IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

CARROLL SMITH,

Plaintiff,

v. MEMORANDUM AND ORDER

VT GRIFFIN SERVICES, 06-C-084-S

Defendant.

Plaintiff Carroll Smith commenced this action in Monroe County pursuing state law claims against VT Griffin Services for wrongful termination, tortious interference of contract and defamation. In his complaint he alleges that he was wrongfully terminated on July 6, 2005 and that defendant communicated false information about him to others, including a prospective employer. Defendant removed the action to this Court based on diversity jurisdiction.

On June 15, 2006 defendant filed a motion for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, submitting proposed findings of facts, conclusions of law, affidavits and a brief in support thereof. This motion has been fully briefed and is ready for decision.

On a motion for summary judgment the question is whether any genuine issue of material fact remains following the submission by both parties of affidavits and other supporting materials and, if

not, whether the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. An adverse party may not rest upon the mere allegations or denials of the pleading, but the response must set forth specific facts showing there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

There is no issue for trial unless there is sufficient evidence favoring the non-moving party that a jury could return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

FACTS

For purposes of deciding defendant's motion for summary judgment the Court finds that there is no genuine dispute as to any of the following material facts.

Plaintiff Carroll Smith is an adult resident of Tomah, Wisconsin. VT Griffin is a corporation organized under the laws of the State of Georgia with its principal place of business in Atlanta, Georgia.

Griffin provides professional and technical support services and job order contracting under dozens of contracts throughout the country with private industry and federal agencies including the U.S. Army, U.S. Navy, U.S. Air Force and General Services Administration. The company provides these services for the U.S. Army base at Fort McCoy located outside Sparta, Wisconsin.

Griffin hired plaintiff as a Material coordinator and warehouse lead on January 6, 2003. Plaintiff, an at-will employee, worked in a large facility with an arms room that contained a vault in which the Army kept all types of weapons from small arms to heavy machine guns. In the summer of 2005 plaintiff reported to Supply Manager Terry Green. In addition to plaintiff, Wade Bruggeman, Wade Cox, Robbie Fritsch, Tom Habhegger, Amy Rudicil and Jeremiah White also worked in the warehouse.

Griffin employees working on the Fort McCoy Contract enter a Contact Line Number (CLIN) on their time sheets in order that the work they perform may be billed to the government. On or about June 6, 2005 plaintiff was directed by Green to begin charging his time from CLIN 2003 (relating to installation retail supply services to customers in a single stock fund) to CLIN 2030 (relating to mobilization/demobilization-base support performed in direct support of contingency operations or directly attributable to support a mission or personnel providing mission support.

Plaintiff told Green on two occasions in June 2005 he did not think this change was right but did not refuse to comply with it.

Plaintiff believed that Griffin was committing fraud against the United States government. He told other employees in the work place that he intended to contact the Fraud and Abuse Hotline. Plaintiff told Barb Olson, the Chief of Mobilization and Security at Fort McCoy, about his concerns regarding the billing practices of Griffin.

In late June plaintiff modified Amy Rudicil's leave request from a full day to three hours. He told her it would not be appropriate to take a full day of leave for her doctor's appointment.

On Friday July 1, 2005 at approximately 11:30 a.m. Amy Rudicil approached Retail Supply System Administrator Michelle Martin in tears complaining that plaintiff had sexually harassed her. Martin contacted her supervisor Green who met with her and Rudicil. Rudicil told Martin and Green that plaintiff had touched her and made inappropriate gestures. She also advised that there were witnesses to this conduct. Green contacted Human Resources Manager Mary Norman. Norman met with Green, Martin and Rudicil. Rudicil made specific allegations about plaintiff's conduct towards her. Norman and Green made the decision to transfer Rudicil away from plaintiff.

