IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

PAMELA KURTH,

OPINION AND ORDER

Plaintiff,

02-C-0213-C

v.

VENCOR, INC.,

Defendant.

- -

This is a civil action for monetary relief in which plaintiff Pamela Kurth is suing defendant Kindred Nursing Centers Limited Partnership, d/b/a Kennedy Park Medical and Rehabilitation Center (sued incorrectly as Vencor, Inc.), for breach of contract and violation of public policy relating to her termination of employment by defendant. Plaintiff brought the action in the Circuit Court for Marathon County, Wisconsin, seeking an unspecified amount in compensatory and exemplary damages together with costs. Defendant then removed the action to this court pursuant to 28 U.S.C. §§ 1441 and 1446, alleging diversity jurisdiction.

Although neither party disputes diversity, the court has an independent obligation to insure that it exists. See generally Wild v. Subscription Plus, Inc., 292 F.3d 526 (7th Cir.

2002). Because defendant is a limited partnership and a limited partnership has the citizenship of each partner, the court requested that defendant submit additional information about the citizenship of its partners. See Guaranty National Title Co. v. J.E.G. Associates, 101 F.3d 57, 58 (7th Cir. 1996); see also Meyerson v. Harrah's East Chicago Casino, No. 01-1993, slip op. at 2 (7th Cir. July 11, 2002) (court vacated district court judgment because no indication of citizenship of unincorporated association). After receiving such information by affidavit, I am satisfied that diversity of citizenship exists.

Presently before the court is (1) plaintiff's motion to remand pursuant to 28 U.S.C. § 1447(c) on the grounds that this court lacks subject matter jurisdiction because the amount in controversy does not exceed $75,000; and (2) defendant's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) on the grounds that plaintiff's breach of contract claim is barred by the Wisconsin Fair Employment Act and that plaintiff's termination did not violate public policy.

Because the court has subject matter jurisdiction over plaintiff's claims, plaintiff's motion to remand this case will be denied. Because plaintiff has stated a cause of action for breach of contract and violation of public policy, defendant's motion to dismiss will be denied.

For the sole purpose of deciding these motions, plaintiff's allegations in the complaint are accepted as true.

ALLEGATIONS OF FACT

Plaintiff Pamela Kurth is a resident of Wausau, Wisconsin. Defendant Kindred Nursing Centers Limited Partnership, d/b/a Kennedy Park Medical and Rehabilitation Center, is a Delaware limited partnership. Defendant is in the business of operating nursing homes.

Defendant employed plaintiff as a registered nurse at its nursing home facility located in Schofield, Wisconsin. On or about March 17, 2000, plaintiff reported to the facility administrator that her supervisor had been harassing her and that her supervisor's practices endangered the care and safety of the facility residents. As part of plaintiff's employment agreement with defendant, plaintiff was required to comply with an employer-provided Code of Business Conduct, which encourages employees to report harassment to management. The code provides that no retaliatory action will be taken against employees who report harassment. On March 20, 2000, plaintiff's employment with the defendant was terminated.

OPINION

A. Motion to Remand

There are two elements to federal diversity jurisdiction under 28 U.S.C. § 1332.

First, there must be complete diversity of parties. Second, the amount in controversy must exceed $75,000. In this case, plaintiff does not allege lack of complete diversity; rather, she disputes the amount in controversy.

Generally, the amount in controversy alleged by a plaintiff in good faith will be determinative on the issue of jurisdictional amount unless it appears to a legal certainty that the claim is for less than that required by the statute. See Rexford Rand Corp. v. Ancel, 58 F.3d 1215, 1218 (7th Cir. 1995). However, if the court's jurisdiction is challenged by the court or the opposing party, the party seeking to invoke jurisdiction bears the burden of supporting its jurisdictional allegations by "competent proof." NFLC, Inc. v. Devcom Mid-America, Inc., 45 F.3d 231, 237 (7th Cir. 1995) (citing McNutt v. General Motors Acceptance Corp. of Indiana, 298 U.S. 178, 189 (1936)). The Court of Appeals for the Seventh Circuit has interpreted this burden to mean that a party must show "to a reasonable probability that jurisdiction exists." Chase v. Shop 'N Save Warehouse Foods, Inc., 110 F.3d 424, 427 (7th Cir. 1997). Therefore, defendant bears the burden of showing that the amount in controversy exceeds $75,000 on the basis of facts existing at the time of removal. Id.; see also Gould v. Artisoft, Inc., 1 F.3d 544, 547 (7th Cir. 1993).

Resolution of the $75,000 question is not difficult. To meet its burden, defendant relied properly on plaintiff's complaint and defendant's own information regarding plaintiff's earnings from her employment with defendant. Although plaintiff did not allege an amount

in controversy in the complaint she filed in state court, defendant's records show that she earned in excess of $52,000 from her employment with defendant in 1999. The passage of time between plaintiff's last day of employment (March 20, 2000) and the filing of plaintiff's complaint (February 27, 2002) was almost two years. Relying on these facts, defendant concluded that plaintiff's lost wages alone would exceed $75,000.

