

2004

Melany Zoumadakis v. Uintah Basin Medical Center and individuals Dr. Mark Mason, Lloyd Nielson, Carolyn Smith, and John Does 1-10 : Brief of Appellant

Utah Court of Appeals

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Carolyn Cox; Attorney for Appellees.

Jay L. Kessler; Attorney for Appellant.

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IN THE UTAH COURT OF APPEALS

MELANY ZOUMADAKIS,
Plaintiff/Appellant,

v.

UINTAH BASIN MEDICAL
CENTER, and individuals DR.
MARK MASON, LLOYD
NIELSON, CAROLYN SMITH, and
JOHN DOES 1-10.
Defendants/Appellees.

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APPELLANT BRIEF

(ORAL ARGUMENT
REQUESTED)

App. Case No. 20040542

APPELLANT BRIEF

Appeal from the May 24, 2004, final decision
of the Eighth Judicial District Court's Order by
Judge Anderson, granting Defendant's Motion to Dismiss
(All parties contained in caption)

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**UTAH COURT OF APPEALS
BRIEF**

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UTAH APPELLATE COURTS
DEC 03 2004**

MELANY ZOUMADAKIS,
Plaintiff/Appellant,

**UINTAH BASIN MEDICAL
CENTER, and individuals DR.
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APPELLANT BRIEF

App. Case No. 20040542

APPELLANT BRIEF

JURISDICTIONAL STATEMENT

Jurisdiction is proper pursuant to § 78-2a-3 et. seq. of the Utah Code Annotated, in that this is a case that was transferred from the Utah Supreme Court to the Utah Court of Appeals. This matter is an appeal from the Eighth Judicial District Court final order wherein the Supreme Court had original jurisdiction pursuant to § 78-2-2(4) of the Utah Code Annotated.

ISSUES FOR REVIEW

The District Court erred by granting appellees' Motion to Dismiss and by not allowing appellant to conduct discovery that would support the allegations in the Complaint. The Complaint was sufficiently plead according to Rule 8 of the Utah Rules of Civil Procedure and the District Court erred by dismissing appellant's claims. The District Court also erred when it ignored appellant's request for time to amend the complaint during oral arguments and issued its final order to dismiss before appellant could file her Motion to Amend.

These issues have been reserved for appeal because a final ruling against Appellant took effect on May 24, 2004, and a timely appeal was filed on June 22, 2004.

STANDARD OF REVIEW

The standard of review for challenging the District Court's findings are reviewed "for correctness, according them [the District Court] no particular deference." Bonham v. Morgan, 788 P.2d 497, 499 (Utah 1989). In reviewing the District Court's grant of a motion to dismiss for correctness, the Court "must accept the factual allegations in the complaint as true and consider all reasonable inferences to be drawn from those facts in a light most favorable to the plaintiff." Ho v. Jim's Enterprises, Inc., 29 P.3d 633, 636 (Utah 2001).

The standard of review for the "denial to amend pleadings is abuse of discretion." Kasco Services Corporation v. Benson, 831 P.2d 86, 92 (Utah 1992). The "primary consideration that a trial judge must take into account in determining whether leave should be granted is whether the opposing side would be put to unavoidable prejudice by having an issue adjudicated for which he had not had time to prepare." Id.

STATUTORY PROVISIONS

Rule 8 of the Utah Rules of Civil Procedure:

"A pleading which sets forth a claim for relief ... shall contain (1) a short plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which he deems himself entitled."

Rule 15(a) of the Utah Rules of Civil Procedure:

"...a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires."

Article 1, Section 7 of the Utah Constitution:

"No person shall be deprived of life, liberty or property, without due process of law."

Article 1, Section 11 of the Utah Constitution:

“All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law...”

STATEMENT OF THE CASE

On December 5, 2003, appellant filed a Verified Complaint claiming defamation, intentional infliction of emotional distress, and tortious interference with contract. On January 23, 2004, appellees filed a Motion to Dismiss and Memorandum in Support thereof, stating that appellant had failed to state a claim. Appellant replied with an Objection to the Motion to Dismiss and appellees filed a reply memorandum. Oral arguments were held on May 10, 2004. Appellant argued that discovery would be an integral part of the case and that an allowance of time to amend the complaint would be in order before dismissing the claims.

On May 24, 2004, the court filed an Order granting appellees Motion to Dismiss. The Court found that the claim for defamation was not pled with particularity and that qualified privilege prevented the claim. On the issue of intentional infliction of emotional distress, the court found that the claim was insufficient and that the alleged conduct did not rise to the level required by Utah law. Finally the court found with respect to the claim of interference with an employment contract, that there was no contract to be enforced.

STATEMENT OF THE FACTS

On or about June 11, 1990, the appellant began her employment as a registered nurse with appellee, Uintah Basin Medical Center (hereinafter “UBMC”). (Compl. ¶ 5). As far as appellant knew, she never received a negative report during her employment with UBMC Home Healthcare. (Compl. ¶ 6).

On or about September 19, 2003, the appellant was called into appellee, Lloyd Nielson's (hereinafter "Nielson"), office and was told that there have been numerous complaints by appellee, Dr. Mark Mason (hereinafter "Mason"), against appellant. (Compl. ¶ 7). The specific complaints by Mason included that the appellant was telling patients that Mason was ordering wrong things, that Mason was giving improper care, and that appellant smelled of alcohol as complained of by an unsolicited patient. (Compl. ¶ 8). According to appellant's received information and belief, appellee, Carolyn Smith (hereinafter "Smith"), misrepresented to Mason that appellant was questioning his care. (Compl. ¶ 9).

Without any research into these allegations, Nielson wrote a disciplinary action subjecting appellant to alcohol and drug screens, a communications class, denial of appellant to speak with Mason's patients, and denial of appellant to speak with any patient or doctor about various treatments. (Compl. ¶ 10). These restrictions on appellant would make it impossible for her to follow her general duties as a registered nurse. (Compl. ¶ 11).

During this meeting with Nielson, appellant was asked to sign a disciplinary action form. Appellant would not sign the disciplinary action form, and requested to take it home, review it, and make proper suggestions with her attorney. When appellant would not sign the form Nielson fired her. Due to this firing, appellant lost her long term sick leave, medical benefits, life insurance, retirement benefits, wages, and her job. (Compl. ¶ 14.)

Appellant claims that Nielson defamed her by adding untrue reports to her employment file, told the Department of Workforce Services that she quit and was not fired, and misstated that appellant's professionalism and work history which affected her ability to keep her job, or to obtain future work. (Compl. ¶ 36).

According to appellant's information and belief, the disciplinary action came as a result of libel, slanderous, patently false, and fraudulent misrepresentations by appellees Nielson, Mason, Smith, and/or other John Does. (Compl. ¶ 12). According to appellant, she believes that appellees did nothing to confirm or corroborate the allegations against the appellant. (Compl. ¶ 13).

Appellant filed her complaint against appellees on December 5, 2003. Appellees then filed its Motion to Dismiss on February 18, 2004. Appellant replied in an Objection to the Motion to Dismiss on February 24, 2004 and then filed a request for oral argument. (Docketing Statement ¶ S). At the oral argument appellant repeatedly stated that dismissal without discovery would be unfair. (Tr. at 11, 12, 13, 20, 21). As well, appellant asked the court for the time allowed to amend the complaint before considering dismissal. (Tr. at 18). The District Court filed its Order granting appellees' Motion to Dismiss.

SUMMARY OF ARGUMENT

Appellant's claims of defamation, intentional infliction of emotional distress, and tortious interference with employment contract were all sufficiently plead in her Verified Complaint. The District Court erred when the granted appellees Motion to Dismiss. This case was dismissed without allowing appellant to participate in any discovery or amend the complaint. Appellant requests that this Order by the District Court should be remanded so appellant can conduct necessary discovery regarding her case because the Complaint contained sufficient statements of claims. As well, appellant requests that this case be remanded so that appellant can have time to submit a Motion to Amend the Complaint to plead her claims with more particularity.

ARGUMENT

I. THE DISTRICT COURT ERRED BY DISMISSING THE CASE BECAUSE APPELLANT'S COMPLAINT WAS PLEAD WITH PARTICULARITY TO SURVIVE A MOTION TO DISMISS.

The District Court erred by granting the Motion to Dismiss for failure to state a claim because appellant's complaint was sufficient to allow this case to continue into discovery. The Utah Rules of Civil Procedure "restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with the vital role in the preparation for trial." Williams v. State Farm Insurance Company, 656 P.2d 966, 970 (Utah 1982), citing Blackham v. Snelgrove, 280 P.2d 453, 455 (Utah 1955). The Williams Court goes on to state that "a complaint is required only to ... give the opposing party fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved." *Id.* Appellant did file a complaint that was sufficient to give notice of the claims and an indication of the type of litigation involved. The following arguments will outline the claims in the complaint and why they should have withstood the Motion to Dismiss.

A. APPELLANT HAD A VIABLE CAUSE OF ACTION IN DEFAMATION AGAINST APPELLEES.

In appellant's Complaint it states that appellees published falsehoods of appellant to other employees and to the Department of Workforce Services. These falsehoods were clearly listed as "specific complaints by Mason included that the [appellant] was telling patients that Mason was ordering wrong things, that Mason was giving improper care, and that the [appellant] smelled of alcohol as complained of by an unsolicited patient." Compl. ¶ 8. Due to these defamatory statements appellant has lost her job with UBMC, cannot find new employment, and is in danger of losing her home.

The District Court in its Order granting the Motion to Dismiss stated that appellant's claim for defamation was not plead with particularity and that the general statements referred to in the Complaint do not inform the defendants when, where, and whom the statements were made by. However, in Williams, the Court stated that "a complaint for defamation must set forth 'the language complained of ... in words or words to that effect.'" 656 P.2d 966, 970 (Utah 1982). The Williams Court stated that statements such as "annoy, threaten, and intimidate" or "derogatory and libelous statements" are insufficient. Id. However, in the case at bar, appellant has plead in "words to that effect," the untrue statements of the appellees. The defamatory statements that appellant plead in her Complaint were plead with enough particularity to survive a Motion to Dismiss and to continue on to the discovery process.

The District Court also found that the defamation claim could be dismissed because the statements were subject to qualified privilege. "If qualified privilege exists, the burden is on the plaintiff to prove that the privilege was abused. The plaintiff can show abuse of the privilege by proving that the defendant acted with malice or that the publication of the defamatory material extended beyond those who had a legally justified reason for receiving it." Brehany v. Nordstrom, 812 P.2d 49, 58 (Utah 1991). Appellant would hope to prove with discovery, even though the defamatory statements made by Mason, Smith, and Nielson may be protected by qualified privilege, that possible statements made to Workforce Services would be publishing of the defamatory statements. Appellant argues that discovery is needed to obtain her employment file and her Department of Workforce Services file to substantiate how far the defamatory statements have been spread. However, even if Workforce Services would be considered a legitimately interested recipient or third-party and covered by qualified privilege, the

District Court could have allowed appellant time to file a Motion to Amend to include in her defamation claim that appellees acted with malice. Once the Complaint was amended with the facts showing appellees acted with malice, then the defamation claim would stand the challenge of qualified privilege.

