2021 WL 650885
United States District Court,
N.D. Illinois, Western Division.

Matthew KIRCHOFF, Plainitff,

v.

CHEM PROCESSING, INC., Defendant.

Case No. 20 C 50242
|
Signed 02/19/2021

Attorneys and Law Firms

David J. Fish, Thalia Pacheco Argomaniz, The Fish Law Firm, P.C., Naperville, IL, for Plaintiff.

Scott A. Calkins, Reno & Zahm LLP, Rockford, IL, for Defendant.

ORDER

Philip G. Reinhard, United States District Court Judge

***1** For the reasons stated below, defendant's motion to dismiss [11] is denied.

STATEMENT-OPINION

Plaintiff, Matthew Kirchhoff, brings this action against his former employer, Chem Processing Inc., asserting violations of the Americans with Disabilities Act (42 U.S.C. § 12101, et seq.) ("ADA") (Count II) and the Family Medical Leave Act (29 U.S.C. § 2615) ("FMLA") (Count III). He also asserts he was subjected to a retaliatory discharge in violation of Illinois common law (Count I). Subject matter jurisdiction is proper pursuant to 28 U.S.C. §§ 1331 and 1367. Defendant moves to dismiss [11] pursuant to Fed. R. Civ. P. 12(b)(6).

The following facts are taken from the complaint. Plaintiff was hired by defendant as a maintenance technician around April 3, 2018. When hired, he was told his work would be mainly in the basement. When he began working for defendant, he was working on the first floor most of the time. He regularly was going up and down the stairs with heavy machinery and equipment which often weighed up to 60 pounds. When he took the position, he was unaware he would constantly have to climb up and down the stairs.

Plaintiff has been diagnosed with chronic neck and back pain and arthritis. His medical conditions prohibit him from repeatedly carrying heavy equipment up and down the stairs. Carrying heavy equipment up and down the stairs exacerbated his medical conditions. At some point, plaintiff asked if his workstation could be moved upstairs as an accommodation. Defendant denied this request and did not provide him with an alternative accommodation.

Around April 2019, plaintiff applied for intermittent FMLA leave for his condition. Defendant approved this FMLA leave. Plaintiff was allowed one or two days of FMLA leave, one time per month, if his back and neck pain flared up. When he used this intermittent FMLA leave, his supervisor, Al Hudson, would tell plaintiff's co-workers that he was going to have to fire plaintiff for missing days. Plaintiff learned of these threats and because of them became afraid to use FMLA leave because he did not want to lose his job. Hudson made similar comments about another employee who also had intermittent FMLA leave.

Around June 2019, defendant purchased a toolbox and a welding machine for the maintenance department to use and placed it upstairs. Plaintiff again asked Hudson if he could move his workstation upstairs, Hudson agreed, and plaintiff began having his workstation upstairs around July 2019. After being placed upstairs, plaintiff's condition significantly improved, and he experienced fewer flareups. Plaintiff's workstation remained upstairs until his termination on September 23, 2019.

On September 23, 2019, Hudson instructed plaintiff to move his tools back to the basement. Plaintiff was concerned about moving back to the basement due to his medical condition and safety concerns and asked to speak with defendant's owner Chad Bertrand.

The safety concerns related to the conditions in the basement. Plaintiff found it hard to breathe in the basement. When the weather was hot and humid, dangerous chemicals would seep through and drip down from the ceiling to the walls making the floors slippery. The leakage was often so severe that they had to place buckets to collect the chemicals. Defendant was aware of the leakage. Plaintiff received maintenance work forms from management many times requesting him to repair the leakage. Plaintiff regularly complained to Hudson about

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the unsafe conditions in the basement, which Hudson agreed existed, but defendant did not fix the dangerous conditions. Around April 30, 2019, plaintiff suffered a workplace injury when a CPVC pipe split and plaintiff was sprayed with hot nickel.

***2** Returning to the events of September 23, 2019, after plaintiff asked to speak with Bertrand, the plant manager, James Young, approached plaintiff and asked him to move his workstation to the basement. Plaintiff told Young working upstairs was helpful for his back problems and asked if he could continue being accommodated by staying upstairs. Young told him no and did not offer any alternative accommodation.

Plaintiff also told Young that he was concerned about the unsafe working conditions in the basement, specifically, the leakage of chemicals. Young asked plaintiff to show him the leakage in the basement. They went to the basement and plaintiff pointed to several of the leaks. Young ignored him and laughed. Plaintiff again asked to speak with Bertrand. Young said he was going to lunch with Bertrand and would notify him.

