

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Cassandra Wiltz,	:	
	:	
Plaintiff-Appellant,	:	No. 14AP-645
	:	(Ct.Cl. No. 2014-00431)
v.	:	
	:	(REGULAR CALENDAR)
Accountancy Board of Ohio,	:	
	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on June 23, 2015

Cassandra Wiltz, pro se.

Michael DeWine, Attorney General, *Emily M. Simmons* and
Christopher L. Bagi, for appellee.

APPEAL from the Court of Claims of Ohio

DORRIAN, J.

{¶ 1} Plaintiff-appellant, Cassandra Wiltz, appeals from the July 16, 2014 judgment of the Court of Claims of Ohio granting the motion to dismiss filed by defendant-appellee, the Accountancy Board of Ohio (the "ABO").

Facts and Procedural History

{¶ 2} On May 2, 2014, appellant filed a complaint against appellee. In the complaint, she alleged that a former employer terminated her employment and threatened her with retaliation when she complained about violations of law, professional standards, and ethics. She alleged the employer threatened to involve the ABO and that the ABO participated in the retaliation efforts by disseminating knowingly false and misleading claims and documents about her. Finally, appellant alleged that the actions of the ABO resulted in lost work and her ability to work in her chosen profession. She was

also subjected "to extreme humiliation and embarrassment, * * * [which] caused extreme distress." (Complaint, 6.)

{¶ 3} On June 2, 2014, the ABO moved to dismiss the complaint pursuant to Civ.R. 12(B)(1) and (6). The ABO argued that: (1) it was not responsible for the actions of appellant's former employer, and, therefore, she failed to state a claim for relief; (2) the court lacked jurisdiction over appellant's claims because they were constitutional in nature; (3) the ABO was entitled to discretionary immunity concerning the decision of how and whether to investigate appellant's general inquiry to the ABO; and (4) the public duty rule applied to bar appellant's claims concerning the ABO's investigation. Appellant filed a memorandum contra on June 16, 2014.

{¶ 4} On July 16, 2014, the Court of Claims granted appellee's motion to dismiss pursuant to Civ.R. 12(B)(1) and (6). The court made the following findings summarized below:

(1) To the extent appellant was challenging any administrative determination of the ABO, the court lacked subject-matter jurisdiction.

(2) To the extent appellant alleges the ABO discriminated against her because of her race, she has not alleged an employer-employee relationship with the ABO, and, therefore, the discrimination claim does not fall within the scope of worker-protection statutes.

(3) To the extent appellant alleges the ABO discriminated against her because of her race in violation of the Ohio and federal constitutions, such discrimination claim is not actionable in the Court of Claims.

(4) To the extent appellant alleges she was not permitted to fully participate in an ABO hearing, such a claim involves due process and equal protection concerns, which are not actionable in the Court of Claims.

(5) To the extent appellant alleges a claim over which the court has jurisdiction, she has failed to identify any statutory or common law authority to support her contention that the ABO owed her a duty or that she can maintain a cause of action for monetary damages in the Court of Claims based upon the alleged breach.

(6) To the extent appellant alleges the ABO is liable for performance or non-performance of a public duty, the state is generally immune from liability, pursuant to R.C. 2743.01(E)(1)(a), and the complaint "conclusively shows that there was no special relationship between appellant and the ABO to warrant an exception to immunity pursuant to R.C. 2743.02(A).

Appellant filed an appeal and raises five assignments of error, as follows:

[1.] The Court of Claims abused its discretion and denied the plaintiff due process, when it dismissed the plaintiff's case on the basis of a sua sponte argument (namely, that the Court of Claims did not have jurisdiction to hear the plaintiff's case, because R.C. 119.12 dictates that the Accountancy Board's refusal "to accept" and "to investigate" an ethics complaint from the plaintiff was an administrative determination of an agency that could only be appealed in the Common Pleas Court).

[2.] The Court of Claims erred and made an improper application of the law, when it dismissed the plaintiff's case on the basis of a claim that it did not have jurisdiction to hear the case, because R.C. 119.12 dictates that the Accountancy Board's refusal "to accept" and "to investigate" an ethics complaint from the plaintiff was an administrative determination of an agency that could only be appealed in the Common Pleas Court.

[3.] The Court of Claims erred and made an improper application of the law, when it dismissed the plaintiff's case on the basis of a claim that the plaintiff's discrimination charge did not fall within the scope of worker-protection statutes (because the plaintiff did not allege that she had an employer-employee relationship with the defendant).

