STATE OF NORTH CAROLINA

COUNTY OF GASTON

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
08-CVS-3154

JASON FISHER, BYRON ADAMS, B.C. BARNES, CHERYL BARTLETT, KATHY BEAM, CAROLYN BOGGS, SUSETTE BRYANT, DANIEL CASE, GENE DRY, RICKY GRIFFIN, WENDY HERNDON, EVERETT JENKINS, SANDRA LANGSTON, CYNTHIA STAFFORD, MARY TAUTIN, and TIMOTHY THOMAS,

Plaintiffs,

v.

COMMUNICATION WORKERS OF AMERICA, COMMUNICATION WORKERS OF AMERICA, DISTRICT 3, and COMMUNICATION WORKERS OF AMERICA LOCAL 3602,

Defendants.

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS

The Plaintiffs hereby respond to Defendants' Motion To Dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

On August 11, 2008, Defendants CWA and District 3 served on counsel for Plaintiffs their Rule 12(b)(6) Motion to Dismiss and supporting Memorandum (the "Memorandum"). Also on August 11, counsel for the Plaintiffs were served with Defendant Local 3602's Rule 12(b)(6) Motion To Dismiss. In its Motion, Defendant CWA Local 3602 adopted and incorporated by reference Defendants CWA and District 3's supporting Memorandum. This response is timely filed under Rule 15.6 of the General Rules of Practice and Procedure for the North Carolina Business Court.

ARGUMENT

1. Plaintiffs' Complaint States Legally Sufficient Claims.

The Defendants' motion should be denied. When considering a motion to dismiss for failure to state a claim upon which relief can be granted

> [T]he court must construe the complaint liberally and "should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief." (citations omitted)
> *Gress v. Rowboat Co., Inc.*, 661 S.E.2d 278, 281, 2008 N.C. App LEXIS 1074 (June 3, 2008).

The Complaint alleges the requisite elements of recognized causes of action and gives Defendants adequate notice as to the nature and the extent of each claim. Accordingly, it should not be dismissed.

Defendants' Memorandum cites three cases in support of the appropriate standard for a motion to dismiss under Rule 12(b)(6): *Craven v. Cope*, 656 S.E.2d 729, 2008 N.C. App. LEXIS 266 (January 17, 2008); *Johnson v. Bollinger*, 86 N.C. App. 1, 356 S.E.2d 378 (1987); and *Stanback v. Stanback,* 297 N.C. 181, 254 S.E.2d 611 (1979). Plaintiffs' Complaint satisfies the standards set out in all three cases.

Under *Craven v. Cope*, a complaint may be dismissed for one or more of the following reasons: "(1) when on its face the complaint reveals no law that supports plaintiff's claim; (2) when on its face the complaint reveals the absence of fact sufficient to make a good claim; and (3) when some fact disclosed in the complaint necessarily defeats plaintiff's claim." *Id.,* at 731. Under *Johnson v. Bollinger*, a complaint may be dismissed if there is an "insurmountable bar" to recovery on the face of the Complaint. *Id.,* at 380. Under *Stanback v. Stanback* a complaint may be dismissed for failure to

"state enough to give the substantive elements of at least some legally recognized claim." *Id.*, at 626.

As shown below, the Complaint asserts facts sufficient to support claims for violation of the North Carolina Identity Theft Protection Act ("ITPA") and common law invasion of privacy. Violation of the ITPA is, by statutory definition, an unfair and deceptive trade practice. Thus, the Complaint asserts claims for which relief may be granted and the Defendants' motion should be denied.

2. Plaintiffs' Claim Under the ITPA Contains All Necessary Factual Allegations and Substantive Elements Required By the Statute.

The ITPA provides that a business may not "intentionally communicate or otherwise make available to the general public an individual's Social Security number." N.C.G.S. § 76-62(a)(1).

Plaintiffs allege in the Complaint that: 1) each Defendant is a "business" for purposes of the Act (Complaint, para. 33); 2) Defendants' actions in authorizing the dissemination and posting of Plaintiffs' Social Security numbers on a publicly accessible bulletin board constituted a violation of the Act (Complaint paras. 1, 21, 22, 28, 29, 30, and 34); and 3) the dissemination was intentional. (Complaint, para. 35). The Complaint therefore sufficiently alleged all the necessary facts and substantive elements of a violation of the IPTA.

Defendants argue that the Complaint is insufficient because it did not "proffer facts supporting a claim that the Defendants *intentionally* communicated or otherwise made available to the general public their Social Security numbers." (emphasis in original, see Memorandum, p. 4). Contrary to Defendants' assertion, the Plaintiffs do

proffer facts to support that their Social Security numbers were made available to the public through the intentional action of the Defendants, as noted above.

Defendants next argue that the Complaint proffers no facts to prove that the illegal publication of the Social Security numbers was for "nefarious or improper purposes." Memorandum p. 4. However, the ITPA does not require that allegations of nefarious or improper purposes are required to state a claim. The mere publication constitutes a violation and the Defendants' motives need not be alleged. Nonetheless, Plaintiffs allege at paragraphs 35, 42, and 45 of the Complaint that the Defendants' conduct was malicious.

The Defendants argue that the notice disseminated by the Defendants and published on the bulletin board identified the Plaintiffs' Social Security numbers as "'National ID" only, with no indication that the "National ID" was the person's Social Security number. Memorandum p. 4. *See also* Exhibit A, attached to Amended Complaint.

The Defendants' argument fails for three reasons: 1) a Social Security number is, for virtually all United States citizens and permanent residents, the quintessential "National ID" number and the two terms are practically synonymous; 2) the numbers appearing under the heading "National ID" on the offending publication appeared directly beside the Plaintiffs' names and took the standard form for Social Security numbers, *i.e.*, a set of three, then two, then four digits separated by hyphens (*e.g.*, 123-45-6789) and are instantly recognizable as Social Security numbers; 3) the Plaintiff who discovered the publication instantly recognized his own Social Security number and

correctly assumed that the other numbers were the Social Security numbers of all the other listed employees. Complaint para. 22.

Next, the Defendants argue that Plaintiffs fail to allege any member of the general public actually accessed the Social Security numbers posted on the bulletin board, or that Defendants intended the distribution of the information "to facilitate identity theft." Memorandum p. 4. Defendants cannot cite to the Act to buttress this argument for dismissal because the Act does not require that the victims' information actually be compromised by a third party. As discussed above, the Act does not require allegation of any particular motive. Mere publication of the protected information is sufficient to constitute a violation.

Finally, the Defendants argue that the Complaint does not rebut, in anticipation, the defense which Defendants may or may not rely on, contained in the Act for when the "collection, use, or release of a Social Security number is for internal verification or administrative purposes." Memorandum p. 4-5; N.C.G.S. § 75-1.1(b)(2). However, to survive a motion to dismiss, the Complaint need only meet the applicable pleading standard. The Complaint need not refute arguments the Defendants may or may not make. Moreover, the alleged facts show that the impermissible posting of the Social Security numbers could not reasonably have been for "internal verification or administrative purposes." The Complaint does not allege that the Defendants collection or administrative use was prohibited by the statute, but rather that they acted unlawfully in publishing the Plaintiffs' Social Security Numbers on a public bulletin board.

3. The Unfair or Deceptive Trade Practices Act ("UDTPA") Is Expressly Incorporated By the ITPA

The Second cause of action in the Complaint is for violation of the North Carolina Unfair or Deceptive Trade Practices Act. N.C.G.S. § 75-1.1. Complaint paras. 37-39. Defendants argue that the publication of the Plaintiffs' Social Security numbers does not constitute a violation of the Unfair or Deceptive Trade Practices Act according to standards set forth in various cases and in the legislative history of the Act. Memorandum p. 4-5.

However, the ITPA § 75.62(d) explicitly provides that: "A violation of this section is a violation of G.S. 75-1.1." This express incorporation of the UDTPA by the ITPA is sufficient to defeat the Defendants' motion.

Nevertheless, it should be noted that the Defendant labor organizations further undermine their argument for dismissal of the UDTPA claim by attempting to characterize themselves as entities beyond the scope of the statute, as not "in or affecting commerce." Memorandum p. 6. This argument fails for two reasons.

First, UDTPA itself expressly provides that the a party claiming exemption from the Act bears the burden of proving it is exempt: "(d) Any party claiming to be exempt from the provisions of this section shall have the burden of proof with respect to such claim." N.C.G.S. §75-1.1(d). Here, the Defendants merely assert that the relationship of "employee and labor representative" is exempt. Defendants do not cite to case law nor any provision of the statute exempting labor organizations as entities not "in or affecting commerce." Thus, Defendants' fail to meet their burden of showing that labor organizations are exempt.

Second, for purposes of state and federal law, including labor and employment laws, labor organizations are invariably treated as businesses with assets, liabilities, and employees. For example, a labor organization acts as a private employer with respect to its employees. In the instance of Defendant Communication Workers of America, for example, according to its official report to the United States Department of Labor, it is an organization with reported assets of $575,709,161.00, employing 862 employees, and having total receipts of $643,498,492.[1]

Under North Carolina law, a labor union is treated as a legal entity for purposes of civil litigation when it carries out the business for which it was formed, i.e. representing employees. In *R.H Bouligny, Inc. v. United Steelworkers of America, AFL-CIO*, 270 N.C. 160, 154 S.E.2d 354 (1967), the court determined that "[a]n unincorporated labor union may be sued in the courts of this State as a legal entity separate and apart from its members" and that "as such it may be held liable in damages for torts committed by its employees or agents acting in the course of their employment." *Id.*, at 168.

The National Labor Relations Act ("NLRA") treats labor organizations in exactly the same way as it treats other employers affecting commerce, when the union is acting in its role as employer. *See,* 29 U.S.C. §152(2). The National Labor Relations Board ("NLRB"), the federal agency which administers the NLRA, will take jurisdiction in cases where a union acts as an employer. *See, e.g.*, *Hotel Employees and Restaurant Employees International Union, Local 26, AFL-CIO, and Emma S. Johnson*, 344 NLRB 567 (April 29, 2005) (employee of a union was wrongfully discharged from her job as a

[1] See, United States Department of Labor, Office of Labor Management website, Form LM-2, Communication Workers AFL-CIO National Headquarters; available at: http://www.dol.gov/esa/olms/regs/compliance/rrlo/lmrda.htm#1

union organizer when she complained about her work-schedule and the complaints were treated as protected concerted activity under Section 7 of the NLRA).

In the present case, in the face of state and federal laws which all treat unions as legal entities and employers engaged in business, the Defendants' argument that the employee-labor representative relationship is exempt from the provisions of UDTPA cannot succeed. Because the Defendants' contentions are unsupported and incorrect, their motion to dismiss the Unfair and Deceptive Trade Practices cause of action should be denied.

4. The Third Cause of Action for Invasion of Privacy Should Not Be Dismissed

The Defendants' motion should be denied because the Complaint alleges facts sufficient to state a claim for intrusion into seclusion and private affairs. Alternatively, the passage of the ITPA and the particular facts of this case justify recognition of the "public disclosure of private facts" branch of the invasion of privacy tort.

A. Invasion of Privacy, Intrusion into Seclusion and Private Affairs

The Plaintiffs' cause of action for invasion of privacy through intrusion on seclusion and private affairs is recognized by North Carolina courts and the Complaint alleges sufficient facts to state a claim. Therefore, the motion to dismiss the third cause of action should be denied.

In *Toomer v. Garrett*, 155 N.C. App. 462, 574 S.E.2d 76 (2002), the North Carolina Court of Appeals recognized a claim for invasion of privacy where the plaintiff "allege[d] that defendants intentionally obtained information from his state personnel file and gave it to unauthorized individuals." *Id.,* at 480. The plaintiff in *Toomer* further "allege[d] that [the defendants] intentionally used their authority to allow unauthorized persons to

examine plaintiff's file." The plaintiff's Social Security number was one of the pieces of information illegitimately accessed and disseminated. *Id.*, at 467.

