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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

WENDY GOERING, Plaintiff, v. IBP, INC.; MIKE GROETHE, Plant Manager; ALBERTO OLGUIN, Human Resources Manager; and JULIO SOTO, Assistant Human Resources Manager, Defendants.	*	NO. 4-00-CV-90240 MEMORANDUM OPINION, RULING PARTIALLY GRANTING AND PARTIALLY DENYING MOTION TO DISMISS, AND ORDER DISMISSING WITH PREJUDICE SOME OF PLAINTIFF'S CLAIMS

Plaintiff filed an eleven-count petition in the Iowa District Court for Dallas County relating to her employment with defendant IBP, Inc. Defendants removed the case to this court, pursuant to 28 U.S.C. § 1441(c), and now move to dismiss nine of the counts, pursuant to Federal Rule of Civil Procedure 12(b)(6).

I. STANDARD OF REVIEW

On review of a motion to dismiss, the allegations of the complaint must be taken as true. *See Cruz v. Beto*, 405 U.S. 319, 322 (1972). "A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The allegations in the complaint must be viewed in the light most favorable to the nonmoving party, giving her the benefit of all reasonable inferences. *See Knapp v. Hanson*, 183 F.3d 786, 788 (8th Cir. 1999).

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II. FACTS

The following allegations are considered facts for purposes of this motion, and are found in the complaint. Plaintiff began employment with IBP in December, 1997. In October, 1998, she learned she was pregnant and told her supervisor, defendant Alberto Olguin. Almost immediately following the announcement of her pregnancy, her immediate supervisor, defendant Julio Soto, began to question her about her work, demanded explanations every time she left her desk, informed her that she was going to the bathroom too often, and told her she would have to obtain a doctor's excuse because of the frequency of her bathroom visits. Soto did not behave toward any other employee in this manner. Later in October, 1998, she complained to Olguin about Soto's behavior, but Olguin took no action. She then complained to the plant manager, defendant Mike Groethe, about Soto's behavior and Olguin's inaction, but Groethe took no action. In November, 1998, plaintiff called IBP to report that she was sick and could not work; she returned to work three days later with a heart monitor and a doctor's excuse and permission to return to work. Later that same month, Groethe called plaintiff into his office and recommended she take a leave of absence rather than jeopardize her job, but plaintiff refused. Later in November, 1998, plaintiff called IBP to report she was sick and would not be at work; she returned to work two days later. Later that same month, after a meeting with Soto, Olguin, and Groethe, plaintiff was placed on ninety days probation, from December 9, 1998, to February 9, 1999, for absenteeism. In December, 1998, Soto gave plaintiff a poor work evaluation. Later in December, 1998, plaintiff found Soto searching through her desk; she later discovered her personal diary missing, which contained a log of Soto's conduct toward her. On January 18, 1999, plaintiff left her desk to

obtain some Tylenol; when she returned, Soto and Mike Miller[1] informed her that she had taken an unauthorized break and would be suspended for two days. On January 19, 1999, plaintiff returned to work, but Soto and Miller fired her, explaining that she had taken an unauthorized break while on probation.

III. COUNTS III AND IV

Defendants move to dismiss counts III and IV, which allege discrimination and retaliation in violation of Iowa Code § 216, arguing that plaintiff failed to timely file her complaint after receipt of her right-to-sue letter from the Iowa Civil Rights Commission. Plaintiff concedes that her complaint was untimely under *Saemisch v. Ley Motor Co.*, 387 N.W.2d 357, 359 (Iowa 1986). The motion will be granted as to counts III and IV.

IV. COUNT V

Defendants move to dismiss count V, which alleges a private conspiracy under 42 U.S.C. § 1985(3), contending that the statute does not protect the alleged deprivation.[2] It is clear that § 1985(3) is not limited to conspiracies involving state action, but also reaches purely private conspiracies. *Griffin v. Breckenridge*, 403 U.S. 88, 101 (1971). That reach, however, only grasps private conspiracies that are "'aimed at interfering with rights...protected against private, as well as official encroachment,'" not those private conspiracies "'aimed at a right that is by definition a right only against state interference.'" *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 278 (1993) (quoting *United Bhd. of Carpenters, Local 610 v. Scott*, 463 U.S. 825, 833 (1983)).

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[1]The complaint and briefs do not indicate Miller's position with IBP during this time.

[2]This court construes plaintiff's complaint as invoking only the deprivation clause of § 1985(3).

The Court has only explicitly recognized two constitutional rights that the statute protects from private conspiracies: the Thirteenth Amendment's right to be free from involuntary servitude, and the Thirteenth Amendment's right of interstate travel. *Id.* Reading plaintiff's complaint in a light most favorable to her, this Court cannot conceive of any facts that would implicate these two constitutional rights. *See D.W. v. Radisson Plaza Hotel*, 958 F. Supp. 1368, 1376-77 (D. Minn. 1997).