[4.] The Court of Claims erred, abused its discretion, and made an improper application of the law, when it ignored the true allegations of the plaintiff's complaint and dismissed the complaint on the basis of a claim that "the complaint charges the defendant with failing to perform a public duty (ie: the duty to investigate allegations against accountants that have been made to it) and the defendant is immune from liability regarding the non-performance of a public duty."

[5.] The Court of Claims erred, made an improper application of its own rules, and abused its discretion, when it ignored (and did not acknowledge or address, in any manner) the true charges and allegations of the plaintiff's complaint and it dismissed the complaint on the basis of claims that "the complaint failed to identify any statutory or common law authority" and "the complaint did not set forth any allegations that would entitle the plaintiff to relief."

Standard of Review

{¶ 5} Civ.R. 12(B)(1) permits dismissal where the trial court lacks jurisdiction over the subject matter of the litigation. *Guillory v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 07AP-861, 2008-Ohio-2299, ¶ 6. The issue of subject-matter jurisdiction involves "a court's power to hear and decide a case on the merits and does not relate to the rights of the parties." *Vedder v. Warrensville Hts.*, 8th Dist. No. 81005, 2002-Ohio-5567, ¶ 14. The standard of review for a dismissal pursuant to Civ.R. 12(B)(1) is "whether any cause of action cognizable by the forum has been raised in the complaint." *Washington Mut. Bank v. Beatley*, 10th Dist. No. 06AP-1189, 2008-Ohio-1679, ¶ 8. This court reviews a trial court's decision on a Civ.R. 12(B)(1) motion to dismiss for lack of subject-matter jurisdiction under a de novo standard of review. *Pankey v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 13AP-701, 2014-Ohio-2907, ¶ 7.

{¶ 6} In deciding whether to dismiss a complaint, pursuant to Civ.R. 12(B)(6), for failure to state a claim upon which relief can be granted, the trial court must presume all factual allegations in the complaint are true and construe the complaint in the light most favorable to the plaintiff, drawing all reasonable inferences in favor of plaintiff. *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192 (1988). Before the court may dismiss the complaint, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling the plaintiff to recovery. *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242 (1975), syllabus. We review de novo the dismissal of a complaint pursuant to Civ.R. 12(B)(6). *Shockey v. Wilkinson*, 96 Ohio App.3d 91, 94 (4th Dist.1994).

First and Second Assignments of Error

{¶ 7} In her first and second assignments of error, appellant alleges that the court abused its discretion, denied appellant due process, and improperly applied the law by dismissing the complaint when it sua sponte characterized appellant's claim as an appeal of an administrative determination of an agency pursuant to R.C. 119.12. Appellant clarifies for this court that R.C. 119.12 is not applicable to this case because the complaint she filed is not an appeal of an administrative decision. (Appellant's Brief, 9, 11.) She also clarifies that there are no constitutional claims anywhere in the complaint she filed. (Appellant's Brief, 8.) With these clarifications, it is not necessary for us to further consider appellant's first and second assignments of error, as well as the trial court's related findings, as they are moot. Rather, we will consider the remaining assignments of error and whether the court had other grounds for dismissal.

{¶ 8} Accordingly, we find the first and second assignments of error to be moot.

Third Assignment of Error

{¶ 9} In the third assignment of error, appellant alleges that the court erred and improperly applied the law by dismissing the complaint when it determined that appellant did not allege an employer-employee relationship with the ABO, and, therefore, her discrimination claim would not fall within the scope of worker protection. Appellant states that a discrimination claim is indeed one of the claims she made in her complaint. She argues, however, that, although a claim made pursuant to R.C. 4112.02(A) may require the existence of an employer-employee relationship, a claim made pursuant to R.C. 4112.02(I) and (J) does not.

{¶ 10} R.C. 4112.02(A) states:

It shall be an unlawful discriminatory practice:

(A) For any *employer*, because of the race, color, religion, sex, military status, national origin, disability, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

(Emphasis added.) R.C. 4112.02(I) states:

It shall be an unlawful discriminatory practice:

(I) For *any person* to discriminate in any manner against any other person because that person [1] has opposed any unlawful discriminatory practice defined in this section or [2] because that person has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code.

(Emphasis added.) R.C. 4112.02(J) states:

It shall be an unlawful discriminatory practice:

(J) For *any person* [1] to aid, abet, incite, compel, or coerce the doing of any act declared by this section to be an unlawful discriminatory practice, [2] to obstruct or prevent any person from complying with this chapter or any order issued under it, or [3] to attempt directly or indirectly to commit any act declared by this section to be an unlawful discriminatory practice.

