IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Blake Humphrey, Plaintiff, v. Board of Trustees of Community College District No. 508, City Colleges of Chicago, Kennedy-King College, Eduardo Jose Barrios, and Leslie Shankman School Corporation, Defendants.	)	No. 18 L 12146

MEMORANDUM OPINION AND ORDER

A valid claim of negligent or willful and wanton conduct must plead a cognizable legal duty owed by a defendant to a plaintiff. An employer owes no duty to conduct background checks or train, supervise, or control employees, or implement policies or procedures for the benefit of an employee's subsequent employer. Absent a duty owed to the plaintiff in this case, the motion to dismiss must be granted and the defendant dismissed with prejudice.

Facts

On March 1, 2013, Eduardo Barrios began working at Sonia Shankman Orthogenic School[1] after passing a background check. On July 11, 2014, and unknown to Shankman, Barrios began working at Kennedy-King College, part of the City Colleges of Chicago,[2] also after passing a background check. As of that date, Barrios worked at both Shankman and CCC.

[1] The Leslie Shankman School Corporation sponsors the Shankman School.
[2] The non-Shankman defendants are referred to collectively as "CCC."

On October 28, 2014, Peter Myers, Shankman's co-executive director, learned of a student's claim that he had been sexually assaulted by Barrios. Myers prepared a report and, on October 30, 2014, submitted it to the Illinois Department of Children and Family Services. After submitting the report to DCFS, Myers learned from the victim of other acts by Barrios that had not been disclosed, including leaving students at Starbucks unattended and taking students to his home to see his dog. Myers testified that, at the time, he knew such acts violated the school's policies, but he did not "connect[] the dots" between what were plainly policy violations and what might constitute sexual grooming. Myers told DCFS investigators that Shankman had terminated Barrios for policy violations "around these issues," and that Myers justified the termination based on the instances of leaving students unattended and taking them to his home.

Myers testified that Shankman fired Barrios within the week of the occurrence. An affidavit supplied by Kimberly Williamson, Shankman's human resources director, avers that the school terminated Barrios' employment on October 28, 2014. A notice of termination/layoff form indicates that Barrios' last day of work was October 28, 2014 and that his first day without pay was October 29, 2014.

Despite the termination from Shankman, Barrios continued to work for CCC. According to Humphrey, on December 13, 2017, Barrios sexually assaulted Humphrey while he was a student at Kennedy-King College. On March 6, 2018, CCC terminated Barrios' employment.

On November 8, 2018, Humphrey filed a complaint in this case; on January 22, 2019, he filed an amended complaint, and on April 2, 2019, he filed a second amended complaint. In the latest iteration, the first nine causes of action are directed against CCC and Barrios. Counts ten and eleven are directed against Shankman and are based on negligent and willful and wanton conduct, respectively. Both counts allege that Barrios was working for Shankman as of Barrios'

December 13, 2017 sexual assault of Humphrey.[3] The counts both allege that Shankman owed Humphrey a duty to exercise reasonable care in the screening, hiring, supervision, and control of its employees. Both counts further allege that Shankman knew or should have known that Barrios was unfit for any position of employment and that he created a danger to students at CCC. Both counts further allege that Shankman knew or should have known that Barrios had prior sexual assault and sexual abuse complaints filed against him while a Shankman employee. Both counts raise allegations that Shankman had a mandated duty to report any claim of sexual abuse or assault of a student and had a duty to train, supervise, and manage its employees so that they would not sexually assault or abuse CCC students. Counts ten and eleven also allege that Shankman had a duty to conduct background checks of their employees and had to enact and enforce policies to prevent employees from committing sexual abuse and assault.

Based on these allegations, the two counts claim that Shankman was both negligent and willful and wanton by failing to: (a) conduct a background check before hiring Barrios; (b) train its employees to refrain from sexually assaulting and abusing students; (c) supervise its employees to refrain from sexually assaulting and abusing students; (d) control its employees from sexually assaulting and abusing students; (e) enact policies to protect students from sexual assault and abuse; (f) implement policies to protect students from sexual assault and abuse; and (g) enforce policies to prevent employees from sexually assaulting and abusing students. Based on these failings, Humphrey alleges that Shankman proximately caused his sexual assault by Barrios while a student at CCC.

