IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND (NORTHERN DIVISION)

NANCY MATHIAS ADAIR,	*	
Plaintiff,	*	
v.	*	**Case No. RDB-06-2602**
MCGUIREWOODS LLP, *et al.*,	*	
Defendants.	*	

* * * * * * * * * * * * * *

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS COUNT TWO OF PLAINTIFF'S COMPLAINT

Defendants, McGuireWoods LLP ("McGuireWoods") and Joseph G. Tirone ("Tirone") (collectively, "Defendants"), by and through undersigned counsel, file this Memorandum in Support of their Motion to Dismiss Count Two of the Complaint filed by Plaintiff, Nancy Mathias Adair ("Plaintiff").

FACTUAL ALLEGATIONS

Plaintiff was employed as a legal secretary for McGuireWoods from 1997 through September 1, 2005. Comp. ¶¶ 7 and 18. On or about August 28, 2006, Plaintiff filed a four-count Complaint against Defendants, alleging violations of the Family and Medical Leave Act ("FMLA"), retaliatory discharge in violation of public policy, defamation and intentional infliction of emotional distress, all which related to the termination of Plaintiff's employment with McGuireWoods. In Count Two of her Complaint, Plaintiff alleges that "Defendants' termination of [her] employment for exercising, or attempting to exercise, her lawful rights under the FMLA was wrongful, retaliatory and in contravention of the public policy of this nation and state, as codified by the FMLA." Comp. ¶ 41.

Accepting these allegations as true for purposes of this Motion only, under Maryland law, claims of discrimination and retaliation that can be pursued under statutes which provide their own remedy (*i.e.*, the Family and Medical Leave Act) are not covered by the tort of abusive discharge. Plaintiff, thus, is barred from further pursuit of her abusive discharge claim, and dismissal of Count Two is warranted.

PROCEDURAL HISTORY

As noted above, on or about August 28, 2006, Plaintiff filed a four-count Complaint against Defendants in the Circuit Court for Baltimore City, Maryland, Case No. 24-C-06-006943, which was served upon Defendants on September 15, 2006. On October 3, 2006, pursuant to U.S.C. § 1331 (Federal Question), Defendants removed the state court action to this Court.

LEGAL STANDARD

A Motion to Dismiss is governed by Rule 12(b)(6) of the Federal Rules of Civil Procedure. The purpose of such a motion is to test the legal sufficiency of the Complaint. *See Talley v. Farrell*, 156 F. Supp. 2d 534, 549 (D. Md. 2001). In considering a motion to dismiss, the court is to accept as true all well-pleaded allegations and should view the Complaint in the light most favorable to the Plaintiff. *See De Sole v. United States*, 947 F.2d 1169, 1171 (4th Cir. 1991).[1] While the Court must assume, *arguendo,* the truth of the Complaint's allegations, the Court should ignore its legal conclusions. *See District 28, United Mine Workers of Am., Inc. v. Wellmore Coal Corp.*, 609 F.2d 1083, 1085 (4th Cir. 1979). The Court should grant a motion to dismiss where Plaintiff has failed to plead facts that would entitle her to relief. *See Mylan Labs., Inc. v. Akzo, N.V.*, 770 F. Supp. 1053, 1059 (D. Md.

[1] "[O]f course, this doesn't mean [the facts alleged in the complaint] are true." *Patton v. Pryzbylski*, 822 F.2d 697, 698 (7th Cir. 1987).

1991). Accordingly, "[a] complaint may be dismissed if the law does not support the conclusions argued, or where the facts alleged are not sufficient to support the claim presented." *Id*.

ARGUMENT

COUNT TWO MUST BE DISMISSED BECAUSE PLAINTIFF HAS FAILED TO STATE AN ACTIONABLE CLAIM FOR ABUSIVE DISCHARGE

In Count Two of her Complaint, Plaintiff advances the tort claim of abusive discharge, alleging that "Defendants' termination of [her] employment for exercising, or attempting to exercise, her lawful rights under the FMLA was wrongful, retaliatory and in contravention of the public policy of this nation and state, as codified by the FMLA." Comp. ¶ 41. As the discussion below establishes, Plaintiff has failed to state an actionable claim for abusive discharge.