The *Toomer* plaintiff's invasion of privacy claim was initially dismissed by the Superior Court for failure to state a claim. The Court of Appeals reversed the dismissal, however, concluding that the "unauthorized examination of the contents of one's personnel file, especially where it includes sensitive information such as medical diagnoses and financial information, like the unauthorized opening and perusal of one's mail, would be highly offensive to a reasonable person." *Id.,* at 480.

Before *Toomer*, the tort of invasion of privacy by intrusion into seclusion or private affairs was limited to situations in which there had been "intentional intrusion, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns… [where] the intrusion would be highly offensive to a reasonable person." *Miller v. Brooks*, 123 N.C. App. 20, 26-27, 472 S.E.2d 350 (1996) (citation omitted). *Toomer* expanded the tort to include illegitimate inspection and dissemination of sensitive personal information including Social Security numbers.

Here, the Complaint alleges facts similar to those in *Toomer*. The Defendants and their authorized agents "intentionally obtained information… and gave it to unauthorized individuals." *Toomer,* at 480. As in *Toomer*, the Defendants "used their authority to allow unauthorized persons" to view the information. *Id.* As in *Toomer*, the public disclosure of the Plaintiffs' Social Security numbers can be analogized to the "unauthorized opening and perusal of one's mail" and "would be highly offensive to a reasonable person." *Id.* Accordingly, the Defendants' motion should be denied.

B. Invasion of Privacy, Public Disclosure of Private Facts.

Defendants contend that the invasion of privacy claim should be dismissed because North Carolina does not recognize the "public disclosure of private facts" branch of the tort. As shown above, however, the Complaint alleges facts sufficient to state a claim for intrusion into the Plaintiffs' seclusion and private affairs, so the Defendants' motion should be denied. Moreover, the passage of the ITPA and the particular facts of this case now justify recognition of the "public disclosure" branch of the tort in North Carolina.

Of the four generally recognized branches of the invasion of privacy tort, North Carolina courts have thus far recognized only two: 1) intrusion upon seclusion or private affairs; and 2) appropriation of another's name or likeness. *Hall v. Post*, 323 N.C, 259, 372 SE2d 711 (1988). *Hall* involved a newspaper which published true but embarrassing information about a non-public figure's personal life. The court held that North Carolina would not recognize the "public disclosure of private facts" branch of the tort in part because the tort of intentional infliction of emotional distress ("IIED") would "almost inevitably" be available to a plaintiff who suffered such disclosure.

In the present case, Plaintiffs have certainly been victims of public disclosure of private facts and suffered emotional distress, however, their emotional distress does not rise to the level required to sustain a claim for IIED. *See, Stanback v. Stanback*, 297 N.C. 181, 196, 254 S.E.2d 611, 622 (1979) (plaintiff must adduce evidence of emotional distress constituting an "emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so." *Id.,* at 304.

If the court holds that the Plaintiffs' claim is necessarily a "public disclosure" claim and dismisses it on that basis, the Plaintiffs will slip through the crack created by *Hall v. Post*. Plaintiffs would be stuck without an invasion of privacy claim but also without the IIED claim envisioned by *Hall* to be "almost inevitably" available.

With respect to the third count of the Complaint for invasion of privacy, Plaintiffs have alleged facts sufficient to state a claim for intrusion into seclusion and private affairs. However, even if the Court concludes the claim must be analyzed as one for public disclosure of private facts, Plaintiffs have offered reasonable, good faith arguments for recognition of the claim in light of the passage of the ITPA and the particular facts of this case.

CONCLUSION

For the foregoing reasons, Plaintiffs request that the Defendants' Motion to Dismiss be denied.

Dated this 29th day of August, 2008.

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CERTIFICATE OF SERVICE

I certify that I served the foregoing on the Defendants in this action by depositing copies of the same in first-class U.S. Mail, postage prepaid, addressed to them as follows:

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This 29th day of August, 2008.

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CERTIFICATE OF COMPLIANCE WITH RULE 15.8

I hereby certify that the foregoing complies with the limitation on the length of briefs contained at Rule 15.8 of the General Rules of Practice and Procedure for the North Carolina Business Court.

This 29th day of August, 2008.

s/ Stephen J. Dunn