Analysis

The Code of Civil Procedure authorizes Shankman's combined 2-615 and 2-619 motion to dismiss. *See* 735 ILCS 5/2-619.1. A

[3] The second amended complaint contains repeated allegations that Humphrey's sexual assault occurred on December 13, 2017 and December 13, 2018.

section 2-615 motion tests a complaint's legal sufficiency, while a section 2-619 motion admits a complaint's legal sufficiency, but asserts affirmative matter to defeat the claim. *See Bjork v. O'Meara*, 2013 IL 114044, ¶ 21; *Patrick Eng., Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31. A court considering either motion must accept as true all well-pleaded facts and reasonable inferences arising from them, *Doe v. Chicago Bd. of Ed.*, 213 Ill. 2d 19, 23-24 (2004), but not conclusions unsupported by facts, *Pooh-Bah Enterps., Inc. v. County of Cook*, 232 Ill. 2d 463, 473 (2009).

One of the enumerated grounds in support of a section 2-619 motion is that "affirmative matter" may avoid the legal effect of or defeat the claim. *See* 735 ILCS 5/2-619(a)(9). Affirmative matter is something in the nature of a defense that negates the cause of action completely or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint. *See McIntosh v. Walgreens Boots Alliance, Inc.*, 2019 IL 123626, ¶ 16. The party relying on affirmative matter has both the burdens of proof and going forward. 4 Richard A. Michael, Illinois Practice § 41:8, at 481 (2d ed. 2011). If a motion is based on facts not apparent from the face of the complaint, the moving party must attach affidavits or other evidence. *See Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116 (1993). If the defendant carries its burden of going forward, "the burden then shifts to the plaintiff, who must establish that the affirmative defense asserted either is 'unfounded or requires the resolution of an essential element of material fact before it is proven.'" *Epstein v. Chicago Bd. of Ed.*, 178 Ill. 2d 370, 383 (1997) (quoting *Kedzie*, 156 Ill. 2d at 116). A plaintiff's failure to submit a counteraffidavit may be fatal to a cause of action. *See Philadelphia Indem. Ins. Co. v. Pace Suburban Bus Serv.*, 2016 IL App (1st) 151659, ¶ 22.

Shankman's central argument is that it owed Humphrey no duty. This argument is based factually on: (1) Barrios' background check that came back clean; (2) Shankman never knew that Barrios had ever applied for, was accepted by, or worked for CCC; (3) Myers timely reported Barrios' sexual assault and other conduct to DCFS; (4) Shankman timely fired Barrios; and (5) Barrios' sexual assault of

Humphrey occurred more than three years after Shankman fired Barrios. The legal basis for Shankman's argument is that Humphrey cannot establish the four essential elements of a common-law duty. In response, Humphrey argues that Shankman owed him a duty because it knew of Barrios' past conduct and that it made him unfit for any position of employment and a danger to CCC students, including Humphrey. Humphrey further argues as a matter of law that Shankman's duty is confirmed by the holding in *Doe-3 v. McLean Cty. Unit Dist. No. 5*, 2012 IL 112479.

The record establishes that Shankman has met its burdens of proof and going forward as to factual issues. First, Shankman has presented evidence that it conducted a background check of Barrios before hiring him and that the investigation turned up no untoward conduct. CCC also conducted a background check that came back negative. That result is equally unsurprising since the first student allegation of Barrios' sexual assaults did not occur until after both Shankman and CCC had hired him.

Second, Shankman has shown that at no time did it have institutional knowledge that Barrios had ever applied for, been accepted by, or worked for CCC. Humphrey has failed to present any evidence to the contrary. Rather, Humphrey argues that Shankman should have known of Barrios' other employment through annual background checks. That argument has no currency because had Shankman conducted a background check on Barrios' first employment anniversary – March 1, 2014 – it would not have shown that he had been hired by CCC – July 11, 2014 – or that he had allegedly sexually assaulted the Shankman student – October 28, 2014.

