VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 23-CV-02746

Lynn Lamothe-Farwell, Plaintiff v. Community Health Centers of the Rutland Region, Inc., Defendant	DECISION ON MOTION

RULING ON DEFENDANT'S PARTIAL MOTION TO DISMISS

This is an employment case. Plaintiff Lynn Lamothe-Farwell brings this action against her former employer, Defendant Community Health Centers of the Rutland Region, Inc., alleging that the termination of her employment breached the parties' implied employment contract and constituted unlawful retaliation and discrimination under the Vermont Fair Employment Practices Act. Ms. Lamothe-Farwell also asserts a claim under the Vermont Consumer Protection Act ("CPA"), alleging that she was induced into employment by Community Health's unfair and deceptive promises, namely, that it would provide her with a respectful and professional workplace environment and afford her fair employment practices. Pursuant to Rule 12(b)(6) of the Vermont Rules of Civil Procedure, Community Health moves to dismiss the CPA claim for failure to state a claim upon which relief may be granted. Defendant is represented by Andrew H. Maass, Esq., and Plaintiff is represented by Kaveh S. Shahi, Esq. For reasons that follow, Defendant's motion is GRANTED. [1]

Factual Background

For purposes of deciding the instant motion, the Court accepts the following facts as true. Community Health is engaged in the business of providing healthcare services to patients in the Rutland region. Compl. ¶ 2. On February 22, 2021, Ms. Lamothe-Farwell began employment with Community Health as a front office manager in one of its facilities. *Id.* ¶ 3. She received an annual salary and benefits for performing this job. *Id.* According to Lamothe-Farwell, in order to induce her into accepting employment, Community Health made promises and representations that it would afford a good, fair, and professional workplace, and also take

[1] The Court notes that there were multiple rounds of additional briefing on the motion, including surreplies filed by both parties without permission from the Court. While there may exist sufficient grounds to allow the filing of a surreply, the better practice would have been for counsel to first seek permission from the Court. *See* Vt. R. Civ. P. 7(b)(4).

responsibility for its actions and follow its own rules of conduct. Compl. ¶ 48. Lamothe-Farwell accepted employment with Community Health "[a]s a result of" these promises and representations. *Id*. ¶ 51.

As it turned out, Community Health's promises and representations were false, deceptive, and unfair, because in reality, its "workplace was a toxic environment with favoritism, backbiting, divisiveness, power plays, bullying, incompetence, and cliques." *Id*. ¶ 49. Additionally, on October 6, 2022, Community Health terminated Lamothe-Farwell's employment, citing her "lack of appropriate behavior within the workplace." *Id*. ¶ 28 (quoting Community Health's statement). Lamothe-Farwell disputes the accuracy and truthfulness of this stated cause, and asserts that her termination was actually retaliatory and discriminatory, as well as contrary to Community Health's stated own code of conduct and promises of fair treatment. *Id*. ¶¶ 37, 48-49, 58-75. She alleges that as a result of Community Health's "deceptive and unfair practices," her "career as a manager particularly in healthcare, was ruined." *Id*. ¶ 52.

Discussion

In reviewing a motion to dismiss, the Court accepts "all facts alleged in the complaint as true and in the light most favorable to the nonmoving party." *Coutu v. Town of Cavendish*, 2011 VT 27, ¶ 4; *see also Winfield v. State*, 172 Vt. 591, 593, 779 A.2d 649, 652 (2001) (mem.) (when considering a motion to dismiss under Rule 12(b)(6), the court must "assume that all well pleaded factual allegations in the complaint are true, as well as all reasonable inferences that may be derived therefrom"). However, to the extent a party asserts "conclusory allegations or legal conclusions masquerading as factual conclusions," the Court is not required to accept them as true. *Rodrigue v. Illuzzi*, 2022 VT 9, ¶ 33 (quotation omitted). "The purpose of a motion to dismiss for failure to state a claim upon which relief can be granted is to test the law of the claim, not the facts that support it." *Samis v. Samis*, 2011 VT 21, ¶ 9. Dismissal is proper when there is no set of facts and circumstances alleged in the complaint which, if proved, would entitle the plaintiff to relief. *Id*.; *see also Montague v. Hundred Acre Homestead, LLC*, 2019 VT 16, ¶ 11 ("[W]here the plaintiff does not allege a legally cognizable claim, dismissal is appropriate.").