(Emphasis added.)

{¶ 11} Appellant states in her brief that, in her complaint, she alleged violations of R.C. 4112.02(I) and (J). More specifically, she states: "My Court of Claims Complaint describes how the Accountancy Board provided assistance to a former employer of mine, who took retaliation against me 'because I made charges about its racially motivated discriminatory behavior.' " (Appellant's Brief, 18.) In her brief, appellant quotes from her complaint as evidence of her allegations of racially motivated discrimination. In particular, appellant quotes the following:

"An employer of mine committed fraud and other financial crimes and violated accounting laws * * * *and laws against discrimination*. The employer also terminated my employment and made threats, when I made complaints about the violations of laws (and solely because I made the complaints). One of the threats was that, if I told any investigative authority about their violations of laws, additional relation would be taken against me (which they would get * * * the Accountancy Board of Ohio to assist with)."

(Emphasis added.) (Appellant's Brief, 19-20, referring to Complaint, 1, 2, and 5.) She also quotes:

"The actions of the Accountancy Board of Ohio were taken, to assist others in retaliating against me (for making complaints about violations of federal and state laws), to prevent others from performing investigations of violations of federal and [state] laws (by my former employer and by others who have relationships with the Accountancy Board of Ohio), to cause me to lose work and my right to earn a living and *because of my (black) race.*"

(Emphasis added.) (Appellant's Brief, 22, referring to Complaint, 6.) Appellant states in her brief that, "[a]s additional evidence of the Board's racially motivated animus, my Complaint also describes what occurred during an Accountancy Board meeting, when Board members singled me out and treated me in a manner that was not consistent with the manner in which it treated all Caucasian persons who attended the meeting." (Appellant's brief, 19.) Appellant also states:

I also appeared at a 6/8/12 Board meeting, * * * [.] During the 6/8/12 meeting * * * the Board * * * would only allow me 2 to 4 minutes to speak [on the record] during the meeting (despite the fact that all of Caucasian people who came to the meeting were allowed an unlimited amount of time to speak).

(Appellant's Brief, 4.)

{¶ 12} Appellee argues that appellant failed to allege facts to establish that she fell within any of the protections of Chapter 4112. Appellee points out that, although appellant states in her brief that, in her complaint, she "made charges about [her former employer's] racially motivated discriminatory behavior," the complaint actually alleged that her employer violated "accounting laws and ethics." (Appellee's Brief, 12.) According to appellee, the allegations of discriminatory behavior are being made for the first time on appeal, and nowhere in the complaint does it allege any facts to support that her employer discriminated against her because of her race. Rather, the complaint alleges that her employer retaliated against her due to her attempt to make whistleblower claims concerning breach of accounting laws and ethics—not because of her race.

{¶ 13} We find that the Court of Claims erred in dismissing appellant's discrimination claim pursuant to Civ.R. 12(B)(6). Ohio is a notice pleading state. Pursuant to notice pleading, "[appellant was] required to allege sufficient facts to give [the ABO] notice of [her] claim." *San Allen, Inc. v. Buehrer*, 8th Dist. No. 99786, 2014-Ohio-2071, ¶ 84, referencing *Thatcher v. Lauffer Ravines, LLC*, 10th Dist. No. 11AP-851, 2012-Ohio-6193, ¶ 43-48 ("Although claim was 'not spelled out in the complaint by explicit reference to the appropriate statutory sections,' " the case could nevertheless proceed on the theory that defendant violated various statutory provisions if the allegations in the complaint " 'provided fair notice to the defendants that the action could proceed on this theory.' "). "Notice pleading under Civ.R. 8(A)(1) and (E) require that a claim concisely set forth only those operative facts sufficient to give 'fair notice of the nature of the action.' " *Montgomery v. Ohio State Univ.*, 10th Dist. No. 11AP-1024, 2012-Ohio-5489, ¶ 20, quoting *Ford v. Brooks*, 10th Dist. No. 11AP-664, 2012-Ohio-943, ¶ 13.

{¶ 14} In addition to the excerpts from the complaint which were noted by appellant in her brief and are highlighted above, we also consider appellant's allegation that the ABO "also gave the [knowingly false and misleading information and documents] to my former employer, so that its agents could circulate them to others (and with knowledge that they intended to circulate them), including to my perspective [sic] employers and to others that I had made aware of the violations of laws." (Complaint, 5.)