Therefore, the District Court should have denied the Motion to Dismiss and allowed appellant to either seek discovery of her employment file and her Department of Workforce Services file, or allow appellant time to file a Motion to Amend the Complaint to add facts to her defamation claim to show appellees acted with malice.

B. APPELLANT'S CLAIM OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS IS A VIABLE CAUSE OF ACTION AGAINST APPELLEES.

Appellant has been suffering from severe emotion distress since hearing the defamatory statements by Mason, Smith, and Nielson. In order for a claim of intentional infliction of emotional distress to survive it must be "so extreme and outrageous as to permit recovery." Walter v. Stewart, 67 P.3d 1042, 1048 (Utah Ct. App. 2003). The level of distress must "rise to a level that "no reasonable [person] could be expected to endure." Id. at 1049. The conduct of the tortfeasor should be "atrocious, and utterly intolerable in a civilized community." Retherford v. AT&T Communications, 844 P.2d 949, 977-78 (Utah 1992). The Walter Court stated that these elements are "each questions of law for the court to determine, in the first instance." 67 P.3d 1042, 1048.

Appellant believes the District Court erred when it held that appellant's claim of intentional emotional distress was insufficient because it did "not rise to the level required by Utah law." The District Court also stated that case law "indicates mere termination is not sufficient to constitute outrageous conduct as required for a valid" claim. (Order, May 24, 2004).

Appellant disagrees with the District Court because the defamatory comments in combination with her being fired caused appellant to suffer severe emotional distress. Appellant was told of complaints stating she was telling patients that Mason was ordering wrong things, that Mason was giving improper care, and that the appellant smelled of alcohol that was complained of by an unsolicited patient. After over 13 years of working with UBMC and having an exemplary work record, appellant was devastated with these complaints. In addition to these defamatory comments, which appellant maintains are completely false, appellant was forced to either sign a disciplinary action form or be terminated. Appellant disagreeing with the false statements recorded on the form, refused to sign the disciplinary action form, resulting in her termination.

These events that occurred severely effected appellant. Appellant has been receiving counseling and is on medication due to the emotion distress she has suffered. In addition, appellant is horribly embarrassed from the statements made and is anxious and fearful of the bad reputation these comments have inflicted. Appellant's ability to find a job due to these defamatory comments has been hindered and this causes additional emotional distress.

Appellant requests that the Court remand this claim back to the District Court so through the discovery process, appellant can further prove the defamatory statements and who they have been published to. These facts will come to light with the ability to discover appellant's employment file and her file with Workforce Services. Appellant further argues from the statements above that her intentional infliction of emotional distress claim does rise to the level of "atrocious and utterly intolerable conduct" because she was not merely terminated, she was defamed by her co-workers and subjected to a forced termination because she would not agree with the defamatory statements alleged. Therefore, appellant's intentional infliction of emotional distress claim should be

remanded back to the District Court because there were sufficient facts stated to support the claim and to survive a Motion to Dismiss.

C. APPELLANT'S CLAIM FOR TORTIOUS INTERFERENCE WITH EMPLOYMENT CONTRACT WOULD NOT STAND AS A SUFFICIENT CAUSE OF ACTION, HOWEVER THE DISTRICT COURT ERRED BY NOT ALLOWING APPELLANT TIME TO AMEND THE COMPLAINT.

Appellant claimed tortious interference with employment contract in the Complaint. The Complaint truthfully stated that appellees all contributed to the defamatory statements made against appellant, which led to appellants termination from her employment and which has made it impossible for her to obtain comparable employment. Appellant also argued that appellees had breached their procedure by not following the formal grievance procedure in the Employee Handbook. However, appellant now admits that no contract of employment existed between her and UBMC, due to that it was considered employment at-will and was so stated in the Employee Handbook and Employee Acknowledgement form.

In now admitting that appellant had made a mistake in the claim asserted, appellant feels that because it was requested in the Oral Argument that appellant should have been allowed time to amend the Complaint before a Motion to Dismiss would be considered. Appellant requests this Court to remand this case back to the District Court to allow appellant time to file a Motion to Amend her Complaint.

If appellant is allowed time to amend her Complaint, appellant would be able to amend the claim of tortious interference with employment contract, to the correct claim of wrongful discharge. Along with this amended claim appellant would state supporting facts that show appellees wanted appellant terminated because appellant keep meticulous records and had a zealous desire to follow all state laws and regulations regarding the

treatment of patients. Appellant would show in an amended complaint and through discovery that appellees wanted appellant terminated so they could contravene enforceable professional ethical obligations.

Therefore, based on the above arguments appellant requests that this Court remand this case back to the District Court to allow appellant time to amend this claim in the Complaint. The arguments below will also show support for appellant's request to amend the Complaint.

II. THE DISTRICT COURT ERRED BY NOT ALLOWING APPELLANT TIME TO FILE A MOTION TO AMEND COMPLAINT BEFORE CONSIDERING A MOTION TO DISMISS.

The District Court erred when it ignored appellant's request during oral arguments for time to amend the Complaint. Appellant clearly states on the record that "a Motion to Dismiss would be improper at this time and allowance for an amended complaint would be in order." (Tr. at 18). In granting the Motion to Dismiss, the District Court did not allow any time for appellant to file a Motion to Amend the Complaint.

"The standard of review of a denial to amend pleadings is abuse of discretion." Kasco Services Corporation, 831 P.2d 86, 92 (Utah 1992), citing Cheney v. Rucker, 381 P.2d 86, 91 (Utah 1963). Rule 15(a) of the Utah Rules of Civil Procedure states, "a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." (2004). When a trial judge is determining whether a leave should be granted, the judge must consider "whether the opposing side would be put to unavoidable prejudice by having an issue adjudicated for which he had not had time to prepare." Kasco Services Corporation, 831 P.2d 86, 92 (Utah 1992), citing Bekins Bar V Ranch v. Huth, 664 P.2d 455, 464 (Utah 1983).

In the case at bar, the District Court did not allow appellant the time necessary to file a Motion to Amend before dismissing the case. Rule 15(a) states that a leave to

amend should be “freely given when justice so requires.” It would have been more just to grant appellant time to file a Motion to Amend than to take the chosen course of action in dismissing the case with prejudice. Appellant requests this Court to remand this case back to the District Court, so that appellant can file a Motion to Amend the Complaint.

If remanded back to the District Court, appellant would be able to properly file a Motion to Amend accompanied by a memorandum of points and authorities in support, and a proposed amended complaint. See Holmes Development, LLC v. Cook, 48 P.3d 895, 909-10 (Utah 2002). When a court is determining whether to grant or deny a motion to amend, “Utah courts have focused on three factors: the timeliness of the motion; the justification given by the movant for the delay; and the resulting prejudice to the responding party.” Kelly v. Hard Money Funding, Inc., 87 P.3d 734, 742 (Utah Ct. App. 2004).

If appellant was given the time to file a Motion to Amend it would have been considered timely because the case had not reached the advanced stages of the litigation process. At the point of dismissal, appellees had not filed an Answer, therefore, an amended complaint would not have prejudiced the appellees because they would have ample time to prepare for any amended issues. Appellant’s following arguments will support the request that this Court remand this case back to the District Court to allow appellant to file a Motion to Amend.

**A. APPELLANT IS JUSTIFIED IN FILING A MOTION TO AMEND
BECAUSE APPELLEES USED QUALIFIED PRIVILEGE AS AN
AFFIRMATIVE DEFENSE.**

Appellant would be justified in filing a Motion to Amend because appellees asserted qualified privilege as an affirmative defense. Appellant did not predict the defense of qualified privilege when drafting the Complaint, but once appellees asserted

qualified privilege as an affirmative defense, it is up to appellant to show “abuse of the privilege by proving that the defendant acted with malice or that the publication of the defamatory material extended beyond those who had a legally justified reason for receiving it.” Brehany, 812 P.2d 49, 58.

Appellant should be allowed to file a Motion to Amend because appellant can assert that appellees acted with malice when defaming appellant, which led to appellant’s termination. In an amended complaint appellant would assert the qualified privilege that protects communications between Nielson, Smith, and Mason, was transcended by the appellees acting with malice. Appellant would assert that Mason and Smith published the defamatory statements about appellant because they were concerned with appellant’s meticulous records and zealous desire to follow all state laws and regulations regarding the treatment and care of patients. Appellant was not going to attempt to “blow the whistle” on appellees for fear that appellees would terminate her if she did, however, appellees maliciously defamed appellant which led to her termination.

In addition to Smith and Mason’s actions toward appellant, Nielson also had malicious intentions for terminating appellant. Appellant argues that Nielson wanted her terminated because she was a threat to his job. Appellant asserts that shortly before her termination took place, she made a suggestion to Nielson about creating a wound-care unit in the place of a conference room. When Nielson heard this suggestion, appellant states that Nielson became irate and told appellant “he would handle it.” (Objection to Dismiss).

These incidents in combination with several others form the argument that appellees were malicious in making the defamatory statements which led to appellant’s termination. These malicious actions are even more pronounced, if appellant in her amended complaint shows her exemplary work history and glowing recommendations.

Therefore, appellant requests that this Court remand this case back to the District Court, to allow appellant to file a Motion to Amend. Appellant did not know that a qualified privilege defense would be asserted and requests an opportunity to amend the complaint with the facts that support the argument that appellees were malicious in their defamatory statements which transcends the protection of qualified privilege.

B. APPELLANT IS JUSTIFIED IN FILING A MOTION TO AMEND BECAUSE APPELLANT WAS MISTAKEN AS TO HER CLAIM FOR TORTIOUS INTERFERENCE WITH CONTRACT.

Appellant requests this Court to remand this case back to the District Court, so appellant can make a Motion to Amend, to amend her third cause of action. Appellant explained above in Argument I(C) that she was mistaken in claiming the grievance procedure in the Employee Handbook created a contract between appellant and UBMC. In learning that the UBMC Employee Handbook discounts all arguments of contractual employment, and instead supports appellees' employment-at-will stance, appellant would have made a Motion to Amend the complaint to claim wrongful discharge.

Under the claim for wrongful discharge appellant would pursue that appellees' termination of appellant was a "violation of a clear and substantial public policy." Hansen v. America Online, Inc., 96 P.3d 950, 952 (Utah 2004). "An employee's discharge for a reason that contravenes a clear and substantial public policy gives rise to a cause of action in tort." *Id.* An employer should not "exploit the employment relationship by demanding that an employee choose between continued employment and violating a law or failing to perform a public obligation of clear and substantial import." *Id.*

In the case at bar, appellant felt that her termination and the defamatory comments made by Mason, Smith, and Nielson, ensued from appellees' concern that appellant

followed the rules and regulations of her profession too carefully. As stated in the argument above, appellant suspects that appellees pursued her termination because they were afraid that appellant would "blow the whistle."