That same afternoon, Norman and Green interviewed Wade Bruggeman and White. On Tuesday July 5, 2005 Norman and Green interviewed Linda Short. Norman presented all the information that she had received in her investigation to Project Manager George Harvey. On July 6, 2005 Harvey terminated plaintiff. Plaintiff has not shown that at that time Harvey had any knowledge of plaintiff's concerns about Griffin's billing practices. The termination letter informed plaintiff that he had violated the sexual harassment policy of the company. The letter informed plaintiff that he was no longer allowed in any areas controlled by VT Griffin.

In December 2005 plaintiff received a job offer from another contractor, Logistics Engineering and Environmental Support Services Incorporated (LESCO) and/or Eagle Systems and Services, Inc. to perform work at Fort McCoy. Plaintiff told his former co-worker Hagberger. Hagberger told Green that plaintiff would be returning to work at Fort McCoy.

Green told Rick Whitley, his counterpart in the government operations at Fort McCoy, that plaintiff had been terminated and that he was prohibited from entering areas at Fort McCoy controlled by Griffin. Whitley suggested Griffin advise John Ryder, his superior.

Harvey, the project manager for Griffin, told Ryder, the government official in charge of the access roster at Fort McCoy,

that Griffin had terminated plaintiff for sexual harassment. He also showed Ryder a copy of plaintiff's July 6, 2005 termination letter which stated that plaintiff was no longer allowed in the areas controlled by Griffin. LESCO withdrew plaintiff's job offer in mid-December 2005.

MEMORANDUM

Plaintiff claims that he was wrongfully terminated. The employment-at-will doctrine allows an employer to discharge an employee for good cause or for no cause. Batteries Plus, LLC v. Mohr, 244 Wis. 2d, 559, 628 N.W.2d 364 (2001). In Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 2335 N.W.2d 834 (1980), the Wisconsin Supreme Court adopted the public policy exception to the employment-at-will doctrine. Brockmeyer requires an employee to allege that he was discharged for refusing to violate a constitutional or statutory provision. Bushko v. Miller Brewing Co., 134 Wis. 2d 136, 141, 396 N.W. 2d 167, 179 (1986).

In his brief in opposition to summary judgment plaintiff cites two statutory provisions that he believed defendant was violating, Wis. Stats. § 943, 39 (1) and 31 U.S.C. § 3729(a)(1) and (1) which prohibit fraudulent billing practices. Plaintiff cannot meet the requirement of refusing to violate these provisions because he did not refuse to bill his time as required by his supervisor even though he thought it was wrong.

The alternative route to establish a wrongful discharge claim is to prove that the law imposes an affirmative obligation upon an employee, the employee fulfills that obligation and the employer terminated the employee for fulfilling the legal obligation. Hausman v. St. Croix Care Ctr., 214 Wis. 2d 655, 571 N.W.2d 393 (1997). In Hausman, the court stated, "Wisconsin law imposes an affirmative obligation upon the plaintiffs to act to prevent suspected abuse or neglect of nursing home residents. One such appropriate action under this legal obligation is to report the abuse or neglect." Id. at 667.

The statutes cited by plaintiff, Wis Stats. § 943.39(1) and 31 U.S.C. § 3729 (a)(1) and (2), do not create an affirmative duty to act to prevent alleged fraud. Plaintiff has not shown that he had an affirmative obligation to prevent fraud that he fulfilled. Accordingly, plaintiff can not show that he was wrongfully discharged according to Hausman. Defendant is entitled to judgment as a matter of law on plaintiff's wrongful discharge claims.

In his brief in opposition plaintiff for the first time raises a claim under the 31 U.S.C. § 3730(h), the federal False Claims Act. Plaintiff's complaint which was filed in Monroe County Circuit Court alleges state law claims of wrongful termination, tortious interference with contract and defamation. It was removed to this Court by the defendant based on diversity. Plaintiff's new counsel chose not to amend the complaint to add the federal False

Claims Act claim but rather to argue that the complaint implicitly stated this claim.