The Vermont Consumer Protection Act provides a cause of action to any "consumer who contracts for goods or services in reliance upon false or fraudulent representations or practices . . . or who sustains damages or injury as a result of any false or fraudulent representations or practices prohibited by" the Act. 9 V.S.A. § 2561(b) (2020 repl. ed.). In Count III of her Complaint, Lamothe-Farwell asserts that her claim falls under this provision, as follows:

> As a prospective employee and subsequently as an employee hired by defendant, plaintiff was a consumer in the labor market seeking to contract for services in return for income and benefits. In addition to the service of employment, defendant offered the services of HR to its employees such as the plaintiff. Plaintiff was therefore a consumer under CFA section 2451a(1).

Compl. ¶ 47. Community Health counters that Ms. Lamothe-Farwell was its employee, not a "consumer" of any "goods or services" it sold; that Lamothe-Farwell did not contract for any "goods or services" from Community Health; and that it was Lamothe-Farwell's employer not a

"seller," within the meaning of the CPA. The Court agrees. Although the Vermont Supreme Court has not yet addressed whether the CPA applies to an alleged "unfair or deceptive act" committed by an employer during the inducement and formation of an employment contract, and/or by the employer's failure to treat an employee in a manner promised during the period of contract formation, the Court concludes that our Supreme Court is unlikely to extend the CPA's scope in such a manner, and therefore Lamothe-Farwell's claim must be dismissed.

First, the Complaint fails to allege facts that would show that Ms. Lamothe-Farwell and Community Health are a "Consumer" and "Seller" within the meaning of the CPA. The CPA defines a "Consumer" as "any person who purchases, leases, contracts for, or *otherwise agrees to pay consideration* for goods or services not for resale in the ordinary course of the person's trade or business but for the person's use or benefit." 9 V.S.A. § 2451a(1) (emphasis added). Here, Lamothe-Farwell does not assert that she agreed to pay any consideration to Community Health for its goods or services. Rather, she contends that "in return for" receiving income and benefits, she contracted "for" certain services *from* her employer Community Health. Compl. ¶ 47.[2] Not only does this formulation fail to satisfy the CPA's definition of a "consumer," it is plainly twisted and nonsensical. It posits that the employer provides the employee not only income and benefits, but *also* certain "services," while the employee gives nothing to the employer in return. On the contrary, however, the typical employee receives income and benefits (not services) from her employer, as may be specified in the employment contract; and in return, the employee agrees to terms that obligate the employee to perform certain job duties or functions.[3]

Moreover, under the CPA, a "Seller" means "a person regularly and principally engaged in a business of selling goods or services to consumers." 9 V.S.A. § 2451a(3). While Lamothe-Farwell argues that Community Health offers and sells to its prospective and current employees (such as herself) the "service of employment" and/or the "service of HR," Community Health is not in the business of offering or selling such services to anyone, including any employees. Rather, Community Health is regularly and principally engaged in offering or selling healthcare-related services to patients in the Rutland region. *See* Compl. ¶ 2; Pl.'s Surreply to Mot. to Dismiss Count III, at 4-5 (quoting a description of Community Health's business function and scope directly from its website); *see also Foti Fuels, Inc. v. Kurrle Corp.*, 2013 VT 111, ¶ 21 (noting that, to be considered "'in commerce,' the transaction must take place in the context of an ongoing business in which the defendant holds himself out to the public" (quotation omitted)). Under the CPA, therefore, Community Health is a seller of healthcare services, not a seller of "services of employment" or "services of human resources" to anyone, including its employees. *See Carter v. Gugliuzzi*, 168 Vt. 48, 52-3, 716 A.2d 17, 21 (1998) (to "sell" under the CPA means "'to cause or further the sale of,' 'to deal in an article of sale; as, to *sell* groceries or

[2] The allegations in Paragraph 47 of the Complaint are legal conclusions which the Court is not required to accept as true.

[3] The Court notes that elsewhere, Lamothe-Farwell seems to readily adopt this common sense understanding and description of the relationship between her and her employer. *See* Pl.'s Opp'n to Mot. to Dismiss Count III, at 8-9 (admitting that "here, plaintiff contracted to provide services as the Front Office Manager *to* defendant CHCRR, and did so *for her benefit* by way of a salary of $65,520 per annum plus benefits such as a health/dental plan." (emphasis added) (citing Compl. ¶ 3)).

insurance.'" (quoting *Webster's New International Dictionary* 2272 (2d ed. 1953)) *cf*. *Foti Fuels*, 2013 VT 111, ¶ 21 ("[T]ransactions resulting not from the conduct of any trade or business but rather from private negotiations between two individual parties who have countervailing rights and liabilities established under common law principles of contract, tort and property law remain beyond the purview of the statute." (quotation omitted)). Thus, the facts alleged by Lamothe-Farwell do not demonstrate that her employment relationship with Community Health falls within the concepts of "consumer" and "seller" under the CPA.

Second, Lamothe-Farwell tellingly fails to cite a single case involving any state consumer protection law or the Federal Trade Commission Act in which an employer was found or considered to have sold or furthered the sale of "services of employment" or "services of human resources," to any of its employees. *Cf*. Carter, 168 Vt. at 52 ("In construing the Act, we look to the interpretations accorded similar terms and provisions of the Federal Trade Commission Act and other state consumer protection laws." (citing, inter alia, 9 V.S.A. § 2453(b)). Likewise, there is no authority cited for the notion that an employee is a "consumer" of "services of employment" or "services of HR" that are sold by the employer to the employee.

Indeed, the United States District Court for the District of Vermont has rejected this argument, finding "there is no apparent good faith basis for extending the [Vermont CPA] to cover the relationship between an employer and an employee." *Nashef v. AADCO Med., Inc.*, 947 F. Supp. 2d 413, 424 (D. Vt. 2013). Although in *Nashef*, the employer sought to assert a CPA claim against its employee (and thus Lamothe-Farwell argues it is distinguishable on that basis), the Court finds the district court's analysis persuasive and equally applicable to this case. As the *Nashef* Court observed, the "typical employment relationship does not involve 'consumers' [and] 'sellers.'" *Id*. Moreover, as the district court appropriately noted:

> Other state courts interpreting their state's consumer protection statutes have held that do not afford a private remedy for an employer or employee for issues arising out of the employment relationship. *See, e.g.*, *Donovan v. Digital Equip. Corp.*, 883 F. Supp. 775, 786 (D.N.H. 1994) (holding that the New Hampshire Consumer Protection Act "does not provide a private remedy for 'disputes arising out of the employment relationship between an employer and an employee'") (quoting *Evans v. Certified Eng'g & Testing Co.*, 834 F. Supp. 488, 499 (D. Mass. 1993) (noting that "the Massachusetts Supreme Judicial Court [has] held that disputes arising out of the employment relationship between an employer and an employee are not cognizable under" the Massachusetts Consumer Protection Act) (internal quotation marks and alterations omitted); *see also Bolen v. Paragon Plastics, Inc.*, 754 F. Supp. 221, 227-28 (D. Mass. 1990) (noting the Massachusetts Supreme Court decision in *Manning v. Zuckerman*, 444 N.E. 2d 1262 (Mass. 1983) "unequivocally established that disputes between employers and employees fall outside the scope of" the Massachusetts Consumer Protection Act).

Id. at 425-26 (D. Vt. 2013). Thus, the Court agrees with the *Nashef* Court's prediction that "the Vermont Supreme Court would not extend the [CPA] to the typical employer-employee relationship without a clear directive from the Vermont legislature indicating that the [Act] was intended to extend that far." *Id*. at 426; *see also State v. DeCoster*, 653 A.2d 891, 896 (Me.