By being allowed to file a Motion to Amend, appellant would be able to assert the wrongful discharge claim and list the supporting facts that show appellant was discharged to contravene professional and ethical standards.

Appellant requests that this Court remand this case, to allow appellant the opportunity to file a Motion to Amend, so appellant can claim wrongful discharge.

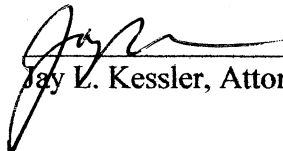
CONCLUSION

Appellant maintains that her case was dismissed in error and that her claims of defamation and intentional infliction of emotional distress were plead with enough particularity to give appellees notice of the nature and basis of the claims. As well, appellant argues that the District Court erred by not giving appellant time to file a Motion to Amend before dismissing this case.

In conclusion, appellant respectfully requests that the District Court's ruling dismissing her case is reversed, and under the direction of this Court find that the original Complaint was plead sufficiently on the claims of defamation and intentional infliction of emotional distress, or to allow appellant time to file a Motion to Amend the Complaint.

RESPECTFULLY SUBMITTED this 26 day of November, 2004.

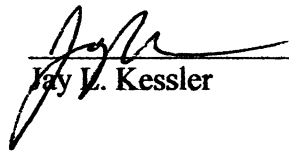
KESSLER LAW OFFICE


Jay L. Kessler, Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of November, 2004, I hand-delivered two copies of the foregoing Appellant Brief to the following:

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Salt Lake City, Utah 84111-2263



Jay L. Kessler

ADDENDUM

CONTENTS OF ADDENDUM

1. Plaintiff's Complaint
2. Defendants' Answer
3. Defendant's Motion and Memorandum in Support of Motion to Dismiss with attached Affidavits
4. Plaintiff's Objection to motion to Dismiss with attached Affidavits
5. Defendant's Reply Brief to Motion to Dismiss
6. Eighth District Court's Order Dismissing Plaintiff's Complaint.

FILED
DISTRICT COURT
DUCHESNE COUNTY, UTAH

DEC 05 2003

JOANNE McKEE, CLERK
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IN THE EIGHTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH

MELANY ZOUMADAKIS,
Plaintiff.

VERIFIED COMPLAINT

v.

UTAH BASIN MEDICAL CENTER, INC., and
individuals DR. MARK MASON, LLOYD
NIELSON, CAROLYN SMITH, and JOHN
DOES 1-10.
Defendants.

Judge JR Anderson

Case No. 030800083

COME NOW the Plaintiff, and for causes of action against the Defendants,
allege as follows:

JURISDICTION, VENUE, AND THE PARTIES

1. At the time of the incident giving rise to this cause of action, the Plaintiff and Defendants resided in Duchesne County, State of Utah.
2. The incident giving rise to this cause of action occurred in Duchesne County, State of Utah.
3. Jurisdiction is proper in this court pursuant to Utah Code Annotated §78-3-4(1).
4. Venue is proper in this court pursuant to Utah Code Annotated §78-13-7.

STATEMENT OF FACTS

5. On or about June, 1990, the Plaintiff began her employment as a registered nurse with Defendant Uintah Basin Medical Center with Home Healthcare (hereinafter UBMC).

6. As far as the Plaintiff ever knew, she never received a negative report at her employment with UMBC Home Healthcare.

7. On or about September 19, 2003, the Plaintiff was called into Defendant Lloyd Nielson's, (hereinafter Nielson) office and told that there have been numerous complaints by Defendant Dr. Mason, (hereinafter Mason) against the Plaintiff.

8. The specific complaints by Mason included that the Plaintiff was telling patients that Mason was ordering wrong things, that Mason was giving improper care, and that the Plaintiff smelled of alcohol as complained of by an unsolicited patient.

9. According to information and belief, Defendant Smith (hereinafter Smith), also misrepresented to Mason that the Plaintiff was questioning his care.

10. Without any research into the allegations whatsoever, Nielson wrote a disciplinary action subjecting the Plaintiff to alcohol and drug screens, a communications class, denial of the Plaintiff to speak with Mason's patients, denial of the Plaintiff to speak with any patient or doctor about various treatments.

11. The above-listed restrictions would have been impossible to follow under the Plaintiff's general duties as a registered nurse.

12. The disciplinary action came as a result of libel, slanderous, patently false, and fraudulent misrepresentations by Defendants' Nielson, Mason, Smith, and/or other John Does.

13. The Defendants did nothing to confirm or corroborate the allegations against the Plaintiff.

14. When the Plaintiff would not sign the disciplinary action form, and requested to take it home, review it, and make proper suggestions with her attorney, Nielson fired her, and the Plaintiff lost long term sick leave, medical benefits, life insurance, retirement benefits, wages, and her job.

15. All of the complaints against the Plaintiff were patently false, defamed her character, and have jeopardized her career.

16. Before being fired, the Plaintiff tried to talk to Mason, but was told by Nielson that if she talked to anyone about the disciplinary action she would be terminated.

17. The Plaintiff wrote a letter to Mason, gave it to Nielson to give to Mason, and Nielson refused to give it to Mason and would not return the letter to the Plaintiff.

18. Nielson's disciplinary report incorrectly states that the Plaintiff has been warned on many occasions regarding her behavior, when in reality, the Plaintiff has had an exemplary work history.

19. The Plaintiff has tried to communicate with all of the people involved in this matter but has been rebuffed at every turn.

20. In order to preserve their rights the Plaintiffs have hired present counsel and filed this lawsuit.

FIRST CAUSE OF ACTION
LIBEL AND SLANDER (against all Defendants)

21. The Plaintiff incorporates herein by this reference paragraphs 1 through 20 of this Complaint.

22. The Defendants had an affirmative duty to speak and/or write the truth about the actions and professionalism of the Plaintiff at all times relative to her work.

23. The Defendants breached this duty by spreading falsehoods by either the spoken word or through writings stating that the Plaintiff smelled of alcohol while on the job, that the Plaintiff questioned Mason's care for patients, and that the Plaintiff had numerous negative reports on her employment record.

24. That the Defendants' malicious breach of their duty to speak and write the truth about the Plaintiff rises to the level of libel and slander.

25. That due to the Defendants' libel and slander against the Plaintiff, the Plaintiff has lost her job with Uintah Basin Medical Center, is suffering severe emotional and psychological depression and stress, cannot find new employment, and is in danger of losing her home.

26. That as a result of the Defendants' libel and slander against the Plaintiff, the Plaintiff has suffered losses of and is entitled to: at least \$200,000.00 in present and future lost wages; pain and suffering; punitive damages pursuant to §78-18-1 of the Utah Code Annotated, because of the Defendant's willful, malicious, and/or intentionally fraudulent conduct in this matter; plus court costs, attorney's fees, interest and expenses.

SECOND CAUSE OF ACTION
INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS(All Defendants)

27. The Plaintiff incorporates herein by this reference paragraphs 1 through 26 of this Complaint.

28. The Defendants knew and willfully subjected the Plaintiff to emotional distress by lying about her work activities, professionalism, and/or employment record.

29. The Defendants subjected the Plaintiff to the aforesaid emotional distress specifically for the purpose of terminating her employment.

30. The Plaintiff has been receiving counseling and is on medication for the emotional distress the Defendants subjected her to.

31. Due to the Defendant's Intentional Infliction of Emotional Distress upon the Plaintiff, the Plaintiff is entitled to recover her compensatory damages which include: loss of wages, all medical, prescription, and psychiatric bills related to the emotional distress, and an amount in punitive damages and pain and suffering to be determined at trial in this matter, plus interest, costs, expenses and attorney's fees.

THIRD CAUSE OF ACTION
TORTIOUS INTERFERENCE WITH EMPLOYMENT (All Defendants)

32. The Plaintiff incorporates herein by this reference paragraphs 1 through 31 of this Complaint.

33. Each of the Defendants in this matter contributed to the false allegations against the Plaintiff which led to her being terminated from her employment, and making it impossible for her to obtain comparable employment.

34. According to information and belief, Defendant Smith, misrepresented and slandered the Plaintiff's conversation about Mason to Defendant Mason.

35. According to information and belief, Defendant Mason slandered the plaintiff by stating to Defendant Nielson that the Plaintiff questioned his care, and smelled of alcohol.

36. Defendant Nielson slandered and libeled the Plaintiff by adding untrue reports in her employment file, told the Department of Workforce Services that the Plaintiff quit and was not fired, and misstated the Plaintiff's professionalism and work history thereby affecting her ability keep her job or to obtain future work.

37. Due to the Defendants' Tortious interference with employment, the Plaintiff has suffered losses of and is entitled to: at least \$200,000.00 in present and future lost wages; pain and suffering; punitive damages pursuant to §78-18-1 of the Utah Code Annotated, because of the Defendant's willful, malicious, and/or intentionally fraudulent conduct in this matter; plus court costs, attorney's fees, interest and expenses.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiffs pray for relief against the Defendant as follows:

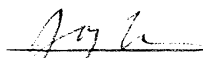
a) First Cause of Action; Slander and Libel, in the amount of at least \$200,000.00 in present and future lost wages; pain and suffering; punitive damages pursuant to §78-18-1 of the Utah Code Annotated, because of the Defendant's willful, malicious, and/or intentionally fraudulent conduct in this matter; plus court costs, attorney's fees, interest and expenses.

b) Second Cause of Action; Intentional Infliction of Emotional Distress: the Plaintiff is entitled to recover her compensatory damages which include: loss of wages, all medical, prescription, and psychiatric bills related to the emotional distress, and an amount in punitive damages and pain and suffering to be determined at trial in this matter, plus interest, costs, expenses and attorney's fees.

c) Third Cause of Action, Tortious Interference with Employment, in the amount of \$200,000.00 in present and future lost wages; pain and suffering; punitive damages pursuant to §78-18-1 of the Utah Code Annotated, because of the Defendant's willful, malicious, and/or intentionally fraudulent conduct in this matter; plus court costs, attorney's fees, interest and expenses.

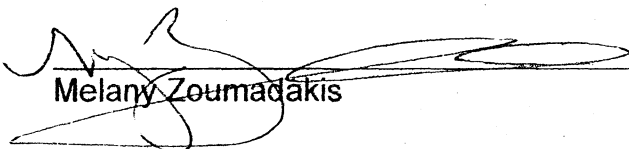
DATED this 14th day of November, 2003.

KESSLER LAW OFFICE



Jay L. Kessler, Counsel for Plaintiff

DATED this 14 day of November, 2003.


Melany Zoumadakis

STATE OF UTAH)
 ss
COUNTY OF SALT LAKE)

Melany Zoumadakis, on this 14 day of November, 2003, being first duly sworn and under oath, deposes and says that she is the Plaintiff in the above-entitled action; that she has read the foregoing Verified Complaint and understands the contents thereof, and the same is true and acceptable of her own knowledge.


Notary Public

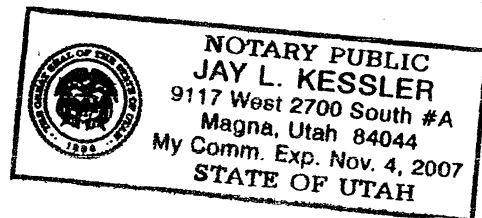
SERVE:

Uintah Basin Medical Center, Inc.
c/o Bradley D. LeBaron, Registered agent
250 West 300 North
Roosevelt, Utah 84066

Lloyd Nielson
Uintah Basin Medical Center, Inc.
250 West 300 North
Roosevelt, Utah 84066

Dr. Mark Mason
Uintah Basin Medical Center, Inc.
250 West 300 North
Roosevelt, Utah 84066

Carolyn Smith
Uintah Basin Medical Center, Inc.
250 West 300 North
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Attorneys for Defendants

IN THE EIGHTH JUDICIAL DISTRICT COURT
STATE OF UTAH, COUNTY OF DUCHESNE

MELANY ZOUMADAKIS,

Plaintiff

v.

UINTAH BASIN MEDICAL CENTER, INC.,
and individuals DR. MARK MASON,
LLOYD NIELSON, CAROLYN SMITH, and
JOHN DOES 1-10,

Defendant

MOTION TO DISMISS

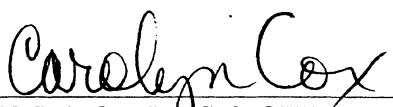
Case No. 030800083

Judge John R. Anderson

HEARING REQUESTED

Defendants Uintah Basin Medical Center, Inc., Dr. Mark Mason, Lloyd Nielson and Carolyn Smith, by their counsel and pursuant to Utah R. Civ. P. 12(b)(6), move to dismiss the complaint of plaintiff Melany Zoumadakis in its entirety and with prejudice for failure to state a claim. This Motion is supported by a Memorandum in Support filed herewith. Defendants also request a hearing on this Motion pursuant to Rule 7 (e) of the Utah Rules of Civil Procedure.

DATED this 23rd day of January, 2004.



HOLME ROBERTS & OWEN LLP
CAROLYN COX
299 South Main Street, Suite 1800
Salt Lake City, UT 84111-2263

Attorneys for Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 22nd day of January, 2004, a true and correct copy of the foregoing **MOTION TO DISMISS** was served by U.S. mail, postage prepaid, as follows:

JAY L. KESSLER
9117 West 2700 South #A
Magna, Utah 84044

Nichelle Stepaniuk

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Attorneys for Defendants

IN THE EIGHTH JUDICIAL DISTRICT COURT
STATE OF UTAH, COUNTY OF DUCHESNE

MELANY ZOUMADAKIS,

Plaintiff

v.

UINTAH BASIN MEDICAL CENTER, INC.,
and individuals DR. MARK MASON,
LLOYD NIELSON, CAROLYN SMITH, and
JOHN DOES 1-10,

DEFENDANT

**MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS**

Case No. 030800083

Judge John R. Anderson

Defendants Uintah Basin Medical Center, Inc., Dr. Mark Mason, Lloyd Nielson and Carolyn Smith, by their counsel, respectfully submit this Memorandum in Support of Motion to Dismiss the complaint of plaintiff Melany Zoumadakis. For the reasons stated below, plaintiff's complaint fails to state a claim upon which relief can be granted and should be dismissed, in its entirety, with prejudice.

STATEMENT OF FACTS

1. Plaintiff Melany Zoumadakis ("Ms. Zoumadakis") was employed by Uintah Basin as a home health nurse in its home health department from approximately June 1990 through mid-September 2003. Complaint ¶¶ 5, 14.

2. Defendant Uintah Basin Medical Center ("Uintah Basin") is a small rural hospital located in Roosevelt, Utah. Complaint ¶ 1.

3. Defendant Dr. Mark Mason is a doctor who provides services to Uintah Basin pursuant to a contract, under which Uintah Basin manages Dr. Mason's practice. Complaint ¶ 8.

4. Defendant Lloyd Nielson is employed by Uintah Basin as the director of Uintah Basin's home health department, in which role he supervised Ms. Zoumadakis. Complaint ¶¶ 7, 10.

5. Defendant Carolyn Smith is employed by Uintah Basin and serves as Dr. Mason's medical assistant. Complaint ¶ 9.

6. In this action, Ms. Zoumadakis claims that defendants defamed her. The specific allegations of defamatory communications include:

a. a statement by Ms. Smith to Dr. Mason that Ms. Zoumadakis had questioned his care of Dr. Mason's patients. Complaint ¶ 9;

b. complaints by Dr. Mason to Mr. Nielson that Ms. Zoumadakis was telling Dr. Mason's patients that he had ordered the wrong treatment and was giving improper care, and that a patient complained to Dr. Mason that Ms. Zoumadakis smelled of alcohol, Complaint ¶ 8;

c. a written disciplinary report by Mr. Nielson that addressed the above complaints by Dr. Mason. Complaint ¶ 18.

7. Ms. Zoumadakis' Second Cause of Action alleges a claim for intentional infliction of emotional distress. In support of that claim, Ms. Zoumadakis alleges that the defendants subjected her to emotional distress by making the statements outlined in paragraph 6 above. Complaint ¶ 28.

8. Ms. Zoumadakis' Third Cause of Action alleges a claim for tortious interference with employment. In support of that claim, Ms. Zoumadakis alleges that defendants interfered with her employment by Uintah Basin by making the statements outlined in paragraph 6 above. Complaint, ¶¶ 33-36.

ARGUMENT

I. MS. ZOUMADAKIS' FIRST CAUSE OF ACTION ALLEGING DEFAMATION MUST BE DISMISSED

In her first cause of action, Ms. Zoumadakis alleges a claim of defamation. The elements of a claim for defamation include (1) that defendants published statements concerning plaintiff; (2) such statements were false, defamatory and not subject to any privilege; (3) such statements were published with the requisite degree of fault; and (4) their publication resulted in damage. *West v. Thomson Newspapers*, 872 P.2d 999, 1007 (Utah 1994). Ms. Zoumadakis' defamation claim must be dismissed because (1) she failed to plead her claim with adequate particularity; (2) to the extent she identifies defamatory statements, such statements are subject to a qualified privilege; and (3) as to defendant Nielson, the defamatory statements attributed to him were not published.

A. Ms. Zoumadakis' Defamation Claim Is Not Pled With Particularity As Required By Rule 9 and Therefore It Must Be Dismissed

Utah law requires that defamation claims be pled with particularity. *Boisjoly v. Morton Thiokol, Inc.*, 706 F.Supp 795, 799-800 (D.Utah 1988); *Williams v. State Farm Ins. Co.*, 656 P.2d 966, 971 (1982). To meet this requirement, a plaintiff must identify the defamatory statement either by its "words or words to that effect;" general statements characterizing the defamatory words are inadequate. *Id.* Courts have also required that the complaint allege when, where and to whom the alleged defamatory statement was made. *Boisjoly*, 706 F.Supp. at 800. This level of specificity is required so that the court can determine if the complained of statement is defamatory and also so that the defendant may formulate a defense. *Id.*

Applying the above standards, Ms. Zoumadakis' Complaint fails to state a claim for defamation. Although Ms. Zoumadakis identifies generally the type of statements, she fails to identify when and where such statements were allegedly made. Complaint, ¶¶ 8, 9 and 18. Thus, Ms. Zoumadakis' first cause of action must be dismissed.

B. Ms. Zoumadakis' Defamation Claim Must Be Dismissed Because To The Extent Defamatory Statements Are Adequately Alleged, They Are Subject To A Qualified Privilege

The law has long recognized that a publication is conditionally privileged if it is made to protect a legitimate interest of the publisher. *Brehany v. Nordstrom*, 812 P.2d 49, 59 (Utah 1991). The privilege also extends to statements made to advance a legitimate common interest between the publisher and the recipient of the publication. *Id.* at 58; *Lind v. Lynch*, 665 P.2d 1276, 1278 (Utah 1983). Here, at best, Ms. Zoumadakis alleges that Ms. Smith, Dr. Mason's medical assistant, made a defamatory statement to Dr. Mason regarding Ms. Zoumadakis'

interaction with Dr. Mason's patients; that Dr. Mason complained about Ms. Zoumadakis' interaction with his patients, and also reported a patient complaint regarding Ms. Zoumadakis to Mr. Nielson, head of Uintah Basin's home health division and Ms. Zoumadakis' supervisor, and that Mr. Nielson prepared a written disciplinary action based on those statements.

Ms. Smith's statements to Dr. Mason, and Dr. Mason's statements to Mr. Nielson are subject to a qualified privilege and therefore cannot constitute defamation. Ms. Smith works for Dr. Mason as his medical assistant. As such, Ms. Smith and Dr. Mason have a common interest in the welfare of the patients seen by Dr. Mason. Statements by Ms. Smith to Dr. Mason regarding Ms. Zoumadakis' interaction with and care of Dr. Mason's patients clearly fall within that common interest.

Similarly, given that Dr. Mason is under contract with and provides services to Uintah Basin, he has a common interest with Uintah Basin. This interest is furthered by the fact that Uintah Basin's home health division provides care to Dr. Mason's patients. Again, statements by Dr. Mason to Mr. Nielson, who directs Uintah Basin's home health division and directly supervises Ms. Zoumadakis, regarding Ms. Zoumadakis' performance of her home health duties fall within that common interest and therefore within the qualified privilege.

Because the alleged defamatory statements fall within the qualified privilege, dismissal of Ms. Zoumadakis' defamation claim is warranted.

C. Ms. Zoumadakis' Defamation Claim Must Be Dismissed As Against Defendant Lloyd Nielson Because Ms. Zoumadakis Fails to Allege Publication

Ms. Zoumadakis' defamation claim as against Nielson rests on a disciplinary report prepared by Mr. Nielson and presented to Ms. Zoumadakis that contained Dr. Mason's

complaints and concerns about Ms. Zoumadakis. To make out a claim for defamation, Ms. Zoumadakis must demonstrate that the allegedly defamatory statement (i.e., the disciplinary report) was published to third parties. *DeBry v. Godbe*, 992 P.2d 979, 985 (Utah 1999) (“the requirement of publication means that the defamatory statement must be communicated to a third person and that the third person reads and understands the statement”). However, Ms. Zoumadakis alleges only that Mr. Nielson showed her the disciplinary report; she does not allege that Mr. Nielson published the disciplinary report to any third party. Because she has failed to establish publication by Mr. Nielson, a necessary element of a defamation claim, her first cause of action must be dismissed as against Mr. Nielson, and as against Uintah Basin to the extent the claim relies on Mr. Nielson’s report.

II. MS. ZOUMADAKIS’ SECOND CAUSE OF ACTION FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS MUST BE DISMISSED AS A MATTER OF LAW

Ms. Zoumadakis’ second cause of action purports to state a claim for intentional infliction of emotional distress against all defendants. This claim must be dismissed because Ms. Zoumadakis fails to state a claim under Utah law.

To state a claim for intentional infliction of emotional distress under Utah law, a plaintiff must show:

- (a) that the defendant engaged in some conduct toward the plaintiff considered outrageous and intolerable in that it offends the generally accepted standards of decency and morality (b) with the purpose of inflicting emotional distress or where any reasonable person would have known that such would result, and (c) that severe emotional distress resulted as a direct result of the defendant’s conduct.

Ankers v. Rodman, 995 F.Supp. 1329, 1335 (D. Utah 1997) quoting *Russell v. Thomson Newspapers, Inc.*, 842 P.2d 896, 905 (Utah 1992). Dismissal of a claim for intentional infliction of emotional distress on a Rule 12 motion is appropriate if all the elements of the tort are not alleged or if the alleged conduct on which the claim is based does not rise to the level of outrageousness required under Utah law. *Boisjoly*, 706 F.Supp. 795, 801-02 (D. Utah 1988).

Here, dismissal of Ms. Zoumadakis' intentional infliction claim is appropriate because as a matter of law, the alleged conduct on which she bases her claim does not rise to the level of outrageousness required under Utah law. Whether the alleged conduct at issue may reasonably be regarded as so extreme and outrageous as to permit recovery is a question of law for the court. *Ankers*, 995 F.Supp. at 1335. The burden of proving outrageous conduct is a heavy one, and liability may be imposed only where the conduct is "atrocious, and utterly intolerable in a civilized community." *Retherford v. AT & T Communications*, 844 P.2d 949, 977-78, n.19 (Utah 1992). Conduct which simply constitutes an insult or indignity is not actionable.

Ms. Zoumadakis alleges that defendants Dr. Mason and Ms. Smith made untrue allegations to Ms. Zoumadakis' supervisor regarding her work performance in providing services to their patients. Such allegations, even if true, hardly rise to the level of "atrocious and utterly intolerable" behavior as required to establish a claim for intentional infliction of emotional distress. In *Boisjoly*, 706 F.Supp. at 801-02 (D. Utah 1988), plaintiff was employed by defendant as an engineer and was involved in the manufacturing of certain parts used in Space Shuttle Challenger. After the Challenger exploded, plaintiff testified before a federal commission investigating the incident. Plaintiff claimed that in connection with that investigation, his employer discredited him, threatened his job and removed him from the

investigation of the accident. Again, the court found that under Utah law, such conduct, while not laudable or desirable behavior, was not "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society." *Id* at 802. *See also Ankers*, 995 F. Supp. at 1336-37 (pinching plaintiff's buttocks in front of spectators at a National Basketball Association game and the television audience as a matter of law was not sufficiently outrageously to support a claim for intentional infliction of emotional distress).

Taking Ms. Zoumadakis' allegations as true, that employees and contractors of Uintah Basin complained to Ms. Zoumadakis' supervisor regarding her performance with their patients simply does not constitute conduct that is so outrageous and extreme "as to go beyond all possible bounds of decency" and be considered "atrocious." Ms. Zoumadakis' second cause of action should therefore be dismissed.

III. MS. ZOUMADAKIS' THIRD CAUSE OF ACTION FOR TORTIOUS INTERFERENCE WITH EMPLOYMENT MUST BE DISMISSED

In support of her third cause of action for tortious interference with employment, Ms. Zoumadakis alleges that the false allegations that are the subject of her defamation claim led to her termination. As an initial matter, while Ms. Zoumadakis entitles her claim one of tortious interference with "employment," such a claim does not exist under Utah law. Ms. Zoumadakis' claim is in effect a claim for tortious interference with contract within the employment setting. To establish a claim for interference with contract, a party must show (1) that the defendant intentionally interfered with plaintiff's existing contractual relationship; (2) by an improper purpose or for an improper means; (3) causing damage to plaintiff. *St. Benedict's Development*

Co. v. St. Benedict's Hospital, 811 P.2d 194, 200 (Utah 1991); *Leigh Furniture & Carpet Co. v. Isom*, 657 P.2d 293 (Utah 1982); *see also Milatz v. Frito-Lay, Inc.* 1997 U.S. App. LEXIS 599, *8 (10th Cir. 1997) (a claim of tortious interference with employment relationship requires the existence of a valid enforceable contract); *Tatum v. Philip Morris, Inc.*, 809 F.Supp. 1452, 1468 (W.D. Okla. 1992), *aff'd* 16 F.3d 417 (10th Cir. 1993), *cert. denied*, 114 S.Ct. 1833 (1994) (same). Taking Ms. Zoumadakis' allegations as true, Ms. Zoumadakis' claim must be dismissed because 1) she cannot establish the first element of her claim; and 2) the only interference alleged are actions by parties to the relationship, which as a matter of law, cannot constitute interference with contract.

A. Ms. Zoumadakis Does Not Adequately Allege the First Element of her Claim for Interference With Contract or Interference With Employment Relationship

Taking Ms. Zoumadakis' allegations as true, her claim must be dismissed because she cannot meet the requirements of the first element of a claim for interference with contract or employment relations. As an initial matter, Ms. Zoumadakis cannot meet the requirements of the first element because she does not allege that she was employed pursuant to a valid enforceable employment contract, and in fact, she was employed at will. *See Leigh Furniture*, 657 P.2d at 301 (to prove a claim for interference with contract, plaintiff must prove the existence of a contract between him or herself and a third person); *Milatz*, 1997 U.S. App. LEXIS 599 at *8 (to establish a claim for interference with employment requires an enforceable employment contract); *Tatum*, 809 F. Supp. at 1468 (same). Even taking her allegations as true, Ms. Zoumadakis cannot show she had a valid, enforceable contract with which the defendants interfered. Therefore, her claim must fail.

Ms. Zoumadakis also fails to meet the requirements of the first element because she does not allege that defendants intentionally interfered with her employment relationship with Uintah Basin. Rather, at most, she alleges that the defendants made false and defamatory allegations against her which led to her being terminated from her employment. However, Utah law requires more than a mere showing that the alleged intentional wrongdoing had some impact on an economic relationship of which the defendant should have been aware. Instead, to state a claim for intentional interference, a party must show that the defendant intended to interfere with the contract or business relation or that the defendant knew interference would be the substantially certain and necessary consequence of the alleged wrongful action. *Mumford v. ITT Commercial Finance Corp.*, 858 P.2d 1041, 1044 (Utah App. 1993).

Here, Ms. Zoumadakis does not plead either that defendants intended to interfere with her employment relationship or facts demonstrating that defendants knew interference would be the substantially certain and necessary consequence of their allegedly wrongful actions. Rather, Ms. Zoumadakis pleads only that her termination was in fact the result of their acts, and her claim for intentional interference must be dismissed.

B. Ms. Zoumadakis' Third Cause of Action Must Be Dismissed Because The Only Interference Alleged Is By Parties to The Contract


As noted above, Ms. Zoumadakis' claim of interference with contract fails because she cannot point to a valid enforceable contract with Uintah Basin, nor can she show defendants had the requisite intent. However, even if Ms. Zoumadakis could show a valid enforceable contract, her claim should still be dismissed as a matter of law. As the Utah Supreme Court found in *Leigh Furniture*, "it is well settled that one party to a contract cannot be liable for the tort of

interference with contract for inducing a breach by himself or the other contracting party.” 657 P.2d at 301. Ms. Zoumadakis has alleged only that Uintah Basin, and its employees and agents, interfered with her employment relationship with Uintah Basin.¹ Such allegations are insufficient to establish her claim and it must be dismissed.

CONCLUSION

For the reasons stated above, Ms. Zoumadakis’ complaint should be dismissed in its entirety, with prejudice.

DATED this 23 day of January, 2004.


HOLME ROBERTS & OWEN LLP
BLAINE J. BENARD
CAROLYN COX
BRITTANY J. NELSON
299 South Main Street, Suite 1800
Salt Lake City, UT 84111-2263

Attorneys for Defendants

¹ Because a corporation can only act through its employees and agents, their acts must be considered the acts of the entity.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this _____ day of January, 2004, a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION TO DISMISS** was served by U.S. mail, postage prepaid, as follows:

JAY L. KESSLER
9117 West 2700 South #A
Magna, UT 84044

Attorney for Plaintiff

DATED this _____ day of January, 2004.

FILED
DISTRICT COURT
DUCHESNE COUNTY, UTAH

FEB 18 2004

JOANNE McKEE, CLERK
BY SS DEPUTY

Jay L. Kessler (8550)
KESSLER LAW OFFICE
Attorney for Melany Zoumadakis
9117 West 2700 South, #A
Magna, Utah 84044
Telephone: (801) 252-1400
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IN THE EIGHTH JUDICIAL DISTRICT COURT
IN AND FOR DUCHESNE COUNTY, STATE OF UTAH

MELANY ZOUMADAKIS,
Plaintiff.

v.

UTAH BASIN MEDICAL CENTER, INC., and
individuals DR. MARK MASON, LLOYD
NIELSON, CAROLYN SMITH, and JOHN
DOES 1-10.
Defendants.

OBJECTION TO MOTION
TO DISMISS

Judge JR Anderson

Case No. 030800083

COMES NOW the Plaintiff, by and through counsel undersigned, and objects to
the Defendants' Motion to Dismiss, as follows:

STANDARD OF REVIEW

The Utah Supreme Court has held, "When reviewing the propriety of granting a
motion to dismiss for failure to state a claim upon which relief may be granted, we
accept as true all material allegations contained in the complaint and all reasonable
inferences drawn therefrom. St. Benedict's Dev. Co. v. St. Benedict's Hosp., 811 P.2d
194, 196 (Utah 1991).

ARGUMENT

1. MS. ZOUMADAKIS' HAS A VIABLE CAUSE OF ACTION IN DEFAMATION AGAINST THE DEFENDANTS

The elements for a claim of defamation are as outlined in Defendants Memorandum. They are:

A) That Defendants published statements concerning Plaintiff.

The Plaintiff states in her Complaint that Defendants Carolyn Smith and Dr. Mark Mason published falsehoods about the Plaintiff's work history. The Plaintiff specifically states:

8. The specific complaints by Mason included that the Plaintiff was telling patients that Mason was ordering wrong things, that Mason was giving improper care, and that the Plaintiff smelled of alcohol as complained of by an unsolicited patient.

9. According to information and belief, Defendant Smith (hereinafter Smith), also misrepresented to Mason that the Plaintiff was questioning his care. (See Complaint-paras 8 & 9).

The Plaintiff also specifically states in her Complaint that Defendant Nielson published:

18. Nielson's disciplinary report incorrectly states that the Plaintiff has been warned on many occasions regarding her behavior, when in reality, the Plaintiff has had an exemplary work history. (See Complaint-para 18).