A. Maryland Law's Limited Recognition of the Tort of Abusive Discharge.

In 1981, the Maryland Court of Appeals recognized a cause of action in tort for abusive discharge when the motivation for the discharge contravenes "some clear mandate of public policy." *See Adler v. American Standard Corp.*, 291 Md. 31, 47, 432 A.2d 464, 473 (1981), *ans. conformed to*, 538 F.Supp. 572 (D.Md. 1982), *aff'd & rev'd*, 830 F.2d 1303 (4th Cir. 1987). In defining the scope of "public policy," the Court of Appeals held that a claim of abusive discharge may be available when an employee is discharged in connection with her refusal to act in an unlawful manner, her attempt to perform a statutorily prescribed duty, her exercise of a statutory right or privilege, or her performance of an important public function. *See Makovi v. Sherwin-Williams Co.*, 316 Md. 603, 610-11, 561 A.2d 179, 182 (Md. 1989).

The tort of abusive discharge is limited in application. Specifically, Maryland courts have consistently held that a cause of action for abusive discharge is *unavailable* when the "public policy sought to be vindicated by the tort" is expressed in a "statute which carries its own remedy for

vindicating that public policy." *Chappell v. Southern Md. Hosp., Inc*., 578 A.2d 766, 770 (Md. 1990); *see Makovi*, 316 Md. at 180, 561 A.2d at 605. In other words, the tort of abusive discharge is not complementary, and it is available *only* if it does not overlap with an existing statutory remedy or, as explained by the Court of Appeals in *Makovi*, *only* if a clear mandate of public policy would otherwise be left unvindicated. *Makovi*, 316 Md. at 611-13, 561 A.2d 179 at 182-84.

For example, in *Makovi*, the Court of Appeals held that the tort of abusive discharge did not cover an employee's claim that she was discharged as a result of sex discrimination in violation of Article 49B of the Maryland Code and Title VII of the 1964 Civil Rights Act. In explaining its narrow interpretation of the tort, the court stated that "[a]busive discharge is inherently limited to remedying only those discharges in violation of a clear mandate of public policy *which otherwise would not be vindicated by a civil remedy*." 316 Md. at 605, 561 A.2d at 180 (emphasis supplied). The court further opined that "public policy" includes not only the goal of the policy but also "the remedy legislatively created to achieve that goal." 316 Md. at 605, 561 A.2d at 180. Thus, with respect to the employee's claim of sex discrimination, the court held that the Maryland legislature had already provided a remedy through the Maryland Commission on Human Relations and, therefore, the tort of abusive discharge was unavailable. The holding in *Makovi* cemented the long-standing view that claims of discrimination in violation of laws that provide their own remedy may not be pursued through the tort of abusive discharge.

Courts in Maryland have followed *Makovi's* lead by consistently rejecting claims of abusive discharge when other remedies exist through which individuals can vindicate their rights. *See e.g., Watson v. Peoples Security Life Insurance Co*., 322 Md. 467, 588 A.2d 760 (1991) (holding that a claim of discrimination covered by Title VII does not give rise to a tort claim of abusive discharge);

Parlato v. Abbott Laboratories, 850 F.2d 203, 206 (4th Cir. 1988) (holding that statutory remedies for age and race discrimination preclude supplemental state-law remedy for wrongful discharge); *Adams v. Catalyst Research*, 659 F. Supp. 163, 164–65 (D. Md. 1987) (holding that ERISA remedies preempt supplemental state-law remedy for wrongful discharge); *Chekey v. BTR Realty, Inc.*, 575 F. Supp. 715, 717–18 (D. Md. 1983) (holding that statutory remedies for age discrimination preclude supplemental state-law remedy for wrongful discharge); *Silkworth v. Ryder Truck Rental, Inc.*, 70 Md. App. 264, 270–71, 520 A.2d 1124, 1128 (1987) (holding that Maryland's Occupational Health and Safety Act preempts supplemental state-law remedy for wrongful discharge), *cert. denied,* 310 Md. 2 (1987); *Gaskins v. Marshall Craft*, 110 Md. App. 705, 714–15, 678 A.2d 615 (1996) (holding that because FLSA, Title VII and Article 49B provide mechanisms for addressing equal pay and retaliatory dismissals, plaintiff was prohibited from basing a wrongful discharge claim on those statutes); *Marrs v. Marriott Corp.*, 830 F. Supp. 274 (D. Md. 1992); *Farasat v. Paulikas*, 32 F. Supp. 2d 244, 248 (D. Md. 1997); *Zahodnick v. Intl Bus. Mach. Corp.*, 135 F.3d 911, 914 (4th Cir. 1997) (holding that availability of remedies under the False Claims Act precluded civil action for wrongful discharge). Thus, in the instant action, for purposes of determining whether Plaintiff's tort claim of abusive discharge is viable, we must identify whether an existing remedy is available to vindicate Plaintiff's rights under the FMLA.

B. Defendants' Alleged Violation Of The FMLA Does Not Give Rise To An Independent Claim Of Abusive Discharge Because The FMLA Provides Its Own Remedy For Any Such Violation.

In Count One of her Complaint, Plaintiff pleads a direct cause of action against Defendants under the FMLA, in connection with Defendants' alleged interference with Plaintiff's FMLA rights. Comp. ¶¶ 30-37. The FMLA, which is codified at 29 U.S.C. § 2601 *et seq.*, requires employers with at least 50 employees to provide eligible employees up to 12 workweeks of unpaid leave

within any 12-month period to attend to personal health concerns, to take care of a seriously-ill spouse, child or parent, or to attend to the birth or adoption of a child. *See* 29 U.S.C. §§ 2611-12. Employees qualify for FMLA leave if they have worked for the employer for at least one year and for at least 1,250 hours during the previous 12-month period. *See* 29 U.S.C. § 2611. Section 2615(a) of the FMLA prohibits employers from interfering with employees' statutory right to take FMLA leave. In Count One, Plaintiff contends that she was terminated from employment with McGuireWoods as a result of her exercise or attempted exercise of her statutory leave rights in violation of Section 2615(a) of the FMLA. Comp. ¶¶ 32-33.

The FMLA provides various means by which employees may vindicate their rights under the Statute. First, employees may file complaints with the Wage and Hour Division of the Department of Labor's Employment Standards Administration ("DOL") to address violations of the FMLA. *See* 29 U.S.C. § 2617(b). Second, if an administrative complaint cannot be resolved administratively, the DOL may file a lawsuit to ensure compliance and recover damages. Third, applicable to the instant action, employees may file private causes of action under the FMLA, without involvement of the DOL, to address violations of the Statute and to seek equitable relief and/or monetary damages through the courts. *See* 29 U.S.C. § 2617(a).

Count One of Plaintiff's Complaint was filed pursuant Section 2617(a) of the FMLA and alleges violations of Section 2615(a). Clearly, Plaintiff seeks to vindicate her FMLA-based rights through this cause of action. Thus, to the extent that Maryland public policy prohibits interference with FMLA rights, it is without question that this public policy will be effectuated through Count One of Plaintiff's Complaint. As such, given the availability of the FMLA's statutory remedies and recognizing

the holding in *Makovi* and its progeny, Plaintiff is precluded from pursing her complimentary abusive discharge cause of action. Accordingly, Count Two must be dismissed with prejudice.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court grant its Motion and dismiss with prejudice Count Two of Plaintiff's Complaint.

Respectfully submitted,

October 6, 2006

/s/

Harriet E. Cooperman, Bar No. 00729
Devin J. Doolan, Jr., Bar No. 15970
SAUL EWING LLP
500 East Pratt Street
Baltimore, Maryland 21202
Telephone: (410) 332-8974
Facsimile: (410) 332-8973
Email: hcooperman@saul.com
Email: ddoolan@saul.com

Attorneys for Defendants, McGuireWoods LLP and Joseph G. Tirone