UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

PAUL FILAROSKI,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Civil No. 97-140-P-C***
	)	
NATIONAL SEMICONDUCTOR	***)***	
CORPORATION, et al.,	***)***	
	)	
Defendants	***)***	

RECOMMENDED DECISION ON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

The plaintiff asserts claims of age discrimination under federal and state law as well as tort claims alleging defamation and negligent and intentional infliction of emotional distress. Pending are two motions for summary judgment. The motion of defendant National Semiconductor (Maine), Inc. (Docket No. 8) seeks summary judgment in its favor on all counts. It should be denied as moot, in light of the plaintiff's subsequent stipulation to the dismissal of this defendant with prejudice. *See* Stipulation of Dismissal (Docket No. 16). The other motion, filed on behalf of National Semiconductor (Maine), Inc. and co-defendant National Semiconductor Corporation (hereinafter "National Semiconductor") (Docket No. 6), seeks summary judgment only on the tort claims. To the extent that this motion applies to National Semiconductor (Maine), Inc., it should also be denied as moot. Concerning National Semiconductor, for the following reasons I recommend that the summary judgment motion be granted.

I. Summary Judgment Standards

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Scenario

Viewed in the light most favorable to the plaintiff, the record reveals the following relevant facts: The plaintiff was hired in 1965 by Fairchild Semiconductor Corporation, which was purchased by National Semiconductor in 1987. Complaint (Docket No. 1) at ¶¶ 5-6; Answer and Defenses of Defendant National Semiconductor Corp. ("Answer") (Docket No. 2) at ¶¶ 5-6. National Semiconductor terminated his employment on September 20, 1996. Complaint at ¶ 13; Answer at ¶ 13. The plaintiff was 57 years old at the time of his discharge. Exh. 4 to Deposition of Ernesto J. D'Escoubet ("Descoubet Dep."), appended to Plaintiff's Statement of Material Facts ("Plaintiff's SMF") (Docket No. 11), at 2.

From September 1991 forward, the plaintiff's supervisor at National Semiconductor was Ernesto D'Escoubet, who held the title of "Vice president, Operations" in the company's data management division. Defendant National Semiconductor Corporation's Answers to Interrogatories, appended to Plaintiff's SMF (Docket No. 11), at ¶ 6. The plaintiff's job title was "Staff Manager." *Id.* In late 1993 or early 1994, D'Escoubet asked the plaintiff if he would be interested in becoming the manager of National Semiconductor's plant in Penang, Malaysia. Deposition of Paul Filaroski ("Filaroski Dep."), appended to Plaintiff's SMF, at 52; Plaintiff's Answers to Defendant National Semiconductor Corp.'s Interrogatories ("Plaintiff's Interrog. Resp."), appended to National Semiconductor's Statement of Material Facts ("National Semiconductor SMF") (Docket No. 7), at ¶ 2. When the plaintiff said he was interested in such a post, D'Escoubet asked him to draft a proposal describing how he would manage the plant. Filaroski Dep. at 52. D'Escoubet seemed pleased with what the plaintiff produced in response to this request. *Id.* However, when D'Escoubet took this proposal to Todd Smith, National Semiconductor's director of human resources, the

plaintiff overheard Smith state that he was too old for the job in Malaysia. Deposition of Todd H. Smith ("Smith Dep.")[1], appended to Plaintiff's SMF; Filaroski Dep. at 52-53.

Subsequent to this incident, D'Escoubet began a pattern of ridiculing the plaintiff in front of other National Semiconductor employees. Filaroski Dep. at 51-52. On one occasion, D'Escoubet complained that the plaintiff's wife had misspelled his name on a Christmas card. *Id*. at 92. This incident later led to D'Escoubet making comments about the plaintiff's wife at a staff meeting, in which D'Escoubet "belittled" her and "used vile language." *Id*. at 103. On at least one another occasion, D'Escoubet complained that the plaintiff used "old methods," a remark the plaintiff took to refer to his age. *Id.* at 96, 100. On still another occasion, D'Escoubet made "snide remarks" in response to the plaintiff's comments at a meeting concerning the timing of pay raises. *Id*. at 98. D'Escoubet also suggested that the plaintiff could lose his job for offering an opinion at a meeting with which D'Escoubet disagreed. *Id*. at 99. On another occasion, he compared the plaintiff to another plant manager whom D'Escoubet considered a "loser" with "old ideas." *Id*. at 100. He told the plaintiff, "I can't stand your face . . . I'll just look the other way," thereafter referring to "old folks" while looking at the plaintiff. *Id*. at 102. Another conversation involved D'Escoubet saying "I hate you" to the plaintiff while pointing at him. *Id*. at 106. When asked why by the plaintiff, D'Escoubet used an expletive to describe the plaintiff, prompting laughter from others in attendance, and also accused him of "[l]iving in the past." *Id*. In front of a colleague, D'Escoubet declared to

