

STATE OF NORTH CAROLINA
COUNTY OF BUNCOMBE

IN THE SPECIAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
CIVIL ACTION NO: 7CV 06055

DANIEL T. EGLINTON, M.D.

Plaintiff,

v.

BLUE RIDGE BONE & JOINT CLINIC,
P.A., BRBJ ASHEVILLE, L.L.C. and BRBJ
FLETCHER, L.L.C

Defendant.

**BRBJ CLINIC'S REPLY TO
PLAINTIFF'S MEMORANDUM OF
LAW IN OPPOSITION TO CLINIC'S
MOTION TO DISMISS**

Come Now Defendant Blue Ridge Bone & Joint Clinic, P.A. ("Clinic") and responds to Plaintiff's Memorandum of Law in Opposition to the Clinic's Motion to Dismiss. Plaintiff's Complaint remains flawed and should be dismissed for the following reasons:

- 1. Plaintiff's allegation that he was "wrongfully discharged because of a disabling condition and that BRBJ took unwarranted advantage that condition" does not state a claim for wrongful discharge in violation of public policy under North Carolina law; and**
- 2. Plaintiff's claims for breach of contract remain impermissibly vague and fail to state a claim for relief.**

First, Plaintiff's claim that he was "wrongfully discharged because of a disabling condition" does not support a claim for wrongful termination in violation of North Carolina's public policy as a matter of law. (See Plaintiff's Memorandum of Law, p. 6). The public policy exception granting at-will employees a claim for relief for termination is a narrow one. *Roberts v. First Citizens Bank & Trust Co.*, 124 N.C. App. 713, 721, 478 S.E.2d 809, 814 (1996). Plaintiff's claim cannot survive merely because he claims to have been suffering a "disability" at the time of his alleged termination. *Baucomb v. Cabarrus Eye Center, P.A.*, 2007 WL 1074663 (M.D.N.C. April 4, 2007)(plaintiff failed to allege her fibromyalgia

constituted a “handicap” under NCEEPA and defendant’s termination of plaintiff while taking leave pursuant to FMLA did not violate North Carolina’s public policy). Even to arguably support such a claim, Plaintiff would have to provide the Court and the Defendants with some notice of the alleged disability or handicap under which he claims to suffer, and that handicap or disability would have to fall within the definitions of disability or handicap under recognized North Carolina law. *Id.*; *See also Simmons v. Chemol Corp.*, 137 N.C. App. 319, 322, 528 S.E.2d 368, 370 (2000).

Again, the mere fact or allegation that Plaintiff was “terminated” while “on leave” cannot support a claim for wrongful termination in violation of North Carolina’s public policy. *See Buser v. Southern Food Services, Inc.*, 73 F.Supp.2d 556, 565-566 (M.D.N.C. 1999) For example, the *Buser* Court held,

While discharging an employee who has taken a valid leave of absence pursuant to the FMLA raises serious concerns for this Court, the Court nonetheless declines to hold, in the absence of North Carolina precedent, that this rises to the level of a public policy concern to justify creating a new and distinct Coman claim.

Id. at 566; *See also, Baucomb* 2007 WL 1074663, *supra*; *Imes v. City of Asheville*, 163 N.C. App. 668, 670, 594 S.E.2d 397, 398 (2004); *McCullough v. Branch Banking & Trust Co., Inc.*, 136 N.C. 340, 524 S.E.2d 569 (2000). Plaintiff’s claim for wrongful termination is not supported by North Carolina law and should be dismissed accordingly.

Second, Plaintiff’s claims for breaches of contract remain vague and conclusory, necessitating their dismissal as a matter of law. While Plaintiff has alleged the existence of various contracts between himself and the Clinic and the other defendants, he has given no indication in either of his Complaints as to how those contracts were breached and as to what type of damage he seeks. Indeed, Plaintiff’s brief is the only place he truly sets out the rationale for his claims. (Plaintiff’s Memorandum of Law, p. 5-6)(stating, “Plaintiff’s claim

for breach of the employment agreement revolves around the termination clause of the agreement and the means and amounts by which Plaintiff would be compensated for his accounts receivable held and collected by BRBJ.”).

Rule 8 of the North Carolina Rules permits “notice” pleading, but it requires litigants to give the Court and each other “notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief.” N.C. R. Civ. P., Rule 8. A conclusory statement that the parties had a contract and that it was breached is simply not enough to sufficiently state a claim for relief. *See FCX, Inc. v. Bailey*, 14 N.C. App. 149, 197 S.E.2d 381 (1972)(plaintiffs’ conclusory statement that they were third-party beneficiaries of a contract were insufficient to state a claim or relief). Accordingly, Plaintiff’s Complaint should be dismissed.

This, the 10th day of March 2008.

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STATEMENT OF COMPLIANCE WITH WORD COUNT

The undersigned counsel certifies that the forgoing **BRBJ CLINIC'S REPLY TO PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO CLINIC'S MOTION TO DISMISS** is within the limitations on length of briefs pursuant to Rule 15.8 of the General Rules of Practice for the North Carolina Business Court.

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of March, 2008, the foregoing **BRBJ CLINIC'S REPLY TO PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO CLINIC'S MOTION TO DISMISS** was served on the following persons by depositing a copy in the United States mail, first class, postage prepaid, addressed to the following counsel of record:

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