

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

TRACEY D. HAMMONDS,)	CIVIL ACTION NO. 3:01CV00023
)	
Plaintiff,)	
)	
v.)	
)	
BUILDERS FIRST SOURCE-)	<u>MEMORANDUM OPINION</u>
ATLANTIC GROUP, INC.,)	
)	
AND)	
)	
BUILDERS' SUPPLY & LUMBER)	
CO., INC. a/k/a Frederick Holding Corp.)	
Defendants.)	JUDGE JAMES H. MICHAEL, JR.

Before the court is the “Motion to Dismiss Plaintiff’s Amended Complaint, or, in the alternative, for Summary Judgment,” filed July 17, 2001 by the defendant Builders First Source-Atlantic Group, Inc.¹ This matter was referred to United States Magistrate Judge B. Waugh Crigler for proposed findings of fact, conclusions of law, and a recommended disposition. See 28 U.S.C. § 636(b)(1)(B). In his September 18, 2001 Report and Recommendation, the Magistrate Judge recommended that the court grant the defendant’s motion. The plaintiff filed timely objections to the Magistrate Judge’s recommendations.² Having reviewed *de novo* those

¹For purposes of this motion only, Builders First Source-Atlantic Group, Inc. stipulates that it is the successor to the other defendant named in the case, Builders’ Supply & Lumber Co., Inc. The history of the company’s corporate acquisitions and name changes is set forth in footnote one of the defendant’s memorandum in support of its motion.

² On January 23, 2002, Defendant Builders filed a motion to strike the plaintiff’s objections because the plaintiff did not serve the objections on the defendant within ten days of the issuance of the Report and Recommendation pursuant to Fed. R. Civ. P. 72. The defendant also contends that the objections were conclusory and general observations rather than the “specific, written objections,” required under Rule 72. As such, the defendant argues that the court should conduct a clear error, rather than *de novo*, review of the Report

portions of the Report and Recommendation as to which objections were made, see 28 U.S.C. § 636(b)(1) (West 1993 & Supp. 2000); Fed. R. Civ. P. 72(b), the court shall grant the defendant's motion to dismiss, or in the alternative, for summary judgment for the reasons stated herewith.

I.

In March 1997, the plaintiff, Tracey D. Hammonds, began driving trucks for defendants Builders First Source-Atlantic Group, Inc. and Builders' Supply & Lumber Co., Inc.³ As a driver, the plaintiff was required to load, unload, and deliver building materials. On June 12, 1997, the plaintiff leaned across a balcony to lift some building materials and suffered an injury later diagnosed as a herniated disk.

At some point following his injury but prior to February 2, 1998, the plaintiff began physical therapy. On February 2, 1998, the plaintiff went on medical leave, and his treating physician, Dr. Robert Rutkowski, advised the defendants that the plaintiff was under his care for lumbar radiculopathy as a result of the June 1997 accident. On February 9, 1998, Dr. Rutkowski notified the defendants that the plaintiff could return to light duty work. This meant the plaintiff was prohibited from operating a forklift, driving long distances, or lifting more than 15 to 20 pounds. On February 11, 1998, the defendants informed Dr. Rutkowski that no light duty work was available for plaintiff.

and Recommendation. Given the court's ultimate disposition in this case, any error in service of the objections was harmless. Furthermore, the court considers the plaintiff's objections to be in accordance with the specificity requirement of Rule 72. As such, the court denies the defendant's motion.

³ The court treats the defendant's motion as a motion to dismiss pursuant to 12(b)(6). See Section II of this Opinion. Accordingly, the court accepts as true all of the well-pleaded allegations in the plaintiff's Amended Motion for Judgment. *Edwards v. City of Goldsboro*, 178 F.3d 231, 237 n.1 (4th Cir. 1999).

On May 11, 1998, the plaintiff underwent surgery to correct the disc tear and disc bulge, which his physician, Dr. Donald P.K. Chan, determined to be the result of the plaintiff's June 1997 work-related injury. On August 14, 1998, the defendants advised the plaintiff by letter that since he had been on leave due to an occupational medical disability since February 2, 1998, and since he was unable to return to work, he had accordingly been terminated as of August 2, 1998. In the plaintiff's subsequent pleadings, he indicates that he later applied for a position as a flatbed truck driver in February 1999, but was not re-hired by the defendant.

The plaintiff commenced this action in the Circuit Court of Culpeper County, Virginia on July 17, 2000, alleging breach of contract, wrongful termination and wrongful non-rehire. The defendant subsequently removed the case to the United States District Court for the Western District of Virginia. The case was referred to the Magistrate Judge on April 12, 2001.