Plaintiff relies on three Eighth Circuit cases in support of her argument that § 1985(3) protects rights contained in the First, Fourth, and Fourteenth Amendments from private conspiracies. The first case is *Lewis v. Pearson Foundation, Inc.*, 908 F.2d 318 (8th Cir. 1990). Whatever that case may stand for is of no moment because it was vacated when rehearing en banc was granted, *id.* at 328, and on rehearing an equally divided court affirmed the district court's dismissal of the case. *Lewis v. Pearson Found., Inc.*, 917 F.2d 1077 (8th Cir. 1990).

Plaintiff's second case is *United States v. Bledsoe*, 728 F.2d 1094 (8th Cir. 1984). That case is inapposite because the statute at issue was 18 U.S.C. § 245, not § 1985(3), and the court specifically noted that "[t]he statute at issue in this case is fundamentally different from section 1985(3) in that the statute [§ 245] itself clearly creates a substantive right." *Id.* at 1097.

Plaintiff's third and best case is *Action v. Gannon*, 450 F.2d 1227 (8th Cir. 1971) (en banc). It is, however, factually distinguishable from the case at bar. There, the court found, with some trepidation, *id.* at 1235, that § 5 of the Fourteenth Amendment gave Congress the power to protect the First Amendment's rights of freedom of assembly and worship from private conspiracies, and that Congress did so in § 1985(3). *Id.* at 1232-35. The court, however, addressed the § 1985(3) issue in the context of the rights of assembly and worship in a church

setting, and where the defendants' motives were both racially and economically based. The court noted the narrow issues to be resolved: "(1) Does the Fourteenth Amendment protect the First Amendment rights *involved here*, and (2) if so, does it protect *those* rights against state action only or against private actions as well?" *Id.* at 1235 (emphasis added). Plaintiff's claims do not involve the rights at issue in *Action*, and the *Action* court specifically noted that "a source of congressional power to reach the private conspiracy must be found in each case." *Id.* at 1233.

These three Eighth Circuit cases are all pre-*Bray*. Plaintiff presents no post-*Bray* authority to support her argument, and this Court is of the opinion that the Supreme Court, after *Bray*, would not extend § 1985(3)'s scope into the areas urged by plaintiff. *See Bray*, 506 U.S. at 278; *see also Tilton v. Richardson*, 6 F.3d 683, 686-87 (10th Cir. 1993); *Radisson Plaza*, 958 F. Supp. at 1376-77; *Lowden v. William M. Mercer, Inc.*, 903 F. Supp. 212, 219-20 (D. Mass. 1995). Defendants' motion will be granted as to count V.

V. COUNTS VI, VII, VIII, IX, X, AND XI

Defendants argue that counts VI, VII, VIII, IX, X, and XI, which allege state law claims, must be dismissed because they are preempted by chapter 216 of the Iowa Civil Rights Act. The underlying focus in resolving the preemption issue is "the nature of the [nonchapter 216] action." *Grahek v. Voluntary Hosp. Coop. Ass'n of Iowa, Inc.*, 473 N.W.2d 31, 34 (Iowa 1991). A nonchapter 216 claim is preempted "unless [it is a] separate and independent, and therefore incidental, cause[] of action." *Greenland v. Fairtron Corp.*, 500 N.W.2d 36, 38 (Iowa 1993) (citing *Grahek*, 473 N.W.2d at 34 and *Vaughn v. Ag Processing, Inc.*, 459 N.W.2d 627, 639 (Iowa 1990) (en banc)). A nonchapter 216 claim is "not separate and independent when, under the facts of the case, success in the nonchapter [216] claim[]...requires proof of discrimination."

Id. (citing *Grahek*, 473 N.W.2d at 34).

A. COUNT VI

Count VI alleges an invasion of privacy/intrusion upon seclusion based upon Soto's alleged theft of plaintiff's personal diary from her work desk. Iowa has adopted the invasion of privacy/intrusion upon seclusion tort as described in Restatement (Second) of Torts § 652A (1977). Winegard v. Larsen, 260 N.W.2d 816, 822 (Iowa 1977). That section of the Restatement says that "[t]he right of privacy is invaded by [an] unreasonable intrusion upon the seclusion of another, as stated in § 652B...." Restatement § 652A(2)(a). Section 652B states that "[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or [her] private affairs or concerns, is subject to liability to the other for invasion of [her] privacy, if the intrusion would be highly offensive to a reasonable person." Comment (b) to section 652B says that the invasion "may be by some other form of investigation or examination into [a person's] private concerns, as by opening [her] private and personal mail, searching [her] safe or [her] wallet, [or] examining [her] private bank account...." Plaintiff relies solely upon Soto's alleged theft of her personal diary, not upon the alleged discrimination and retaliation. Chapter 216, therefore, does not preempt this count, and the motion will be denied as to it.

B. COUNT VII

Count VII alleges civil theft based on Soto's alleged theft of plaintiff's personal diary. Though plaintiff does not say so explicitly, "The civil equivalent of a theft prosecution is an action for conversion." *State v. Taylor*, 506 N.W.2d 767, 768 (Iowa 1993) (citing *Kendall/Hunt Publ'g Co. v. Rowe*, 424 N.W.2d 235, 247 (Iowa 1988)). This court construes this count as an action for conversion of plaintiff's personal diary. Under Iowa law, "conversion is the act of wrongful

control or dominion over another's personal property in denial of or inconsistent with that person's possessory right to the property." *Rowe*, 424 N.W.2d at 247. Plaintiff relies solely upon the alleged theft of her personal diary, not upon the alleged discrimination and retaliation. Chapter 216, therefore, does not preempt this count, and the motion will be denied as to it.

C. COUNT VIII

Count VIII alleges negligent supervision, hiring, and investigation based on Soto's alleged discriminatory and retaliatory conduct. "[T]he torts of negligent hiring, supervision, or training 'must include as an element an underlying tort or wrongful act committed by the employee.'" *Schoff v. Combined Ins. Co. of Am.*, 604 N.W.2d 43, 53 (Iowa 1999) (quoting *Haverly v. Kaytec, Inc.*, 738 A.2d 86, 91 (Vt. 1999)). Plaintiff relies solely upon Soto's alleged discriminatory and retaliatory conduct as the underlying tort or wrongful act. If plaintiff were to fail on her discrimination and retaliation claims, she would necessarily fail on her negligent supervision claim. *See Greenland*, 500 N.W.2d at 38. Chapter 216, therefore, preempts this count, and the motion will be granted as to it.

D. COUNT IX

Count IX alleges tortious infliction of emotional distress. Plaintiff must prove the following four elements to succeed on this tort:

> (1) Outrageous conduct by the defendant;
> (2) The defendant's intentional causing, or reckless disregard of the probability of causing emotional distress;
> (3) Plaintiff suffered severe or extreme emotional distress; and
> (4) Actual and proximate causation of the emotional distress by the defendant's outrageous conduct.

Vaughn, 459 N.W.2d at 635-36. Plaintiff does not clearly state on what "outrageous conduct" she

relies as the basis for her claim. It is clear that if she relies solely on the alleged discrimination and retaliation, the claim would be preempted by chapter 216. *Greenland*, 500 N.W.2d at 38. This court, however, construes her complaint as incorporating the alleged theft and trespass as her "outrageous conduct." Therefore, if plaintiff fails on her discrimination and retaliation claims, she would not necessarily fail on this claim. *Cf. id.* Chapter 216 does not preempt this count, and the motion will be denied as to it.

E. COUNT X

Count X alleges civil trespass based on Soto's alleged entrance onto plaintiff's property to steal her personal diary. "'A trespasser is one who is not rightfully upon the land or property of another, but enters it without the consent, either express or implied, of the owner or occupier thereof.'" *Reasoner v. Chicago, Rock Island & Pac. R.R. Co.*, 101 N.W.2d 739, 741 (Iowa 1960) (quoting *Mann v. Des Moines Ry. Co.*, 7 N.W.2d 45 (Iowa 1942)). Plaintiff relies solely upon Soto's alleged entrance onto her property, not the alleged discrimination and retaliation. Chapter 216, therefore, does not preempt this count, and the motion will be denied as to it.

F. COUNT XI

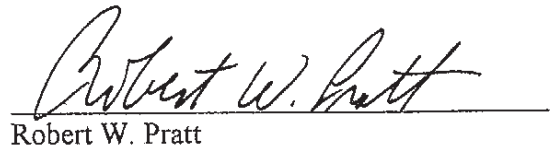
Count XI argues that "Defendant IBP, Inc. is liable for Julio Soto's negligent conduct toward Plaintiff, as it was foreseeable and within the course and scope of their relationship with Defendant IBP, Inc." Respondeat superior is not a separate cause of action, but a legal fiction under which an employer can be held responsible for the wrongful acts of its employees. *See Martin & Pitz Assocs., Inc., v. Hudson Constr. Servs., Inc.*, 602 N.W.2d 805, 807 (Iowa 1999) ("[T]he legal fiction of imputed negligence rests on...a tort.") (quoting *Drewery v. Daspit Bros. Marine Divers, Inc.*, 317 F.2d 425, 427 (5th Cir.1963)). This court, therefore, does not construe

this count as alleging a separate cause of action, but rather as arguing that defendant IBP is liable for the wrongful conduct of Soto, as alleged elsewhere in the complaint. Because no cause of action exists in count XI, the motion will be granted as to it.

VI. RULING AND ORDER

Defendants' motion to dismiss is **GRANTED** as to counts III, IV, V, VIII, and XI and it is **ORDERED** that those counts be dismissed with prejudice. Defendants' motion to dismiss is **DENIED** as to counts VI, VII, IX, and X.

Dated this 8th day of September, 2000.



Robert W. Pratt
U.S. District Judge