Third, Shankman has shown that on October 30, 2014, Myers timely filed a report with DCFS about Barrios' sexual assault pursuant to the Abused and Neglected Child Reporting Act. *See* 325 ILCS 5/1, *et seq.*[4] Since Humphrey cannot counter that fact, he

[4] The statute does not provide for a private right of action. *See Doe-3*, 2012 IL 112479, ¶ 25 n.7.

argues unrelatedly that Shankman failed to report to DCFS Barrios' acts of sexual grooming. Yet Myers testified that he did report these events to DCFS investigators at the time. What DCFS did or did not do with any of the information Myers provided about Barrios' alleged sexual assault or grooming was not under Myers' or Shankman's control after the report had been submitted.

Fourth, Shankman has established that it fired Barrios the same day that Myers learned of the allegations of sexual assault by a Shankman student. Humphrey argues that Myers' testimony that Barrios was fired within the week is inconsistent with Williamson's affidavit and, therefore, raises a credibility issue. That argument is spurious. Even if Myers' testimony conflicted with the affidavit, which it does not, Shankman puts an end to Humphrey's credibility argument by attaching as an exhibit to the reply brief a termination/layoff form. That form establishes that Shankman, in fact, terminated Barrios' employment on October 28, 2014.

Fifth, Humphrey alleges that his sexual assault by Barrios occurred on December 13, 2017. That date is more than 37 months after Shankman fired him on October 28, 2014. Not surprisingly, Humphrey has not presented a factual argument that Shankman had any control over Barrios after his employment termination.

Without any facts to support its allegations, Humphrey attempts to construct a two-part legal argument to defeat Shankman's motion to dismiss. First, according to Humphrey, because Shankman knew of Barrios' October 28, 2014 sexual assault, Shankman owed a duty to all future Barrios' students at CCC to prevent him from sexually assaulting them. Second, Shankman's alleged failures to conduct a background check, train, supervise, or control Barrios, and enact, implement, and enforce policies, all breached Shankman's duties to Humphrey that proximately caused Barrios' sexual assault of Humphrey 37 months later.

Humphrey's threadbare legal arguments are not supported by the singular case on which he relies, *Doe-3*. Indeed, Humphrey disingenuously distorts that case's facts and holding. *Doe-3* involved

a severance agreement between the school district defendants and a teacher that concealed his previous sexual abuse of students. *See Doe-3*, 2012 IL 112479, ¶ 5. Further, the defendants wrote a "falsely positive letter of reference" for the teacher and provided the letter to another school district. *Id.* The defendants also provided falsified employment information indicating that the teacher had worked a full school year when, in fact, he had twice been disciplined during his last year of teaching and left before the end of the term. *See id.*, ¶ 6. Given the information supplied, the second school district hired the teacher. *See id.*, ¶ 7.

The court in *Doe-3* examined each of the four elements comprising a duty analysis. *See id.*, ¶¶ 30-35. Those elements established that the defendants, "[h]aving undertaken the affirmative act of filling out [the teacher's] employment verification form, . . . had a duty to use reasonable care in ensuring that the information was accurate." *Id.*, ¶ 35. The court accepted the plaintiff's argument that the defendants had breached their duty and created a risk of harm by providing false information to the second school district. *See id.*, ¶ 27.

The facts of *Doe-3* bear no relationship whatsoever with this case. Here, Shankman did not enter into a severance agreement with Barrios; rather, it summarily fired him. Further, Shankman never supplied false information to anyone, including CCC or DCFS. In contrast to *Doe-3*, the subsequent employer in this case, CCC, never relied on any information Shankman provided in deciding to hire Barrios.

As a matter of law, Humphrey cannot establish the same four elements the court analyzed in *Doe-3* to find that defendants owed the plaintiff a duty. Duty is, of course, a question of law to be decided by the court. *See Burns v. City of Centralia, 2014 IL 116998, ¶ 13; Choate v. Indiana Harbor Belt R.R.*, 2012 IL 112948, ¶ 22. To determine if a duty exists, a court is to analyze whether a relationship existed between the plaintiff and the defendant for which the law would impose a duty on the defendant for the plaintiff's benefit. *See Doe-3*, 2012 IL 112479, ¶ 22, *quoting Marshall*

v. Burger King Corp., 222 Ill. 2d 422, 436 (2006). The "relationship" is "a shorthand description for the analysis of four factors: (1) the reasonable foreseeability of the injury, (2) the likelihood of the injury, (3) the magnitude of the burden of guarding against the injury, and (4) the consequences of placing the burden on the defendant." *Id.*, *citing Simpkins v. CSX Transp., Inc.*, 2012 IL 110662, ¶ 18. A court's analysis of the duty element focuses on the policy considerations inherent in these four factors and the weight accorded to each based on the case's particular circumstances. *Id.*