Plaintiff, having been granted leave to file an amended complaint, filed his Amended Motion for Judgment (hereinafter, "amended complaint") on June 27, 2001 in which he alleged breach of contract and wrongful termination. The defendant responded with a motion to dismiss, or in the alternative, for summary judgment, filed on July 17, 2001.

On September 18, 2001, the Magistrate Judge issued a Report and Recommendation in which he recommended that the defendant's motion be granted. The plaintiff filed his objections to the Magistrate Judge's Report and Recommendations. The court shall conduct a *de novo* review of those portions of the Report and Recommendations to which objections have been made.

II.

The defendant has filed a motion to dismiss, or alternatively, a motion for summary judgment. While the Federal Rules of Civil Procedure provide that where "matters outside the

pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56,” Fed. R. Civ. P. 12(b), the court notes that the record in this case is limited to the amended complaint, responsive pleadings, and two exhibits attached to the defendant’s motion to dismiss. A court, when ruling on a 12(b)(6) motion to dismiss, can consider any documents attached to the complaint or incorporated in the complaint by reference. *Fare Deals Ltd. v. World Choice Travel.Com, Inc.*, 180 F.Supp.2d 678, 683 (D.Md. 2001) (citing *New Beckley Mining Corp. v. Int’l Union, United Mine Workers of Am.*, 18 F.3d 1161, 1164 (4th Cir.1994)). Therefore, the court shall treat the defendant’s motion as a motion to dismiss the plaintiff’s amended complaint for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6).

In deciding a motion to dismiss under Rule 12(b)(6), the court must determine “whether the complaint, under the facts alleged and under any facts that could be proved in support of the complaint, is legally sufficient.” *Eastern Shore Markets, Inc. v. J.D. Assocs.*, 213 F.3d 175, 180 (4th Cir. 2000). The court must “assume the truth of all facts alleged in the complaint and the existence of any fact that can be proved, consistent with the complaint’s allegations . . . [but] need not accept the legal conclusions drawn from the facts. . . . [or] accept as true unwarranted inferences, unreasonable conclusions, or arguments.” *Id.* (citations omitted). Furthermore, when the allegations of the complaint conflict with any exhibits or other documents, whether attached to the complaint or adopted by reference, the exhibits or documents prevail. 180 F.Supp.2d at 683 (citing *Fayetteville Investors v. Commercial Builders, Inc.*, 936 F.2d 1462, 1465 (4th Cir.1991)). A motion to dismiss for failure to state a claim for relief should not be granted “‘unless it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.’” *GE Inv. Private Placement Partners II v.*

Parker, 247 F.3d 543, 548 (4th Cir. 2001) (internal citations omitted).

III.

The plaintiff's June 27, 2001 amended complaint sets forth two claims.⁴ The plaintiff alleges that the defendants breached their employment contract by failing to provide the plaintiff with a suitable light duty position. The plaintiff further alleges that he was wrongfully terminated in violation of the public policy underlying the Virginians with Disabilities Act ("VDA"), VA. CODE ANN. § 51.5-40 *et seq.* (Michie 1998). The court first addresses the breach of contract claim.

A.

The plaintiff states in his amended complaint that he and the defendants "entered into a contract of employment." (Amended Compl. at ¶ 10.) The defendant asserts that this contract unambiguously establishes an at-will employment relationship. The Magistrate Judge found that the plaintiff failed to allege any facts to overcome the presumption under Virginia law that the employment was at will. As no objection has been filed to the Magistrate's finding in this claim, the court reviews the matter for clear error.

Virginia adheres to the employment-at-will doctrine which provides that when "the intended duration of a contract for the rendition of services cannot be determined by fair inference from the terms of the contract, then either party is ordinarily at liberty to terminate the contract at will, upon giving the other party reasonable notice." *See Miller v. SEVAMP*,

⁴In his opposition to the defendant's motion, the plaintiff sets forth a third claim of "wrongful non-rehire based on fundamental fairness." The amended complaint contains no such claim. Furthermore, the plaintiff offered no case law to support his claim, and the court finds no support for it under Virginia law. The Magistrate Judge reached the same conclusion, and the plaintiff did not object to his findings. As such, the court finds that the plaintiff's wrongful non-rehire claim is not a claim upon which relief can be granted.

Inc., 234 Va. 462,465, 362 S.E.2d 915, 916-917 (1987). Not only does the contract at issue in this case not provide a definite term of employment, it contains the following language:

I understand that, if employed, I have been hired at the will of the employer and that my employment may be terminated at will, at any time and with or without cause, the employer's only obligation being to pay salary or wages due and owing at the time of termination.