Plaintiff began moving his tools to the basement. During this time, plaintiff spoke with defendant's environmental health and safety manager, Ed Gammon, and raised his concerns about the unsafe working conditions in the basement and his frustration with being ignored. Plaintiff threatened to file a formal complaint and asked Gammon: "Do I have to go to OSHA for someone to listen to me?"

When Bertrand returned from lunch, plaintiff was instructed to go to Bertrand's office with Young. When he entered the office, Bertrand began verbally attacking him. When Bertrand calmed down, plaintiff shared his concerns about moving to the basement and the leakage problem and that he had previously had chemicals leak on him. Bertrand accused him of having a bad attitude and fired him.

Plaintiff filed a charge with the Illinois Department of Human Rights and the EEOC on January 8, 2020 charging an ADA violation. Plaintiff received a right to sue letter on April 3, 2020. Plaintiff timely filed this suit on June 26, 2020.

Defendant moves to dismiss for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). To survive a Rule 12(b)(6) motion to dismiss for failure to state a claim, a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). If the complaint (1) describes the claim in sufficient detail to give the defendant fair notice of what the claim is and the grounds upon which it rests and (2) plausibly suggests that the plaintiff has a right to relief above a speculative level, this requirement is met. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007); see also Ashcroft v. Iqbal, 556 U.S. 662 (2009).

A plaintiff's "claim for relief" is his expression of the wrong done to him. Albiero v. City of Kankakee, 122 F.3d 417, 419 (7th Cir. 1997). It is "the aggregate of operative facts which give rise to a right enforceable in the courts." Sojka v. Bovis Lend Lease, Inc., 686 F.3d 394, 399 (7th Cir. 2012) (quotation marks and citations omitted). Stated more succinctly, a claim is "a grievance." Albiero, 122 F.3d at 419. Albiero gives the following as an example of a claim: "the City violated my rights by preventing me from renovating my apartments." Id. Here, plaintiff's claim, based on the complaint's factual allegations, is that defendant took unlawful retaliatory action against him when it fired him.

"Federal pleading rules call for a short and plain statement of the claim showing that the pleader is entitled to relief." Johnson v. Shelby, 574 U.S. 10, 11 (2014) (quotation marks and citation omitted). Twombly and Iqbal "concern the *factual* allegations a complaint must contain to survive a motion to dismiss. A plaintiff must plead facts sufficient to show that her claim has substantive plausibility." Id. at 12 (emphasis in original). If plaintiff alleges "simply, concisely, and directly" the events that entitle him to damages from defendant, he has met his pleading burden. Id. If plaintiff informs defendant of the factual basis for his complaint, he is "required to do no more to stave off threshold dismissal for want of an adequate statement of [his] claim." Id. " 'The federal rules effectively abolish the restrictive theory of the pleadings doctrine, making it clear that it is unnecessary to set out a legal theory for the plaintiff's claim for relief.' " Id., quoting, 5 C. Wright & A. Miller, Federal Practice and Procedure § 1219. at 277-78. (3d ed. 2004). Since the federal rules do not require a complaint to set out a legal theory for a plaintiff's claim for relief, the rules "do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted." Id. at 11.

***3** As Johnson makes clear, a complaint must state facts, not legal theories; it is only the sufficiency of the facts pled in the complaint that is the subject of a 12(b)(6) motion. Therefore, when presented with a 12(b)(6) motion, it is

the court's task to examine the factual allegations in the complaint and determine whether the complaint contains plausible allegations of fact that support a right to relief under a recognized legal theory. If the complaint does contain such plausible allegations of fact, then the complaint cannot be dismissed on a 12(b)(6) motion. Id.

While a complaint need not identify a legal theory or theories, it may do so. If it identifies an incorrect legal theory, it is not fatal to the complaint. Id.; Williams v. Seniff, 342 F.3d 774, 792 (7th Cir. 2003). Once a plaintiff has "specified the wrong done to him, a plaintiff may substitute one legal theory for another without altering the complaint," Albiero, 122 F.3d at 419, and a plaintiff can later change its legal theories. BRC Rubber & Plastics, Inc. v. Continental Carbon Co., 900 F.3d 529, 540-41 (7th Cir. 2018). If a complaint identifies multiple legal theories, that does not multiply the claims for relief. NAACP v. American Family Ins. Co., 978 F.2d 287, 292 (7th Cir. 1992). "One set of facts producing one injury creates one claim for relief, no matter how many laws the deeds violate." Id. Therefore, when considering a motion to dismiss, if some plausible theory can be identified that would entitle the plaintiff "to relief on its claim, that claim may move forward and a motion to dismiss other legal theories must be denied." KFC Corp. v. Iron Horse of Metaire Road, LLC, No. 18 C 5294, 2020 WL 3892989, * 3 (N.D. Ill. Jul. 10, 2020). Rule 12(b)(6) does not allow for "piecemeal dismissals of parts of claims." BBL, Inc. v. City of Angola, 809 F.3d 317, 325 (7th Cir. 2015).

Plaintiff has identified three possible legal theories under which he might be entitled to relief on his claim that his termination was an unlawful retaliatory action. Two of these legal theories arise under federal law: (1) that defendant violated the FMLA when it fired him in retaliation for needing and using FMLA leave; and (2) that defendant fired him in violation of the ADA in retaliation for seeking a reasonable accommodation for his disability. His third legal theory is that defendant violated Illinois law when it fired him in retaliation for reporting unsafe working conditions and threatening to file an OSHA claim.

Plaintiff has identified a plausible legal theory—retaliation in violation of the FMLA—that would entitle him to relief on his claim. Plaintiff argues, among other things, that his termination was an adverse employment action taken in retaliation for his use of and need for FMLA leave. Dkt # 24, p.12.

Proving a retaliation claim under the FMLA requires three elements: "(1) the employee engaged in statutorily protected activity; (2) the employer took adverse action against the employee; and (3) the protected activity caused the adverse action." Freelain v. Village of Oak Park, 888 F.3d 895, 901. (7th Cir. 2018). Plaintiff has alleged that he engaged in statutorily protected activity under the FMLA (his use of intermittent leave). He has alleged an adverse action—his termination. He asserts the cause of his termination was his protected activity. Dkt # 24, p. 10. This is all that is required of him to survive a motion to dismiss. See Johnson, 574 U.S. at 11; see also, Lucas v. Eakas Corp., No. 19 C 6642, 2020 WL 4226670, * 2 (N.D. Ill. Jul. 23, 2020) ("[P]laintiff alleges his employment was terminated in retaliation for his having taken FMLA leave. That is enough." (denying motion to dismiss)).[1]

***4** Rule 12(b)(6) does not allow for "piecemeal dismissals of parts of claims." BBL, Inc. 809 F.3d at 325. "[T]he question at this stage is simply whether the complaint includes factual allegations that state a plausible claim for relief." Id. Because the complaint states a plausible claim for unlawful discharge under the legal theory of retaliation in violation of the FMLA, the complaint survives the motion to dismiss. Id. Because an FMLA retaliation claim has been stated, defendant's arguments seeking dismissal of plaintiff's other legal theories are unallowable attempts at "piecemeal dismissals of parts of claims." Id.; KFC Corp., 2020 WL 3892989 at * 3.

Defendant argues plaintiff has pled himself out of court because his complaint "presents at least three competing theories as to why Defendant made the decision to terminate Plaintiff's employment." Dkt # 12, p. 10. It quotes paragraph 60 of the complaint which alleges plaintiff "was terminated for his complaints, and request for accommodation and his need for FMLA leave." Id., p. 11. Defendant states "[i]t is worthy of note that Plaintiff's complaint does not plead alternative claims. Rather, his various theories as to why Defendant terminated his employment are plead as inconsistent facts in support of each single claim." Id. Defendant argues the complaint's allegations claim a "mixed motive"[2] for plaintiff's termination and thus establish none of the theories advanced by plaintiff (use of FMLA leave, seeking an accommodation, or the OSHA threat/ safety concerns) could have been the "but for" cause of his termination.

Plaintiff has not pled inconsistent facts. There is nothing about any of his facts that conflicts with any of his other facts. Taking FMLA leave, having his supervisor say he would have

to fire plaintiff for taking the FMLA leave, asking for an ADA accommodation, having the request denied, threatening to go to OSHA about safety concerns shortly after the denial of his accommodation request, and being fired within hours of making the accommodation request, and the OSHA threat, all could have happened. None of the facts is inconsistent with any of the other facts.

Plaintiff has advanced several legal theories as to what motivated his firing: retaliation for taking FMLA leave, retaliation for seeking an ADA accommodation, retaliation for threatening to call OSHA. These are theories as to defendant's motives. At the time plaintiff filed the complaint, he did not know defendant's actual motivation for firing him, but he was not required to know that motivation in order to file a complaint. All that was required of him was to be able to allege facts from which it could plausibly be inferred that he was fired unlawfully in retaliation for engaging in some protected activity. He did not have to allege any of these theories (or any theory at all) as to what motivated defendant to fire him. Johnson, 574 U.S. at 11. He only needed to plead facts—facts that plausibly suggest he has a right to relief above a speculative level. Twombly, 550 U.S. at 555. The facts he pled have met this standard. As set forth above, his claim is that defendant took unlawful retaliatory action against him when it fired him. The facts he alleged in support of this claim are supported by the legal theory of FMLA retaliation[3] and, therefore, the complaint cannot be dismissed. Whether he can prove he is entitled to relief from defendant is for later determination, but the facts alleged in the complaint plausibly suggest he has a right to relief above the speculative level. Id.

***5** Defendant argues that because plaintiff alleged in his complaint that he was terminated "for his complaints, and request for accommodation and his need for FMLA leave" that he cannot establish that any one of these was the but-for cause of his termination. According to defendant, if they all were the reason, no one of them was the reason, and therefore plaintiff has not stated a claim upon which relief can be granted. He quotes extensively from Thomas v. Kamtek, Inc., 143 F. Supp.3d 1179 (N.D. Ala. 2015) in support of this argument. However, Thomas, relied on that court's prior decision in Savage v. Secure First Credit Union, 107 F. Supp.3d 1212 (2015).

In Savage, the district court ruled that to avoid dismissal of her compliant, the plaintiff must amend her complaint "to eliminate all claims except her ADEA claim or to eliminate all claims except her ADA claim, or to eliminate all claims except her retaliation claim, and to allege that "but-for" her age, or "but-for" her disability, or "but-for" defendant's retaliatory motive, there would have been no adverse employment action." Savage, 107 F. Supp.3d at 1218 (emphasis in original). In other words, the court concluded Savage had to choose only one of these theories as the "but-for" cause of the adverse action against taken against her. Id. If she did not, the case would be dismissed. Id.

The Eleventh Circuit Court of Appeals reversed the district court. Savage v. Secure First Credit Union, No. 15-12704, 2016 WL 2997171 (11th Cir. May 25, 2016). The Court of Appeals concluded the district court erred in requiring the plaintiff to choose only one theory of liability. The Court of Appeals stated that it was "a well-settled rule of federal procedure that plaintiffs may assert alternative and contradictory theories of liability." Id. The court agrees with the Eleventh Circuit's understanding of the law. Defendant's argument that plaintiff's complaint must be dismissed because he did not choose only one legal theory of liability is incorrect.

For the foregoing reason, defendant's motion to dismiss [11] is denied.

All Citations

Slip Copy, 2021 WL 650885, 62 NDLR P 159

Footnotes

1 The court notes that analysis of retaliation claims under the ADA is the same as under the FMLA. The FMLA and the ADA "are legally distinct, but in cases claiming unlawful retaliation, the analyses under the two separate acts overlap." Freelain, 888 F.3d at 900. Because a claim has been stated under an FMLA retaliation theory, it is unnecessary to examine other legal theories in support of the complaint. However, the court notes that, had it been necessary to analyze plaintiff's claim under an ADA retaliation theory, the complaint's allegations state a plausible claim for unlawful discharge under the legal theory of retaliation in violation of the ADA. The ADA retaliation provisions protect individuals even if they are not "qualified individuals with a disability" under the ADA. Rodrigo v. Carle Foundation Hospital, 879 F.3d 236,243 (7th Cir. 2018). Thus, plaintiff is protected by the retaliation provisions regardless of whether he is a qualified individual with

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a disability under the ADA. Plaintiff alleged he sought a reasonable accommodation (keeping his workstation upstairs) which is protected activity under the ADA. Id. His discharge was the alleged adverse action. He asserts the protected activity was the cause of his termination. Dkt # 24, p.10 ("Defendant failed to reasonably accommodate his disability by not providing him with a reasonable alternative accommodation and not engaging in the interactive process, and firing him after he sought a reasonable accommodation.").

2 A "mixed motives" case is one in which the employer had both lawful and unlawful motives in taking an adverse action against an employee. See Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 958 (7th Cir. 2010). Plaintiff is asserting only unlawful motivations in his firing. At this point in the case, there is no basis for concluding this is a "mixed motives" case.

3 As well as the legal theory of ADA retaliation.

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