Not only were specific statements published by the Defendants as properly pled, but the statements were pled with particularity. Specifically the untruths as to how the Plaintiff took care of her patients; how she took care of herself (i.e. the alcohol breath statement); that the Plaintiff questioned the doctor's care; and that untruths were written in her employment history.

The above-listed statements are specific enough in order for the Defendants to formulate a defense.

Also, the Plaintiff states in her Complaint that she was told about the aforesaid untruths in the office of Defendant Nielson on September 19, 2003. The employment history untruths would need to be turned over in discovery to ascertain exactly when and where those untruths took place.

B) Such statements were false, defamatory and any privilege is rebuffed by Defendants' malice.

The Plaintiff clearly rebuffs the statements published by the Defendants. The Complaint outlines that the Defendants have ruined the Plaintiff's life through the defamatory statements.

Further, it is curious that the Defendants do not deny that their statements were untrue. Instead the Defendants invoke a qualified privilege that the statements that were made are the subject of a common interest between Dr. Mason, Ms. Smith, and Mr. Nielson to protect the welfare of the patients. Unfortunately, the statements were untrue, and used to terminate Ms. Zoumadakis' employment for many malicious reasons, such as:

a. Defendant Mason and Smith published untruths about the Plaintiff because they were concerned about the Plaintiff's meticulous records and zealous desire to follow all state laws and regulations regarding treatment and care for patients. Although the Plaintiff did not attempt to "blow a whistle" on the behaviors of Smith and Mason, it became clear that they would try and do anything to remove the Plaintiff from her job; even publish untruths. (See Exhibit A-Affidavit of Melany Zoumadakis).

b. It is the Plaintiff's belief that Defendant Nielson wanted the Plaintiff removed from her job because she was a threat to his job. Shortly before Mr. Nielson

threatened to terminate the Plaintiff, Ms. Zoumadakis made the suggestion that a wound-care unit could be put into one of the conference rooms, and that if it would help she could talk to the administrators about it. My Nielson became irate and told the Plaintiff that "He would handle it". (See Exhibit A-Affidavit of Melany Zoumadakis).

Also, when the staff at the Medical Center found out what had taken place with the Plaintiff's termination, they made a card in support of her. According to workers who desire to remain anonymous, Mr. Nielson grabbed the card away, destroyed it, and yelled at the employees who drafted and signed it. (See Exhibit A-Affidavit of Melany Zoumadakis).

One of the employees specifically told Ms. Zoumadakis that he told Mr. Nielson that "He would not participate in blackballing her [the Plaintiff]." Insinuating that this is exactly what Mr. Nielson was trying to do. (See Exhibit A-Affidavit of Melany Zoumadakis).

Ms. Zoumadakis' exemplary record and many supporters (as evidenced by many community petitions to reinstate her) show that Mr. Nielson fired Ms. Zoumadakis and published a fraudulent and/or libelous employment history of her to "blackball her" for his own employment comfort.

C) As outlined above the Plaintiff does indeed allege that Mr. Nielson published his untruths for the purpose of terminating the Plaintiff.

Not only did Defendant Nielson publish his untruths about the Plaintiff in her employment file, but he wrongfully, and with the malicious intent to defame, tell Utah Workforce Services that the Plaintiff quit from her job rather than her being wrongfully terminated. (See Exhibit A-Affidavit of Melany Zoumadakis).

This information will need to be obtained through discovery. As such a Motion to Dismiss is premature at this stage.

2. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS IS A VIABLE CAUSE OF ACTION AGAINST THE DEFENDANTS.

The Plaintiff agrees that IIED may be imposed if the conduct of the tortfeasor is "atrocious, and utterly intolerable in a civilized community." Retherford v. AT&T Communications, 844 P.2d 949, 977-78 (Utah 1992).

Clearly the conduct of the Defendants rises to the level of IIED. The Defendants rely upon Boisjoly v. Morton Thiokol, Inc., 706 F.Supp. 795 (D. Utah 1988) to support their position that Ms. Zoumadakis was not sufficiently inflicted with enough intention emotional distress to warrant a cause of action. Boisjoly, at 801-02.

Boisjoly is distinguished from the present case because the untruths did not cost the Boisjoly Plaintiff his job. He was just moved to a different position. In Ms. Zoumadakis' case, she was terminated because of published untruths.

It is the extra malicious step of terminating the job Ms. Zoumadakis loved and performed so well for more than 13 years which makes the Defendants' actions "atrocious and utterly intolerable".

3. MS. ZOUMADAKIS WAS A THIRTEEN YEAR AT-WILL EMPLOYEE EXCEPT FOR THE EMPLOYEE HANDBOOK AGREEMENT WHICH WAS BREACHED DUE TO TORTIOUS INTERFERENCE WITH CONTRACT.

Although Ms. Zoumadakis cannot show a specific contract for work, she was a long-term employee who considered her job secure. Her employee handbook provided for a grievance procedure which was breached by Defendant Nielson. (See Exhibit

B-Grievance Procedure).

The procedure allowed for a meeting with two administrators regarding the specific grievance. After the termination, and within the five day window to file, Ms. Zoumadakis tendered the grievance to Defendant Medical Center, which was summarily ignored. As such it was a breach of an employee/employer contract due to the tortious interference of the Defendants. (See Exhibit C-Formal Notice of Grievance Letter).

Further discovery will evidence the breach of employment contract and the tortious interference thereof.

CONCLUSION

A period of time to conduct discovery is necessary to determine if the Complaint should be amended, and to what degree. The Utah Supreme Court held, "Utah, however has adopted liberalized pleading rules. These rules allow parties to present any legitimate claims they have relating to their dispute, subject to the requirement that their adversary have fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved."

The Plaintiff respectfully requests that a period of discovery be allowed to determine if the pending Motion to Dismiss has merit, and that the pleadings be allowed to be amended if necessary.

DATED this 17th day of February, 2004.

KESSLER LAW OFFICE


Jay L. Kessler, attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 17 day of February, 2004, I sent via hand-delivery or First Class United States Mail a copy of the foregoing Objection to Motion to Dismiss to the following:

Carolyn Cox, Esq.
Holme Roberts & Owen LLP
299 S. Main Street
Suite 1800
Salt Lake City, Utah 84111-2263

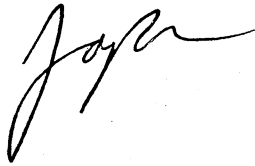
A handwritten signature in black ink, appearing to be "J. Cox", is written over the address block.

EXHIBIT A

Jay L. Kessler (8550)
KESSLER LAW OFFICE
Attorney for Melany Zoumadakis
9117 West 2700 South, #A
Magna, Utah 84044
Telephone: (801) 252-1400
Facsimile: (801) 252-1401

IN THE EIGHTH JUDICIAL DISTRICT COURT
IN AND FOR DUCHESNE COUNTY, STATE OF UTAH

MELANY ZOUMADAKIS,
Plaintiff.

V.

UNTAH BASIN MEDICAL CENTER, INC., and :
individuals DR. MARK MASON, LLOYD :
NIELSON, CAROLYN SMITH, and JOHN :
DOES 1-10. :
Defendants. :

**AFFIDAVIT IN SUPPORT OF
OBJECTION TO MOTION
TO DISMISS**

Judge JR Anderson

Case No. 030800083

STATE OF UTAH)
) ss
County of Salt Lake)

I, Melany Zoumadakis, being first duly sworn upon her oath, deposes and attests as follows:

1. That I am an adult and am competent and able to attest to the following matters from personal knowledge and experience.
2. That I am the Plaintiff in the above-entitled action.
3. That I was terminated from my job Uintah Basin Medical Center, Inc. due to the malicious defamation of the Defendants, specifically due to the following behaviors:

a. Defendant Mason and Smith published untruths about me because they were concerned about my meticulous records and zealous desire to follow all state laws and regulations regarding treatment and care for patients. Although the I did not attempt to "blow a whistle" on the behaviors of Smith and Mason, it became clear that they would try and do anything to remove me from my job; even publish untruths.

b. It is my belief that Defendant Nielson wanted me removed from my job because he believed that I was a threat to his job. Shortly before Mr. Nielson threatened to terminate me, I made the suggestion that a wound-care unit could be put into one of the conference rooms, and that if it would help I would talk to the administrators about it. My Nielson became irate and told me that "He would handle it".

Also, when the staff at the Medical Center found out what had taken place with my termination, they made a card in support of me. According to workers who desire to remain anonymous, Mr. Nielson grabbed the card away, destroyed it, and yelled at the employee who drafted it.

One of the other employees specifically told me that he told Mr. Nielson that "He would not participate in blackballing me." Insinuating that this is exactly what Mr. Nielson was trying to do.

4. Also, when I applied for unemployment, Mr. Nielson gave an untrue statement of my work history to the Dept. of Workforce Services to try and deny me benefits.

5. That If called upon to testify in this matter I would affirm the above written statements.

Further affiant saith not.

FROM : A M L S

FAX NO. : 5691420

Feb. 16 2004 08:05PM P3

DATED this 16 day of February, 2004.


Melany Zoumadakis

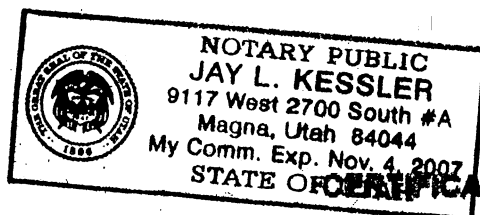
STATE OF UTAH)

ss

COUNTY OF SALT LAKE)

Melany Zoumadakis, on this 16 day of February, 2004, being first duly sworn and under oath, deposes and says that she is the Plaintiff in the above entitled action; that she has read the foregoing document and understands the contents thereof, and the same is true and acceptable of her own knowledge.


Notary Public



CERTIFICATE OF SERVICE

I hereby certify that on this 16 day of February, 2004, I sent via First Class United States Mail a copy of the foregoing Affidavit in Support of Objection to Motion to Dismiss to the following:

Carolyn Cox, Esq.
Holme Roberts & Owen LLP
299 S. Main Street
Suite 1800
Salt Lake City, Utah 84111-2263

EXHIBIT B

GRIEVANCE PROCEDURE/ALTERNATIVE DISPUTE RESOLUTION

Uintah Basin Medical Center is firmly committed that undisclosed problems will remain unresolved, and eventually lead to a decay of work relationships, dissatisfaction in working conditions, and a decline in productivity. Therefore, Uintah Basin Medical Center has established a grievance procedure to solve problems as quickly and fairly as possible. The grievance procedure should not be interpreted as anything more than a method of solving problems before they reach damaging proportions.

Eligibility:

Employees eligible to grieve under the grievance procedure are Full-Time Regular employees, Part-Time Regular employees and PRN employees. Volunteers and employees who voluntarily terminate employment are ineligible to grieve under the grievance procedure.

Guidelines:

Employees who seek resolution of employment situations by using the grievance procedure are assured that they will not be subject to discrimination, retaliation, or be penalized in any way for their use of the following procedures.

An employee having a problem, complaint, or dispute should make every effort to resolve the matter through discussion with the immediate supervisor. An employee should use diligence in trying to work any problems out with their supervisor. Only after measurable effort has been made should an employee move on to the other steps.

If the employee's concern is not resolved to the employee's satisfaction through step 1, the employee may file a written appeal to the Director of Human Resources within five (5)

working days following the supervisor's final decision. The Director of Human Resources may arrange to meet with both the grieving employee and the supervisor, separately at first then together, in an effort to settle the conflict. The Director of Human Resources will then take the matter under consideration, and conduct any necessary investigation of the facts related to the situation. A decision and explanation should be rendered within fifteen days of the written appeal.

If the grievance is not resolved through the decision from the Director of Human Resources, the employee has five (5) working days to file a written request for review to the Administrator. The Administrator will discuss the matter with the employee, investigate the facts and ensure that policies were followed. The Administrator will then provide the employee with a verbal or written response within fifteen (15) days from the date of receiving the written appeal.

If the employee is still not satisfied with the outcome of the Administrator's response, the employee may file a copy of the same written request within five (5) working days to the Grievance Committee. The Grievance Committee will consist of three (3) board members, and two (2) employees that are not associated with the department wherein the grievance has occurred. A decision from the Grievance Committee will be final and conclusive.

EXHIBIT C

**KESSLER LAW OFFICE
JAY L. KESSLER, ATTORNEY
3335 South 900 East
Suite #120
Salt Lake City, Utah 84106
Telephone: (801) 467-3760
Facsimile: (801) 467-3764**

September 24, 2003

Utah Basin Medical Center, Inc.
Director of Human Resources
250 West 300 North 75-2
Roosevelt, Utah 84066

Re: Zoumadakis v. Utah Basin Medical Center, Inc., Lloyd Neilen,
 Dr. Mason, et. al.
 Grievance letter

Dear Director of Human Resources,

I have been retained by Melany Zoumadakis to rectify the inappropriate termination of her employment. Let this letter be my formal notice of our grievance regarding the inappropriateness and manner in which she was terminated.

Ms. Zoumadakis vehemently refutes the charges against her. She feels as though virtually no effort was made to corroborate these charges. The letter styled "Corrective Disciplinary Action" which she was supposed to sign, does not evidence anything she has done wrong except for what Dr. Mason alleges, which we dispute.

This letter is the only notice you will receive regarding our dispute with the manner Ms. Zoumadakis was terminated. We will settle for nothing short of the following:

1. An immediate reinstatement to her job;
2. Reimbursement for all back wages she has lost;
3. A written apology on behalf of the Medical Center; and,
4. Reimbursement of all medical bills she has incurred due to the emotional distress she has been subjected to.

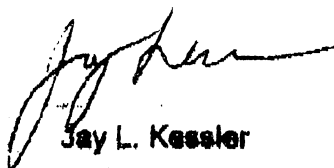
It is my belief that this matter can be settled amicably, but if I do not hear from yourself or your attorney by September 30, 2003, by 4:30 P.M., we will personally serve you with a Complaint filed in the Eighth Judicial District Court. Following

the filing in the court, and service of the same to you, you will have twenty days to file an answer.

The District Court Complaint will be separate from a discrimination claim filed concurrently with the local office of the Equal Employment Opportunity Commission.

If you have any questions please do not hesitate to call.

Sincerely,

A handwritten signature in black ink, appearing to read "Jay L. Kessler", written in a cursive style.

Jay L. Kessler

cc: M. Zoumadakis

HOLME ROBERTS & OWEN LLP
Blaine J. Benard, #5661
Carolyn Cox, #4816
299 South Main Street, Suite 1800
Salt Lake City, Utah 84111-2263
Telephone: (801) 323-5800
Facsimile: (801) 521-9639

Attorneys for Defendants

IN THE EIGHTH JUDICIAL DISTRICT COURT
STATE OF UTAH, COUNTY OF DUCHESNE

MELANY ZOUMADAKIS,

Plaintiff

v.

UINTAH BASIN MEDICAL CENTER, INC.,
and individuals DR. MARK MASON,
LLOYD NIELSON, CAROLYN SMITH, and
JOHN DOES 1-10,

Defendant

**REPLY MEMORANDUM
SUPPORT OF DEFENDANTS'
MOTION TO DISMISS**

Case No. 030800083

Judge John R. Anderson

HEARING REQUESTED

Defendants Uintah Basin Medical Center, Inc., Dr. Mark Mason, Lloyd Nielson and Carolyn Smith, by their counsel, respectfully submit this Reply Memorandum in Support of their Motion to Dismiss the complaint of plaintiff Melany Zoumadakis. For the reasons stated below and in defendants' initial Memorandum in Support dated January 23, 2004 ("Memo. in Support"), plaintiff's complaint fails to state a claim upon which relief can be granted and should be dismissed, in its entirety, with prejudice.

ARGUMENT

I. ZOUMADAKIS' FIRST CAUSE OF ACTION FOR DEFAMATION SHOULD BE DISMISSED

A. Zoumadakis' Defamation Claim Is Not Pled With Adequate Particularity

Defendants first seek dismissal of Zoumadakis' defamation claim on the grounds it is not pled with adequate particularity. In response, Zoumadakis argues that she adequately pled the content of the allegedly defamatory statements and therefore has met her particularity burden. However, even assuming Zoumandakis adequately pled the content of the alleged statements, to meet her burden of pleading with particularity, Zoumadakis must also allege when, where and to whom the alleged defamatory statement was made. *Boisjoly v. Morton Thiokol, Inc.*, 706 F.Supp 795, 800 (D. Utah 1988).¹ Zoumadakis has not pled this additional information with respect to the alleged defamatory statements and her first cause of action must therefore be dismissed.

B. Zoumadakis' Defamation Claim Must Be Dismissed Because Even Assuming She Met Particularity Requirements, The Alleged Defamatory Statements Are Subject To A Qualified Privilege

As set forth in defendants' initial Memo. in Support, even assuming Zoumadakis pled her defamation claim with adequate particularity, her claim must still be dismissed because the defamatory statements alleged are subject to a qualified privilege. In response, Zoumadakis does not dispute the common interest between the defendants giving rise to the privilege, but rather argues that the privilege does not apply for several reasons. First, Zoumadakis suggests that the

¹ In her reply, Zoumadakis argues that she meets this requirement because her Complaint identifies when she learned of the alleged defamatory statement. However, Zoumadakis must identify when, where and to whom the alleged defamatory statements were made, not when she learned about the statements.

qualified privilege does not apply because the alleged defamatory statements are untrue.

However, application of the qualified privilege does not rest on the truth of the alleged defamatory statements. Rather, the privilege blocks liability even though the statements are in fact false. *Brehany v. Nordstrom*, 812 P.2d 49, 58-59 (Utah 1991).

Based on an affidavit submitted with her Objection to the Motion to Dismiss, Zoumadakis also asserts that the statements were made for malicious reasons, including that defendants Mason and Smith were concerned about Zoumadakis' meticulous records and her desire to follow all state laws and regulations regarding patient treatment and care; and that defendant Nielson wanted to terminate plaintiff because she was a threat to his job. As an initial matter, Zoumadakis' assertions in opposition to defendants' motion are not raised in the Complaint, but were made only in response to this motion. A Rule 12(b)(6) motion addresses the sufficiency of the allegations contained in the complaint. Zoumadakis cannot supply missing elements of her complaint by way of a self serving affidavit filed in response to a motion to dismiss. *See e.g. Nester v. Bank One Corp.*, 244 F.Supp. 1344, 1346 (D. Ut. 2002) (It is inappropriate to consider an affidavit from plaintiff in connection with a Rule 12(b)(6) motion to dismiss since the sufficiency of the complaint is the only issue before the court).

Moreover, as Zoumadakis acknowledges, her new affidavit is not based on her own knowledge but rather on hearsay. Thus, her affidavit is defective and cannot provide a basis for denying defendants' motion.

As set forth in defendants' initial Memo. in Support, the alleged defamatory statements are privileged as a matter of law and Zoumadakis' defamation claim therefore must be dismissed.

C. Zoumadakis' Defamation Claim Must Be Dismissed As Against Defendant Nielson for Lack of Publication

As set forth in defendants' initial Memo. in Support, Zoumadakis' defamation claim must be dismissed as against defendant Nielson for the additional reason that his alleged defamatory statements were not published to a third party. In her objection, Zoumadakis does not dispute that Nielson's alleged defamatory statements were not published to a third party. However, Zoumadakis seeks to avoid dismissal of her claim through a new allegation that Nielson told Utah Workforce Services that Zoumadakis quit her job, rather than saying she was wrongfully terminated. Once again, Zoumadakis can not rectify deficiencies in her Complaint through statements and assertions not contained in the Complaint.

In addition, and more importantly, Nielson's statement to workforce services that Zoumadakis quit her employment is simply not defamatory. To constitute defamation, a statement must impeach an individual's honesty, integrity, virtue or reputation, and thereby expose the individual to public hatred, contempt or ridicule. *West v. Thomson Newspapers*, 872 P.2d. 999, 1008 (Utah 1994). Simply stating that a person quit their job, even if untrue, does not constitute defamation as a matter of law. Zoumadakis' defamation claim must therefore be dismissed.

II. ZOUMADAKIS' SECOND CAUSE OF ACTION FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS SHOULD BE DISMISSED

Defendants seek dismissal of Zoumadakis' second cause of action alleging intentional infliction of emotional distress on the grounds that as a matter of law, the conduct on which her claim is based (Dr. Mason's and Smith's allegedly untrue statements regarding Zoumadakis' work performance, and Nielson's documentation of the same) does not rise to the level of outrageousness necessary to state a claim under Utah law. *Boisjoly*, 706 F. Supp. at 801-02 (plaintiff's allegations that his employer discredited him, threatened his job and removed him from the investigation of NASA accident did not rise to outrageousness necessary to state a claim under Utah law). In response, Zoumadakis attempts to distinguish the *Boisjoly* case and argues that here defendants' conduct is more outrageous because she was ultimately terminated. However, Utah courts have consistently rejected claims for intentional infliction that arise out of the alleged wrongful termination of an employee.

In *Larson v. Sysco Corp.*, 767 P.2d 557 (Utah 1989), plaintiff claimed he had been wrongfully terminated, and in addition to a claim for breach of contract, sought recovery for intentional infliction of emotional distress. The Court affirmed the lower court's grant of summary judgment on plaintiff's claim for intentional infliction of emotional distress, stating: that "[w]hile" termination can be an emotionally distressing event in one's life, mere termination alone does not constitute the intentional infliction of emotional distress." *Id.* at 561.

Similarly, in *Sperber v. Galigher Ash*, 747 P.2d 1045 (Utah 1987), the Utah Supreme Court held that plaintiff's claim for intentional infliction of emotional distress arising out of an alleged wrongful termination was properly dismissed for failure to state a claim under Utah law. As in *Larson*, the Court found that mere discharge from employment, even where plaintiff

claimed the employer had given an incorrect reason for termination, did not state a claim for intentional infliction as a matter of law. The Court noted that while every employee who contests a termination decision suffers some emotional anguish as a result of the termination, such distress is simply insufficient to state a claim for intentional infliction of emotional distress, absent facts that would independently support such a claim. *Id.* at 1028-1029. *See also*, *Gudenkauf v. Stauffer Comm., Inc.*, 922 F.Supp. 461, 464 (D.Kan. 1996) (termination for allegedly discriminatory reasons is insufficient to state a claim for intentional infliction of emotional distress); *Bunker v. City of Olathe*, 2001 U.S. Dist. LEXIS 3583 (D.Kan. 2001) (demotion and other adverse employment actions for allegedly wrongful reasons is insufficient to state a claim for intentional infliction of emotional distress).

Here, Zoumadakis essentially alleges that defendants should not have terminated her employment and the reasons proffered were incorrect. Such allegations, even if true, do not state a claim for intentional infliction of emotional distress. Her second cause of action should be dismissed with prejudice.

III. ZOUMADAKIS' CLAIM FOR INTENTIONAL INTERFERENCE WITH CONTRACT MUST BE DISMISSED

Defendants seek dismissal of Zoumadakis' third cause of action for interference with contract for two reasons: 1) she does not allege, nor can she, that she had a valid contractual relationship with which the defendants interfered, the first element of a claim for interference with contract; and 2) she alleges only interference by parties to the contracts or their employees and agents. With respect to the first basis for dismissal, Zoumadakis does not dispute that she

did not have an employment agreement and in fact acknowledges that she was an at will employee². Zoumadakis' Objection to Motion to Dismiss at 5. As an at will employee, Zoumadakis did not have a valid enforceable employment contract with which defendants could interfere. See Defendants' initial Memo. in Support at 8-9. In addition, as she does not dispute, Zoumadakis alleges only wrongful actions on the part of defendants, and does not allege that defendants undertook those acts in an intentional attempt to interfere with her contractual relationship. In the absence of such allegations, her claim fails. See Defendants' initial Memo. in Support at 10.

More importantly, even if Zoumadakis had or could allege a valid enforceable contract with which defendants intentionally interfered, as set forth in defendants' initial Memo. in Support, she alleges only interference by Uintah Basin or its employees and agents acting on its behalf. One party to the contract cannot be liable for the tort of interference with contract. *Leigh Furniture & Carpet Co. v. Isom*, 657 P.2d 293, 301 (Utah 1982). Zoumadakis fails to even address this argument, much less provide contrary authority. Her third cause of action for interference with contract must therefore be dismissed.

² Zoumadakis does suggest that she was denied a grievance procedure to which she was entitled. While defendants dispute Zoumadakis' assertions, such assertions cannot defeat this motion to dismiss because they are not raised in the complaint. See *above* at 3. In addition, even if Zoumadakis' assertions had been set forth in her complaint *and* Zoumadakis could demonstrate that the grievance procedure was a valid contractual right, her claim would still fail because the alleged acts of interference were by a party to the contract, i.e., Uintah Basin or others acting on its behalf. See *below* at 7.

did not have an employment agreement and in fact acknowledges that she was an at will employee². Zoumadakis' Objection to Motion to Dismiss at 5. As an at will employee, Zoumadakis did not have a valid enforceable employment contract with which defendants could interfere. See Defendants' initial Memo. in Support at 8-9. In addition, as she does not dispute, Zoumadakis alleges only wrongful actions on the part of defendants, and does not allege that defendants undertook those acts in an intentional attempt to interfere with her contractual relationship. In the absence of such allegations, her claim fails. See Defendants' initial Memo. in Support at 10.

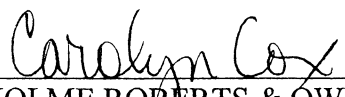
More importantly, even if Zoumadakis had or could allege a valid enforceable contract with which defendants intentionally interfered, as set forth in defendants' initial Memo. in Support, she alleges only interference by Uintah Basin or its employees and agents acting on its behalf. One party to the contract cannot be liable for the tort of interference with contract. *Leigh Furniture & Carpet Co. v. Isom*, 657 P.2d 293, 301 (Utah 1982). Zoumadakis fails to even address this argument, much less provide contrary authority. Her third cause of action for interference with contract must therefore be dismissed.

² Zoumadakis does suggest that she was denied a grievance procedure to which she was entitled. While defendants dispute Zoumadakis' assertions, such assertions cannot defeat this motion to dismiss because they are not raised in the complaint. See *above* at 3. In addition, even if Zoumadakis' assertions had been set forth in her complaint *and* Zoumadakis could demonstrate that the grievance procedure was a valid contractual right, her claim would still fail because the alleged acts of interference were by a party to the contract, i.e., Uintah Basin or others acting on its behalf. See *below* at 7.

CONCLUSION

For the reasons set forth above and in defendants' initial Memo. in Support, Zoumadakis' Complaint should be dismissed in its entirety, with prejudice.

DATED this 24th day of February, 2004.

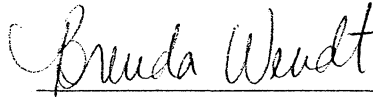


HOLME ROBERTS & OWEN LLP
CAROLYN COX
299 South Main Street, Suite 1800
Salt Lake City, UT 84111-2263
Attorneys for Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 24th day of February, 2004, a true and correct copy of the foregoing REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS was served by U.S. mail, postage prepaid, as follows:

Jay L. Kessler
9117 West 2700 South #A
Magna, Utah 84044



MAY 24 2004

IN THE EIGHTH JUDICIAL DISTRICT COURT
IN AND FOR DUCHESNE COUNTY, STATE OF UTAH

JOANNE MCKEE, CLERK
BY WJR DEPUTY

MELANY ZOUMADAKIS,

Plaintiff,

vs.

UINTAH BASIN MEDICAL CENTER
et al.,

Defendants.

RULING

Case No. 030800083

Judge John R. Anderson

The Court having received defendants' Motion to Dismiss, plaintiff's Memorandum in Opposition, defendant's Reply, having received oral argument, having reviewed the pleadings and being otherwise fully informed, enters the following:

This case involves Ms. Zoumadakis, who was employed by Uintah Basin Medical Center ("UBMC") as a home health care nurse and Dr. Mark Mason (employed by UBMC), Carolyn Smith (doctor Mason's medical assistant), and Mr. Lloyd Nielson (director of home health care). Summarily, the plaintiff claims defamation, intentional infliction of emotional distress, and interference with contract in the employment setting. The dispute revolves around 1) statements made by Ms. Smith to Dr. Mason that Plaintiff had questioned Dr. Mason's care of his patients; 2) complaints by Dr. Mason to Mr. Nielson that Plaintiff had been complaining of his care to the patients and a complaint by a patient that Plaintiff smelled of alcohol; and 3) Mr. Nielson's written disciplinary report addressing the above complaints.

Plaintiff's claim for defamation was not pled with particularity as required. The general statements referred to in the Complaint do not inform defendants when, where and to whom the alleged defamatory statements were made. Even if the allegations are sufficient, they are subject to a qualified privilege, as Dr. Mason, Ms. Smith, and Mr. Nielson all share a common interest and the statements were made to protect a legitimate interest of the publisher. *See Brehany v. Nordstrom*, 812 P.2d 49, 59 (Utah 1991). Finally, Plaintiff did not allege that Mr. Nielson published the disciplinary report to any third party who read and understood the statements. Plaintiff attempts to rebuff the privilege by claiming the statements were untrue. However, the privilege is not defeated even if the statements were false. Plaintiff submits an affidavit in which she raises new information not raised in her complaint, such as, defendants were acting out in alleged retribution, or that Mr. Nielson made statements to a third party. Because the 12(b) motion's focus is on the sufficiency of the complaint, it is inappropriate to consider this affidavit, despite the affidavit being defective as based on hearsay.

Similarly, plaintiff's claim for intentional infliction of emotional distress is insufficient,

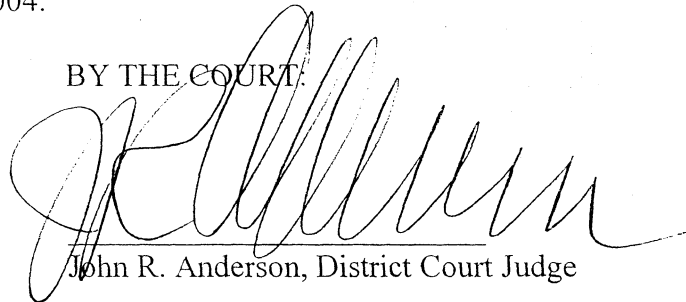
as the alleged conduct does not rise to the level required by Utah law, i.e., going "beyond all bounds of decency, and . . . atrocious and utterly intolerable in a civilized society." *Boisjoly v. Morton Thiokol, Inc.*, 706 F. Supp 795, 802 (D. Utah 1988). Defendant has provided ample case law that indicates mere termination is not sufficient to constitute outrageous conduct as required for a valid intentional infliction of emotional distress claim.

Finally, Plaintiff's claim for interference with employment contract is fatally flawed. Plaintiff has shown no valid enforceable employment with which to interfere. Plaintiff was an at-will employee. Even if plaintiff could show a valid enforceable contract, which as noted above she cannot, *Leigh Furniture & Carpet Co. v. Isom*, 657 P.2d 293 (Utah 1982) indicates one party to the contract cannot be liable for interference for inducing a breach by himself or by the other party. Here, all of Defendants are parties to the contract, either directly or as UBMC's employees or agents. As such, they cannot be liable for interference. In response, Plaintiff refers to the grievance procedure provided for in the employee handbook, and claims she was denied the process, therefore Defendants interfered with her employment. However, as stated above, she does not allege anybody other than parties to the contract interfered, and therefore, Defendants cannot be held liable under a claim for interference of contract.

Based upon the above, it is hereby ORDERED that defendants' Motion to Dismiss is GRANTED.

Dated this 24 day of May, 2004.

BY THE COURT:

A handwritten signature in black ink, appearing to read "John R. Anderson", is written over a horizontal line.

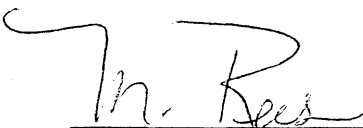
John R. Anderson, District Court Judge

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 030800083 by the method and on the date specified.

METHOD	NAME
Mail	JAY L KESSLER ATTY 9117 W 2700 S STE A MAGNA, UT 84044
Mail	CAROLYN COX ATTORNEY DEF 299 S MAIN ST STE 1800 SALT LAKE CITY UT 84111
Mail	JAY L KESSLER ATTORNEY PLA 9117 W 2700 S STE A MAGNA UT 84044

Dated this 24 day of May, 2004.


Deputy Court Clerk