{¶ 15} Construing these excerpts from the complaint in a light most favorable to appellant and drawing all reasonable inferences in her favor, we find that appellant stated a claim in her complaint that the ABO violated R.C. 4112.02(I) by discriminating against her because she opposed any unlawful discriminatory practice defined in R.C. 4112.02—i.e., discharge without just cause because of race—by opposing her termination "because of her black race" and "violations of the laws against discrimination." We further find that appellant stated a claim in her complaint that the ABO violated R.C. 4112.02(J) by aiding and abetting her former employer in doing any act declared by this section to be an unlawful discriminatory practice—i.e., to discriminate against appellant because of race regarding any matter directly or indirectly related to employment—by disseminating false and misleading information and documents to "perspective" [sic] employers "to cause

[her] to lose work and [her] right to earn a living, and because of [her] black race." (Appellant's Brief, 20.)

{¶ 16} We also find that the Court of Claims erred in dismissing appellant's discrimination claim pursuant to Civ.R. 12(B)(1). R.C. 2743.02(A)(1) establishes the subject-matter jurisdiction of the Court of Claims and states that the state "consents to be sued, and have its liability determined, in the Court of Claims created in this chapter in accordance with the same rules of law applicable to suits between private parties." Discrimination pursuant to R.C. 4112.02 is a claim which is made between private parties. Therefore, the Court of Claims clearly has subject-matter jurisdiction over claims of discrimination.

{¶ 17} Accordingly, we sustain the third assignment of error to the extent appellant alleges violations of R.C. 4112.02(I) and (J) as observed above. We overrule the third assignment of error to the extent appellant alleges violations of R.C. 4112.02(A).

Fifth Assignment of Error

{¶ 18} It is appropriate now to consider appellant's fifth assignment of error before considering her fourth assignment of error. In the fifth assignment of error, appellant alleges that the court erred, improperly applied its own rules, and abused its discretion by dismissing the complaint when it determined the complaint failed to identify any statutory or common law authority and did not set forth any allegations that would entitle appellant to relief.

{¶ 19} The trial court found that, to the extent appellant alleges a claim over which the court has jurisdiction, she has failed to identify any statutory or common law authority to support her contention that the ABO owed her a duty or that she can maintain a cause of action for monetary damages in the Court of Claims. The court stated: "In short, the complaint does not set forth allegations which, if proven, would entitle plaintiff to relief in this court." (Judgment Entry, 3.) In making this finding, the Court of Claims construed her claim as an allegation that the ABO did not properly "investigate and consider the imposition of disciplinary action against accounting professionals." (Judgment Entry, 4.) The court concluded that such investigation and consideration constitutes a public duty.

{¶ 20} In her brief, appellant alleges, generally, that the Court of Claims "ignored" and did not acknowledge or address in any manner the "true" charges in her complaint. She clarifies that her complaint alleges that the ABO (1) circulated known false claims and documents about her; (2) took actions with her ability to work and earn a living; and (3) aided/assisted her former employer with retaliation against her.

{¶ 21} It is true that appellant does not specifically name her causes of action, and we agree that, upon reading the complaint, they are difficult to decipher. However, as noted above, Ohio is a notice pleading state. Therefore, appellant was not required to plead a legal theory of recovery. We have already found above that appellant stated a claim of discrimination pursuant to R.C. 4112.02(I) and (J). We also find, construing the complaint in a light most favorable to plaintiff and drawing all reasonable inferences in her favor that appellant stated a claim in her complaint that the ABO defamed her and/or aided and abetted her former employer in defaming her.

{¶ 22} "Defamation involves the publication of a false statement ' "made with some degree of fault, reflecting injuriously on a person's reputation, or exposing a person to public hatred, contempt, ridicule, shame or disgrace, or affecting a person adversely in his or her trade, business or profession." ' " *Mehta v. Ohio Univ.*, 194 Ohio App.3d 844, 855, 2011-Ohio-3484, ¶ 26 (10th Dist.), quoting *Jackson v. Columbus*, 117 Ohio St.3d 328, 2008-Ohio-1041, ¶ 9, quoting *A & B—Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council*, 73 Ohio St.3d 1, 7 (1995). The elements of defamation are: " ' "(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." ' " *Mehta*, quoting *Mallory v. Ohio Univ.*, 10th Dist. No. 01AP-278 (Dec. 20, 2001), quoting *Akron-Canton Waste Oil, Inc. v. Safety-Kleen Oil Serv., Inc.*, 81 Ohio App.3d 591 (9th Dist.1992), quoting 3 Restatement (Second) of the Law (1977), 155, Section 558. "Slander" is defamation in its spoken form, while "libel" is written or printed. *Schmidt v. Northcoast Behavioral Healthcare*, 10th Dist. No. 10AP-565, 2011-Ohio-777, ¶ 8, citing *Matikas v. Univ. of Dayton*, 152 Ohio App.3d 514, 2003-Ohio-1852, ¶ 27. We conclude that the factual allegations appellant asserted in her

complaint address the basic elements of a defamation claim.¹ Therefore, the Court of Claims erred in dismissing the defamation claim pursuant to Civ.R. 12(B)(6).