Although plaintiff stipulates in her affidavit that her damages will not exceed $75,000, this evidence was not in existence at the time of removal. In In re Shell Oil Co., 970 F.2d 355, 356 (7th Cir. 1992), the court of appeals stated that a post-removal affidavit or stipulation is ineffective to authorize remand because jurisdiction is determined at the time of removal. See also Chase, 110 F.3d at 430; St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 292 (1938). Plaintiff cites Unified Catholic Schools of Beaver Dam Educ. Assn. v. Universal Card Servs. Corp., 34 F. Supp. 2d 714 (E.D. Wis. 1999), for the proposition that the court may consider evidence generated subsequent to removal if it is probative of the amount in controversy at the time of removal. However, what plaintiff fails to realize is that in United Catholic Schools the court disregarded an affidavit submitted under facts virtually identical to the facts of this case.

In Unified Catholic Schools, the plaintiff filed her complaint in state court without a specified amount of damages. After the defendant removed the case to federal court, the plaintiff filed a motion to remand. In support of the motion, the plaintiff submitted an

affidavit in which she averred that her damages were less than $74,000 and offered to stipulate to the same. Guided by Seventh Circuit precedent stating that post-removal affidavits and stipulations limiting claims to less than the jurisdictional amount are ineffective as a basis for remand, the court disregarded the affidavit.

Defendant has shown to a reasonable probability that at the time of removal, the amount in controversy exceeded $75,000. Therefore, plaintiff's motion to remand the case to state court will be denied.

B. Motion to Dismiss

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) will be granted only if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations" of the complaint. Cook v. Winfrey, 141 F.3d 322, 327 (7th Cir. 1998) (citing Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)); Gossmeyer v. McDonald, 128 F.3d 481, 489 (7th Cir. 1997). Moreover, in a Rule 12(b)(6) motion to dismiss, all plaintiff's well-pleaded facts are taken as true, all inferences are drawn in favor of plaintiff and all ambiguities are resolved in favor of plaintiff. Dawson v. General Motors Corp., 977 F.2d 369, 372 (7th Cir. 1992).

1. Breach of contract claim

Defendant argues that plaintiff's breach of contract claim must be dismissed because the Wisconsin Fair Employment Act provides the exclusive remedy for her claim. Defendant is correct when it argues that the Wisconsin Fair Employment Act provides the exclusive remedy for claims of discrimination or retaliation prohibited by the Act. See Mursch v. Van Dorn Co., 627 F. Supp. 1310, 1312-15 (W.D. Wis. 1986). The issue is whether plaintiff is alleging anything prohibited by the Act.

Wis. Stat. § 111.321 states in part that:

> [n]o employer . . . may engage in any act of employment discrimination as specified in s. 111.322 against any individual on the basis of age, race, creed, color, disability, marital status, sex, national origin, ancestry, arrest record, conviction record, membership in the national guard, state defense force or any reserve component of the military forces of the United States or this state or use or nonuse of lawful products off the employers premises during nonworking hours.

Wis. Stat. § 111.322(3) further states that "it is an act of employment discrimination to . . . discharge or otherwise discriminate against any individual because he or she has opposed any discriminatory practice under this subchapter."

Plaintiff's complaint does not refer to employment discrimination based on any of the classifications enumerated in Wis. Stat. § 111.321. Plaintiff alleges that she reported to the facility administrator "that she had been the object of harassment at work by a supervisor and that the supervisor's practices endangered the care and safety of the residents of the facility." See Cpt., dkt. #2, ¶5. In its brief in support of its motion to dismiss, defendant

attempts to frame plaintiff's breach of contract claim as a claim of sexual harassment under Wis. Stat. § 111.36, but such a claim is not supported by plaintiff's allegations. Plaintiff did not specify the basis for the harassment in her complaint and, in fact, the harassment that plaintiff complains of suggests retaliation for her whistleblower status. Furthermore, in plaintiff's brief in opposition to the motion to dismiss, she asserts that the harassment was not based on gender. Therefore, I conclude that plaintiff is not limited to remedies in the Wisconsin Fair Employment Act.

Plaintiff alleges that her termination breached the provisions set forth in defendant's Code of Business Conduct, which she was required to observe as part of her employment with defendant. In Ferraro v. Koelsch, 124 Wis. 2d 145, 157-58, 368 N.W.2d 666 (1985), the Wisconsin Supreme Court held that an employer's promise of employment on stated terms and conditions and the employee's promise to continue employment under those terms constituted an express contract that superseded the at-will nature of the employment. Plaintiff has alleged that (1) the Code of Business Conduct established conditions of employment; (2) she performed her work in reliance on the standards set forth in the code; and (3) defendant terminated her in violation of these standards. These allegations are adequate to state a claim of breach of contract.

