STATE OF MAINE
CUMBERLAND, ss.

BUSINESS & CONSUMER COURT
DOCKET NO. BCD-CIV-2021-37

SCOTT JACQMIN, Plaintiff, v. SAVILINX, Defendant.	)	ORDER GRANTING IN PART AND DENYING IN PART SAVILINX'S MOTION TO DISMISS

Plaintiff Scott Jacqmin ("Jacqmin") has brought a four count Complaint against Defendant Savilinx ("Savilinx"). Count I alleges employment discrimination and retaliation in violation of *inter alia* the Maine Whistleblower Protection Act, 26 M.R.S.A. § 831 et. seq.; Count II alleges invasion of privacy; Count III alleges Intentional Inflict of Emotional Distress; and Count IV alleges Negligent Infliction of Emotional Distress. In response, Savilinx has filed a Motion to Dismiss all four counts pursuant to M.R. Civ. P. 12(b)(6) for failure to state a claim. In support of its Motion, Savilinx also asks the Court to consider certain photographs, videos, and documents pursuant to the *Moody* exception. *See Moody v. State Liquor & Lottery Comm'n*, 2004 ME 20, ¶ 10, 843 A.2d 43. For the reasons discussed below, the Court declines to invoke the *Moody* exception; denies the Motion with regard to Counts I and II; and grants the Motion with regard to Counts III and IV.[1]

LEGAL STANDARD

[1] Counsel have filed well-written and comprehensive briefs. Accordingly, rather than delaying the case by waiting several weeks for the opportunity to conduct oral argument, the Court is ruling on the Motion without hearing as authorized by M.R. Civ. P. 7(b)(7).

When reviewing a motion to dismiss under Rule 12(b)(6), the Court "consider[s] the facts in the complaint as if they were admitted." *Bonney v. Stephens Mem. Hosp.,* 2011 ME 46, ¶ 16, 17 A.3d 123. The complaint is viewed "in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory. *Id.* (quoting *Saunders v. Tisher,* 2006 ME 94, ¶ 8, 902 A.2d 830). "Dismissal is warranted when it appears beyond a doubt that the plaintiff is not entitled to relief under any set of facts that [it] might prove in support of [its] claim." *Id.* However, the Court is not required to accept as true allegations that are merely legal conclusions couched as factual allegations. *See, e.g., Bryan R. v. Watchtower Bible and Tract Society of New York, Inc.,* 1999 ME 144, ¶¶ 20-22, 738 A.2d 839; *Courtois v. Maine Pub. Employees Retirement Sys.,* No. AP-11-26, 2012 WL 609567 (Me. Super. Ct. Jan 17, 2012).

FACTS

Before stating the facts the Court must determine whether it is going to consider the material provided by Savilinx, even though that material was not attached to the Complaint. Under the *Moody* exception the Court can consider official public documents, documents that are central to Plaintiff's claim, and the documents referred to in the Complaint, without converting a motion to dismiss into a motion for summary judgment when the authenticity of such documents is not challenged. *Moody,* 2004 ME 20*,* ¶¶ 9-10, 843 A.2d 43. Here, the materials submitted by Savilinx are not official public documents, may or may not be central to Plaintiff's claim, are not specifically referred to in the Complaint, and have not been authenticated. It seems apparent the materials are central to Savilink's defense, but that is not a basis for applying the *Moody* exception. Accordingly, the Court does not consider the materials in deciding the Motion to Dismiss.

The following facts pled in the Complaint are considered as if they are admitted. Jacqmin was an employee of Savilinx from 2015 to May 10, 2019. Savilinx is a marketing or public relations firm, employing approximately 1,112 employees. Jacqmin performed his job satisfactorily and was identified as having excellent customer service skills. On multiple dates beginning on or about August 27, 2018, Jacqmin reported to Savilinx management what he believed in good faith were violations of law, including specifically HIPAA law violations and misuse or misappropriation of his likeness or image. Specifically, Jacqmin reported to management that Savilinx was creating and publishing imagery in violation of HIPAA and that he did not want his image used in connection with what he believed in good faith to be an unlawful and wrongful use or context. In November 2018, Jacqmin filed a formal HIPAA complaint with state or federal agencies and complained to his immediate supervisor. On January 9, 2019, Jacqmin complained to Savilinx's Chief Executive Officer.

Soon after reporting his complaints Jacqmin was subjected to harassment and retaliation at work. Jacqmin reported this harassment and retaliation to his immediate supervisor and to other Savilinx managers. Savilinx failed to investigate Jacqmin's complaints and took no steps to protect Jacqmin from harassment and retaliation. Rather, Savilinx's managers told Jacqmin to stop complaining. On May 10, 2019, Savilinx discharged Jacqmin for what he alleges were pretextual reasons. Jacqmin suffered damages, including but not limited to emotional distress.