There is nothing in the complaint which was filed in state court to imply that plaintiff was pursuing a claim under the federal False Claims Act. In fact the complaint contains no allegations that plaintiff was concerned about fraud against the United States government. Further, plaintiff did not disclose this cause of action in any of the pretrial proceedings in this matter. It is prejudicial to the defendant for plaintiff to raise this claim for the first time in his brief in opposition to defendant's for summary judgment. Plaintiff will not be allowed to pursue this claim which was not pled in his complaint or any amendment thereto.

Alternatively, the Court will address the merits of the claim. The Federal False Claims Act, 31 U.S.C. § 3729, provides civil penalties against individuals for making false claims for payment to the United States Government. The Attorney General or a private citizen may bring a civil action for false claims. 31 U.S.C. § 3730. The Act also provides as follows at 31 U.S.C. § 3730(h):

> Any employee who is discharged, demoted, suspended, threatened, harassed, or in any manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole.

To prevail on his claim under 31 U.S.C. § 3730(h), plaintiff has to show that he took action to investigate possible fraud, that defendants had knowledge of these actions and that his discharge was motivated at least in part by the protected conduct. Fanslow v. Chicago MFG. Center, Inc., 384 F.3d 469, 479 (7th Cir. 2004). Conduct is protected by the statute if the plaintiff believed in good faith, and a reasonable employee in the same situation might believe, that the employer is committing fraud on the government. Id., at 480.

Plaintiff could possibly prove that he took action to investigate s possible fraud. There is no evidence, however, that Harvey, the person who terminated plaintiff, had any knowledge of these actions. Accordingly, plaintiff could not prevail on his claim under the False Claims Act.

Plaintiff also claims defendants tortiously interfered with his contract. This claim is based on Green's comments to Whitley and Harvey's comments to Ryder. Green and Harvey informed Whitley and Ryder that plaintiff had been terminated for violating Griffin's policy on sexual harassment and was prohibited from entering any areas at Fort McCoy controlled by Griffin. These statement are also included in plaintiff's termination letter. Plaintiff claims he was denied another job because of this information.

To prevail on this claim, plaintiff must prove: 1) an actual or prospective contract existed between plaintiff and a third party;

2)Griffin interfered with that contract or prospective contract, 3)the interference was intentional; 4) the interference caused plaintiff to sustain damages and 5)Griffin was not justified or privileged to interfere. Mackenzie v. Miller Brewing Company, 234 Wis. 2d 1, 608 N.W. 2d 331 (Ct. App. 2000).

In Mackenzie the Court states, "The transmission of truthful information is privileged, does not constitute improper interference with a contract and cannot subject one to liability for tortious interference with a contract or prospective contract. Id. Both Green and Harvey transmitted the information in plaintiff's termination letter which was truthful. This conduct is privileged and is not tortious interference with contact according to Mackenzie.

Plaintiff also pursues a defamation claim against the defendant. To prevail on this claim plaintiff must prove that the statement was spoken to someone other than plaintiff, was false, was unprivileged and tended to harm plaintiff's reputation so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. Schindler v. Seiler, No. 05-C-521-C, 2006 WL908033 (W.D. Wis., April. 6, 2006).

Plaintiff claims that the statements made by Green and Harvey were defamatory. Both Green and Harvey stated that plaintiff had been terminated for violating Griffin's sexual harassment policy and that he was prohibited from entering areas of Fort McCoy controlled

by Griffin. These statements were true. Accordingly, the statements were not defamatory. Defendant is entitled to judgment in its favor as a matter of law on plaintiff's defamation claim.

ORDER

IT IS ORDERED that defendant's motion for summary judgement is GRANTED.

IT IS FURTHER ORDERED that judgment be entered in favor of defendant against plaintiff DISMISSING his complaint and all claims contained therein with prejudice and costs.

Entered this 19th day of July, 2006.

BY THE COURT:

S/

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JOHN C. SHABAZ
District Judge