(Def.'s Ex. A.) The plaintiff has not alleged any facts to suggest that the terms of this contract have been altered in anyway, nor has the plaintiff alleged facts to take the contract out of the category of employment-at-will. See 234 Va. at 466, 362 S.E.2d at 917 (noting that substantial additional consideration such as a promise of promotion or promise of a bonus if employee remained on the job was sufficient to take the contract out of at will category). Therefore, the court finds that the plaintiff was hired as an at-will employee. Accordingly, the plaintiff's contention that the defendants breached their contract by not providing "light duty" work fails, as no obligation existed on the part of the defendant to do so.

Although never raised in his amended complaint, the plaintiff claimed, in his opposition to the defendant's motion, that he detrimentally relied on the contract and on the good faith of the defendants when he underwent "excruciating 'work-hardening' rehabilitation in order to return to work." (Pl.'s Mem. in Opp'n to Def.'s Mot. to Dismiss, at 4.) The plaintiff suggests that his employer was obligated to give him reasonable notice of termination before he underwent these medical procedures, and by not doing so, the defendants were estopped from terminating him.

The theory of promissory estoppel allows recovery "even in the absence of consideration where reliance [on a promise] and change of position to the detriment of the promisee make it unconscionable not to enforce the promise." *Allen M. Campbell Co., Gen. Contractors, Inc.*

v. Virginia Metal Indus., Inc., 708 F.2d 930, 931 (4th Cir. 1983). Without even reaching the question of whether the plaintiff pled sufficient facts to establish the existence of a promise on which he could have relied, the court points out that the theory of promissory estoppel has been expressly rejected as a cognizable cause of action by the Virginia Supreme Court. See *W.J. Schafer Associates, Inc. v. Cordant, Inc.*, 254 Va. 514, 521, 493 S.E.2d 512, 516 (1997) (declining to create such a cause of action); see also *Virginia School of the Arts v. Eichelbaum*, 254 Va. 373, 377, 493 S.E.2d 510, 512 (1997)(same); *Ward's Equipment v. New Holland North America*, 254 Va. 379, 385, 493 S.E.2d 516, 520 (1997)(same). As Virginia does not recognize a claim for promissory estoppel, no relief could be granted under any set of facts that the plaintiff might allege.

Accordingly, the court grants the defendant's motion to dismiss as it relates to the plaintiff's breach of contract claim.

B.

The plaintiff also alleges that his termination was in violation of the Virginians with Disabilities Act (VDA). VA. CODE ANN. § 51.5-41 (Michie 1998). The defendant argues that the plaintiff's claim is precluded by the exclusivity provision of the VDA which requires the plaintiff to proceed under the remedies provided in the statute. The Magistrate Judge recommended a finding in favor of the defendant, and the plaintiff objected to this recommendation.

Under Virginia law, the doctrine of employment-at-will is subject to a narrow public policy exception. An at-will employee may be able to bring a wrongful discharge claim where the discharge is alleged to be in violation of established public policy. *Bowman v. State Bank of Keysville*, 229 Va. 534, 331 S.E.2d 797 (1985) (recognizing employee-shareholders' wrongful

discharge claims because the right of a shareholder to vote his or her stock free of intimidation, conferred by former Va. Code § 13.1-32 (now § 13.1-662), was in furtherance of established public policy); *Lockhart v. Commonwealth Educ. Systems Corp.*, 247 Va. 98, 105, 439 S.E.2d 328, 331 (1994)(holding that plaintiffs' terminations violated the public policy against race and gender discrimination as set forth in the Virginia Human Rights Act, (VHRA), Va. Code § 2.1-715).⁵

It is undisputed that the VDA "is the statement of Virginia's public policy against disability discrimination." *Mannell v. American Tobacco Co.*, 871 F.Supp. 854, 862 (E.D.Va. 1994). Its purpose is "to encourage and enable persons with disabilities to participate fully and equally in the social and economic life of the Commonwealth and to engage in remunerative employment." VA. CODE ANN. §51.5-1 (Michie 1998). However, the VDA also states that "[t]he relief available for violations of this chapter shall be limited to the relief set forth in this section." VA. CODE ANN. § 51.5-46(C) (Michie 1998). This provision makes the VDA the exclusive state remedy for disability-based discrimination in employment. See *Stafford v. Radford Community Hosp., Inc.*, 908 F.Supp. 1369 (W.D.Va. 1995); *Mannell*, 871 F.Supp. at 862. Therefore, any disability discrimination claim alleged by the plaintiff should have been pursued under the remedies provided in the VDA itself. Accordingly, the plaintiff has failed to state a claim upon which relief can be granted.

