IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

NORMAN H. BROOKS, JR.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 00-803 GMS
	)	
ROBERT G. FIORE and the NATIONWIDE MUTUAL INSURANCE CO.,	)	
	)	
	)	
Defendants.	)	

M E M O R A N D U M A N D O R D E R

I. INTRODUCTION

Plaintiff, Norman H. Brooks, Jr. ("Brooks"), filed suit against his former employer, Nationwide Mutual Insurance Co. ("Nationwide") and his supervisor Robert G. Fiore ("Fiore") (collectively "the defendants") for violating various state and federal laws. In total, Brooks has alleged eleven claims relating to his employment contract, his duties as a Staff Judge Advocate in the United States Air Force, and his subsequent termination from Nationwide.

On July 20, 2000, Brooks filed his original complaint in the Superior Court of Delaware, alleging violation of his rights under OSHA and retaliation by the defendants in response to his filing a complaint with the regional OSHA administrator. The action was removed to this court on August 30, 2000 on the basis of diversity jurisdiction. Brooks amended his original Complaint on January 8, 2001 to add various state law and statutory claims. Based on the amended complaint, the defendants filed a pre-answer motion to dismiss, or in the alternative for summary judgment, on January 22, 2001. They subsequently filed this motion for summary judgment on June 13, 2001.

Presently before the court is the defendants' motion for summary judgment on all eleven claims[1]. The court will grant the motion in its entirety because there are no genuine issues of material fact to be resolved by a fact finder.

II. STANDARD OF REVIEW

The court may grant summary judgment "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 judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Boyle v. County of Allegheny, Pennsylvania*, 139 F.3d 386, 392 (3d Cir. 1998). Thus, the court may grant summary judgment only if the moving party shows that there are no genuine issues of material fact that would permit a reasonable jury to find for the non-moving party. *See Boyle*, 139 F.3d at 392. A fact is material if it might affect the outcome of the suit. *Id*. (citing *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247-248 (1986)). An issue is genuine if a reasonable jury could possibly find in favor of the non-moving party with regard to that issue. *Id*. In deciding the motion, the court must construe all facts and inferences in the light most favorable to the non-moving party. *Id*.; *see also Assaf v. Fields*, 178 F.3d 170, 173-174 (3d Cir. 1999).

With these standards in mind, the court will briefly describe the facts and procedural history that led to the motion presently before the court.

III. BACKGROUND

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[1]On January 22, 2001, the defendants filed a motion to dismiss for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Because the court will now rule on the defendants' subsequent motion for summary judgment on the same issues, the January 22, 2001 motion to dismiss is rendered moot and will not be ruled upon.

Brooks was employed by Nationwide as an attorney in its Delaware Trial Division office from February 1993 until November 9, 2000. While employed at Nationwide, Brooks was also a reserve Staff Judge Advocate in the United States Air Force.

During Brooks' interviews with Nationwide in 1993, he learned that it was Nationwide's practice to conduct a performance evaluation after one year of employment and then annually thereafter. These performance evaluations were used in determining whether the employee received a pay raise. Nationwide did not, however, guarantee its employees would receive a post-evaluation raise, regardless of the outcome of an evaluation. Nationwide also assured Brooks, prior to his accepting employment with them, that his job responsibilities would not interfere with his reserve military commitments. These policies were also contained in an employee handbook, which Brooks has acknowledged he received and read. The handbook further clarifies that Nationwide's relationship with its employees is an at-will relationship.

During the first three years of Brooks' employment with Nationwide, Ransford Palmer was his supervisor. Palmer completed annual performance reviews for Brooks. These reviews always resulted in an increase in compensation. In 1997, Fiore was appointed the managing attorney of the Delaware Trial Division office and, therefore, became Brooks' direct supervisor. In May 1997, the first time that Fiore served as Brooks' rater, Brooks again received a raise. The following April, Brooks and Fiore discussed his performance, which resulted in a raise and a promotion. On this occassion, Fiore did not do a written performance evaluation. After complaining to John Flynn, Fiore's supervisor, Fiore completed a written performance evaluation, giving Brooks marks indicating that he "consistently achieved performance standards." Brooks then sent a memorandum entitled "Employee Response to Performance Evaluation" to John Jones, the Division Vice President. In that memorandum, Brooks asserted that his performance

evaluation was "nothing more than an act of reprisal" due to Brooks' original complaint to Flynn about the late written evaluation.

Beginning in September 1998, the Delaware Trial Division attorneys were required to input their time records using a new computer system. Brooks refused to comply with that requirement. Moreover, Brooks asserts that when he typed on his office computer, he experienced pain in his wrists. Brooks believed that this problem was caused by an ergonomically incorrect work station. On November 9, 1998, Brooks filed a complaint with the regional OSHA office regarding his work station configuration. In response, Nationwide flew an occupational health nurse from Ohio to Delaware. The nurse recommended, and Flynn approved, the purchase of a new chair and computer stand for Brooks. Brooks withdrew his OSHA complaint.

In 1998, Nationwide also experienced problems with Brooks' lack of documentation with regard to his time away from the office for military service, which Nationwide paid for. Under Nationwide's policies, a member of the military could receive up to two weeks salary "differential" in a given year for time spent performing required duty. To qualify for the salary differential, however, the employee had to provide notice and documentation in regard to such benefits and/or the allocation of leave. Brooks failed to provide such documentation and, indeed, threatened to sue the office manager when she asked for the records.

Brooks' performance as an attorney for Nationwide was also suffering during this time. Flynn reviewed Brooks' files and noted severe deficiencies in his cases. Therefore, Flynn assigned Tom Bouchelle to monitor Brooks' work on an ongoing basis. Fiore also advised Brooks that failure to heed future directives would result in immediate termination for insubordination.

In Spring 1999, Fiore informed Brooks that due to his performance deficiencies and interpersonal

problems during the prior year, Brooks would not be receiving a salary increase. Fiore also asserted that he would not prepare a written performance evaluation for Brooks because it would be quite negative. Fiore finally put Brooks on a minimum of one year "probation" before any salary increase would even be considered. On October 21, 1999, however, Brooks again asked for a written performance review and salary increase for 1999. Fiore denied this request.

Brooks was called to military duty in April 2000. At that time, he again expressed concern that he had not received a written performance review in two years. When Brooks brought this concern to the Human Resources representative, Julie Blankenship, she informed him that records indicated that his most recent performance review had been conducted in April 1999. Brooks informed Flynn via e-mail that he had not received a review then. He concluded the e-mail by mentioning that Fiore must have retaliated against him for filing the OSHA complaint in November 1998. Flynn then confirmed with Fiore that, in fact, Brooks' last formal evaluation had been in September 1998.

Additionally, Fiore initially imposed certain conditions in connection with Brooks' April 2000 military leave. Among them was the requirement that Brooks use his vacation time for military service, before he would allow Brooks to leave. However, within one day, and prior to Brooks' leaving for duty, Fiore's instructions to Brooks were countermanded. Thereafter, all that remained for Brooks to do was to comply with Nationwide's normal documentation procedures regarding absences for which the employee is seeking paid leave.

Brooks filed another complaint with OSHA in April 2000. In this second complaint, Brooks alleged that both Fiore and Nationwide had retaliated against him for filing his November 1998 OSHA complaint by withholding subsequent performance reviews and salary adjustments. Brooks further asserted

that Fiore's initial response to his impending military leave was in retaliation for the original OSHA complaint. Brooks twice offered to hold the retaliation complaint in abeyance if Flynn would intercede on his behalf with regard to his compensation and performance reviews. Flynn declined on both occasions to do so. Brooks later withdrew the April 2000 OSHA suit.

Brooks returned from his military leave in mid-May 2000. At that time, the office manager once again attempted to obtain the required documentation from him. Brooks refused and accused her of harassment. Brooks finally submitted the paperwork three months later.

On July 20, 2000, Brooks filed his initial lawsuit against Nationwide in the Superior Court of Delaware. Nationwide terminated Brooks' employment on November 9, 2000. Flynn decided to do so after Nationwide's General Counsel recommended that Brooks be terminated for filing a frivolous lawsuit against the company. The General Counsel stated that such a lawsuit constituted disruptive behavior and unprofessional conduct.

With this background in mind, the court will discuss each of Brooks' eleven claims in turn.

IV. DISCUSSION

A. Retaliation

Brooks has indicated that he is no longer pursuing Count One of his amended complaint. Accordingly, the court need not address Count One.

B. Breach of Contract

Count Two of Brooks' amended complaint alleges that the defendants breached an employment contract between the defendants and Brooks. Brooks conceded during his deposition on May 29, 2001 that he never had a contract for employment with the defendant Fiore. Therefore, the court will grant

summary judgment on Count Two as to the defendant Fiore.

With regard to the defendant Nationwide, Brooks has also failed to prove the existence of an employment contract between himself and the defendant Nationwide. Absent a contract of employment, an employee under Delaware law is considered to be an at-will employee. *See Heideck v. Kent Gen. Hosp., Inc.*, 446 A.2d 1095, 1096 (Del. 1982). As such, he or she may be terminated with or without cause at any time. *See id*. Delaware law is clear that "written or oral statements to a prospective employee concerning the conditions of [the prospective employee's] employment are not enforceable against the employer without some basic contract consideration, i.e. detrimental reliance by the employee upon the representations made by the employer." *Asher v. A.I. duPont Inst. of the Nemours Found.*, 1987 WL 14876, at *3 (Del. Super. June 19, 1997) (citing 9 WILLISTON ON CONTRACTS § 1017 (3d ed.).

Brooks' breach of contract claim rests first upon the theory that the pre-hire oral statements made to him formed a valid oral employment contract. As previously noted, these alleged statements include statements that Brooks would receive annual performance reviews and would be permitted to continue serving in the U.S. Air Force reserve without detriment to his position with Nationwide. Such statements, which merely reiterated Nationwide policy, are not sufficient to create enforceable contractual obligations under Delaware law. *See Avallone v. Wilmington Med. Ctr., Inc.*, 553 F.Supp. 931, 936 (D. Del. 1982); *Asher* 1987 WL 14876, at *3. Brooks has presented no evidence that at the time of hire, there was any negotiation, much less consideration, for Nationwide's alleged oral promises. Indeed, Brooks testified during his deposition that he did not condition his acceptance of Nationwide's employment offer in any way. As such, the court finds no valid oral contract.

Alternatively, Brooks argues that a written contract embodying the terms of his employment was

created by a series of documents, including Nationwide's Employee Handbook, a document entitled "Total Compensation Statement," several annual performance evaluations, pay stubs and a statement that Brooks signed, in which he agreed to limit his private practice of law during the time of his employment with Nationwide. This argument too must fail.

Brooks acknowledged that he received an employee handbook in 1993. At his deposition, upon being shown a copy of an employee handbook dated April 1993, Brooks agreed that the book was the one given to him when he began his employment at Nationwide. That handbook clearly states as follows:

> The philosophies, policies, procedures and benefits contained in this handbook are not conditions of employment, *nor do they imply, create or constitute an employment contract. Nationwide has an employment at will relationship with its employees*. This means both Nationwide and each employee have the right to terminate employment at any time, with or without reason. (emphasis added)

This language leaves no doubt as to the nature of the employment relationship Nationwide and its employees shared. Further, Delaware law is well-settled that an employee handbook containing a unilateral expression of company policies, does not create an employment contract. *See Heideck v. Kent Gen. Hosp., Inc.*, 446 A.2d 1095, 1096 (Del. 1982); *Asher*, 1987 WL 14876, at *2-3. Furthermore, none of the other documents which Brooks cites, taken alone, or in conjunction with others, in any way changed his status as an employee at will.

Prior to beginning his employment with Nationwide, Brooks filled out and signed a formal employment application, which stated as follows:

> If I am granted employment, I agree to conform to the rules and regulations of Nationwide , and my employment and compensation can be terminated, with or without cause, and with or without notice, at any time, at the option of either Nationwide or me. I understand no supervisor or

> representative of Nationwide, other than the General Chairman of Nationwide, has the authority to make any representation for employment for any specified period of time, or to make any representations contrary to the foregoing. The policies, procedures and statements contained on this application do not imply, create, or constitute, an employment contract.

It is undisputed that Brooks never had any conversations with the General Counsel of Nationwide regarding his employment, nor did they exchange any correspondence. Similarly, the Total Compensation Statement upon which Brooks relies also contains explicit language warning that the document does not "imply, create or constitute an employment contract." As for the document Brooks signed limiting his practice of law during his employment with Nationwide, that document contains no language indicating that Brooks' employment was anything but at-will. Additionally, it does not contain any language related to performance evaluations, military service, or any of the other alleged "terms" of Brooks' employment "contract."

Therefore, and in light of the fact that Brooks failed to address this claim in his answering brief dated July 23, 2001, the court finds that there is no disputed issue as to Nationwide's assertion that there was no contract as a matter of law. Accordingly, summary judgment in favor of the defendants is granted on Count Two.

C. Promissory Estoppel

In order to succeed on a claim for promissory estoppel, a plaintiff must prove (i) the making of a promise; (ii) with the intent to induce action or forbearance based on the promise; (iii) reasonable reliance; and (iv) injury. *See Scott-Douglas Corp. v. Greyhound Corp.*, 304 A.2d 309, 319 (Del. Super. 1973). Mere expressions of opinion, expectation, or assumption are insufficient. *See Borish v. Graham*, 655 A.2d 831, 835 (Del. Super. 1994). Finally, a "unilateral expression" by an employer of its employment

policy does not modify an employee's at-will status. Such expression is insufficient to give rise to a cause of action for at-will employees. *See Rizzo v. E.I. duPont de Nemours & Co.*, 1989 WL 135651, at *2 (Del. Super. Oct. 31, 1989).

With regard to the defendant Fiore, Brooks points to no evidence of any promises made by Fiore. The court thus grants summary judgment on this count in favor of Fiore.

With regard to Nationwide, Brooks first alleges that Palmer made promises to him during the interview process. Contrary to Brooks' allegations, however, the record shows that the statements made by Palmer during the interview process merely reiterated standard Nationwide policies. Brooks further acknowledges that he cannot remember the exact language used by Palmer during that time. Rather, Brooks seeks to rely only on the conclusory allegations in his affidavit that Palmer used "promise-like language." As such, he cannot as a matter of law meet his burden of proving that any such statements made to him during the interview process were in promissory form. *See Quiroga v. Hasbro, Inc.*, 934 F.2d 497, 500 (3d Cir. 1991) (noting that summary judgment shall be granted if, in opposition, the non-moving party rests solely "upon mere allegations, general denials, or . . . vague statements."); *see also Reeder v. Sanford School, Inc.*, 397 A.2d 139, 141 (Del. 1979) (requiring promissory form unless there is evidence of fraud of falsity).

Moreover, Brooks has also failed to point to any evidence of reasonable and detrimental reliance on the alleged promises. As proof of reliance, Brooks argues that he detrimentally relied on Nationwide's promises by leaving his prior employment, with which he was "content." However, during Brooks' deposition, he freely admitted he was actively seeking other employment of exactly the type offered by Nationwide. The defendants also argue in response that, if accepting new employment alone could support

a claim for promissory estoppel, the at-will doctrine would be effectively abolished. The court finds the defendants' argument to be persuasive.

Brooks further argues that Nationwide breached its "promise" to him that he could remain employed as a Staff Judge Advocate in the United States Air Force.[2] However, the alleged "promise" was nothing more than a restatement of Nationwide's duty under federal law to permit the military service of its employees. Promissory estoppel cannot be predicated upon a promise to do that which the promisor is already obliged to do. *Danby v. Osteopathic Assn. of Delaware*, 104 A.2d 903, 907 (Del. Super. 1954). Moreover, on the present facts, Brooks does not deny that Nationwide in fact permitted him to fulfill his military obligation, thus making this argument moot.

Next, Brooks argues that he was "hired" on January 15, 1993, and that Nationwide's disclaimers regarding, among other things, the at-will employment, were not provided until after he resigned from his previous employer. This argument is also unpersuasive because it is undisputed that Brooks was provided with Nationwide's handbook at or immediately after his interview, and that he signed an application for employment containing explicit disclaimers prior to leaving his former employer.

Finally, Brooks contends that, because he did not receive any formal performance reviews in 1999 and 2000, he suffered an actionable injustice. This argument too must fail. While Brooks was clearly unhappy with the turn of events, his grievances with Nationwide did not amount to the sort of "injustice" that permits the invocation of the doctrine of promissory estoppel. There is ample evidence to show that

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[2]Brooks argues for the first time in his Answer Brief that his real grievance with regard to statements made concerning his military service is, in fact, Nationwide's alleged promise of differential pay during military service. However, Brooks did not raise this issue in any way in his amended complaint. As such, the court will disregard this argument.

Brooks was aware that he was not guaranteed a salary increase each year, was well appraised of his supervisor's opinion of his performance during the relevant time period, and was aware that any formal performance evaluations prepared during the relevant time period would not have led to a salary increase.

The court finds that Brooks failed to adduce sufficient evidence of reliance and injury to sustain Count Three and will, therefore, grant summary judgment for the defendants.

D. Fraud

The elements of fraud under Delaware law are well established. A party claiming fraud must demonstrate (1) a false representation, usually one of fact, made by the defendant; (2) the defendant's knowledge or belief that the representation was false, or was made with reckless indifference to the truth; (3) an intent to induce the plaintiff to act or to refrain from acting; (4) the plaintiff's actions or inaction taken in justifiable reliance upon the representation; and (5) damage to the plaintiff as a result of such reliance. *See Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983).

In the present case, Brooks alleges that the defendants committed fraud against him by falsifying company records to show that his most recent performance evaluation had been conducted in April 1999, when, in fact, he had not received a written performance evaluation since 1998. The court rejects this contention.

The evidence of record establishes unequivocally that the defendants did not possess the intent to deceive Brooks. To the contrary, Brooks himself admitted that Fiore informed him, prior to the time that the incorrect record was created, that he would receive no written performance evaluation in 1999. Brooks also acknowledged that Fiore advised him that he would not receive a raise then, nor in the foreseeable future. Further, as soon as Nationwide's human resources representative learned that the

company records erroneously showed that a performance evaluation had been performed in April 1999, Fiore had the record corrected. Fiore also directly informed Flynn that no evaluation had occurred in April 1999.

Additionally, Brooks never relied on the accuracy of the company record. The record evidence amply demonstrates that as soon as Brooks became aware of the inaccurate company record, he promptly sent Flynn an e-mail stating that the record was wrong and no such evaluation existed. Brooks, therefore, cannot now claim that he was misled by the incorrect record.

Finally, no harm resulted to Brooks as a result of the alleged fraud. Brooks argues that he waited until July 2000 to file his OSHA suit because in April 2000, the company records reflected that a performance evaluation had been completed in April 1999. However, even if Brooks were made to wait as a result of the erroneous entry, he alleges no cognizable harm resulting from that three month stay.

Brooks cannot establish the elements for a valid cause of action for fraud. As such, summary judgment is granted in favor of the defendants on Count Four.

E. Breach of Implied Covenant of Good Faith and Fair Dealing

In this portion of Brooks' claims, he argues that the defendants breached their duty to him to act in good faith and deal fairly by committing acts of fraud, deceit, or misrepresentation.

With respect to Fiore, Brooks admits he never had a contractual relationship with him. To the extent Brooks contends that Fiore acted as an agent of Nationwide, this claim must also fail. Under Delaware law, where a principle is disclosed in a breach of contract action, only the principle is liable for the breach and not the agent. *See Harris v. Dependable Used Cars, Inc.*, 1997 WL 358302, at *1 (Del. Super. March 20, 1997). Therefore, Fiore cannot be held liable either in his personal capacity or as the

agent of Nationwide.

With respect to Nationwide, the court again finds that Brooks' argument is meritless. The Delaware Supreme Court has strictly limited the application of the implied covenant in the employment context, holding that a plaintiff must establish that he or she falls into one of four exclusive categories. *See Lord v. Souder*, 748 A.2d 393, 401 (Del. 2000). The four categories are: (1) where the termination violates public policy and no other remedial scheme exists; (2) where the employer misrepresented an important fact and the employee relied thereon to either accept a new position or remain in a present one; (3) where the employer used its superior bargaining power to deprive an employee of clearly identifiable compensation earned through the employee's past service; and (4) where the employer falsified or manipulated employment records to create fictitious grounds for termination. *See E.I. duPont de Nemours & Co. v. Pressman*, 679 A.2d 426, 442-44 (Del. 1996).

As the defendant stresses, however, irrespective of the category implicated, a claim for the breach of duty of good faith and fair dealing requires employer conduct amounting to fraud, deceit, or misrepresentation. *See Peterson v. Beebe Med. Ctr., Inc.*,1992 WL 354087, at *5 (Del. Nov. 13, 1992), *aff'd*, 623 A.2d 142 (Del. 1993). Thus, the traditional elements of fraud must be present in a claim for breach of an implied covenant of good faith. *See Hudson v. Wesley College, Inc.*, 1998 WL 939712, at *13 (Del. Ch. Dec. 23, 1998) *aff'd* 734 A.2d 641 (Del. 1999).

In Count Five of his complaint, Brooks argues that the defendants breached the implied covenant of good faith and fair dealing by falsifying Nationwide computer records to show that he received an evaluation in September 1999. Brooks has, however, failed to bring forth any evidence that the incorrect record was in any way related to Nationwide's decision to terminate his employment. In fact, there is no

dispute that Brooks' termination occurred as a direct result of his filing a meritless lawsuit against Nationwide. Thus, because no fraud or misrepresentation occurred here, summary judgment in favor of the defendants will be granted as to Count Five.

In Count Seven, Brooks bases his retaliation claim on a violation of public policy. Such a public policy, however, must be recognized by some legislative, administrative, or judicial authority. *See Shearin v. E.F. Hutton Group, Inc.*, 652 A.2d 578, 587-589 (Del. Ch. 1994). The employee asserting the claim must also be able to show that she was responsible in her capacity as an employee for implementing the recognized public interest. *See E.I. duPont de Nemours & Co. v. Pressman*, 679 A.2d 436, 441-442 (Del. 1996).

Brooks argues that the defendants breached the duty of good faith and fair dealing when Fiore allegedly retaliated against him for reporting to senior management Fiore's purported inappropriate imposition of conditions on Brooks' military service. For Brooks to be protected by this implied covenant, however, he must, in his capacity as an employee of the defendant, occupy a position with responsibility for reporting misconduct. *See Lord v. Souder*, 748 A.2d 393, 401 (Del. 2000). Brooks contends he occupied such a position because he is a Staff Judge Advocate in the Air National Guard. However, as the defendants correctly point out, the relevant inquiry is the nature of Brooks' duties *with the defendant employer*. There is no evidence that Nationwide charged Brooks with the responsibility of reporting his supervisor's allegedly improper actions with regard to his military leave. Furthermore, Brooks offers no legal support for his contention that his position as a Staff Judge Advocate conferred upon him a position of responsibility for reporting any purported misconduct of Nationwide.

For the above reasons, the court will grant summary judgment in favor of the defendants

as to both Counts Five and Seven.

F. Employment Rights of Members of the Uniformed Services

Brooks alleges that his rights under the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), were violated from 1998-2000 by the defendants.[3] *See* 38 U.S.C. § 4301 et seq. (2001). Specifically, Brooks argues that the defendants refused to permit him to serve his military duty and required him to seek pre-approval of any military service. Further, Brooks alleges that he did not receive a performance evaluation or pay increase as retaliation for exercising his rights under USERRA. It is clear from the record before the court that he was not prevented from serving military duty and was not subjected to conditions violating USERRA.