[1] The excerpts of the Smith Deposition provided by the plaintiff do not include page numbers. Smith identifies himself as National Semiconductor's human resources director at the second page of the deposition excerpt.

the plaintiff that he "hate[s] bald people." *Id*. at 107.[2] At a time when the plaintiff happened to be outside D'Escoubet's office, D'Escoubet urged the plaintiff to "just die and go away," suggesting that he retire. *Id*. at 108. At a staff meeting during a discussion of the erection of a new building for National Semiconductor, D'Escoubet commented that the plaintiff "has a twinkle in his eye because he wished he could get it up." *Id*. at 109. In the presence of two colleagues, D'Escoubet said of the plaintiff, "[L]ook how fat he is and he's eating a pretzel." *Id*. at 110. Finally, D'Escoubet laughed when another National Semiconductor employee remarked at a meeting that the plaintiff could "sit in for" a sick employee who was "the ugliest man in National Semiconductor." *Id*.

At his deposition, the plaintiff testified concerning his perception that National Semiconductor was "going to get rid of" him. *Id*. at 146. Asked if this made him "emotionally upset," the plaintiff responded that it caused him "concern." *Id*. at 147. He also noted that he felt "degraded" and "belittled" by the experience. *Id*. at 143. He made no complaint to D'Escoubet's superior because he felt too proud to do so, and made no mention of it at the time of his discharge because he thought it would be futile to complain at that point. *Id*. at 136, 156. Concerning his final meeting with D'Escoubet, at which the terms of his separation from the company were discussed, the plaintiff felt no emotional effect but thereafter felt "a little sad in leaving" his employer after so many years of service. *Id*. at 153-54.

The plaintiff has not sought treatment from any mental health professionals or social workers following his discharge. *Id*. at 154. He did not cry or otherwise show his emotions at work because he felt it would have been a sign of weakness, although he did cry at his deposition. *Id*. at 178-79,

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[2] Page 107 of the Filaroski Deposition is part of the excerpt of this document appended to the National Semiconductor SMF. National Semiconductor concedes that the plaintiff is, in fact, bald. National Semiconductor SMF at ¶ 21.

192. During the period in which he worked under D'Escoubet, the plaintiff underwent plastic surgery on his eyelids to improve his appearance in an effort to improve his standing in his department and to cause people at work to "stop calling [him] names." *Id*. at 138-39.

At all times relevant to these proceedings, National Semiconductor had secured workers' compensation coverage, through self-insurance, for its employees. Affidavit of Eugene Kiernan, appended to National Semiconductor SMF, at ¶ 3.

III. Discussion

a. Maine Workers' Compensation Act

National Semiconductor first contends that the plaintiff's tort claims are barred by the exclusivity and immunity provisions of the Maine Workers' Compensation Act, 39-A M.R.S.A. § 104. When, as here, an employer-defendant has secured appropriate workers' compensation coverage under the statute, the employer is "exempt from civil actions . . . involving personal injuries sustained by an employee arising out of and in the course of employment." *Id*. The plaintiff concedes that the torts at issue here involve personal injuries sustained in the course of his employment by National Semiconductor, but takes the position that the injuries did not arise out of that employment within the meaning of the statute.

The Law Court has spoken to the "arising out of" test most recently in *Li v. C.N. Brown Co.*, 645 A.2d 606 (Me. 1994), and in a manner that illustrates how broadly the exclusivity and immunity provisions sweep. *Li* involved an employer that knowingly exposed an employee to an armed robbery at her retail workplace, resulting in her death by stabbing. *Id*. at 607. The Law Court noted that "[a]n injury arises out of employment when, in some proximate way, it has its origin, its source,

or its cause in the employment." *Id.* at 609 n.2 (citations omitted) (holding that "arising out of" prong met because complaint against employee was "premised on a breach of its duty . . . created by [the] employment relationship."); *see also Knox v. Combined Ins. Co. of Am.*, 542 A.2d 363, 365-66 (Me. 1988) (mental injuries caused by workplace sexual harassment not excluded from workers' compensation coverage); *Comeau v. Maine Coastal Servs.*, 449 A.2d 362, 370 (Me. 1982) (Carter, J., concurring) ("arising out of" requires "a showing that the injury was caused by an increased risk to which claimant, as distinct from the general public, was subjected by his employment.") (quoting 1 Larson, *The Law of Workman's Compensation* § 6 (1979)).

The tort injuries at issue here arose out of the plaintiff's employment with National Semiconductor because their origin lies in the plaintiff's employment relationship with this defendant. It seems more than obvious that derisive comments made to the plaintiff in his workplace by supervisory personnel concerning the plaintiff's desirability as an employee are proximately related to the plaintiff's employment.