⁵ Although not at issue in this Opinion, the court notes that in 1995, the state legislature amended the VHRA to add, in part, the following language: "Causes of action based upon the public policies reflected in this chapter shall be exclusively limited to those actions, procedures and remedies, if any, afforded by applicable federal or state civil rights statutes or local ordinances." VA. CODE ANN. §2.1-725(D)(Michie 1995). In *Doss v. Jamco, Inc.*, 254 Va. 362, 492 S.E.2d 441 (Va. 1997), the Virginia Supreme Court subsequently held that this language prohibits a common law cause of action based upon the public policies reflected in the VHRA.

Although never addressed in his amended complaint, in his opposition to the defendant's motion, the plaintiff refers without elaboration to the public policy allegedly reflected by another Virginia statute. Namely, Virginia Code § 40.1-51.1 requires every employer:

[T]o furnish each of his employees safe employment and a place of employment which is free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees, and to comply with all applicable occupational safety and health rules and regulations promulgated under this title.

VA. CODE ANN. § 40.1-51.1(A) (Michie 1999). The plaintiff suggests that the public policy reflected by this statute was violated by the defendant's refusal to provide him with light duty work. Without addressing whether this statute could provide the basis for a public policy-based wrongful discharge claim, the court fails to see any connection between the plaintiff's allegations (failure to provide light duty work) and the duties imposed on the employer (maintaining a work place without recognized hazards) under § 40.1-51.1.

In his objection to the Magistrate Judge's report, the plaintiff reiterates that "when the defendants failed to provide plaintiff with light-duty work ..., they failed to provide a workplace free from 'recognized hazards that are causing or are likely to cause death or serious physical harm...' to the plaintiff." (Pl.'s Obj. to Report and Recommendation, at 2.) While the court considers this a creative argument, it is one without any legal basis. Section 40.1-51.1 obligates an employer to provide a workplace free of "exposure to toxic materials or harmful physical agents," VA. CODE ANN. § 40.1-51.1(B) (Michie 1999), and not, as the plaintiff contends, a workplace which ensures equal treatment of disabled persons. The plaintiff has alleged no facts which bring this case within the purview of what is essentially an occupational safety statute.

Therefore, the court overrules the plaintiff's objection and accepts the Magistrate Judge's recommendation to grant the defendant's motion to dismiss the plaintiff's wrongful discharge claim.

III.

In conclusion, for the reasons stated above, the court shall grant the defendant's motion to dismiss the plaintiff's amended complaint for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6). The plaintiff's objections are overruled, and the Magistrate Judge's Report and Recommendation is accepted in full.

An appropriate Order this day shall issue.

ENTERED: _____
Senior United States District Judge

Date

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FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

TRACEY D. HAMMONDS,)	CIVIL ACTION NO. 3:01CV00023
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Plaintiff,)	
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BUILDERS FIRST SOURCE-)	<u>ORDER</u>
ATLANTIC GROUP, INC.,)	
)	
AND)	
)	
BUILDERS' SUPPLY & LUMBER)	
CO., INC. a/k/a Frederick Holding Corp.)	
Defendants.)	JUDGE JAMES H. MICHAEL, JR.

For the reasons stated in the accompanying Memorandum Opinion, it is accordingly

ADJUDGED, ORDERED AND DECREED

as follows:

1. The Magistrate Judge's Report and Recommendation, filed September 18, 2001, shall be, and it hereby is, ACCEPTED;
2. The plaintiff's objections, filed September 28, 2001, shall be, and they hereby are, OVERRULED;
3. The defendant's "Motion to Dismiss Plaintiff's Amended Complaint, or in the alternative, for Summary Judgment," filed July 17, 2001, shall be, and it hereby is GRANTED;
4. The plaintiff's August 2, 2001 "Motion to Dismiss Defendant's Motion to Dismiss and Motion for Summary Judgment," shall be, and it hereby is, DENIED;
5. The defendant's "Motion to Strike Plaintiff's Objection to the Magistrate's

Report and Recommendation,” filed January 23, 2002, shall be, and it hereby is, DENIED;

6. The Clerk of the Court is instructed to STRIKE this case from the docket of the court.

The Clerk of the Court is further directed to send a certified copy of this Order and the accompanying Memorandum Opinion to all counsel of record and to Magistrate Judge Crigler.

ENTERED: _____
Senior United States District Judge

Date