

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 00-3893

WILLIAM SILVERSTEIN,)
Plaintiff)
)
v.)
)
MICROSYSTEMS SOFTWARE, INC.,)
THE LEARNING COMPANY, INC.,)
and MATTEL, INC.,)
Defendants)

SECOND AMENDED COMPLAINT
Jury Trial Demanded

As directed by Judge Zobel and assented to by the defendants' counsel at the December 6, 2000 status conference on this matter, the plaintiff hereby amends his Complaint. His complaint is therefore amended to read as follows:

Introduction

1. This is a suit arising from the defendants' misuse of legal process and other harassment of the plaintiff, all in retaliation for his having exercised protected rights in complaining of violations of his rights publicly and through administrative and judicial proceedings and encouraging others to exercise their rights as well.

Parties

2. The plaintiff, William Silverstein, is a natural person residing at #####1, Austin, Travis County, Texas.

3. On information and belief, defendant Microsystems Software, Inc (“MSI”) is a Massachusetts corporation, with a usual place of business at 1900 West Park Drive, Suite 180, Westborough, MA 01581.

4. At all times relevant to this lawsuit, defendant MSI has been subject to the requirements and prohibitions of the Family and Medical Leave Act (“FMLA”), 29

U.S.C. § 2601, et seq., the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12101 et seq., and Massachusetts law in its treatment of the plaintiff.

5. On information and belief, defendant The Learning Company, Inc (“TLC”) is a Delaware corporation, with a usual place of business in Cambridge, Massachusetts.

6. At all times relevant to this lawsuit, defendant TLC has been subject to the requirements and prohibitions of the FMLA, the ADA, and Massachusetts law, in its treatment of the plaintiff.

7. Upon information and belief, TLC acquired all of the stock of MSI subsequent to the plaintiff's firing by MSI and prior to September of 1998, and took direct control of the operation of MSI's business, moving its employees and operations into its own division, TLC Multimedia.

8. On information and belief, by its actions defendant TLC became a successor in interest to defendant MSI within the meaning of §2611 of Title 29 and §12111 of Title 42 of the United States Code, and under Massachusetts law.

9. Upon information and belief, defendant Mattel, Inc. (“Mattel”) is a Delaware corporation with its world headquarters and principal place of business in El Segundo, California, which is registered to do business in the Commonwealth of Massachusetts.

10. At all times relevant to this lawsuit, defendant Mattel has been subject to the requirements and prohibitions of the FMLA and the ADA and Massachusetts law in its treatment of the plaintiff.

11. Upon information and belief, Mattel acquired the stock of TLC and merged TLC's operations into its own subsequent to September of 1998 and prior to August 31, 1999.

12. On information and belief, by its actions defendant Mattel became a successor in interest to defendants MSI and TLC within the meaning of §2611 of Title 29 and §12111 of Title 42 of the United States Code, and under Massachusetts law.

13. Mattel, MSI and TLC are represented by the same counsel with respect to the handling of litigation against the plaintiff, and, on information and belief, Mattel directs all three parties' handling of litigation against the plaintiff.

Facts

14. The plaintiff filed suit in this Court in September of 1998 complaining of being fired by MSI and subsequently denied employment by MSI and TLC due to his having taken time off for treatment of a job-related disability (“the previous lawsuit”).

15. The plaintiff chronicled the complaints that underlay his lawsuit, and the lawsuit itself, on a world wide web site through which he tells the story of his case and encourages others to stand up for their own rights.

16. In the previous lawsuit, MSI and TLC filed a counterclaim for libel against the plaintiff about the opinions expressed on his world wide web site.

17. In litigating that counterclaim, the defendants pointed to no harm they had sustained as a result of the plaintiff's publication of his opinions.

18. After engaging in discovery in the previous lawsuit, the defendants on August 31, 1999 served a Rule 68 Offer of Judgment in that case, offering to allow the plaintiff to take “judgment in the case” against all defendants, which the plaintiff accepted on September 1, 1999.

19. On September 13, 1999, Middlesex Superior Court entered judgment in the previous case “against the defendants in the above-captioned case in favor of the plaintiff.”