2. Violation of public policy

Wisconsin adheres to the employment-at-will doctrine, which provides that when the terms of employment are indefinite, an employer may discharge an employee for no cause or for "cause morally wrong" without legal consequences. Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 567, 335 N.W.2d 834, 837 (1983). However, "an employee has a cause of action for wrongful discharge when the discharge is contrary to fundamental and well-defined public policy as evidenced by existing law." Id. at 573, 335 N.W.2d at 840.

> [The] fundamental and well defined public policy of protecting nursing home residents from abuse and neglect . . . is demonstrated in part by Wis. Stat. § 50.07(1)(e) which prohibits a nursing home from retaliating against an employee who provides information regarding abuse or neglect to a state official, and by Wis. Stat. § 46.90(4)(b) which prohibits an employer from discharging an employee for reporting abuse or neglect of a resident to a county agency. We also find the public policy of protecting nursing home residents to be present in Wis. Stat. § 940.295(3)'s imposition of criminal penalties on workers who knowingly permit abuse or neglect to occur.

Hausman v. St. Croix Care Center, 214 Wis. 2d 655, 665, 571 N.W.2d 393, 397 (1997). Plaintiff alleges that her termination violates public policy because she was terminated as a result of reporting concerns regarding patient care and safety to the nursing home administrator.

In Bushko v. Miller Brewing Co., 134 Wis. 2d 136, 396 N.W.2d 167 (1986), the Wisconsin Supreme Court limited the scope of the public policy exception to the employment-at-will doctrine. The court held that the exception will be invoked only when an employee is discharged for refusing to violate public policy at the request, command or

instruction of the employer. Id. at 142, 396 N.W.2d at 170. Like the plaintiffs in Hausman, plaintiff does not meet the Bushko limitation because there is no allegation that her termination was the result of refusing to violate public policy at the request of her employer. In Hausman, the plaintiffs asked the court to eliminate the Bushko limitation by "redefin[ing] the public policy exception . . . to include actions for wrongful termination based on particular whistle-blowing activities of a discharged employee." Hausman, 214 Wis. 2d at 666, 571 N.W.2d at 397. Although the court refused to adopt a broad whistleblower exception, it held that the public policy exception may apply in certain circumstances in which the Bushko limitation has not been met. Id. at 667-69, 571 N.W.2d at 397-98. In Hausman, the plaintiffs were former employees at the defendant nursing home who reported concerns of abuse and neglect of patients to a state official. Id. at 660, 571 N.W.2d at 395. The court recognized the plaintiffs' affirmative legal obligation to act to prevent abuse or neglect of nursing home patients under Wis. Stat. § 940.295(3). Id. at 667, 571 N.W.2d at 398.

Defendant argues that plaintiff does not fall under any public policy exception because she did not report her concerns to state officials. However, Wis. Stat. § 940.295(3) does not limit reporting to state officials; it requires only some action to prevent a person from abusing or neglecting patients. The statute states in part:

Any person in charge of or employed in any facility or program under sub. (2)

> who does any of the following, or *who knowingly permits another person to* . . . intentionally . . . recklessly . . . [or] negligently abuse or neglect a patient or a resident.

Wis. Stat. § 940.295(3)(a) (Emphasis added.).

In Hausman, the court held:

> Where the law imposes an affirmative obligation upon an employee to prevent abuse or neglect of nursing home residents and the employee fulfills that obligation by reporting the abuse, an employer's termination of employment for fulfillment of the legal obligation exposes the employer to a wrongful termination action. In such circumstances, the employee may pursue a wrongful termination suit under the public policy exception regardless of whether the employer has made an initial request, command, or instruction that the reporting obligation be violated.

Hausman, 214 Wis. 2d at 669, 571 N.W.2d at 398. Defendant argues that plaintiff does not allege that she had any *legal* obligation to report her concerns and therefore she does not fall under the public policy exception. However, plaintiff's complaint states explicitly, "[u]nder applicable Wisconsin law . . . plaintiff had an obligation to report the concerns to management." See Cpt., dkt. #2, ¶9. Plaintiff has stated a claim upon which relief can be granted pursuant to the public policy exception to the employment-at-will doctrine. Accordingly, defendant's motion to dismiss will be denied.

ORDER

IT IS ORDERED that

1. Plaintiff Pamela Kurth's motion to remand is DENIED;

2. Defendant Kindred Nursing Centers Limited Partnership's motion to dismiss for failure to state a claim is DENIED; and

3. The caption shall be changed to reflect that the proper defendant is Kindred Nursing Centers Limited Partnership, d/b/a Kennedy Park Medical and Rehabilitation Center.

Entered this 16th day of July, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge