UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

LOUISE H. COFFIN,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 96-374-P-C***
	)	
MARVIN RUNYON, et al.,	***)***	
	)	
Defendants	***)***	

RECOMMENDED DECISION ON MOTION OF DEFENDANT BARRY CURTIS FOR SUMMARY JUDGMENT

Defendant Barry Curtis moves for summary judgment on Counts IV and V of the complaint, the only remaining counts asserted against him in this action. These counts allege state-law claims of intentional infliction of emotional distress and negligent infliction of emotional distress, respectively. I recommend that the court grant the motion in part and deny it in part.

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 the party the benefit of all reasonable inferences to be drawn in its favor." *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990). 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.) (citing *Celotex*, 477 U.S. at 324), *cert. denied*, 132 L. Ed. 2d 255 (1995); 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 Assn. of Machinists & Aerospace Workers v. Winship Green Nursing Ctr*., 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Background

The plaintiff's decedent, Judith A. Coffin, was an employee of the United States Postal Service and the supervisor of defendant Curtis. Affidavit of Anne M. Carney, Esq. (Docket No. 20) ¶ 1; Affidavit of Lou Dettorre (Docket No. 33) ¶¶ 3-4. Coffin died on August 23, 1995. Affidavit of Theodore H. Kirchner, Esq. (Docket No. 21) ¶ 2(e). In her suicide note, dated August 17, 1995, Coffin wrote, *inter alia*, "Make sure you get even with Barry Curtis [and two others]. I guess they did end up winning because I let them." Exh. F to Plaintiff's Opposition to Defendant Curtis's Motion for Summary Judgment ("Plaintiff's Opposition") (Docket No. 32) at [1].

Curtis denies each of the specific instances of conduct that allegedly caused emotional distress to the plaintiff which he identifies as having been asserted against him. Affidavit of Barry W. Curtis, attached to Curtis's Statement of Material Facts as to Which There are No Genuine Issues to be Tried ("Curtis Aff.") (Docket No. 30), ¶¶ 4-8. The plaintiff offers additional evidence in her response, which will be discussed below.

III. Analysis

Curtis argues that he is entitled to summary judgment because he has denied each of the specific allegations of conduct that may have caused emotional distress to Coffin and because the plaintiff cannot controvert those denials with admissible evidence. He also argues, in summary fashion, that recovery for negligent infliction of emotional distress under Maine law requires the existence of an underlying tort, which is not present in this case.

The plaintiff offers nothing to controvert Curtis's denial of the incidents set forth in paragraphs 4-7 of his affidavit, despite the fact that those paragraphs are very carefully and narrowly drawn. However, the plaintiff does offer evidence that disputes Curtis's assertion that "I have never intentionally and systematically undercut Judith Coffin's authority within her department and in other departments." Curtis Aff. ¶ 8. Contrary to Curtis's assertion, not all of this evidence is necessarily inadmissible. For example, Curtis admits in his responses to interrogatories that he referred to Coffin as "smurfette." Defendant Barry Curtis' Answers to Interrogatories, attached to Plaintiff's Opposition, at 6-7. Lou Dettorre states that, based on statements made to him by Curtis and Curtis's performance which he directly observed, he formed the "impression that Barry Curtis was doing everything in his capability to make Judith A. Coffin's job more difficult, and to make

her fail." Detorre Aff. ¶¶ 4-8. The plaintiff also offers several instances of sarcasm and strongly worded comments addressed to or about Coffin by Curtis in Postal Service documents. Exhs. A, B, D & E to Plaintiff's Opposition. Finally, the plaintiff offers deposition testimony of Melissa Shattuck, an EAP (employee and workplace) counselor employed by the Postal Service with whom Coffin spoke concerning Curtis. Deposition of Melissa P. Shattuck at 3, 6, 14-18, 53, 82, 83, 107.

Curtis first asserts that the "weakness" of the plaintiff's evidence requires entry of summary judgment in his favor. Assessment of the weight of evidence, of course, is the exclusive province of the factfinder at trial. Under applicable summary judgment standards, this argument cannot prevail. Curtis next attacks the decedent's statements to Shattuck as hearsay. The plaintiff maintains that the statements are admissible as exceptions to the hearsay rule under Fed. R. Evid. 803(3) as evidence of the decedent's then existing state of mind. Curtis argues that "the declarant here is Melissa Shattuck and her state of mind is completely irrelevant." Defendant Barry Curtis's Reply to Plaintiff's Opposition ("Reply Memorandum")[1] (Docket No. 35) at 3. Curtis understandably cites no authority for this clearly incorrect statement. The declarant involved in Shattuck's testimony is Coffin; her state of mind is highly relevant, because the plaintiff must show that Coffin did in fact suffer severe emotional distress. *Vicnire v. Ford Motor Credit Co.*, 401 A.2d 148, 154 (Me. 1979).

