UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

NELLIE C. DAVIDSON,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Civil No. 97-70-P-C***
	)	
LIBERTY MUTUAL INSURANCE	***)***	
COMPANY, et al.,	***)***	
	)	
Defendants	***)***	

RECOMMENDED DECISION ON DEFENDANTS' MOTION TO DISMISS

In this dispute arising out of the plaintiff's termination from employment by defendant Liberty Mutual Insurance Company ("Liberty Mutual"), the plaintiff asserts statutory claims under the Americans with Disabilities Act (Count I), the Maine Human Rights Act (Count II) and the Employee Retirement Income Security Act ("ERISA") (Counts III and IV) against Liberty Mutual and its affiliate, Liberty Life Assurance Company of Boston ("Liberty Life"), which provided disability insurance coverage to the plaintiff. The complaint also includes common-law claims of intentional interference with an advantageous economic relationship (Counts V and VI), intentional and negligent infliction of emotional distress (Counts VII and VIII) and defamation (Count IX). Separate counts of the complaint seek punitive damages under federal and state law (Counts X and XI). Pending is the defendants' motion to dismiss Counts V, VI, VII, VIII, IX and XI under Fed. R. Civ. P. 12(b)(6) for failure to state a valid claim. For the reasons that follow, I recommend that the motion be granted.

"When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-

pleaded facts as they appear in the complaint, extending the plaintiff every reasonable inference in [her] favor." *Pihl v. Massachusetts Dep't of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993). Although all inferences must be indulged in the plaintiff's favor, the court need not accept "bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like." *Aulson v. Blanchard*, 83 F.3d 1, 3 (1st Cir. 1996). The defendant is entitled to dismissal for failure to state a claim "only if it clearly appears, according to the facts alleged, that the plaintiff cannot recover on any viable theory." *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 52 (1st Cir. 1990); *see also Jackson v. Faber*, 834 F. Supp. 471, 473 (D. Me. 1993). Review is limited to allegations in the complaint; the court may not consider factual allegations, arguments, and claims that are not included in the complaint. *Doyle v. Hasbro, Inc.*, 103 F.3d 186, 190 (1st Cir. 1996).

I. Factual Background

The complaint makes the following assertions that are relevant to the pending motion: The plaintiff was a fulltime employee of Liberty Mutual at its offices in Lewiston, Maine from September 1977 to June 1995. Complaint (Docket No. 1) ¶ 11. As a condition of employment, she was required to participate in Liberty Mutual's Short-Term Disability Plan and its Longterm Disability Plan. *Id*. at ¶ 12. The Longterm Disability Plan involves coverage under an insurance policy issued to Liberty Mutual by Liberty Life, which is 90-percent owned by Liberty Mutual. *Id*. at ¶¶ 10, 14. Liberty Mutual was the administrator of the Longterm Disability Plan for ERISA purposes. *Id*. at ¶ 16.

In July 1993, while serving as a senior office assistant with Liberty Mutual, problems with her right arm and shoulder caused the plaintiff to go on short-term disability until October 1993. *Id*.

at ¶¶ 17, 18. The same medical problems caused her to stop working in March 1994. *Id*. at ¶ 19. Pursuant to the Longterm Disability Plan, following 26 weeks of benefits under Liberty Mutual's Short-Term Disability program a Liberty Mutual employee would begin to receive longterm disability benefits at the 27th week of disability, and would be eligible to continue receiving them for up to 78 weeks if unable to perform all duties of her usual occupation on a fulltime basis. *Id*. at ¶¶ 20, 22. Liberty Life informed the plaintiff in June 1994 that she was entitled to receive longterm disability benefits as of June 1, 1994, and she received such benefits until February 1995. *Id*. at ¶ 21.

In February 1995, the plaintiff returned to work at Liberty Mutual in a temporary, part-time, light-duty assignment. *Id*. at ¶ 24. The "partial disability" provisions of the Longterm Disability Plan permitted an employee to receive partial disability payments upon returning to work on a modified schedule. *Id*. at ¶ 25. According to the Plan, a partially disabled employee would continue to receive benefits for up to a year as long as she remained partially disabled and was not earning 100 percent of her pre-disability income. *Id*. at ¶ 26. Nevertheless, and although she was working on a modified, light-duty schedule as of February 1995, the plaintiff received full pay from Liberty Mutual rather than a combination of partial pay and partial disability benefits under the Plan. *Id*. at ¶ 27.