{¶ 23} We also find that the Court of Claims erred in dismissing appellant's defamation claim pursuant to Civ.R. 12(B)(1). Defamation is a claim which is made between private parties. Therefore, the Court of Claims clearly has subject-matter jurisdiction over the claim of defamation against the ABO as an agency. Accordingly, the Court of Claims erred in dismissing appellant's defamation claim, pursuant to Civ.R. 12(B)(1), for lack of subject-matter jurisdiction.

{¶ 24} Accordingly, we sustain appellant's fifth assignment of error.

Fourth Assignment of Error

{¶ 25} Finally, we turn to appellant's fourth assignment of error. In her fourth assignment of error, appellant alleges that the trial court erred and improperly applied the law by dismissing her complaint when it determined that her complaint alleged that the ABO failed to perform a public duty and that public duty immunity would, therefore, protect the ABO from liability. (Appellant's Brief, 24.) Appellant argues that aiding and assisting another with retaliating against appellant "because [she] made charges about its racially motivated discriminatory behavior" is not a "public duty" immune from liability. She further argues that "[1] engaging in racially motivated retaliation, [2] circulating known false documents and claims about me 'directly to my prospective employers and to others,' [3] damaging my reputation, and [4] interfering with my ability to work and earn a living are not 'public duties' subject to R.C. 2743." (Appellant's Brief, 25.)

{¶ 26} R.C. 2743.02(A)(3) states:

(a) Except as provided in division (A)(3)(b) of this section, the state is immune from liability in any civil action or proceeding involving the performance or nonperformance of a public duty, including the performance or nonperformance of a public duty that is owed by the state in relation to any action of an individual who is committed to the custody of the state.

¹ We acknowledge that there are many possible defenses against defamation, among them truth, privilege, or statute of limitations. The trial court and appellee did not acknowledge any claim of defamation and, consequently, did not assert or consider any defenses to the same. Therefore, we decline to opine regarding the existence or application of any such defenses at this time.

(b) The state immunity provided in division (A)(3)(a) of this section does not apply to any action of the state under circumstances in which a special relationship can be established between the state and an injured party.

{¶ 27} "Public duty" includes, but is not limited to, any statutory, regulatory, or assumed duty concerning any action or omission of the state involving any of the following:

Permitting, certifying, licensing, inspecting, *investigating*, supervising, regulating, auditing, monitoring, law enforcement, or emergency response activity[.]

(Emphasis added.) R.C. 2743.01(E)(1)(a). A "special relationship" is demonstrated if all of the following elements exist:

(i) An assumption by the state, by means of promises or actions, of an affirmative duty to act on behalf of the party who was allegedly injured;

(ii) Knowledge on the part of the state's agents that inaction of the state could lead to harm;

(iii) Some form of direct contact between the state's agents and the injured party;

(iv) The injured party's justifiable reliance on the state's affirmative undertaking.

R.C. 2743.02(A)(3)(b).

{¶ 28} In determining that R.C. 2743.02(A)(3) applied, the trial court construed the claims as being allegations of improper or non-investigation of her complaint against her former employer, we find no error on the part of the court in this regard, as investigating or not investigating clearly falls under the definition of public duty. The trial court did not consider, however, whether R.C. 2743.02(A)(3) applies to appellant's discrimination and defamation claims. Therefore, we remand this case to the trial court to consider the same.

{¶ 29} Accordingly, we overrule in part and sustain in part appellant's fourth assignment of error.

Conclusion

{¶ 30} For the reasons stated above, we find appellant's first and second assignments of error to be moot. We overrule in part and sustain in part her third assignment of error, overrule in part and sustain in part her fourth assignment of error, and sustain her fifth assignment of error. Accordingly, the judgment of the Court of Claims is affirmed in part, but we reverse the judgment dismissing appellant's discrimination and defamation claims pursuant to Civ.R. 12(B)(1) and (6), and remand this case to that court for further proceedings in accordance with law and consistent with this decision.

Judgment affirmed in part; reversed in part; cause remanded.

KLATT and SADLER, JJ., concur.