Brooks first alleges that his USERRA rights were violated because the defendants prevented him from serving military duty from 1998-2000. *See* 38 U.S.C. § 4301 et seq. (2001). The record clearly indicates, however, that the defendants not only permitted Brooks to fulfill his military committments, they permitted him to receive CLE time and full pay for extended periods of military service for which Brooks was also receiving military pay. Brooks himself testified at his deposition that, in 1998, he and Fiore resolved their issues related to his military service and he did in fact serve.

Brooks argues next that the violation of his USERRA rights relate to Connie Peterson's attempts to have him properly document his military service time. He does not dispute, however, that this was done

[3]As a preliminary matter, it is clear from settled law that Fiore is not covered by USERRA. *See* 38 U.S.C. § 4303(4)(A) (2001). Thus, he can not be held individually liable. Courts have recognized that USERRA applies only to employers, or those individuals who have the power to hire or fire the employee. *See Satterfield v. Borough of Schuykill Haven*, 12 F. Supp. 2d 423, 438 (E.D. Pa. 1998). Here, it is undisputed that, while Fiore carried out orders to fire Brooks, he did not initiate that decision, nor did he have the power to do so.

in order to account for any pay differential for which he might be eligible under Nationwide's *voluntary* policy of paying its employees the difference between any military pay received and their usual pay during periods of military service. However, there is no requirement under USERRA that Nationwide provide such differential pay to its employees. Further, USERRA does not prohibit employers from requiring certain notification procedures or documentation of military leave. In fact, USERRA specifically states that an individual wishing to perform military service is protected by the statute only if "the person...has given advance written or verbal notice of such service to such person's employer." 38 U.S.C. § 4312(a) (2001). Thus, it is clear that the problems Brooks contends are related to the notification and pay procedures are not actionable under USERRA.

Brooks next alleges that he was penalized from 1998-2000 because the defendants held him to the same billable hour requirements as other attorneys and forced him to use vacation time for his military leave. There is, however, no record evidence that demonstrates any action was taken against Brooks as a result of his billable hours deficiency. To the contrary, in 2000, Brooks' billable hour goal was explicitly reduced to account for time spent on military leave. Even prior to 2000, there is no evidence in the record that action was ever taken against Brooks for having a deficiency in his hours. Further, Brooks' contention that he was required to use vacation time for military duty is unsupported in the record. In fact, while Fiore was initially confused in April 2000 about the requirements of the law when he required Brooks to use his vacation time, that misunderstanding was promptly resolved. Thereafter, Brooks completed his military leave as scheduled.

Finally, Brooks argues that Fiore retaliated against him for reporting Fiore's mistaken April 2000 directive to Nationwide management by refusing to perform an annual review or salary increase. In the

defendants' briefs, they point out that Brooks has twice changed this allegation. First Brooks alleged that the lack of a performance evaluation and salary increase were caused by Fiore's retaliation since Brooks went over Fiore's head to force him into action. Secondly, he attributed the lack of a performance evaluation and salary increase to retaliation for filing his OSHA complaint. He now claims it was retaliation for exercising his rights under USERRA. The court thus agrees with defendants that this claim is clearly a post-hac claim, and there is no evidence to support it.

G. Unreimbursed Client Expenses

Brooks alleges that defendants failed to reimburse him for expenditures related to his employment at Nationwide. Specially, Brooks testified at his deposition that he is seeking reimbursement for expenditures that occurred from January 2000 through August 3, 2000.

Brooks has identified no basis for holding Fiore personally liable for these expenses. Thus, summary judgment will be granted as to Fiore.

With regard to Nationwide, the record clearly indicates that Brooks never submitted any receipts or requests for reimbursement for these alleged expenses during his employment. Nor has Brooks identified any specific expenses during the course of this litigation and, indeed, has failed to disclose an actual amount of money due him. As such, the court will grant summary judgment on Count Eight in favor of the defendants.