20. After notice was given by the Court of the September 13, 1999 entry of judgment in the previous case, the plaintiff made several requests to MSI and the TLC division of Mattel that they agree that their outstanding discovery requests need not be responded to, as the September 13, 1999 judgment had concluded that lawsuit.

21. On September 17, 1999, the plaintiff notified the MCAD of the resolution of the charge he had brought which had led to the original lawsuit—and upon which judgment had just been entered—directing it to close its file on the charge under § 9 of chapter 151B.

22. On September 20, 1999 MSI and the TLC division of Mattel responded to the plaintiff's requests for agreement that the previous case was over by sending a draft settlement agreement with respect to the libel counterclaim that required the plaintiff to agree to confidentiality in exchange for the counterclaim's being dismissed with prejudice.

23. The demanded confidentiality agreement—if it had been agreed to—would have prohibited the plaintiff from voluntarily speaking about his case, his

employment by MSI, and the employment practices of MSI, TLC or Mattel, punishable by a penalty of \$50,000 per violation. (See Exhibit 1 hereto, the defendants' proposed settlement agreement.)

24. On September 21, 1999 the counsel that represented the defendants at the time sent a letter to plaintiff's counsel saying that the defendants wanted the "penalty" provision to restrain the plaintiff, noting that the plaintiff believed what he was saying, and also listed which of their outstanding discovery requests they still wanted answered. (See Exhibit 2 hereto.)

25. Mattel has controlled the conduct of litigation against the plaintiff by MSI and TLC at least since the making of the Offer of Judgment.

26. Mattel has itself filed abusive lawsuits to silence others—sometimes obtaining surrender from parties unable to pay the cost of defending the suits.

27. On September 27, 1999, the plaintiff filed a charge of retaliation under chapter 151B with the Massachusetts Commission Against Discrimination about the defendants' demand that the plaintiff agree to silence as the price of their dismissal of the libel counterclaim.

28. On or about October 4, 1999, the plaintiff served a motion for summary judgment against the libel counterclaim in the prior lawsuit.

29. At hearing on the plaintiff's motion for summary judgment in January of 2000, when the judge asked MSI and the TLC division of Mattel what the plaintiff had published that was defamatory, the counsel that represented them at the time began by quoting a statement on the plaintiff's web site that he had been fired when

he went to the hospital for medical treatment, but then announced the defendants' intention to dismiss the libel counterclaim to let the parties "get on with their lives."

30. MSI and the TLC division of Mattel were subsequently permitted to dismiss their libel counterclaim "without prejudice" over the objection of the plaintiff to the dismissal's not being "with prejudice."

31. The plaintiff has appealed the propriety of the "without prejudice" nature of the dismissal, and the accompanying refusal of the Superior Court to rule on the summary judgment motion.

32. The plaintiff removed his September 1999 charge from the MCAD prior to public hearing by filing in court in August of 2000 while the charge was still pending before the MCAD.

33. On November 6, 2000, subsequent to the plaintiff's prior Amended Complaint, the defendants made a request for sanctions against the plaintiff before the Massachusetts Commission Against Discrimination ("MCAD"), saying that it was improper for the plaintiff to have filed—and amended—this lawsuit in Middlesex Superior Court without leave from the MCAD, despite the plaintiff's having waited well over the 90 days required by § 9 of chapter 151B by filing in court approximately eleven months after he had filed with the MCAD.

34. In addition, on information and belief, the defendants have engaged in other retaliatory conduct by encouraging or permitting their employees to defame the plaintiff in online forums and to urge others in those forums to shun him.

Damages

35. The plaintiff has sustained and continues to sustain harm including emotional stress, physical stress, lost salary, travel expenses, research expenses, and legal expenses in dealing with the libel counterclaim and the defendants' other retaliatory actions.

Count I
Workers Compensation - Retaliation
Massachusetts General Laws Chapter 152, § 75B

36. The facts set forth above are hereby incorporated in full with the same force and effect as if they had been individually realleged herein.

37. The plaintiff brought a claim for benefits against MSI under c.152 that was resolved by a lump-sum settlement signed by MSI's Chief Executive Officer, Richard Gorgens.

38. As set forth above, the plaintiff complained in his previous lawsuit and publicly on his website that MSI and TLC had violated chapter 152 of the General Laws.

39. (a) MSI's and TLC's filing of the libel counterclaim in the previous lawsuit, (b) MSI's, TLC's and Mattel's demand, after the entry of the Rule 68 Judgment in the previous lawsuit, that the plaintiff agree to silence about his case in exchange for their agreeing to dismiss the libel counterclaim with prejudice, (c) MSI's, TLC's and Mattel's seeking sanctions before the MCAD for the plaintiff's having filed this lawsuit, and (d) their other retaliatory conduct set forth in paragraph 34 above, constituted discriminatory acts of retaliation against the plaintiff because he had exercised a right afforded by chapter 152 of the General Laws, in violation of § 75B(2) of chapter 152.

Count II
Retaliation
Massachusetts General Laws Chapter 151B § 4

40. The facts set forth above are hereby incorporated in full with the same force and effect as if they had been individually realleged herein.

41. As set forth above, the plaintiff brought a claim under chapter 151B of the General Laws alleging discrimination and retaliation against MSI and TLC over his firing and their refusal to re-employ him.

42. As set forth above, the plaintiff complained in his previous lawsuit and publicly on his website that MSI and TLC had violated chapter 151B of the General Laws.

43. (a) MSI's and TLC's filing of the libel counterclaim in the previous lawsuit, (b) MSI's, TLC's and Mattel's demand, after the entry of the Rule 68 Judgment in the previous lawsuit, that the plaintiff agree to silence about his case in exchange for their agreeing to dismiss the libel counterclaim with prejudice, (c) MSI's, TLC's and Mattel's seeking sanctions before the MCAD for the plaintiff's having filed this lawsuit, and (d) their other retaliatory conduct set forth in paragraph 34 above, constituted discriminatory acts of retaliation against the plaintiff because he had exercised rights afforded by chapter 151B of the General Laws, in violation of § 4 of chapter 151B.

Count III
Retaliation
Family and Medical Leave Act - 29 U.S.C. § 2601 et seq.

44. The facts set forth above are hereby incorporated in full with the same force and effect as if they had been individually realleged herein.

45. As set forth above, the plaintiff complained in his previous lawsuit and publicly on his website that MSI and TLC had violated the Family and Medical Leave Act.

46. (a) MSI's and TLC's filing of the libel counterclaim in the previous lawsuit, (b) MSI's, TLC's and Mattel's demand, after the entry of the Rule 68 Judgment in the previous lawsuit, that the plaintiff agree to silence about his case in exchange for their agreeing to dismiss the libel counterclaim with prejudice, (c) MSI's, TLC's and Mattel's seeking sanctions before the MCAD for the plaintiff's having filed this lawsuit, and (d) their other retaliatory conduct set forth in paragraph 34 above, constituted discriminatory acts of retaliation against the plaintiff because he had exercised rights protected by the FMLA, set forth a cause of action under § 2617 of Title 29 of the United States Code for intentional violation of § 2615(b) of Title 29 of the United States Code by MSI and the TLC division of Mattel.

47. This Court has jurisdiction to hear these claims under the provisions of § 2617 of Title 29 of the United States Code.

Count IV
Retaliation
American with Disabilities Act - 42 U.S.C. § 12101 et seq.

48. The facts set forth above are hereby incorporated in full with the same force and effect as if they had been individually realleged herein.

49. As set forth above, the plaintiff brought a claim in his prior lawsuit under chapter 151B of the General Laws.

50. The provisions of chapter 151B and the Americans with Disabilities Act, in connection with the employments each of those laws covers, regulate and protect the same sorts of conduct.

51. As set forth above, the plaintiff complained in his previous lawsuit and publicly on his website that MSI and TLC had violated the Americans with Disabilities Act.

52. (a) MSI's and TLC's filing of the libel counterclaim in the previous lawsuit, (b) MSI's, TLC's and Mattel's demand, after the entry of the Rule 68 Judgment in the previous lawsuit, that the plaintiff agree to silence about his case in exchange for their agreeing to dismiss the libel counterclaim with prejudice, (c) MSI's, TLC's and Mattel's seeking sanctions before the MCAD for the plaintiff's having filed this lawsuit, and (d) their other retaliatory conduct set forth in paragraph 34 above, constituted discriminatory acts of retaliation against the plaintiff because he had exercised rights protected by the Americans with Disabilities Act, set forth a cause of action under § 12117 of Title 42 of the United States Code for intentional violation of § 12203(b) of Title 42 by MSI, TLC, and Mattel.

53. Silverstein filed charges with the Massachusetts Commission Against Discrimination and the Equal Employment Opportunity Commission ("EEOC") about the conduct of the defendants with respect to the libel counterclaim.

54. The EEOC issued Silverstein a "Right to Sue" letter on May 24, 2000.

Count V
Abuse of Process

55. The facts set forth above are hereby incorporated in full with the same force and effect as if they had been individually realleged herein.

56. As set forth above, the plaintiff complained in his previous lawsuit and publicly on his website that MSI and TLC had violated his legal rights.

57. As set forth above, (a) MSI and TLC filed a libel counterclaim in the previous lawsuit and (b) MSI, TLC and Mattel demanded after the entry of the Rule 68 Judgment in the previous lawsuit that the plaintiff agree to silence about his case in exchange for their agreeing to dismiss the libel counterclaim with prejudice.

58. *Near v. Minnesota*, 283 U.S. 697 (1931), limits defamation actions to the provision of compensatory damages, and declares “prior restraint” against the publishing of defamation to be unconstitutional.

59. The defendants' use of a libel claim for the declared purpose of obtaining the plaintiff's silence was the use of legal process to seek a form of relief for which it is not designed.

60. The defendants' use of legal process to seek relief for which such process is not designed constituted abuse of process under Massachusetts law.

Count VI
Negligent or Intentional Infliction of Physical and Emotional Distress

61. The facts set forth above are hereby incorporated in full with the same force and effect as if they had been individually realleged herein.

62. As set forth above, the plaintiff complained in his previous lawsuit and publicly on his website that MSI and TLC had violated his legal rights.

63. (a) MSI's and TLC's filing of the libel counterclaim in the previous lawsuit, (b) MSI's, TLC's and Mattel's demand, after the entry of the Rule 68 Judgment in the previous lawsuit, that the plaintiff agree to silence about his case in exchange for their agreeing to dismiss the libel counterclaim with prejudice, (c) MSI's, TLC's and

Mattel's seeking sanctions before the MCAD for the plaintiff's having filed this lawsuit, and (d) their other retaliatory conduct set forth in paragraph 34 above, foreseeably inflicted physical stress and emotional harm upon the plaintiff.

64. The defendants' conduct exceeded any legal privilege, and thus constituted the negligent or intentional infliction of physical and emotional distress under Massachusetts law.

Nonremovability

65. Under the express terms of § 1445(c) of Title 28 of the United States Code, Count I of this Complaint is not removable to federal court as it arises under Massachusetts' Workers Compensation law, chapter 152 of the General Laws.

66. Counts II through VI of this Complaint embody the same cause of action set forth in Count I of this Complaint.

67. As the other counts embody the same cause of action as Count I, Count I is not "separate and independent" from the other counts, under § 1441(c) of Title 28 of the United States Code. Therefore, not only may this case not be removed to federal court with Count I, none of the counts may be severed from Count I and retained in federal court while remanding Count I under § 1441(c).

Prayers for Relief

WHEREFORE, the plaintiff prays that this Court advance this case in every way on the docket and grant a speedy trial and, as a result of said trial, he prays and demands that he be awarded his greatest total available recovery after determination of his rights to each of the following, under any of the counts in this complaint, against each defendant jointly and severally, whether due to its own wrongful acts or

as a successor in interest to a party that acted wrongfully:

(1) His actual damages as a result of the bringing and continuing of the libel counterclaim, including but not limited to all expenses he has or will incur litigating that counterclaim, including attorneys fees and costs, travel to Massachusetts in that connection, lost income for time spent in that connection, and compensation for the ordinary and usual emotional distress and physical stress occasioned by having to defend against that claim;

(2) Punitive damages;

(3) Reasonable attorney's fees and costs for the prosecution of this action;
and

(4) Any and all other relief that the Court deems just and appropriate.

Jury Demand

The plaintiff demands a trial by jury on all issues herein which may be tried by right of jury and an advisory jury on all factual issues material to claims not triable by right by a jury, pursuant to Massachusetts Rule of Civil Procedure 39(c).

Respectfully submitted,

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