UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JOSEPH BATES, Plaintiff,	)	
v.	)	C.A. No. 10-11395-MLW
SKY CHEFS, INC., Defendant.	)	

MEMORANDUM AND ORDER

WOLF, D.J. September 27, 2011

I. INTRODUCTION

Plaintiff Joseph Bates alleges that defendant Sky Chefs, Inc., his former employer, wrongfully terminated him because he injured himself at work and initiated a workers compensation claim. The terms of plaintiff's employment were governed by a collective bargaining agreement (the "CBA"). Defendant is moving to dismiss the Complaint, or for summary judgment, on the basis that plaintiff's wrongful termination claim is preempted by the Labor Management Relations Act (the "LMRA"), 29 U.S.C. §185(a), and that the complaint does not adequately plead a claim under the LMRA (the "Motion to Dismiss"). Plaintiff is moving to amend the complaint in a manner that would add two counts but that would leave the factual allegations materially unchanged (the "Motion to Amend").

For the reasons stated below, defendant's Motion to Dismiss is being allowed and the Complaint is being dismissed. As a result, it is not necessary to decide whether summary judgment is appropriate. The Motion to Amend is being denied.

II. PROCEDURAL HISTORY

Plaintiff filed the Complaint on July 9, 2010, in Suffolk County Superior Court.[1] Defendant removed the case to federal court on August 16, 2010, because the LMRA provides for federal jurisdiction over claims that implicate the terms of a collective bargaining agreement. 29 U.S.C. §185(a). Defendant filed the Motion to Dismiss on August 17, 2010. Plaintiff filed an opposition. On September 15, 2010, plaintiff filed the Motion to Amend. Defendant filed an opposition, and the court permitted plaintiff to file a reply.

III. DISCUSSION

A. Motion to Dismiss

1. The Legal Standard

In considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the court must "take all factual allegations as true and [] draw all reasonable inferences in favor of the plaintiff." Rodriguez-Ortiz v. Margo Caribe, Inc., 490 F.3d 92, 96 (1st Cir. 2007); see also Maldonado v. Fontanes, 568 F.3d 263, 266 (1st Cir. 2009). A motion to dismiss should be denied if a plaintiff has shown "a plausible entitlement to relief." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007); see also Morales-Tanon

[1]In addition to alleging wrongful termination, the Complaint initially included a second count that alleged intentional infliction of emotional distress. In a September 24, 2010 Electronic Order, the court permitted plaintiff to withdraw the second count.

v. Puerto Rico Elec. Power Auth., 524 F.3d 15, 18 (1st Cir. 2008) (applying the Bell Atl. standard to a claim under 42 U.S.C. §1983); Rodriguez-Ortiz, 490 F.3d at 95-96 (applying the Bell Atl. standard to a claim under the Private Securities Litigation Reform Act).

Federal Rule of Civil Procedure 8(a)(2) requires that a complaint include a "short and plain statement of the claim showing that the pleader is entitled to relief." This pleading standard does not require "detailed factual allegations," but does require "more than labels and conclusions . . ., and a formulaic recitation of the elements of a cause of action will not do . . . ." Bell Atl., 550 U.S. at 555. A court may disregard "bald assertions, unsupportable conclusions, and opprobrious epithets." In re Citigroup, Inc., 535 F.3d 45, 52 (1st Cir. 2008). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009)(emphasis added). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, 'it stops short of the line between possibility and plausibility of entitlement to relief.'" Id. (quoting Bell Atl., 550 U.S. at 557).

"Under Rule 12(b)(6), the district court may properly consider only facts and documents that are part of or incorporated into the complaint." Rivera v. Centro Medico de Turabo, Inc., 575 F.3d 10, 15 (1st Cir. 2009) (internal quotation marks omitted); see

Watterson v. Page, 987 F.2d 1, 3 (1st Cir. 1993). From this rule, the First Circuit makes "narrow exceptions for documents the authenticity of which are not disputed by the parties; for official public records; for documents central to plaintiff['s] claim; or for documents sufficiently referred to in the complaint." Watterson, 987 F.2d at 3-4; Beddal v. State Street Bank and Trust, Co., 137 F.3d 12, 16-17 (1st Cir. 1998) (When "a complaint's factual allegations are expressly linked to – and admittedly dependent upon – a document (the authenticity of which is not challenged) that document effectively merges into the pleadings and the trial court can review it in deciding a motion to dismiss under Rule 12(b)(6).").