As to the foreseeability element, it is fundamental that each person owes a duty of ordinary care "to guard against injuries which naturally flow as a reasonably probable and foreseeable consequence of an act. . . ." *Doe v. Coe*, 2019 IL 123521, ¶ 37 (quoting *Bogenberger v. Pi Kappa Alpha Corp.*, 2018 IL 120951, ¶ 46. Here, the "acts" Humphrey claims Shankman breached are failures to conduct a background check, train, supervise, or control Barrios, and enact, implement, and enforce policies and procedures. Even assuming Shankman failed on each point, it is simply not reasonably probable and a foreseeable consequence that Barrios would sexually assault Humphrey three years later while working for a different employer. As noted above, Shankman had no knowledge of Barrios' employment at CCC; Shankman dutifully reported Barrios' conduct to DCFS; and the incident at CCC occurred more than three years after Shankman fired Barrios. Quite simply, Shankman could not have been reasonably expected to foresee Barrios' bad acts three years later while working for another employer.

Second, it patently obvious that Humphrey would be injured from Barrios' sexual assault; however, that is not the focus of the "likelihood of injury" element. Rather, the focus is whether it was likely that Humphrey would be injured by Barrios, then an ex-Shankman employee, when employed by a different employer. To find a likelihood of injury under those circumstances would run afoul of general principle that no duty exits unless there is either a direct or special relationship between the parties. *See, e.g., Reynolds v. Decatur Memorial Hosp.*, 277 Ill. App. 3d 80, 85 (4th Dist. 1996) (no duty absent a patient-physician or some other special relationship)

(citing cases). *Cf., e.g., Whitebread v. Consolidated Grain & Barge Co.*, 2015 IL App (2d) 140574 (employer failed to follow OSHA guidelines for worker safety). In this case, Humphrey has failed to cite any special circumstances linking him – a student at another institution three years later – with Shankman – Barrios' ex-employer. In short, there existed no likelihood of injury under this set of facts.

Third, the burden Humphrey seeks to impose – requiring employers to inform all future employers of employee misconduct – is unacceptable. Humphrey conveniently leaves unanswered the question of how Shankman would have been expected to learn of Barrios' other and subsequent employment at CCC, or any other potential employer. Rather, Myers did precisely what the Abused and Neglected Child Reporting Act required him to do – he reported Barrios' sexual assault to DCFS. In short, it is not this court's position to impose on an employer a duty that neither statutes nor the common law has found to be appropriate.

Fourth, the consequences of requiring employers to track all ex-employees and inform their new employers of past misconduct would be absurd. Humphrey fails to explain where employers would obtain such information, or even if they could given existing privacy laws. Such information would also serve no useful purpose. Potential employers conduct background checks as a matter of course or fail to do so at their own peril. Humphrey's simplistic suggestion that Shankman should have conducted an annual background check is bogus since Barrios' subsequent conduct occurred more than three years after Shankman fired him. Further, to impose a duty on employers to inform all future employers would essentially make the reporting requirements of the Abused and Neglected Child Reporting Act meaningless. The statute creates a centralized reporting depository with DCFS. Humphrey's willingness to rely on private sector solutions to prevent future criminal activity is a dangerous leap this court is unwilling to take.

In sum, the four factors comprising a duty analysis show that, in this case, Shankman owed Humphrey no duty. Further, the

uncontested facts establish that under no circumstances could Humphrey ever identify a duty owed to him by Shankman. The inexorable conclusion is that the motion to dismiss must be granted.

Conclusion

For the reasons presented above, it is ordered that:

1. Shankman's 2-619 motion to dismiss is granted;
2. Shankman is dismissed from this case with prejudice;
3. Pursuant to Illinois Supreme Court Rule 304(a), there exists no just reason for delaying the enforcement, appeal, or both, of this court's order;
4. This case shall proceed as to all other defendants; and
5. Case management shall proceed pursuant to notification by the court.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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