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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

JEFFREY BRUNO,	)	
	)	
	)	
Plaintiff,	)	
v.	)	**Case No. 20-CV-2052**
	)	
MAYOR CHASTITY WELLS-ARMSTRONG in her individual and official capacities, JAMES ELLEXSON, in his individual and official capacities, and THE CITY OF KANKAKEE, a municipal corporation,	)	
	)	
	)	
Defendants.	)	

ORDER

On March 3, 2020, Plaintiff, Jeffrey Bruno, filed a Complaint (#1) against Defendants. On May 1, 2020, Defendants filed a Motion to Dismiss (#7). Plaintiff filed his Response (#9) on May 15, 2020. For the reasons that follow, Defendants' Motion to Dismiss (#7) is GRANTED in part and DENIED in part.

I. ANALYSIS

A. Plaintiff's Complaint (#1)

1. Factual Allegations

Plaintiff's Complaint alleges the following.

Plaintiff was employed by Defendant City of Kankakee's Fire Department. Defendant Chastity Wells-Armstrong was the Mayor of the City of Kankakee.

Defendant James Ellexson was the Director of Human Relations for the City of Kankakee. Defendant City of Kankakee, a municipal corporation, employed the individual Defendants.

Plaintiff had been employed with the Fire Department for many years when, in September 2017, he suffered an aortic dissection while on duty. An aortic dissection is a serious condition in which the inner layer of the aorta tears, blood surges through the tear, and the inner and middle layers of the aorta separate. It can be fatal if the blood-filled channel ruptures through the outside aortic wall.

Plaintiff returned to work on December 4, 2017, still recuperating.

Defendant Wells-Armstrong was elected Mayor in May of 2017.

In January of 2018, Plaintiff enrolled in college "to increase his chance of receiving a raise and being promoted." In February 2018, he was promoted to Interim Assistant Chief. Soon after, he was promoted to Deputy Chief. Throughout 2018, he requested an employment contract, but did not receive one.

In June or July 2018, after having symptoms associated with aortic dissection, Plaintiff spoke with his doctor. The doctor told Plaintiff to stop attending the college program while also working.

Plaintiff received high marks on his 2018 evaluation.

In January of 2019, Plaintiff was provided an employment contract. On January 7, 2019, he met with Wells-Armstrong and Ellexson to discuss the contract's terms and

he told them that he could not continue the college program, under medical advice that he could document with a note from the doctor. Defendants said they would make accommodations for Plaintiff.

On January 11, 2019, Ellexson told Plaintiff that he did not need to continue to attend school while working in order to maintain his position, and that paragraph 13 containing that requirement was "null and void." Plaintiff continued his employment as Deputy Chief. On January 18, 2019, Plaintiff signed the employment contract.

In February of 2019, Plaintiff's doctor provided a note to Plaintiff, which Plaintiff gave to Defendants, stating that "his continued schooling, while working, would be counterproductive to his health."

On July 18, 2019, a different firefighter sued the City and its employees. Ellexson told Plaintiff not to speak with that firefighter, but Plaintiff could not follow that instruction because he supervised the firefighter. Shortly after the suit was filed, Ellexson "insinuated that Plaintiff had been speaking with the former firefighter who had filed suit and divulged discussions had in private meetings."

On July 31, 2019, the City sent Plaintiff a new proposed employment contract. Contrary to the January 2019 agreement and with full knowledge of health risks Plaintiff would face if going to college and working simultaneously, the new contract required Plaintiff to be enrolled in a college program in order to get his raise. On August 8, 2019, Plaintiff asked Ellexson to remove that language from the contract.

Ellexson refused. On August 19, 2019, Ellexson told Plaintiff that he would be demoted to Captain unless he signed the contract by August 23, 2019. Plaintiff resigned on August 26, 2019, effective August 30, 2019.

2. The Employment Contracts

Defendants attach the January 2019 and the August 2019 contracts to their Memorandum in Support of their Motion to Dismiss. (#8-1, #8-2).

Paragraph 13 of the January 2019 contract states that Plaintiff "must maintain year round enrollment to complete his bachelor of science, or related degree."

Paragraph 10 of the August 2019 contract states: "If the Deputy Fire Chief maintains enrollment in an accredited college program leading to the achievement of a Bachelor's Degree, then the Employer will add a total of 2% ($2024.63) annual salary to Deputy Fire Chief's base sum per annum."

Both contracts state that the base salary is $101,231.80 per year.

3. Legal Claims

Plaintiff's Complaint contains nine counts. Counts I and II are based on federal law, and the other claims are based on state law.

Counts I and II allege violations of the Americans With Disabilities Act (ADA) against the City. Count I alleges the City failed to make reasonable accommodations. Count II alleges the City retaliated against Plaintiff for making requests for accommodation, forcing him to resign.

Counts III and IV allege violations of the Illinois Human Rights Act (IHRA). Count III alleges the City failed to make reasonable accommodations. Count IV alleges the City retaliated against Plaintiff for making requests for accommodation, forcing him to resign.

Count V alleges a violation of the Illinois Whistleblower Act against the City. It alleges that Plaintiff was given a new proposed contract, with language requiring him to attend an accredited program in order to receive a pay increase, about a week after Ellexson accused Plaintiff of providing information from private meetings to a former firefighter—information which later became part of that firefighter's lawsuit against the City. It alleges that Plaintiff was constructively discharged when told he had to go back to college or be demoted.

Count VI alleges common law retaliatory discharge against the City, in that the city constructively discharged him "in retaliation for what it believed were his indirect disclosures to a court proceeding of suspected violations of law."

Count VII alleges intentional infliction of emotional distress against all Defendants. It alleges that "[t]he conduct of Defendant in refusing Plaintiff's reasonable requests for accommodation, subjecting him to disciplinary action, and constructively terminating him was truly extreme and outrageous," intended to inflict severe emotional distress.

Count VIII alleges conspiracy against all Defendants. It alleges that "the individual Defendants reached an agreement amongst themselves to constructively terminate Plaintiff in retaliation for allegedly disclosing information that led to a federal lawsuit, thereby depriving Plaintiff of his rights."

Count IX is an indemnification claim, alleging that the City is liable for any judgment obtained against the individual Defendants.

B. Rule 12(b)(6) Standard

The purpose of a Rule 12(b)(6) motion is to test the sufficiency of the complaint, *not* to decide the merits of the case. See *AnchorBank, FSB v. Hofer*, 649 F. 3d 610, 614 (7th Cir. 2011) (emphasis in original). The complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *Huri v. Office of the Chief Judge of the Circuit Court of Cook Cty.*, 804 F.3d 826, 832 (7th Cir. 2015), quoting Fed. R. Civ. P. 8(a)(2). This requirement is meant to give the defendant fair notice of what the claim is and the grounds upon which it rests. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). When ruling on a motion to dismiss, a court must accept, as true, all factual allegations contained within the complaint. See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

To survive a motion to dismiss, the complaint need only contain sufficient factual allegations to "state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678, quoting *Twombly*, 550 U.S. at 570. However, "[n]either conclusory legal statements nor abstract recitations of the elements of a cause of action add to the notice that Rule 8

demands, so they do not help a complaint survive a Rule 12(b)(6) motion." *Huri*, 804 F.3d at 832, citing *Swanson v. Citibank, N.A.*, 614 F.3d 400, 405 (7th Cir. 2010). A plaintiff must provide factual allegations that are enough to raise the right to relief above the speculative level. *Twombly*, 550 U.S. at 555.

C. Defendants' Motion to Dismiss (#7)

Defendants argue that the Complaint should be dismissed in its entirety because none of the counts state a claim on which relief may be granted.

1. ADA Claims (Counts I and II)

a. Reasonable Accommodation (Count I)

Count I is an ADA claim for failure to make reasonable accommodations.

The ADA makes it unlawful for an employer to discriminate against a "qualified individual on the basis of disability." 42 U.S.C. § 12112(a). A "qualified individual with a disability" is a person who, "with or without reasonable accommodation, can perform the essential functions of the employment position."

Plaintiffs may allege employment discrimination claims "quite generally." *Tamayo v. Blagojevich*, 526 F.3d 1074, 1081 (7th Cir. 2008). "[I]n order to prevent dismissal under Rule 12(b)(6), a complaint alleging [employment] discrimination need only aver that the employer instituted a (specified) adverse employment action against the plaintiff on the basis of" the plaintiff's protected status. *Id.*

For the purposes of the Motion to Dismiss, it is assumed Plaintiff was disabled and otherwise qualified for his position. The adverse employment action element is contested.

Plaintiff argues that he requested a reasonable accommodation when he asked Ellexson to remove language from the August 2019 contract requiring him to be enrolled in a college program in order to get a raise. He argues that the denial of the raise was an adverse employment action. Defendants argue that the ADA counts fail to state a claim because Plaintiff did not request a reasonable accommodation and he did not suffer an adverse employment action. Defendants argue that the request was for a bonus, which is not a reasonable accommodation, and the denial of which is not an adverse employment action.

This issue turns on whether the contract language concerned a raise, or a bonus. The Seventh Circuit discussed the distinction in *Fyfe v. City of Fort Wayne*, 241 F.3d 597, 602 (7th Cir. 2001):

> Not every unwelcome employment action qualifies as an adverse action; rather, it must cause a materially adverse change in the terms and conditions of employment, "more disruptive than a mere inconvenience or an alteration of job responsibilities." *Rabinovitz v. Pena*, 89 F.3d 482, 488 (7th Cir.1996) (quoting *Crady v. Liberty Nat'l Bank & Trust Co. of Ind.*, 993 F.2d 132, 136 (7th Cir.1993)). Under this standard, we have held that the denial of a raise constitutes a sufficiently material adverse action, *Hunt v. City of Markham, Illinois*, 219 F.3d 649, 654 (7th Cir. 2000), but that the denial of a bonus does not. *Rabinovitz*, 89 F.3d at 488–89. The difference is that raises are a normal and expected element of an employee's salary, while bonuses generally are "sporadic, irregular, unpredictable, and wholly discretionary on the part of the employer." *Hunt*, 219 F.3d at 654.

> Employees therefore act in reliance upon the expectation of receiving a raise and suffer more deeply when it is denied. *Id.*

The court finds that, at this early stage, Plaintiff has sufficiently alleged that the refusal to remove the contract language at issue denied him a raise, rather than a bonus. The language at issue is: "If the Deputy Fire Chief maintains enrollment in an accredited college program leading to the achievement of a Bachelor's Degree, then the Employer will add a total of 2% ($2024.63) annual salary to Deputy Fire Chief's base sum per annum." Without that 2% increase, Plaintiff's salary remained the same as it was in his prior contract.

Because Plaintiff alleges the denial of a raise, his ADA claim in Count I is sufficiently pled to survive the Motion to Dismiss stage. The Motion to Dismiss is DENIED as to Count I.

b. Retaliation (Count II)

Count II is an ADA retaliation claim.

The ADA prohibits discrimination against those who oppose any act of disability discrimination. 42 U.S.C. § 12203(a). A retaliation claim requires "allegations of a causal link between the adverse employment action and the protected activity." *Prince v. Ill. Dept. of Rev.*, 73 F. Supp. 3d 889, 894 (N.D. Ill. 2010).

Plaintiff alleges the City retaliated against him for making requests for accommodation, forcing him to resign. Defendants argue that the retaliation claim must be dismissed because the denial of a bonus is not an adverse employment action, and because Plaintiff voluntarily resigned his job.

As discussed above, Plaintiff has pled that he was denied a raise. To the extent that Count II concerns a claim for retaliation based on the denial of a raise, Defendants' Motion to Dismiss is DENIED.

Whether Plaintiff has stated a retaliation claim for constructive discharge requires further analysis. "An employee is constructively discharged when, from the standpoint of a reasonable employee, the working conditions become unbearable." *Wright v. Ill. Dept. of Children and Family Services*, 798 F.3d 513, 527 (7th Cir. 2015).

In *Wright*, an ADA case, the Seventh Circuit described the two forms of constructive discharge as follows:

> In the first form, an employee resigns due to alleged discriminatory harassment. Such cases require a plaintiff to show working conditions even more egregious than that required for a hostile work environment claim because employees are generally expected to remain employed while seeking redress, thereby allowing an employer to address a situation before it causes the employee to quit.
>
> The second form of constructive discharge occurs when an employer acts in a manner so as to have communicated to a reasonable employee that she will be terminated.

Id. (internal quotations and citations omitted).

In his Response, Plaintiff argues that he has properly pled constructive discharge and that cases finding otherwise are distinguishable because the plaintiffs in those cases were never asked to put their lives in jeopardy in order to maintain their current positions.

The problem for Plaintiff is that under the facts he alleged in his Complaint, he was not asked to put his life in jeopardy to maintain his position, either. Nor was he told he would be fired. He was offered a contract making the same $101,231.80 annual salary that he had been making previously, working in the same position, and with no requirement that he attend a college program that he alleges would have endangered his health. He was told he would get a 2% salary increase if he was enrolled in a college program, which is different from being told he would be fired if he did not stay enrolled in college program.

The Complaint alleges that Ellexson told Plaintiff that he would be demoted to Captain unless he signed the contract by August 23, 2019. This allegation does not help state a constructive discharge claim, because that comment is not a threat that Plaintiff would be fired. Nothing in that comment forced Plaintiff to either risk his health or resign. Without attending a college program, he could maintain his same job at his same salary if he signed the contract. Or, he could refuse to sign the contract and be demoted to Captain. Either way, there is no suggestion that he needed to enroll in college thereby risking his health, or else he would be fired.

The Complaint fails to state a claim for constructive discharge. It fails to allege either form of such a claim, as Plaintiff cannot show working conditions even more egregious than that required for a hostile work environment claim, nor did Defendants act in such a manner so as to have communicated to a reasonable employee that he will be terminated. See *Wright*, 798 F.3d at 527. To the extent that Count II concerns a claim for constructive discharge, Defendants' Motion to Dismiss is GRANTED.

2. IHRA Claims (Counts III and IV)

Counts III and IV allege IHRA violations analogous to the ADA violations in Counts I and II.

"Like the ADA, the IHRA prohibits employment discrimination based on a person's disability." *Suvada v. Gordon Flesch Co., Inc.*, 2013 WL 5166213, at *11 (N.D. Ill. Sept. 13, 2013), citing 775 Ill. Comp. Stat. 5/2–102(A). The same standards apply in evaluating an ADA claim and an IHRA claim. *Id.*

Defendants argue that the IHRA counts fail to state a claim in the same way as the ADA claims while Plaintiff responds that the IHRA counts state a claim in the same way as the ADA claims.

The outcome of the Motion to Dismiss is the same for the ADA and the IHRA counts. The Motion to Dismiss is DENIED as to Count III, which states a claim that Plaintiff was denied a raise because of his disability. The Motion is also DENIED as to

Count IV insofar as it alleges Plaintiff was denied a raise for requesting a reasonable accommodation. The Motion is GRANTED as to Count IV insofar as it alleges constructive discharge.

3. Illinois Whistleblower Act Claim (Count V)

In Count V, Plaintiff claims Defendants are liable under the Illinois Whistleblower Act, 740 Ill. Comp. Stat. 174/1 *et seq.* (IWA).

"Under the IWA, an employer may not retaliate against an employee: who discloses certain information to a court, government agency, or law enforcement agency; for refusing to participate in certain illegal activities; or with an act materially adverse to a reasonable employee because the employee disclosed public corruption." *Spratt v. Bellwood Public Library*, 380 F. Supp. 3d 783, 788 (N.D. Ill. 2019), citing 740 Ill. Comp. Stat. 174/15, 740 Ill. Comp. Stat. 174/20, 740 Ill. Comp. Stat. 174/20.1. The Complaint purports to state a claim under two provisions of the Act, Section 174/15 and Section 174/20.

The language of 740 Ill. Comp. Stat. 174/15 prohibits an employer from retaliating "against an employee who discloses information in a court, an administrative hearing, or before a legislative commission or committee, or in any other proceeding, where the employee has reasonable cause to believe that the information discloses a violation of a State or federal law, rule, or regulation."

Further, 740 Ill. Comp. Stat. 174/20 prohibits an employer from retaliating "against an employee for refusing to participate in an activity that would result in a violation of a State or federal law, rule, or regulation, including, but not limited to, violations of the Freedom of Information Act."

Defendants argue that the IWA count fails to state a claim because Plaintiff did not experience any retaliatory action, he does not allege that he disclosed any information, and he offers only labels and conclusions as to whether there was any public corruption or wrongdoing.

Plaintiff responds that "[h]is act of having provided information, regarding Defendant's violation of the law, to a litigant to assist in her case against the Defendants is sufficient" to state a Whistleblower Act claim. He points to the Complaint's allegations that on July 18, 2019, a different firefighter sued the City and its employees. Ellexson told Plaintiff not to speak with that firefighter, but Plaintiff could not follow that instruction because he supervised the firefighter. Shortly after the suit was filed, Ellexson "insinuated that Plaintiff had been speaking with the former firefighter who had filed suit and divulged discussions had in private meetings." Information discussed in the meetings later became part of the other firefighter's lawsuit. Then, on July 31, 2019, the City sent Plaintiff the contract requiring him to be enrolled in a college program in order to get a raise. In August, he was told to sign the contract or be

demoted. The Complaint alleges that "Defendants terminated Plaintiff[ ] in retaliation for disclosing suspected violations of law, public corruption and wrongdoing in a manner that would lead to a court proceeding."

The Complaint does not actually allege that Plaintiff disclosed any information to a court, government agency, law enforcement agency, or *anyone*. It alleges that he could not follow instructions not to speak with a firefighter who had filed suit because he supervised her, and that Ellexson "insinuated" that Plaintiff had spoken with the firefighter about "discussions had in private meetings." It does not state that Plaintiff actually did disclose those discussions, or what was discussed in the private meetings.

Plaintiff's allegations about insinuations or accusations of disclosing private discussions to a coworker who later incorporated information into a lawsuit fall short of stating an IWA claim. See *Beasley v. City of Granite City*, 442 F. Supp. 3d 1066, 1072-73 (S.D. Ill. 2020) ("Despite Plaintiff's argument that the information she provided was eventually transmitted to the state court, third-party 'disclosure' is not the type of behavior that the IWA seeks to protect."); *Bello v. Village of Skokie*, 151 F. Supp. 3d 849, 865 (N.D. Ill. 2015) ("[T]he employee must do more than merely voice his suspicion of unlawful conduct—he must actually report the suspected violation of state or federal law to authorities.").

The Motion to Dismiss is GRANTED as to Count V.

4. Retaliatory Discharge (Count VI)

Count VI alleges retaliatory discharge. Defendants argue that this count fails to state a claim because Plaintiff was not discharged. The tort of retaliatory discharge does not include "constructive discharge" cases. *Hartlein v. Illinois Power Co.*, 601 N.E.2d 720, 730 (1992). Plaintiff concedes this point. The Motion to Dismiss is GRANTED as to Count VI.

5. Intentional Infliction of Emotional Distress (Count VII)

Count VII is an Intentional Infliction of Emotional Distress (IIED) claim.

Defendants argue that Count VII fails to allege sufficiently extreme and outrageous conduct to state an IIED claim. Plaintiff argues the Complaint's allegations are sufficient.

The elements of IIED are "(1) extreme and outrageous conduct, (2) intent by the defendant to cause emotional distress, and (3) severe or extreme emotional distress on the part of the plaintiff due to the defendant's conduct." *Saunders v. City of Chicago*, 299 F. Supp. 2d 869, 872 (N.D. Ill. 2004).

To determine whether the alleged conduct is sufficiently extreme and outrageous, Illinois courts apply an objective standard, inquiring whether "the distress inflicted is so severe that no reasonable man could be expected to endure it." *McKay v. Town and Country Cadillac, Inc.*, 991 F. Supp. 966, 972 (N.D. Ill. 1997) (internal quotations and citations omitted). The conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency." *Id.* (internal

quotations and citations omitted). "In the workplace setting, courts have found that terminating an employee in violation of an anti-discriminatory statute, or harshly criticizing or insulting an employee, is not enough to constitute extreme and outrageous conduct." *McKay*, 991 F. Supp. at 972.

The Complaint alleges that Defendants' "refusing Plaintiff's reasonable requests for accommodation, subjecting him to disciplinary action, and constructively terminating him was truly extreme and outrageous." It further alleges that the conduct was intentional and that it "in fact caused severe emotional distress, in that Plaintiff was forced to seek retirement."

The facts as alleged do not show Plaintiff was constructively terminated, forced to seek retirement, or even disciplined at all. Instead, the Complaint alleges that enrolling in college while working posed health risks to Plaintiff, and that under the job contract at issue, Plaintiff could keep his same position making his same salary without enrolling in a college program, or he would get a 2% raise if he did enroll in a college program. He signed the contract then retired. While these allegations state a discrimination claim and can be expected to have caused some distress to plaintiff, the facts as alleged fail to cross into the extreme and outrageous category required to allege an IIED claim. See *McKay*, 991 F. Supp. at 972.

The Motion to Dismiss is GRANTED as to Count VII.

6. Conspiracy (Count VIII)

Count VIII alleges a conspiracy claim.

Defendants argue that the "claim falls away once the other claims are dismissed and there is thus no unlawful object for a conspiracy" and that the claim's "conclusory allegations of conspiracy, devoid of any specific acts, do not satisfy *Iqbal*." Plaintiff again argues his allegations are sufficient.

> Although conspiracy is not something that Rule 9(b) of the Federal Rules of Civil Procedure requires be proved with particularity, and so a plain and short statement will do [citations], it differs from other claims in having a degree of vagueness that makes a bare claim of "conspiracy" wholly uninformative to the defendant. Federal pleading entitles a defendant to notice of the plaintiff's claim so that he can prepare responsive pleadings. [citations]. That is why courts require the plaintiff to allege the parties, the general purpose, and the approximate date of the conspiracy.

Loubser v. Thacker, 440 F. 3d 439, 442-43 (7th Cir. 2006).

Above, the court did not dismiss all of the other claims, so the Court will analyze the sufficiency of Count VIII. Count VIII alleges the individual Defendants "reached an agreement amongst themselves to constructively terminate Plaintiff in retaliation for allegedly disclosing information that led to a federal lawsuit," thereby conspiring "to accomplish an unlawful purpose by unlawful means."

Plaintiff argues that he sufficiently alleges the parties ("the individual Defendants"), the purpose of the conspiracy ("to constructively terminate Plaintiff in retaliation for allegedly disclosing information that led to a federal lawsuit"), and the date of the conspiracy (quoting Complaint paragraphs containing July 2019 and August

2019 dates). But, there are only two individual defendants in this case, Wells-Armstrong and Ellexson. None of the July 2019 and August 2019 allegations concern Wells-Armstrong. Nor do they concern a constructive discharge. Count VIII fails to provide factual allegations that are enough to raise the right to relief above the speculative level. See *Twombly*, 550 U.S. at 555.

The Motion to Dismiss is GRANTED as to Count VIII.

7. Indemnification (Count IX)

Defendants argue that the indemnification count fails to state a claim after the other counts are dismissed, because it is derivative of the other counts. Because the court has not dismissed all of the other counts, the court will not dismiss Count IX. The Motion to Dismiss is DENIED as to Count IX.

IT IS THEREFORE ORDERED THAT:

(1) Defendant's Motion to Dismiss (#7) is GRANTED in part and DENIED in part. The Motion to Dismiss is DENIED as to Count I. To the extent that Count II concerns a claim for retaliation based on the denial of a raise, the Motion is DENIED. To the extent that Count II concerns a claim for constructive discharge, it is GRANTED. The Motion is DENIED as to Count III. The Motion is DENIED as to Count IV insofar as it alleges Plaintiff was denied a raise for requesting a reasonable accommodation. The Motion is GRANTED as to Count IV insofar as it alleges constructive discharge. The Motion is GRANTED as to Counts V, VI, VII, and VIII. It is DENIED as to Count IX.

(2) This case is referred to Magistrate Judge Eric I. Long for further proceedings in accordance with this order.

ENTERED this 26th day of October, 2020.

s/Colin S. Bruce
U.S. DISTRICT JUDGE