2. Facts Alleged

Plaintiff lives in Maine. Defendant is a Delaware corporation and has its principal office in Texas. Beginning in 2009, plaintiff was employed by defendant as a caterer driver at Logan Airport. Defendant trained plaintiff how to operate catering trucks and how to load and unload catering supplies from aircrafts.

On April 17, 2010, plaintiff was loading an aircraft while standing on a lift. He fell while attempting to close the aircraft door and injured his wrist and left leg. He went to a hospital and was diagnosed with an ankle fracture and wrist sprain. A doctor instructed plaintiff not to return to work until he was cleared by an orthopedist.

On the afternoon that plaintiff left the hospital, defendant contacted him at home in Maine and told him to come to Boston to complete an accident report. He was told that he could not file a workers compensation claim if he did not travel to Boston. Plaintiff, along with his wife, traveled to Boston the next day. He requested information about how to file a workers compensation claim and was told that it would "take weeks." Defendant asked about how to make the job safer, noting that a similar accident occurred in Texas and resulted in paralysis.

Defendant then insisted that plaintiff see a doctor of its choosing. He was brought immediately to a non-orthopedic doctor who said, "Well, I guess you obviously cannot work."

Later that day, April 19, 2010, plaintiff received a call from his safety coordinator who stated that the doctor had said he could return to work. The safety coordinator instructed plaintiff to report to work on April 22, 2010. Plaintiff questioned this instruction because he was on pain medications and could not drive, write, or type, and was required to keep his leg elevated.

Plaintiff alleges that defendant "did no want [him] to see his own doctor or contact the workers' compensation carrier, they wanted their own doctor to take care of everything." Compl. at ¶17. This conclusion is supported only by the fact that defendant told plaintiff "'just to see our doctor and we'll take good care of you' and that he should not see another doctor because 'it would cost

him $3,000 and he would have to pay it himself.'" Id. at ¶18.

On April 21, 2010, defendant's workers compensation carrier, Liberty Mutual, notified plaintiff that light duty work was available and that defendant would provide him transportation to Boston. When plaintiff objected because he was still on pain medications, Liberty Mutual informed him that his refusal to work would result in denial of workers compensation benefits.

Plaintiff obtained counsel and advised defendant that he was getting his own doctor and that he had an appointment to see an orthopedist. On April 29, 2010, plaintiff consulted with an orthopedist who told him that he needed to undergo surgery and that he could not return to work. Plaintiff notified defendant that he could not return to work. Defendant then advised plaintiff that he was terminated as of April 28, 2010, the day before plaintiff met with the orthopedist.

3. Additional Facts Considered on Motion to Dismiss

The basis of defendant's Motion to Dismiss is that plaintiff's employment was governed by a CBA that forecloses the availability of judicial relief in this case. Plaintiff does not allege in the Complaint that his employment was governed by the CBA. However, in response to the Motion to Dismiss, plaintiff agrees that this matter is governed by the CBA. See Objection to Defendant's Motion to Dismiss or in the Alternative for Summary Judgment at 5. In addition, he does not dispute its authenticity. Indeed, he assumes

that it is determinative of his case throughout his arguments and incorporates it into the proposed amended complaint attached to his Motion to Amend. Accordingly, the court is considering the CBA as part of the pleadings for purposes of deciding the Motion to Dismiss. See Beddal, 137 F.3d at 16-17; Waterson, 987 F.2d at 3-4.

The parties also raise additional facts in their arguments and in affidavits. For example, in an effort to avoid the preemption of the LMRA, plaintiff asserts that defendant never responded to a letter from his counsel demanding a copy of the documents referred to and quoted in the letter of termination sent to plaintiff and, therefore, that defendant repudiated the CBA. Plaintiff also states in an affidavit that he was unaware of the fact that he was in a union or how to contact it. Defendant submits evidence that plaintiff had, in fact, filed a union grievance form approximately seven months before his accident after being disciplined. As described below, the court is not considering these facts in conjunction with the Motion to Dismiss because the Complaint does not state a claim on which relief can be granted. Moreover, as described below, even if the additional facts were alleged in the Complaint, dismissal would still be appropriate.

4. Wrongful Termination

Plaintiff's wrongful termination claim is styled as a state common law claim. However, as plaintiff concedes, whether his termination was proper turns on the terms of the CBA, which

provides for termination for "just cause," including for the creation of an unsafe working environment. See CBA at §VII(A). The CBA also requires grievances to be filed within fourteen days by plaintiff's union. See id. at §V(A)(1).

Where "resolution of plaintiff's retaliatory discharge claim depends on an interpretation of the collective bargaining agreement . . . the claim is completely preempted by [the LMRA]." Magerer v. John Sexton & Co., 912 F.2d 525, 530 (1st Cir. 1990); see Adames v. Exec. Airlines, Inc., 258 F.3d 7, 12 (1st Cir. 2001) (quoting Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 213 (1985)); Lydon v. Boston Sand & Gravel Co., 175 F.3d 6, 10-11 (1st Cir. 1999); Flibotte v. Pa. Truck Lines, Inc., 131 F.3d 21, 25-26 (1st Cir. 1997) (quoting Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 405-06 (1988)). Here, plaintiff's claim "alleges conduct that arguably constitutes a breach of duty that arises pursuant to a collective bargaining agreement," namely that he was terminated without just cause. See Flibotte, 131 F.3d 21 at 26. Accordingly, his claim is preempted by the LMRA. Id.[2] Plaintiff does not dispute

[2]As defendant points out, because plaintiff's wrongful termination claim alleges retaliation for filing a workers compensation claim, the claim is also preempted by Massachusetts statutory law. M.G.L. c. 152, §75B(2); see Mello v. Stop & Shop Companies, 402 Mass. 555, 557 n.2 (§75B(2) "defin[es] the remedy"); Federici v. Mansfield Credit Union, 399 Mass. 592, 597 (1987); Costanzo v. City of Marlborough, 60 Mass. App. Ct. 1122, at *2 n.5 (2004) (unpublished) (§75B "supercedes any common law claims for retaliatory discharge"). However, as defendant also notes, even if plaintiff had filed his claim under §75B(2), the terms of the CBA would control because its grievance procedure is

that his claim is preempted.

Because plaintiff's claim is preempted by the LMRA, it "'must either be treated as a [LMRA] claim . . . or dismissed as pre-empted by federal labor-contract law.'" DiGiantommaso v. Globe Newspaper Co., 632 F. Supp. 2d 85, 90 (D. Mass. 2009) (quoting Allis-Chalmers Corp., 471 U.S. at 220). However, even if the claim were treated as an LMRA claim, it would be unavailing. In order to obtain judicial relief under the LMRA, the plaintiff was required to exhaust the grievance procedures established by the CBA. See Republic Steel Corp. v. Maddox, 379 U.S. 650, 652-53 (1965); Brennan v. King, 139 F.3d 258, 268 (1st Cir. 1998); Williams v. Sea-Land Corp., 844 F.2d 17, 18 (1st Cir. 1988). Dismissal is appropriate where exhaustion is not alleged. See Vaca v. Sipes, 386 U.S. 171, 184-85 (1967); D'Amato v. Wisconsin Gas Co., 760 F.2d 1474, 1488 (7th Cir. 1985) (affirming dismissal where plaintiff admitted that he made no attempt to exhaust grievance procedures and where he did not allege that employer took action to prevent him from doing so); DiGiantommaso, 632 F. Supp. 2d at 90 (dismissing claim where plaintiff failed to exhaust available grievance procedures). The Complaint does not allege that plaintiff

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inconsistent with the §75B(2)'s statutory cause of action. M.G.L. c. 152, §75B(3) ("In the event that any right set forth under [§75B] is inconsistent with an applicable collective bargaining agreement, such agreement shall prevail"). Accordingly, the LMRA would preempt a claim filed under §75B(2), as well. See Lydon, 175 F.3d at 11. Plaintiff does not dispute this analysis, nor has he ever alleged a claim under §75B(2).

attempted to exhaust the grievance procedures. Moreover, plaintiff acknowledges in his arguments that he did not.

There are two exceptions to the exhaustion requirement of the LMRA. See Williams, 844 F.2d at 18 (citing Vaca, 386 U.S. at 185). "The first is when 'the conduct of the employer amounts to a repudiation of th[e] contractual procedures.' The second is when 'the union has sole power under the contract to invoke the higher stages of the grievance procedure and if, . . . the [employee] has been prevented from exhausting his contractual remedies by the union's wrongful refusal to process the grievance." Id. (quoting Vaca, 386 U.S. at 185) (internal citations omitted). Plaintiff's Complaint does not allege any facts that would support sustaining his claim under either of these exceptions. Indeed, his allegations do not include any conduct by defendant that occurred after plaintiff was terminated. Therefore, on its face, the Complaint does not set out a plausible basis for relief. See Iqbal, 129 S.Ct. at 1949; see also Ramirez-Lebron v. Int'l Shipping Agency, Inc., 593 F.3d 124, 134-35 (1st Cir. 2010) (dismissal inappropriate where plaintiffs alleged that employer entered into sham arbitration award); D'Amato, 760 F.2d at 1488 (dismissal appropriate where only claim of repudiation was that employer fired employee); Beriault v. Local 40, Super Cargoes & Checkers, Int'l Longshoremen's & Warehousemen's Union, 501 F.2d 258, 262-63 (9th Cir. 1974) (dismissal appropriate where plaintiffs "made no showing of the

existence of either" exhaustion exception); Ali v. Giant Food LLC/Stop & Shop Supermarket Co., LLC, 595 F. Supp. 2d 618, 627 (D. Md. 2009) (denying motion to dismiss where plaintiff alleged that he attempted to comply with grievance procedures to no avail); Covalt v. Pintar, 2008 WL 2312651, at *12 (S.D. Tex. 2008 June 4, 2008) (allowing motion to dismiss for failure to claim that union breached its duty of fair representation); Fosbroke v. Emerson College, 503 F. Supp. 256, 257 (D. Mass. 1980) (denying motion to dismiss where plaintiff alleged repudiation).

Plaintiff argues in his opposition to the Motion to Dismiss that he satisfies the first exception to LMRA preemption because defendant repudiated the CBA. See Vaca, 386 U.S. at 185. However, as noted, there are no facts in the Complaint that relate to any such repudiation, which is required to state a claim. Moreover, even if plaintiff's additional allegations were included in the Complaint, dismissal would still be appropriate. He contends that defendant repudiated the CBA by failing to respond to a letter from plaintiff's counsel that demanded copies of the documents cited in the plaintiff's termination letter, including the CBA. The letter from counsel also threatened defendant with litigation. Plaintiff asserts that defendant failed to respond because it hoped that plaintiff would miss the fourteen-day window for filing a grievance under the CBA. Plaintiff also argues that defendant could have treated his counsel's letter as a grievance under the CBA.

Courts require plaintiffs to allege more than mere termination to state a claim of repudiation. See D'Amato, 760 F.2d at 1488 (only claim of repudiation was that employer fired employee). In Ramirez-Lebron, for example, the plaintiffs alleged that their employer "entered into a 'sham, secret agreement'" that induced an arbitrator to issue an award that was unfavorable to the plaintiffs. 593 F.3d at 132. The First Circuit held that the allegation of a "sham" approach to grievance procedures sufficiently pled repudiation. Id. at 135. Here, plaintiff does not cite any case that supports his argument that defendant was obligated to provide him with a copy of the CBA or that its failure to do so amounted to repudiation of the CBA. His allegation that defendant's silence was motivated by a desire to repudiate the CBA lacks factual support and, therefore, may be disregarded. In re Citigroup, Inc., 535 F.3d at 52. Furthermore, had it been incorporated into the Complaint, the termination letter itself would render plaintiff's claim of repudiation implausible because it expressly invokes the "just cause" provisions of the CBA. In contrast, plaintiff's counsel's letter threatened defendant with litigation outside of the CBA procedures. Thus, taken as true, plaintiff's additional allegations of repudiation would not state a claim under the LMRA.

In light of the foregoing, the court concludes that plaintiff's wrongful termination claim is preempted by the LMRA,

and the Complaint is insufficient to state a claim under federal labor law. Accordingly, the Motion to Dismiss is being allowed.

B. Motion to Amend the Complaint

1. The Legal Standard

A party may amend its pleading once as a matter of course within 21 days after serving it or, if a responsive pleading is required, within 21 days after service of a responsive pleading or of a motion under Rule 12(b), (e), or (f). Fed. R. Civ. P. 15(a)(1). In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. Fed. R. Civ. P. 15(a)(2). The court should freely give leave when justice so requires. Id.; O'Connell v. Hyatt Hotels of P.R., 357 F.3d 152, 154 (1st Cir. 2004) (discussing "liberal" amendment policy).

However, a district court does not abuse its discretion when it refuses to allow an amendment that would be futile because it does not state a claim. Chiang v. Skeirik, 582 F.3d 238, 244 (1st Cir. 2009); United States ex rel. Gagne v. City of Worcester, 565 F.3d 40, 48 (1st Cir. 2009) ("Reasons for denying leave include undue delay in filing the motion, bad faith or dilatory motive, repeated failure to cure deficiencies, undue prejudice to the opposing party, and futility of amendment."). "In assessing futility, the district court must apply the standard which applies to motions to dismiss under Fed. R. Civ. P. 12(b)(6)." Adorno v.

Crowley Towing and Transp. Co., 443 F.3d 122, 126 (1st Cir. 2006).

2. Additional Allegations

Plaintiff's proposed Amended Complaint would allege three counts. Count I would allege wrongful termination. It is substantially identical to Count I of the existing Complaint.[3] Count II would allege breach of contract under the LMRA based on plaintiff's termination without just cause, as required by the CBA. Count III would allege a breach of the implied duty of good faith and fair dealing that is implied in the CBA. All three counts allege as grounds for relief only that defendant fired plaintiff because he sought independent medical advice and applied for workers compensation. There is no allegation that plaintiff exhausted his remedies under the CBA or that defendant repudiated the CBA.

3. Analysis

All three counts in the proposed Amended Complaint are subject to LMRA preemption and, therefore, to its exhaustion requirement. See Rogers v. NSTAR Elec., 389 F. Supp. 2d 100, 107, 110-11 (D. Mass. 2005) (claims for wrongful termination, breach of duty of good faith and fair dealing, and breach of contract subject to preemption under the LMRA). Plaintiff does not dispute this conclusion. Rather, he again argues that defendant's repudiation of

[3]The proposed amended complaint omits from Count I an alternative theory of liability for wrongful termination based in public policy.

the CBA exempts him from the exhaustion requirement. For the reasons described above, the failure to allege in the proposed amended complaint either exhaustion or exemption from exhaustion renders plaintiff's proposed Amended Complaint facially insufficient. See Ramirez-Lebron, 593 F.3d at 134-35; D'Amato, 760 F.2d at 1488; Beriault, 501 F.2d at 262-63. Consequently, the Motion to Amend is futile and is being denied. See Chiang, 582 F.3d at 244; Gagne, 565 F.3d at 48.

IV. CONCLUSION

Plaintiff agrees that his employment was governed by the terms of the CBA and, therefore, that his claims that result from his termination are controlled by the LMRA. He has not, however, alleged that he complied with the exhaustion requirements of the LMRA or that he is exempted from them.

Accordingly, for the foregoing reasons, it is hereby ORDERED that:

1. Defendant's Motion to Dismiss Plaintiff's Complaint with Prejudice, or in the Alternative, for Summary Judgment (Docket No. 5) is ALLOWED. The Complaint (Docket No. 1) is DISMISSED.

2. Plaintiff's Motion to Amend (Docket No. 10) is DENIED.

/s/ Mark L. Wolf
UNITED STATES DISTRICT JUDGE