DISCUSSION

The gist of Savilinx's argument – shorn of any reliance on the extraneous materials excluded by the Court – is that Jacqmin has failed to plead with particularity the facts needed to establish the *prima facie* elements for each Count of the Complaint. The gist of Jacqmin's

opposition is that under Maine's relaxed notice pleading practice, he has pled the facts well enough to put Savilinx on notice of his claims. The arguments of both parties are partially correct.

For analytical purposes, it is convenient to divide the Complaint into two halves: Counts I (statutory employment discrimination) and II (invasion of privacy) in the first half, and Counts III (intentional infliction) and IV (negligent infliction) in the second half. The counts in the first half are subject to ordinary notice pleading rules. A plaintiff must plead enough facts to make out the *prima facie* elements of each count, but the Court does not perform any heightened gatekeeper role. *See* M. R. Civ. P. 8(a)(1); *Johnson v. Me. Energy Recovery Co., Ltd. P'ship,* 2010 ME 52, ¶ 16, 997 A.2d 741. Viewing Count I in the light most favorable to Jacqmin, the facts pled by Jacqmin establish that he engaged in protected activity, he experienced adverse employment action, and there is a causal connection. *See Galouch v. Dept. of Prof. & Financial Reg.*, 2015 ME 44, ¶ 12, 114 A.3d 988. Savilinx protests that the Complaint does not specify in detail the precise nature of Jacqmin's HIPAA concerns. However, "[a] complaint need not identify particular legal theories that will be relied upon…" *Johnson,* 2010 ME 52, ¶ 17, 997 A.2d 741. The facts pled in the Complaint put Savilinx on notice that Jacqmin believed the use or context of the imagery involved constituted a HIPAA violation. Having been appropriately put on notice, Savilinx can now ferret out the details through the discovery process.[2] Savilinx's Motion is denied as to Count I.

Similarly, Savilinx has been sufficiently put on notice regarding Jacqmin's Count II violation of privacy claim. Through the facts alleged in his Complaint, Jacqmin claims—at a minimum—that by filming and photographing him in a manner that constitutes a HIPAA violation, and then distributing the imagery to the public, Savilinx has placed him in a false light

[2] Whether Jacqmin had an "objectively reasonable belief" can also be explored through discovery.

in the public eye. *See Berthiaume's Est. v. Pratt,* 365 A.2d 792, 795 (Me. 1976). Viewing the facts in the light most favorable to Jacqmin, the factual allegations are sufficient to survive the Motion to Dismiss. Savilinx's Motion is denied as to Count II.

The counts in the second half of the Complaint are a different matter. Regarding these counts, the Court plays more of a gatekeeper role. The Count III claim for intentional infliction of emotional distress requires alleging facts establishing conduct that "was so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious[] and utterly intolerable in a civilized community." *Davis v. Currier*, 1997 ME 199, ¶ 5, 704 A.3d 1207. "[I]t is for the Court to determine in the first instance whether the defendant's conduct may reasonably be regarded as so extreme and outrageous to permit recovery." *Champagne v. Mid-Me. Med. Ctr.,* 1998 ME 87, ¶ 16, 711 A.2d 1086, 1090 (Me. 1995) (citing *Colford v. Chubb Life Ins. Co. of Am.,* 687 A.2d 609, 616 (Me. 1996)). The facts pled in the Complaint come nowhere close to meeting that standard. Employment discrimination is, unfortunately, commonplace. The nature of the privacy violation alleged here is not extreme. As a matter of law, these allegations fall short of the standard for actionable conduct necessary for a claim of intentional infliction of emotional distress. *See Argereow v. Weisberg*, 2018 ME 140, ¶ 28, 195 A.3d 1210. Furthermore, Jacqmin's factual allegations do not place his emotional distress at a level where it could be characterized as "so severe that no reasonable person could be expected to endure it." *Id.* ¶ 29. Savilinx's Motion is granted as to Count III.

Similarly, the Law Court has been parsimonious about extending the tort of negligent infliction of emotional distress beyond bystander liability actions, and circumstances in which a special relationship exists between the plaintiff and the alleged tortfeasor. *See Curtis v. Porter,* 2001 ME 158, ¶ 19, 784 A.2d 18. This is not a bystander case. Further, the Complaint does not

allege any facts from which it could be found there was a "special relationship" between Jacqmin and Savilinx. *See Berry v. WorldWide Language Res., Inc.,* 716 F. Supp. 2d 34, 53 (D. Me. 2010) (the employer-employee relationship does not qualify as a special relationship for NEID claims). Accordingly, as a matter of law the allegations contained in the Complaint fail to establish the necessary special relationship. Savilinx's Motion is granted as to Count IV.

CONCLUSION

For all the foregoing reasons, Savilinx's Motion to Dismiss is denied as to Counts I and II, and granted as to Counts III and IV. Counts III and IV are dismissed.

So Ordered.

The Clerk is instructed to enter this Order on the docket for this case by incorporating it by reference. M.R. Civ. P. 79(a).

Dated: July 1, 2021

Judge, Business and Consumer Court