The Law Court cases upon which the plaintiff relies to the contrary, *Saucier's Case*, 122 Me. 325 (1923), and the opinion of the court with which Judge Carter (then Justice Carter) concurred in *Comeau*, do not adequately reflect the current state of Maine law concerning the exclusivity of workers' compensation remedies for workplace torts. Although the Law Court in *Comeau* referred to a variety of "factors on the scale weighing toward or against a finding that the injury arose out of and in the course of employment," adoption of such a flexible test was premised on a then-requisite "liberal interpretation" of the "remedial" workers' compensation statute. *Comeau*, 449 A.2d at 367. The Legislature has since explicitly repudiated this rule of liberal construction in favor of applying the Workers' Compensation Act in a manner that is deliberately favorable to neither employer nor

employee. *See* 39-A M.R.S.A. § 153(3); *see also Li*, 645 A.2d at 609-10 (Glassman, J., dissenting). *Saucier*, dating from the early days of the workers' compensation system, can only be described as archaic. In that case, an injured employee's bid for workers' compensation benefits was thwarted because she had deliberately touched a fan, an act "entirely independent of any duty she was required to perform, and done for the sole purpose of satisfying her curiosity." *Saucier*, 122 Me. at 330. Whatever efficacy such a holding has under the present version of the statute, it sheds no light on the instant case. The tort injuries alleged by the plaintiff arose out of and in the course of his employment with National Semiconductor.

b. Defamation

National Semiconductor further contends that, even if the Maine Workers' Compensation Act were not a bar to relief on the plaintiff's tort claims, National Semiconductor would still be entitled to summary judgment on the defamation count because the allegedly defamatory statements are non-actionable opinion. I disagree.

Construing Maine law in the context of the First Amendment, the First Circuit has recently had occasion to discuss the fact-opinion distinction at some length in *Levinsky's, Inc. v. Wal-Mart Stores, Inc*., 127 F.3d 122 (1st Cir. 1997). As pointed out in that case, the First Amendment generally protects opinion from being actionable "unless it contains an objectively verifiable assertion." *Id*. at 127. Thus, a statement that a retail store and its merchandise were "trashy" was non-actionable opinion because it amounted to "loose language that cannot be objectively verified," whereas a statement that the same store sometimes puts telephone customers on "hold" for 20 minutes was not protected opinion. *Id*. at 130, 132.

The plaintiff makes clear in his opposition to the motion that the statements he regards as defamatory are those describing him as too old to run the plant in Malaysia and referring to his use of old methods. In my view, these statements are capable of objective verification. Leaving aside principles of discrimination law, the question of whether one's age and skills impacts adversely on his or her ability to perform job functions involves the exploration of objective fact. However, in light of my earlier conclusion that all of the torts alleged by the plaintiff in this action arose out of and in the course of his employment with National Semiconductor, National Semiconductor is entitled to summary judgment on the plaintiff's defamation claim.

c. Infliction of Emotional Distress

Finally, National Semiconductor takes the position that even if summary judgment is not appropriate on the tort claims in light of workers' compensation immunity, it is entitled to judgment as a matter of law on the claims for intentional and negligent infliction of emotional distress. According to National Semiconductor, it is clear from the summary judgment record that the degree of emotional distress experienced by the plaintiff was insufficient to permit recovery under either tort. I agree.

In Maine, to recover for intentional infliction of emotional distress a plaintiff must demonstrate, *inter alia*, emotional distress so severe that "no reasonable [person] could be expected to endure it." *Colford v. Chubb Life Ins. Co. of Am,*, 687 A.2d 609, 616 (Me. 1996). Likewise, the Law Court has "never held that liability can be imposed upon a defendant for the negligent infliction of emotional distress of some degree less than severe." *Fuller v. Central Maine Power Co.*, 598 A.2d 457, 459-60 (Me. 1991) (citing *Gammon v. Osteopathic Hosp. of Maine, Inc.*, 534 A.2d 1282,

1286 n.9 (Me. 1987)).

I agree with National Semiconductor that any emotional distress revealed by the present record lacks the requisite severity. As the plaintiff notes, *Gammon* eliminated any requirement of "physical impact, objective manifestation, underlying or accompanying tort, or special circumstances" to recover for negligent infliction of emotional distress. *Gammon*, 534 A.2d at 1283-85 (also noting that plaintiff's failure to seek mental health treatment did not preclude recovery). But in so holding, the Law Court stressed that it did not intend to "provide compensation for hurt feelings of the supersensitive plaintiff." *Id*. at 1285. Because the emotional stress suffered by the plaintiff was not severe, National Semiconductor would be entitled to summary judgment on the emotional distress claims in any event.

IV. Conclusion

For the foregoing reasons, I recommend that the pending motions for summary judgment be **DENIED AS MOOT** to the extent that they apply to the now-dismissed defendant National Semiconductor (Maine), Inc., but that the motion for summary judgment filed by both defendants be **GRANTED** as to defendant National Semiconductor, Inc. and that, accordingly, judgment be entered in favor of National Semiconductor, Inc. on the claims for defamation (count III), intentional infliction of emotional distress (count IV) and negligent infliction of emotional distress (count V).

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 19th day of February, 1998.

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David M. Cohen
United States Magistrate Judge