H. Prima Facie Tort

Under Delaware law, claims for prima facie tort are not permitted in the employment context. *See Lord v. Souder*, 748 A.2d 393, 403 (Del. 2000). In *Lord*, the Delaware Supreme Court considered a claim alleging prima facie tort (in addition to claims for breach of contract, promissory estoppel, violation

of public policy, and fraud) based upon an at-will employee's termination. The Court concluded that the tort claim must be dismissed as inconsistent with the employment-at-will doctrine. The Court there viewed the tort claim as an effort to maintain an action for wrongful discharge in contravention of the exclusive categories established by *E.I. duPont de Nemours & Co. v. Pressman* (See discussion section B, *supra*). Contrary to Brooks' position, it is clear that *Lord* governs situations both arising during employment and at termination. 748 A.2d at 400. As such, *Lord* controls Count Nine of Brooks' amended complaint. The court will follow this precedent and grant summary judgment in favor of the defendants on Count Nine.

I. Wrongful Discharge

Brooks testified at his deposition that he believed there was no basis for his termination on November 9, 2000, other than Fiore's "knee-jerk reaction and wrongful perception" that Brooks' lawsuit was without merit. As previously noted, however, Fiore was not responsible for the decision to terminate Brooks' employment. That decision was in fact made by Flynn, upon the advice of Nationwide's General Counsel. Brooks further concedes that, even if Fiore had been the decision-maker, Brooks did not have an employment contract with Fiore. Thus, Fiore can not be held liable for wrongful termination. *See Harris v. Dependable Used Cars, Inc.*, 1997 WL 358302, at *1 (Del. Super. 1997) (citing Delaware Rule that "where the principal is disclosed, only the principle is liable...not the agent.").

With respect to Nationwide's liability on this claim, Delaware courts have noted that nothing is "to be construed as limiting an employer's freedom to terminate an at-will employment contract for its own legitimate business, or even highly subjective, reasons." *See Layfield v. Beebe Med. Ctr, Inc.*, 1997 WL 716900, at *5 (Del. Super. July 18, 1997) (citing *E.I. duPont de Nemours & Co. v Pressman*, 679 A.2d

436, 441 (Del. Super. 1996)). Indeed, these courts have further recognized that, due to the personal nature of an employment relationship, causes of action should not be based solely on personal motivations such as dislike, hatred, or ill-will alone. *See id*. at *11. Thus, the employer's conduct must rise to the level of fraud, deceit, or misrepresentation. *See id*. Courts in other jurisdictions have followed this rationale, and held that an action for wrongful termination does not lie where the at-will employee was terminated for suing the employer. *See e.g., Tynes v. Shoney's, Inc.*, 867 F. Supp. 330, 334 (D. Md. 1994); *Deiters v. Home Depot U.S.A., Inc.*, 842 F. Supp. 1023, 1028 (M.D. Tenn. 1993).

As in Counts Five and Seven of Brooks' complaint, the court here finds no evidence of fraud, deceit, or misrepresentation on Nationwide's part sufficient to sustain a charge of wrongful discharge. Nationwide has made no attempt to hide the reason it fired Brooks, namely that its General Counsel had found the lawsuit to be frivolous and disruptive to the office, while also calling into question Brooks' professional integrity and judgment. On these facts, the court will not find Nationwide acted beyond its legal rights when dealing with such an at-will employee.

For the above reasons, the court will grant summary judgment with regard to Count Ten.

J. Consolidated Omnibus Budget Reconciliation Act

The court will grant summary judgment on Count Eleven, although it was not briefed by the defendants until they filed their reply brief on July 23, 2001, because Brooks has voluntarily withdrawn this claim in his answer to interrogatory question number 14. As there is no longer a dispute as to this issue, summary judgment will be granted.

V. CONCLUSION

For these reasons, IT IS HEREBY ORDERED that:

1. The Pre-Answer Motion to Dismiss (D.I. 21) filed by Nationwide Mutual Insurance Company and Robert G. Fiore is declared moot;

2. The Motion for Summary Judgment (D.I. 59) filed by Nationwide Mutual Insurance Company and Robert G. Fiore is GRANTED.

3. Judgment BE AND IS HEREBY ENTERED in favor of the defendants on all claims against them.

Date: October 11, 2001

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE