IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

SHARON P.,	)	
Plaintiff,	)	
v.	)	CIVIL ACTION NO. 98-CV-
TOWN OF ; PUBLIC LIBRARY; and JOHN C.	)	
Defendants.	)	

PLAINTIFF'S OPPOSITION TO MOTION OF PUBLIC LIBRARY AND JOHN C. FOR JUDGMENT ON THE PLEADINGS

Plaintiff Sharon P. hereby opposes the Motion of the Public Library and John C. for Judgment on the Pleadings, and respectfully submits this memorandum in support of her opposition. Defendants assert that the plaintiff has failed to state a claim upon which relief can be granted against the Library and John C. for wrongful discharge (Counts IV and V), and against the Library for intentional infliction of emotional distress (Count VII). The plaintiff does not oppose the defendants' motion with respect to Count V. As to Counts IV and VII, the defendants' motion should be denied for the following reasons:

1. Ms. P.'s truthfulness to a consultant hired at taxpayer expense to investigate Library staff discontentment was in furtherance of public policy;

2. Congress did not intend the Family and Medical Leave Act (FMLA) to supplant state law remedies;

3. Because the Library likely is not an "employer" under the FMLA, and Ms. P. may have no FMLA right of action against the Library, preemption of her wrongful discharge claim would result in shielding the Library from any liability, contrary to the intention of the FMLA; and

4. Ms. P.'s claim against the Library for intentional infliction of emotional distress is not barred by the Workers' Compensation Law because she alleges not merely that defendant C.'s intentional conduct resulted in injury, but that it was Mr. C.'s malicious intention to cause her severe emotional injury.

<u>INTRODUCTION</u>

Sharon P. alleges that her wrongful discharge was in retaliation for two separate acts, both of which were in furtherance of public policy. First, she requested an extension of unpaid leave so that she could care for her dying husband and two-year old daughter. The defendants do not challenge that such conduct was in furtherance of public policy. Instead, defendants attempt to sever this element of Ms. P.'s wrongful discharge claim through preemption by the FMLA. Second, Ms. P. alleges that defendant C. maliciously fired her in retaliation for her disclosure to a psychologist consultant, hired by the defendants at public expense to investigate Library staff discontentment, that Mr. C.'s affair with a co-worker had damaged staff morale. Defendants distort and trivialize Ms. P.'s truthful responses to the consultant's investigation into antipathy over Mr. C.'s sex life, and argue that public policy was not furthered by her truthfulness.

The Statement of Relevant Facts submitted by the defendants contains several omissions which warrant remedy.

The defendants repeatedly assert that Ms. P. was employed by the Library. No mention is made of the Town despite plaintiff's allegation that she was employed by the Town. <u>See</u> Complaint, 6. The issue of whether Ms. P. was employed by the Town may be of critical importance in determining her eligibility for leave under the FMLA, which applies only to employers having fifty or more employees. The defendants have admitted that Ms. P. was employed by the Library, and denied that she was employed by the Town. <u>See</u> Answer, 6. The plaintiff believes that the Library had less than fifty employees.

This issue also bears upon the instant motion. The Library argues the Ms. P.'s common law wrongful discharge count, insofar as it is based upon the allegation that she was fired as a consequence of her request for leave to care for her husband, is preempted by the FMLA. Even assuming that the plaintiff was entitled to FMLA leave as a Library employee, the plaintiff disagrees with the defendants' preemption analysis. However, more fundamentally, the Library cannot argue for FMLA preemption and, at the same time, assert that Ms. P. has no right of action under the FMLA because she was not employed by the Town, the Library lacked the requisite number of employees to fit the definition of an "employer" and, therefore, Ms. P. was not entitled to FMLA leave. While asserting that preemption in favor of the FMLA claim "provides a statutory remedy for the conduct alleged by the plaintiff," Defendants' Memorandum, p.5, the defendants neglect to mention that if the Library had less than fifty employees then the plaintiff would have no right of action under the FMLA against the Library, and preemption would result in the obliteration of her claim for compensation based upon retaliatory discharge in response to her request for leave.

The defendants make another significant omission. They assert that Ms. P. was on leave from October 16, 1995 through December 1995, and that in January 1996, when she told Mr. C. that she would not return to work after her approved leave had expired, she was fired. The defendants fail to mention that prior to the expiration of her leave in 1995, Ms. P. "told Mr. C. that her husband's health was extremely grave and that she wished to take additional leave to count towards her 1996 FMLA entitlement." <u>See</u> Complaint, ¶15. Only after Mr. C. rejected Ms. P.'s request, and told her "that she would be required to return to work or face termination,"

did Ms. P. tell Mr. C. "that she would not return to work that month due to her husband's deteriorating health." See Complaint, ¶15, 24.

I. MS. P.'S TRUTHFULNESS TO A CONSULTANT, HIRED AT TAXPAYER EXPENSE TO INVESTIGATE LIBRARY STAFF MORALE PROBLEMS, WAS IN FURTHERANCE OF PUBLIC POLICY.

Under New Hampshire law, a cause of action for wrongful discharge consists of two elements -- that plaintiff's employer was motivated by bad faith, malice or retaliation, and that the employee was discharged because the employee performed acts that public policy would encourage, or refused to do something that public policy would condemn. E.g., Cloutier v. Great Atlantic and Pacific Tea Co., Inc., 121 N.H. 915, 921-22 (1981).

The defendants do not dispute that Ms. P.'s Complaint adequately alleges that her termination was motivated by bad faith, malice and retaliation for Ms. P.'s disclosure of Mr. C.'s affair with a co-worker. Accordingly, the defendants focus on the second required element -- the issue of public policy.[i]

The court in Cloutier stated that, the existence of a 'public policy' . . . calls for the type of multifaceted balancing process that is properly left to the jury in most instances . . . We believe it best to allow the citizenry, through the institution of the American jury, to strike the appropriate balance in these difficult cases. Id. at 924.

The Court rejected the defendants' argument that statutory expression of public policy was required: "Public policy exceptions giving rise to wrongful discharge actions may also be based on non-statutory policies." Id. at 922.

In Cilley v. N.H. Ball Bearings, Inc., 128 N.H. 401, the Court reaffirmed Cloutier's holding regarding the role of a jury: the issue of whether a public policy is implicated in an employee discharge should be taken from the jury only when the public policy's existence can be "established or not established as a matter of law . . . " Id. at 406 (citing Cloutier, 121 N.H. at 922).

In an effort to avoid this clear directive of the New Hampshire Supreme Court, the defendants grossly distort the substance of Ms. P.'s wrongful discharge allegation. The defendants rely upon several cases which hold that public policy is not implicated where an employee is discharged as a consequence of disagreements with management policies or practices. The defendants then characterize the conduct of Ms. P. which prompted her discharge as a disagreement over the propriety of Mr. C. having an affair with a subordinate. Thus, the defendants trivialize the public policy issue into whether or not the public has an interest in Mr. C.'s sex life.

There is no allegation in the Complaint that Ms. P. was fired because she objected to Mr. C.'s affair with a co-worker. Indeed, there is not a word in the Complaint regarding Ms. P.'s personal attitude concerning this affair. Rather, the crux of Ms. P.'s wrongful discharge claim is that she was fired because she told the truth to a psychologist consultant, Dr. Edward J., retained

by the defendants at public expense to evaluate staff morale problems at the Library. See Complaint, ¶27-34. Ms. P. told Dr. J. that Mr. C.'s affair with a co-worker, and the preferential treatment given to this individual, had badly damaged staff morale. Obviously, the defendants believed that it was in the public interest to investigate and remedy the morale problems at the Library, otherwise they would not have used taxpayers' monies to compensate Dr. J. See Answer, ¶29.

The significance of Ms. P.'s disclosure to Dr. J.'s evaluation is made apparent in plaintiff's Complaint. Dr. J. told Ms. P. that the prior failure of anyone to tell him this information undermined his report. See Complaint, ¶30. Dr. J. complained to Mr. C. that "his efforts to evaluate staff difficulties had been undermined by the failure to disclose to him the nature of Mr. C.'s relationship with his former co-worker." See Complaint, ¶31.

The defendants have admitted that Mr. C. concluded that it was Ms. P. who informed Dr. J. of his affair and its impact on staff morale. See Complaint, ¶33; Answer, ¶33.

Plaintiff's Complaint makes it clear that the public policy at issue is far removed from any personal views that Ms. P. may have had regarding Mr. C.'s behavior: The conduct of Ms. P., in providing truthful responses to Dr. J.'s inquiries in the context of his evaluation of staff morale problems, was of a nature which public policy would encourage. See Complaint, ¶34.

While it may not be against public policy to lie to your own psychologist, when the psychologist is being paid out of public funds to investigate a staff problem at a public library, such mendacity and wastefulness would be of public concern.

