claim requires a plaintiff to allege "(1) [a] confederation or combination of two or more persons; (2) [a]n

unlawful act done in furtherance of the conspiracy; and (3) [a]ctual damage." Nicolet, Inc. v. Nutt, 525 A.2d 146, 149-50 (Del. 1987) (citations omitted).

The Court has reviewed the allegations of Count V in the Complaint and measured those allegations against the elements required to prove a civil conspiracy under Delaware law and concludes that Plaintiff's factual allegations are sufficient to survive Defendants' Motion To Dismiss.

IV. Conclusion

In sum, the Court will (1) grant in part and deny in part Defendants' Motion To Dismiss (D.I. 7) and (2) grant Defendants' Motion To Strike Portions Of Plaintiff's Answering Brief, Or In The Alternative, For Leave To Take Discovery (D.I. 12).

An appropriate Order will be entered.

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 Defendants. :

ORDER

At Wilmington, this 31 day of March 2005, for the reasons set forth in the Memorandum Opinion issued this date;

IT IS HEREBY ORDERED THAT:

1) Defendants' Motion To Dismiss (D.I. 7) is **GRANTED** in part and **DENIED** in part, specifically:

a. Plaintiff's claims against Byrnes and Ostrow in Counts I and II are dismissed;


b. Plaintiff's IIED claim against Hospital Billing in Count IV is dismissed;

c. All remaining claims are not dismissed;

2) Defendants' Motion To Strike Portions Of Plaintiff's Answering Brief, Or In The Alternative, For Leave To Take Discovery (D.I. 12) is **GRANTED**. The Court has not considered any of Plaintiff's allegations concerning Defendants' release

contentions.

March 31, 2005
DATE


UNITED STATES DISTRICT JUDGE