As of May 1995, the plaintiff had received 52 of the 78 weeks of longterm disability benefits under the Longterm Disability Plan. *Id*. at ¶ 29. The defendants knew that the plaintiff remained eligible for an additional 26 weeks of longterm disability benefits because she remained disabled from her usual work as a senior office assistant. *Id*. Nevertheless, through coercion and intimidation, the defendants sought to have the plaintiff accept a permanent part-time position as a "call attendant" so that she would no longer be eligible for continued longterm disability benefits or

future coverage under the Longterm Disability Plan. *Id*. at ¶ 30. In addition to lacking disability benefits, the offered position involved a cut in pay, less vacation time and a more expensive health insurance plan. *Id*. Liberty Mutual threatened the plaintiff that if she did not accept the offered position she could be terminated from employment with Liberty Mutual. *Id*. The plaintiff refused the job as a call attendant and, in late May or early June of 1995, Liberty Mutual terminated her light-duty work and placed her on disability leave. *Id*. at ¶ 32.

In August 1995, Liberty Life denied the plaintiff's claim for longterm disability benefits from June 1, 1995, forward. *Id*. at ¶ 33. Immediately thereafter, Liberty Mutual terminated the plaintiff's employment retroactively to June 1. *Id*. at ¶ 34. After the plaintiff retained counsel and appealed the denial of disability benefits, Liberty Life granted benefits to her for the period of June 12, 1995, through December 1, 1995. *Id*. at ¶¶ 36-37. Liberty Mutual did not reinstate the plaintiff's employment or consult with her about her employment status or the possibility of her return to the workplace. *Id*. at ¶ 38.

The plaintiff appealed Liberty Life's denial of longterm disability benefits beyond December 1, 1995, although she continued to have limited use of her right shoulder because of Reflex Sympathetic Dystrophy Syndrome. *Id*. at ¶ 39. Pursuant to the Longterm Disability Plan, benefits were payable beyond the second year of disability if an employee was unable to perform with reasonable continuity any occupation for which she was reasonably qualified by training, education, age and physical and mental capacity. *Id*. at ¶ 40. In such circumstances, an employee would be entitled to receive benefits until age 65 if she was under age 60 at the time of disability. *Id*. In May 1996, Liberty Life denied the plaintiff benefits beyond her second year of disability, citing a lack of objective clinical findings concerning her disability. *Id*. at ¶ 42.

As of August 1995, when Liberty Mutual informed the plaintiff she had been terminated from employment, the plaintiff actively sought other jobs. *Id*. at ¶¶ 35, 109. In connection with those efforts, she was forced to tell potential employers and other third parties that the defendants had determined she was not qualified for longterm disability benefits beyond June 1995 and that this was the reason for her termination by Liberty Mutual. *Id*. at ¶¶ 107-08, 110.

II. Discussion

"Congress enacted ERISA to protect the interests of participants in employee benefit plans," achieving these objectives through such measures as reporting and disclosure requirements, standards of conduct for fiduciaries, and remedial provisions. *Johnson v. Watts Regulator Co.*, 63 F.3d 1129, 1132 (1st Cir. 1995) (citations omitted). The statute contains a broad preemption provision. Specifically, ERISA by its terms "supercede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. 29 U.S.C. § 1144(a). The term "state law" includes "all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." *Id*. at subsection (c)(1).

Relying on the ERISA preemption doctrine, the defendants contend they are entitled to dismissal on preemption grounds of all the state-law claims with the exception of the request for relief under the Maine Human Rights Act. The plaintiff concedes that, as to Liberty Life, dismissal on the basis of ERISA preemption is appropriate on her claims for intentional interference with an advantageous economic relationship, intentional infliction of emotional distress and negligent infliction of emotional distress. Plaintiff's Objection to Defendants' Rule 12(b)(6) Motion, etc. (Docket No. 4) at 1. She otherwise opposes the defendants' motion.

Preemption is an "integral part" of ERISA's statutory scheme; the preemption provision is designed "to enhance the efficient operation of the federal statute by encouraging uniformity of regulatory treatment through the elimination of state and local supervision over ERISA plans." *Johnson*, 63 F.3d at 1132 (citations omitted). It is also designed to promote uniformity in ERISA plans "by preventing states from imposing divergent obligations upon them." *Boston Children's Heart Found., Inc. v. Nadal-Ginard*, 73 F.3d 429, 439 (1st Cir. 1996) (citation omitted). The lynchpin of ERISA preemption is whether the state cause of action in question "relates to" an ERISA plan within the meaning of section 1144(a). *Carlo v. Reed Rolled Thread Die Co.*, 49 F.2d 790, 793 (1st Cir. 1995) (citations omitted). The parties here are not in controversy over whether the Longterm Disability Plan comes within the ERISA ambit. Thus, the question becomes whether any of the plaintiff's state-law claims "relate to" the Longterm Disability Plan in the sense of having "a connection with or reference to" it, even if the applicable state law "is not specifically designed to affect such plans, or the effect is only indirect." *Id.* (citations omitted).

In my opinion, the plaintiff's claim against Liberty Mutual for intentional interference with an advantageous economic relationship relates to the ERISA plan and is thus preempted. To establish this tort in Maine, a plaintiff "must show a valid contract or prospective economic advantage . . . [and] interference with that contract or advantage through fraud or intimidation, and damages proximately caused by the interference." *Northeast Coating Tech., Inc. v. Vacuum Metallurgical Co.*, 684 A.2d 1322, 1325 (Me. 1996) (citation omitted). Because Liberty Mutual is the administrator of the ERISA plan in question, Complaint ¶ 16, it discharges "fiduciary functions delineated by ERISA" when it "decides matters required in plan administration." *Payonk v. HMW Indus., Inc.*, 883 F.2d 221, 225 (3d Cir. 1989) (citations omitted). The plaintiff contends that Liberty

Mutual's tortious action had nothing to do with plan administration, but rather consisted of taking steps to prevent her from being entitled to benefits under the plan as otherwise lawfully operated under ERISA. Assuming Liberty Mutual's fraudulent and/or intimidating acts took it outside the scope of its role as plan administrator, such tortious activities plainly still have a connection and reference to the ERISA plan that is not "tenuous, remote or peripheral." *Boston Children's Heart Found*., 73 F.3d at 440 (citation omitted).

The *Boston Children's Heart Foundation* case, relied upon by the plaintiff, provides an instructive contrast. There, the First Circuit held that ERISA preemption did not apply to the plaintiff's breach of state-law fiduciary duties to the nonprofit corporation of which he was an officer and director. *Id*. at 432, 440. His breach consisted of causing the corporation to adopt a new severance plan without disclosing that it provided "far more in benefits" to him than did its predecessor. *Id*. at 438. Even though the new plan was itself covered by ERISA, the claim was not preempted because the misconduct "preceded the formal adoption of the plan," the determination that he had breached state-law fiduciary duties did not "require the resolution of any dispute about the interpretation or administration of the plan," and applying state law in the circumstances did not "raise the core concern underlying ERISA preemption." *Id*. at 440. The court reasoned that the plaintiff's choice of an ERISA plan, rather than some other financial vehicle, was "peripheral" to the underlying claim that he breached his corporate responsibilities. *Id*. The ERISA plan at issue here is anything but peripheral to the state-law claim at issue, and applying state law in these circumstances would very much implicate the core concerns underlying ERISA preemption.

Likewise, the plaintiff's claims against Liberty Mutual for intentional and negligent infliction of emotional distress are also preempted by ERISA. The plaintiff concedes that the emotional

distress claims involve "Liberty Mutual's tortious behavior in orchestrating and insuring the termination of [the plaintiff] as a means of disqualifying her for prospective benefits." Plaintiff's Memorandum of Law in Support of Plaintiff's Objection to Defendant's Rule 12(b)(6) Motion, etc. (Docket No. 5) at 9. Issues involving the plaintiff's qualification for benefits under the Longterm Disability Plan fall squarely within the matters regulated by ERISA, and thus preemption applies.

The defamation claim presents a closer question. The defendants contend that the plaintiff's cause of action for defamation, if any, relates to the ERISA plan — and is thus preempted by ERISA — because the defamatory falsehood at the heart of the claim involved a statement about whether the plaintiff was eligible to collect benefits under the plan. Unlike the allegations relating to the intentional interference claims, which reach into the heart of the relationships and transactions governed by ERISA, the making of these allegedly defamatory statements is not itself regulated by the federal statute. However, ERISA preemption — "deliberately expansive" and "conspicuous for its breadth" — may preempt state law that is "not specifically designed to affect [ERISA] plans, or if the effect is only indirect." *Ingersoll-Rand Co. v. McLendon*, 498 U.S. 133, 138-39 (1990) (citations omitted). When "the existence of a[n ERISA] plan is a critical factor in establishing liability," the cause of action is preempted. *Id*. at 139-40.

Thus, in a case similar to this one, the District Court for the District of Maryland determined that a defamation claim was preempted. *Thomas v. Telemecanique, Inc*., 768 F. Supp. 503, 506 (D.Md. 1991). At issue there were statements that the plaintiff was committing fraud by collecting disability benefits from her employer under an ERISA plan while working at another job. *Id*. at 504. The court reasoned that these allegedly defamatory words were "solely about the plan," that consideration of the defamation claim "will necessarily involve an examination of the employee

benefit plan at issue," and that liability in defamation would ultimately turn on whether the plaintiff had a right to receive benefits and/or whether they were properly terminated. *Id*. at 506. This factual dispute was "so intertwined with the ERISA plan" that the cause of action met the "relates to" test in section 1144(a). *Id., cf. Grand Park Surgical Ctr., Inc. v. Inland Steel Co.*, 930 F. Supp. 1214, 1218-19 (N.D.Ill. 1996) (holding that surgery center could sue employer for defamation where employer told participants in benefit plan that surgery center overcharged patients). The defendants rely on *Thomas* in support of their position on the preemption claim, and the plaintiff offers nothing in the way of argument as to why this court should not adopt that cases's reasoning. Because resolution of the defamation claim would require the court to resolve a "dispute about the interpretation or administration of the plan," *Boston Children's Heart Found.*, 73 F.2d at 440, ERISA preempts the defamation claim as well.[1]

---

[1] I reach my conclusions concerning preemption of the plaintiff's state-law tort claims notwithstanding the Supreme Court's recent caution against the use of an "uncritical literalism" in determining whether the state law at issue relates to an ERISA plan. *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S.Ct. 1671, 1677 (1995) (noting that if "'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes [ERISA] preemption would never run its course") (citations omitted); *see also Golas v. Homeview Inc*., 106 F.3d 1, 7 (1st Cir. 1997) (Bownes, S.J., concurring) (suggesting that *Travelers* marks a significant limitation of ERISA preemption). *Travelers* and a similar case recently decided, *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc*., 117 S.Ct. 832 (1997), concern the extent to which ERISA preempts economic measures that were enacted as general provisions under state law and which incidentally have a relationship to ERISA plans. *See id*. at 842 (citing *Travelers* and holding that economic regulation which does not "dictate the choices" made by ERISA plans not preempted). In cautioning the courts of this circuit to reexamine ERISA preemption in light of *Travelers*, Senior Judge Bownes has nevertheless suggested that it is appropriate to conclude that Congress intended to shield tortfeasors from non-ERISA liability "where ERISA benefits, rights, obligations and core concerns" are "implicated." *Golas*, 106 F.3d at 10 (Bownes, S.J., concurring). Because ERISA benefits, rights and obligations are at center stage here, this plaintiff's state-law claims relate to ERISA in a manner that the state laws at issue in *Dillingham* and *Travelers* did not. Therefore, even if the plaintiff had cited or otherwise relied upon either of these cases in support of its position on preemption, my recommendation would remain the (continued...)

The plaintiff's defamation claim relies on a theory of compelled self-publication, a doctrine previously recognized by this court as one the Law Court would be likely to adopt as a matter of Maine law. *Carey v. Mt. Desert Island Hosp.*, 910 F. Supp. 7, 13 (D. Me. 1995). Because this defamation claim is preempted by ERISA whether or not the plaintiff states a valid claim for defamation under Maine law, the court need not revisit the issues discussed in *Carey* or otherwise address the defendant's contention that the plaintiff fails to state a valid defamation claim.[2]

The defendants also seek dismissal of the plaintiff's claim for punitive damages under state law. In Maine, "[p]unitive damages must be based on underlying tortious conduct by the defendant." *Vicnire v. Fort Motor Credit Co.*, 401 A.2d 148, 155 (Me. 1979) (citation omitted). The plaintiff seeks state-law punitive damages only as to the torts alleged in Counts V through IX of her complaint. Complaint ¶ 119. Since, for the reasons already stated, I conclude that the defendants are entitled to dismissal of these claims, it is also my recommendation that the claim for state-law punitive damages be dismissed as well.

III. Conclusion

For the foregoing reasons, I recommend that the defendants' motion to dismiss be **GRANTED** and, accordingly, that Counts V-IX and XI of the complaint be dismissed.

---

[1](...continued)
same.

[2] Nor is it necessary to address the defendants' contention, raised for the first time in their reply memorandum in contravention of Local Rule 7(c) (reply memoranda "shall be strictly confined to replying to new matter raised in the objection or opposing memorandum"), that certain of the plaintiff's state-law claims are barred by the exclusivity and immunity provisions of the Maine Workers' Compensation Act.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 6th day of June, 1997.

_____

David M. Cohen
United States Magistrate Judge