Indeed, there are a number of public policies implicated by Ms. P.'s conduct:

a. public policy supports truthfulness in response to the investigation of a consultant hired at taxpayer expense;

b. public policy supports truthfulness and cooperation in an investigation intended to improve staff morale at a public library; and

c. public policy militates against lying to a consultant, hired at public expense, where such lack of truthfulness would impair the integrity and usefulness of the consultant's investigation.

Numerous New Hampshire and federal cases, including several of the cases erroneously relied upon by the defendants, support the contention that these issues raise public policy concerns.

In Cilley v. New Hampshire Ball Bearings, Inc., 128 N.H. 401 (1986), the Court reversed the trial court's allowance of defendant's summary judgment motion. The plaintiff "alleged that his discharge was caused by another official's desire to get 'revenge' against him," and that "this

official's desire for revenge grew in part from [the plaintiff's] earlier refusal to lie to the company president on the other official's behalf" to cover for the official's poor performance. Id. at 406.

The New Hampshire Supreme Court found that this allegation was adequate to reach the jury:

> . . . we do conclude that [the plaintiff] has alleged sufficient facts which, if believed by a jury, could lead that jury to conclude that his termination resulted from acts that public policy would encourage. A jury could find, for example, that [the plaintiff] was discharged for refusing to lie and that public policy supports such truthfulness.
>
> Id. at 406.

In MacDonald v. Tandy, 796 F.Supp. 623 (D.N.H. 1992), an employee was fired after his failure of a police polygraph test and additional evidence led the employer to believe that the employee had stolen property. The plaintiff argued that his cooperation in his employer's investigation was supported by public policy. The court found that the employer's conduct was not actionable because the reason the employee was fired was not that he cooperated in the investigation, but because he was suspected of stealing. Id. at 627-28. However, the court also found that, the jury certainly could have inferred from [the defendant employer's loss prevention manager's] testimony that public policy would support an employee's cooperation with his employer in theft investigations. Id. at 627.

Thus, the court agreed with the plaintiff that public policy concerns were implicated by the issue of cooperation with an employer's efforts to resolve a significant workplace problem. The court rejected the plaintiff's broader argument because it concluded that this was not the reason the plaintiff was discharged. Id.

A number of cases have held that conduct in furtherance of workplace safety supports public policy. E.g., Cloutier, 121 N.H. at 973 ("plaintiff was discharged for furthering the laudable public policy objective of protecting the employees who worked under him."); Brewer v. K.W. Thompson Tool Co., Inc., 647 F.Supp. 1562, 1565 (D.N.H. 1986). While improving workplace morale may not rise to the same level of public concern as the threat of physical injury, it was of sufficient concern in this case to prompt the hiring of an independent consultant at public expense.

The New Hampshire Supreme Court also has found public policy furthered by giving employee's a regularly scheduled day off. Cloutier, 915 N.H. at 923-24.

And in Fulford v. Burndy Corp., 623 F.Supp. 78 (D.N.H. 1985), the court found public policy furthered where an employee brought a personal injury lawsuit on behalf of his minor son after the child was bitten by his supervisor's dog.

The two cases primarily relied upon by the defendants are readily distinguishable. Both Bourque v. Town of Bow, 736 F.Supp. 398 (D.N.H. 1980) and Mellitt v. Schrafft Candy Co.,

No. 80-513-D, slip. op. (D.N.H. Dec. 21, 1982), aff'd 685 F.2d 421 (1st Cir. 1982), involved situations where an employee was terminated because he disagreed with the business practices of management. The defendants' attempt to distort Ms. P.'s conduct into a comparable "disagreement" over Mr. C.'s sex life should be rejected by this court.

II. MS. P.'S WRONGFUL DISCHARGE COUNT AGAINST THE LIBRARY, INSOFAR AS IT IS BASED UPON HER REQUEST FOR UNPAID LEAVE, IS NOT PREEMPTED BY THE FMLA.

A. Ms. P.'s Request for Leave was in Furtherance of Public Policy.

The defendants do not dispute that Ms. P.'s request for an extension of unpaid leave to care for her terminally ill husband was in furtherance of public policy. Any such dispute would be frivolous.

In Miller v. CBC Companies, Inc., 908 F.Supp. 1054 (D.N.H. 1995), the plaintiff alleged that she was terminated, in part, because she requested time off from work in order to accompany her disabled child to speech therapy. The court noted that at the time of her discharge, Congress had not yet passed the FMLA, which provides in pertinent part:

> **(b) Purposes**
>
> It is the purpose of this Act --. . .
>
> (2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition . . .
>
> 29 U.S.C. §2601(b)(2).

The court held that even though the public policy defined in the FMLA had not yet been ratified by Congress, Nonetheless, a reasonable juror could conclude that at that time in New Hampshire a nonstatutory public policy existed that would protect employees seeking leave to take care of their disabled children. Miller, 908 F.Supp. at 1066.

Thus, entirely independent of the FMLA, Sharon P. possesses a right of action for wrongful discharge based upon her allegation that she was fired in response to her request for leave. This right of action, and its public policy implications, do not depend upon whether she was an employee of the Town or of the Library, or whether or not she was entitled to FMLA leave. Having established that Ms. P. possesses this common law right of action, the next question is whether this right is preempted by the FMLA.

B. The FMLA Does Not Supplant Common Law Claims Based Upon Conduct Which is Also Actionable Under the FMLA.

New Hampshire law controls Ms. P.'s pendent wrongful discharge claim. Smith v. F.W. Morse & Co., Inc., 76 F.3d 413, 428 (1st Cir. 1996).

In Wenners v. Great State Beverages, 140 N.H. 100 (1995), the New Hampshire Supreme Court defined the criteria which determine whether a common law remedy is preempted by federal legislation.

The Court stated that while a plaintiff may obtain only one award of damages, a state law remedy is not preempted because it creates broader liability or provides greater damages. Id. at 104 ("That a cause of action under state common law may offer the plaintiff a greater remedy than does [federal legislation] does not affect our analysis . . . 'state causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law.'" (citing English v. General Electric, Co., 496 U.S. 72, 89 (1990)); accord Freeman v. Package Machinery Co., 865 F.2d 1331, 1345 (1st Cir. 1988)("Nor does the fact that the damages held to be recoverable under . . . [state law] largely replicated those recoverable under . . . [federal law] disqualify plaintiff from receipt of prejudgment interest on the common portion of the award. To be sure, a plaintiff is entitled to only one full recovery, no matter how many different legal grounds may support the verdict . . . but there is no basis for allowing the losing party to pick which of the overlapped awards it prefers to pay. In collecting the fruits of his victory . . . [plaintiff] was concededly entitled to only a single slice of the pie -- but, the choice of the slice was his.").

The Court in Wenners instructed that "a plaintiff may not pursue a common law remedy where the legislature intended to replace it with a statutory cause of action." Id. at 103. In Wenners, the plaintiff alleged that he was fired as a result of his bankruptcy filing. The defendant asserted that the plaintiff's wrongful discharge claim was preempted by federal bankruptcy law. The court found "no clear statutory intent to supplant the common law cause of action" for a wrongful termination in the bankruptcy law. Id.

In Smith v. F.W. Morse Co., 76 F.3d at 429, the First Circuit interpreted Wenners to further hold that a plaintiff may pursue a common law wrongful discharge action if the relevant federal statute does not provide the plaintiff with a private cause of action.

The Wenners Court noted that allowing a state law cause of action for wrongful termination to go forward based on the same public policy set forth in federal bankruptcy legislation would not create incompatibility, but would be "complimentary" and further the goals of Congress. Id. at 104. Conflict between state and federal law, which is a basis for preemption, exists only when "it is impossible for a private party to comply with both state and federal requirements or where state law stands as an obstacle to the accomplishments and execution of the full purpose and objective of Congress." Id. (citing English, 496 U.S. at 79).

The Court added that, If the field which Congress is said to have preempted includes an area traditionally occupied by the states, such as employment . . . Congress' intent to preempt must be "clear and manifest." Id. at 104 (citing English, 496 U.S. at 79).

There is not a word in the FMLA about the legislation supplanting existent state law remedies. To the contrary, the Act provides: Nothing in this Act . . . shall be construed to supersede any provision of any state or local law that provides greater family or medical leave rights than the rights established under this Act . . . 29 U.S.C. 2651(b).

Similarly, the Department of Labor's regulations interpreting the FMLA provide:

§825.701 Do state laws providing family and medical leave still apply?

(a) Nothing in the FMLA supersedes any provision of state or local law that provides greater family or medical leave rights than those provided by FMLA . . . Employees are not required to designate whether the leave they are taking is FMLA leave or leave under state law, and an employer must comply with the appropriate (applicable) provisions of both. An employer covered by one law and not the other has to comply only with the law under which it is covered. 29 C.F.R. §825.701(a)

"As an administrative agency, the Department of Labor's construction of the statute is entitled to 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" Dodgens v. Kent Mfg. Co., 955 F.Supp. 560, 564 (D.S.C. 1997)(citing Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414, 655 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945)).

Based solely on the Act's and Department of Labor's explicit statements that the FMLA does not supplant state law remedies, even if Ms. P. had a right of action against the Library under the FMLA, her wrongful termination claim would not be preempted. See Wenners, 140 N.H. at 103-4 (Congress' intent to preempt a claim for wrongful termination under state law must be "clear and manifest"). Indeed, like the plaintiff's wrongful discharge claim in Wenners, Ms. P.'s state claim would be "complimentary" to the goals expressed by Congress in the FMLA. See 29 U.S.C. §2601(b) (to promote the "stability and economic security of families, . . . to promote national interests in preserving family integrity . . . [and] to entitle employees to take reasonable leave . . . for the care of a . . . spouse . . . who has a serious health condition . . ."). But there is an additional and discrete reason that preemption is foreclosed: in all likelihood Ms. P. has no right of action against the Library under the FMLA.

C. If Ms. P. is Found to Have Been Employed Only by the Library, and not the Town, Then she Likely Would Have no Cause of Action Against the Library Under the FMLA and Preemption Would Leave her Without Remedy.

An employer who violates the FMLA shall be liable for damages equal to the wages and benefits lost by the employee, plus interest, plus liquidated damages equal to the sum of economic losses and interest, plus reasonable attorney's fees and the costs of litigation. See, 29 U.S.C. §2617. Thus, the scope of damages exceeds that available in a New Hampshire common law wrongful discharge claim. Why, then, is the Library asking this court to limit the plaintiff to

a FMLA claim? The motive behind the defendants' bid for preemption is nowhere to be found in the defendants' argument.

The defendants assure the court that the FMLA "provides a statutory remedy for the conduct alleged by the plaintiff." See Defendants' Memorandum, p.5. They fail to mention that this remedy, and the underlying FMLA right of action, are only available to employees who work for employers who employ 50 or more people. See 29 U.S.C. §2611(2)(B)(ii), and (4)(A)(i). It is plaintiff's belief that the Library did not employ 50 employees. If this is correct, and if Ms. P. is found to have been employed only by the Library, then the Library would not be a covered "employer" under the FMLA, Ms. P. would have had no right to FMLA leave, and she would have no FMLA right of action against the Library. Thus, the Library, without mentioning it to the court, seeks to supplant Ms. P.'s common law claim with federal legislation that, in all likelihood, does not apply to the Library at all and which would render Ms. P. without a remedy against the Library if she is found to have been employed only by the Library. Such an outcome is wholly at odds with the explicit policies voiced in the FMLA:

> The purpose of the FMLA was to increase the rights of employees, not restrict them: Nothing in this act . . . shall be construed to supersede any provision of any state or local law that provides greater family or medical leave rights than the rights established under this Act . . . 29 U.S.C. §2561(b).
>
> Nothing in this Act . . . shall be construed to discourage employees from adopting or retaining leave policies more generous than any policies that comply with the requirements under this Act.
> 29 U.S.C. 2653.

That the Library would attempt to rely upon preemption by the FMLA to shield itself entirely from liability stemming from its wrongful discharge of Ms. P. is a complete perversion of Congress' stated intent. So, too, does the argument ignore the Department of Labor's instruction that an employer which is covered under state law, but not under the FMLA, must comply "with the law under which it is covered." See, 29 C.F.R. §825.701(a).

D. Cases Relied Upon by the Defendants are Inapposite.

The defendants rely upon several cases holding that federal law preempts New Hampshire common law claims for wrongful discharge based upon age or gender discrimination. However, unlike employees discharged because of their status as a woman, or as a disabled or aged person, Ms. P. did something to cause dismissal -- she requested leave. See, Kopf v. Chloride Power Electronics, Inc., 882 F.Supp. 1183, 1189-90 n.6 (D.N.H. 1995) ("For at least the past fifteen years, New Hampshire courts have indicated that disability or age are not **acts** that an employee performs or refuses to perform and thus fail to meet the public policy benchmark.")(emphasis added); accord Miller v. CBC Companies, Inc., 908 F.Supp. 1054, 1066 n.18 (D.N.H. 1995); Howard v. Dorr Woolen Co., 120 N.H. 295, 297 (1980).

In Smith v. F.W. Morse Co., Inc., 76 F.3d 413 (1st Cir. 1996), the First Circuit held that a wrongful discharge claim based upon the allegation that the plaintiff was fired because she was

pregnant was excluded under New Hampshire law, and the plaintiff was restricted to Title VII. Here again, the plaintiff had not done anything in furtherance of public policy. She was fired because of her status as a pregnant woman. In addition, the plaintiff in Smith had a viable claim under Title VII against an employer who was covered by the legislation, in contrast to Ms. P. who would have no FMLA claim against the Library if she is found to have been employed exclusively by the Library.

II. PLAINTIFF'S CLAIM AGAINST THE LIBRARY FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS IS NOT BARRED BY THE WORKERS' COMPENSATION LAW BECAUSE SHE ALLEGES NOT MERELY THAT MR. C.'S INTENTIONAL CONDUCT RESULTED IN INJURY, BUT THAT IT WAS MR. C.'S INTENTION TO CAUSE INJURY.

There is an ample body of caselaw, some of it cited by defendants, which holds that a claim for emotional distress caused by an employer's intentional conduct is barred by the exclusivity provision of the Workers' Compensation Law, RSA 281:12. But these cases do not encompass the precise claim made by Ms. P.

Ms. P. alleges not only that Mr. C.'s outrageous conduct was intentional, but that he intended this conduct to cause severe emotional distress: 35. Mr. C. knew that Ms. P.'s husband was dying, and knew that she also was the mother of a two-year-old daughter, and he knew that terminating Ms. P.'s employment would cause severe emotional distress. 36. Mr. C.'s wrongful and retaliatory termination of Ms. P. was done with the deliberate intention of causing severe emotional distress. Complaint, ¶¶ 35, 36.

The significance of this "crucial distinction" is explained in Brewer v. K.W. Thompson Tool Co., Inc., 647 F.Supp. 1562, 1566 (D.N.H. 1986). In Brewer, the court cites Professor Larson to illustrate "the distinction between actions intentionally taken and injury intentionally caused":

> Since the legal justification for the common-law action is the nonaccidental character of the injury from the defendant employer's standpoint, the common-law liability of the employer cannot, under the almost unanimous rule, be stretched to include accidental injuries caused by the gross, wanton, wilful, deliberate, intentional, reckless, culpable or malicious negligence, breach of statute, or other misconduct of the employer short of genuine intentional injury.

Brewer, 647 F.Supp. at 1566 (citing 2A Larson, the Law of Workman's Compensation §68.13 (1989)).

This "crucial distinction," explained by this court in Brewer in 1986, was recently reaffirmed in Kopf v. Chloride Power Electronics, Inc., 882 F.Supp. 1183, 1191 (D.N.H. 1995). In Kopf, the court cites to Brewer as, noting [the] "distinction between actions intentionally taken and injuries intentionally caused" and indicating that injuries caused by the former constitute

"accidental injuries" for which recovery is barred pursuant to RSA 281-A:8 Kopf, 882 F.Supp. at 1183 (citing Brewer, 647 F.Supp. at 1566).

If Ms. P. alleged only that Mr. C. intentionally fired her in circumstances where it was foreseeable that severe distress would result, the claim would be barred. But Ms. P.'s Complaint goes far beyond this. She alleges that Mr. C. retaliated against her disclosure of his affair with a co-worker by maliciously and deliberately causing her severe emotional injury. Terminating her employment was simply the easiest means he had available to achieve this end. Such deliberate infliction of injury is not within the scope of employment-related conduct exclusively covered by the Workers' Compensation Law. See Brewer, 647 F.Supp. at 1566; Kopf, 882 F.Supp. at 1183.

Conclusion

For the foregoing reasons, the court should deny the Motion of the Public Library and John C. for Judgment on the Pleadings as regards Count IV (Wrongful Discharge against the Library), and Count VII (Intentional Infliction of Emotional Distress against the Library).

Request for Hearing

The plaintiff requests oral argument on this motion in light of the importance and complexity of the issues.

Respectfully submitted,

SHARON P.

By her attorney,

Dated:

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[i] This section addresses only the defendants' arguments concerning Ms. P.'s disclosures to the psychologist consultant hired to investigate staff discontentment. Ms. P.'s request for leave, which defendants do not dispute was in furtherance of public policy, is discussed in Section II, which addresses defendants' FMLA preemption argument.