1995)) ("We find nothing in legislative history . . . to support a conclusion that the Legislature intended that [the Maine Act] be applicable to the relationship between employers and employees. Our Legislature has acted extensively to regulate the relationship between an employer and an employee but has never implicitly or explicitly in such legislation made the [Maine Act] applicable to labor relations. We decline to act where the Legislature has seen no need to act." (*quoted in Nashef*, 947 F. Supp. at 426)); *Bolen*, 754 F. Supp. at 227-28 (holding that the Massachusetts Act "embraces marketplace transactions, not . . . claim[s] against [an] employer for unfair and deceptive acts in connection with an agreement terminating [plaintiff's] employment").

Lastly, Lamothe-Farwell argues that Community Health, as one of the largest regional employers in the "highly competitive labor field for medical services," should be subject to liability under the CPA if it fraudulently induces new employee hires. *See* Pl.'s Surreply to Mot. to Dismiss Count III, at 3-5. Lamothe-Farwell relatedly alleges that the labor market in Vermont is extremely tight, with healthcare providers currently facing a "workforce crisis." Pl.'s Opp'n at 10-11 (quoting State report). However, even accepting these allegations as true, Lamothe-Farwell cites nothing in the CPA suggesting that the law's scope should be expanded by courts whenever the accused entity is especially large in size. Moreover, a tight labor market suggests that employees who believe their employers did not live up to their promises of fair treatment or a professional workplace environment have a relatively easy remedy, i.e., switching employers. *Cf*. *Nashef*, 947 F. Supp. 2d at 425 ("There is no need to extend this protection to employers vis-à-vis their employees as an employer has a pre-existing remedy of terminating any employee who engages in a material misrepresentation during the hiring process."). Further, there are legal remedies, including breach of contract and claims under the Vermont Fair Employment Practices Act, that squarely address an employer's violations of contractual obligations, or violations of statutory obligations regarding the workplace and the fair treatment of employees. Thus, there is no basis to infer that the Legislature intended for the CPA to provide an additional remedy to employees who are misled into employment and/or mistreated by their employers during the course of employment (or through a termination of employment). "This is not a case where common law remedies are 'inadequate for addressing wrongs committed against individual consumers because the cost of litigation . . . outweighs the rewards,' or one where the parties lack countervailing rights and liabilities established under common law principles." *Dole v. Adams*, No. 1:12-CV-24-JGM, 2015 WL 2184130, at *3 (D. Vt. May 11, 2015) (quoting *Foti Fuels*, 2013 VT 111, ¶¶ 21-23).

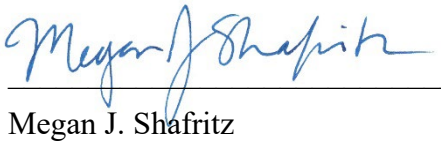
In short, the Court concludes that Plaintiff has failed to demonstrate she has a plausible claim under the Vermont Consumer Protection Act. Accordingly, Count III must be dismissed. *See, e.g.*, *Montague v. Hundred Acre Homestead, LLC*, 2019 VT 16, ¶¶ 11-12 (affirming trial court's grant of Rule 12(b)(6) motion despite novelty of the claim, where "plaintiff [did] not allege a legally cognizable claim," noting that dismissal turned on "the validity of [plaintiff's] legal theories," that is, "the law of the claim, not the facts which support it").

Order

For the foregoing reasons, Defendant's Motion to Dismiss Plaintiff's claim under the Consumer Protection Act (Motion 1) is GRANTED.

Defendant shall file its Answer to the Complaint within 14 days, and thereafter the parties shall promptly file their proposed Rule 16.3 Discovery and Pre-trial Order.

Electronically signed on October 9, 2023 pursuant to V.R.E.F. 9(d).



Megan J. Shafritz
Superior Court Judge