Curtis next asserts, again without citation to authority, that the affidavit of Lou Dettorre must be disregarded because "his statements are highly unreliable." Reply Memorandum at 3. It is basic hornbook law that credibility determinations are to be made by the factfinder at trial, and not by the court on a motion for summary judgment. *E.g.,Cortés-Irizarry v. Corporación Insular de Seguros*,

[1] Curtis's reply memorandum addresses only the claim for intentional infliction of emotional distress (Count IV).

111 F.3d 184, 192 (1st Cir. 1997). Curtis argues that the statements reported by Dettorre are subject to exclusion under Fed. R. Evid. 403 because they are prejudicial and "inflammatory," a term not included in the Rule. Rule 403 requires a balancing by the court; evidence is not to be excluded because it is prejudicial to a party, but only if it is *unfairly* prejudicial. *United States v. Morla-Trinidad*, 100 F.3d 1, 6 (1st Cir. 1996). The statements at issue do not rise to this level. *See, e.g.*, *Bolstridge v. Central Maine Power Co.*, 621 F. Supp. 1202, 1204 (D. Me. 1985) (excluding "day-in-the-life" videotape under Rule 403). Curtis's further argument, that Dettorre does not say that the specific statements he reports Curtis as having made were ever made directly to Coffin, so that those statements cannot be used as evidence of any intent on his part to cause her emotional distress, is incorrect. The plaintiff is not limited to evidence of statements made directly to Coffin by Curtis in order to prove that he intentionally inflicted emotional distress on her.

Finally, Curtis argues that none of the plaintiff's proffered evidence reaches the legal standard for intentional infliction of emotional distress — conduct so extreme and outrageous as to exceed all possible bounds of decency and that must be regarded as atrocious and utterly intolerable in a civilized community — relying on *Colford v. Chubb Life Ins. Co. of Am.*, 687 A.2d 609, 616 (Me. 1996). According to the Restatement (Second) of Torts:

> It is for the Court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery, or whether it is necessarily so. Where reasonable [people] may differ, it is for the jury, subject to the control of the court, to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability.

Restatement (Second) of Torts § 46 comment h. Employing this objective standard of reasonableness, I conclude that the summary judgment evidence submitted by the plaintiff, although

certainly demonstrating objectionable conduct, would not allow a jury to find that Curtis acted in a manner that was "atrocious, and utterly intolerable in a civilized community." *Vicnire*, 401 A.2d at 154. Accordingly, Curtis is entitled to summary judgment on Count IV, which alleges intentional infliction of emotional distress.

Curtis's argument concerning the count for negligent infliction of emotional distress is another matter, however. His argument consists of the quotation of a single sentence from *Gayer v. Bath Iron Works Corp.*, 687 A.2d 617, 621 (Me. 1996), and the assertion that no underlying tort is alleged against him in this action. In *Gayer*, the Law Court states: "Recovery for negligent infliction of emotional distress is premised on the existence of an underlying tort or, in limited circumstances, contract breach." *Id.* On its face, this statement is inconsistent with the Law Court's explicit holdings in *Gammon v. Osteopathic Hosp. of Maine, Inc.*, 534 A.2d 1282, 1283 (Me. 1987), and *Rowe v. Bennett*, 514 A.2d 802, 806 (Me. 1986), neither of which involved an underlying tort or a claim of breach of contract. *Gayer* does not mention those cases, except to quote *Rowe*'s definition of serious emotional distress with approval. 687 A.2d at 622. In *Gammon*, the Law Court clearly abandoned the underlying tort requirement for cases involving negligently inflicted severe emotional distress. 534 A.2d 1285-86 & n. 9. *See also Salley v. Childs*, 541 A.2d 1297, 1300 n.2 (Me. 1988). Like the plaintiff in *Gammon*, the plaintiff here alleges the infliction of severe emotional distress. Complaint (Docket No. 1) ¶ 54.

A close review of *Gayer* reveals that the Law Court's holding on this issue may be limited to the facts of that case, which are distinguishable from those present in the instant case. In the absence of an explicit reference to *Gammon* and a clear statement overruling it, I conclude that *Gammon* continues to be good law. Therefore, when a cause of action is asserted which states the

elements laid out in *Gammon*, a plaintiff will not be required to allege the existence of an underlying tort in order to proceed with her claim for negligent infliction of serious or severe emotional distress. This is the only ground for summary judgment argued by Curtis and I therefore conclude that his motion as to Count V should be denied.

IV. Conclusion

For the foregoing reasons, I recommend that the motion of defendant Barry Curtis for summary judgment be **GRANTED** as to Count IV of the complaint and otherwise **DENIED.**

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 at Portland, Maine this 23rd day of July, 1997.

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David M. Cohen
United States Magistrate Judge