IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

KAREN D. STOPPEL, Plaintiff, v. RENATA J. HENRY, Individually as Director of the Division of Alcoholism, Drug Abuse, and Mental Health of the Delaware Division of Health and Social Services; SUSAN WATSON ROBINSON, Individually as Hospital Director of the Delaware Psychiatric Center of the Delaware Division of Health and Social Services; and PHILIP THOMPSON, Individually as Unit Director at the Delaware Psychiatric Center of the Delaware Division of Health and Social Services, Defendants.	)	C.A. No. N10C-03-078 PLA

ON PLAINTIFF'S MOTION TO AMEND THE COMPLAINT
GRANTED
ON DEFENDANTS THOMPSON AND ROBINSON'S MOTION TO DISMISS
GRANTED
ON PLAINTIFF'S MOTION FOR EXTENSION
OF TIME TO PERFECT SERVICE
DENIED

Submitted: November 9, 2010
Decided: January 4, 2011

Jeffrey K. Martin, Esq., MARTIN & ASSOCIATES, P.A., Wilmington, DE, Attorney for Plaintiff

Joseph C. Schoell, Esq., DRINKER BIDDLE & REATH LLP, Wilmington, DE, Attorney for Defendants Susan Watson Robinson and Philip Thompson

ABLEMAN, JUDGE

I. Introduction

In this action alleging violations of Delaware's Whistleblowers' Protection Act[1] and civil conspiracy, Plaintiff Karen Stoppel claims that Defendants Renata J. Henry, Susan Watson Robinson, and Philip Thompson retaliated against her for reporting an incident of patient abuse at the Delaware Psychiatric Center (DPC) in November 2006. DPC is operated by the Delaware Department of Health and Social Services (DHSS), which employed Stoppel and the three individuals named as defendants during the events which form the basis of Stoppel's claim.

Defendants Thompson and Robinson ("the moving defendants") filed a motion to dismiss on the grounds that they are not "employers" who can be subject to liability under the Whistleblowers' Act and that Stoppel failed to effect proper and timely service against any of the individual defendants. While maintaining that her claims against Thompson, Robinson, and Henry are cognizable under the Whistleblowers' Act, Stoppel has sought to amend her Complaint to add DHSS as a defendant. Stoppel has also moved for an extension of time to perfect service upon all three individual defendants named in the original Complaint.

The Court is satisfied that the amendment to Stoppel's initial Complaint should be accepted as an amendment as of right pursuant to Superior Court Civil Rule 15(a). Stoppel's motion to amend is therefore **GRANTED**. However, upon

[1] 19 *Del. C.* § 1703.

review of the parties' filings and the applicable law, the Court also concludes that Thompson and Robinson cannot be held liable under the Whistleblowers' Act. Furthermore, Stoppel has not demonstrated good cause for her failure to effect proper service upon Thompson, Robinson, or Henry. The Court therefore finds that Thompson and Robinson's motion to dismiss must be **GRANTED**, and Stoppel's motion for extension of time to serve Thompson, Robinson, and Henry should be **DENIED**.

II. Factual and Procedural Background

According to Stoppel, during her employment as an evening charge nurse on DPC's K-3 unit, she saw a female patient placed in restraints by five male employees, one of whom restrained the patient's head by forcing a rolled-up towel over the patient's mouth and anchoring his hands on the bed to secure it. Stoppel claims that the DPC employees' actions bruised the patient, and constituted "the worst abuse of a patient she had ever seen."[2] The senior DPC employee involved was K-3 unit director Philip Thompson, who was Stoppel's direct supervisor. Stoppel notified DPC's nursing director of her concerns about the incident, and filed a Patient Abuse, Mistreatment and Neglect Report that identified Thompson as the person directing the abuse.

[2] Pl.'s Compl. ¶ 11.

Stoppel asserts that each of the individual defendants engaged in retaliatory conduct aimed at covering up the underlying abuse, protecting Thompson from consequences for his part in the event she witnessed, and punishing her for filing a report. By her Complaint, Stoppel alleges that Thompson altered documentation, engaged in intimidation tactics, and submitted retaliatory professional complaints against her, which ultimately led to disciplinary actions approved by Defendant Henry, who was then the director of the DHSS Division of Alcoholism, Drug Abuse, and Mental Health and chairperson of the DPC's governing body. Stoppel further claims that Robinson, the hospital director, ignored Thompson's adverse conduct, attempted to remove Stoppel from her position as a nurse-manager, and violated a Department of Labor agreement meant to end the retaliatory conduct.[3]

On March 5, 2010, Stoppel filed the instant action against Henry, Thompson, and Robinson. Writs were issued for service upon the three defendants on May 24, 2010. The sheriff's return, filed June 21, 2010, indicated that both Thompson and Robinson had been served personally at DPC. In fact, this information would later prove to be inaccurate as to Thompson, who had not been personally served and had not worked at DPC since 2007. Service was returned *non est* as to Henry. On July 7, 2010, Stoppel moved for appointment of a special process server to effect service upon Henry. The Court granted the request, and a

[3] *Id.* ¶¶ 3-5, 13-22.

writ with accompanying alias summons and praecipe was prepared for the process server by August 2, 2010. The writ has not yet been returned.

III. Parties' Contentions

On September 23, 2010, Thompson and Robinson filed a motion to dismiss pursuant to Superior Court Civil Rules 12(b)(4), (5), and (6). By their motion, Thompson and Robinson first seek to have Stoppel's claims against all three individual defendants dismissed based upon failure to effect proper service. Thompson and Robinson argue that Stoppel has not complied with 10 *Del. C.* § 3103, which requires that a party asserting claims against officers of the state government related to the exercise of official powers or duties must serve the Attorney General, State Solicitor, or Chief Deputy Attorney General in order to complete service of process. Because the 120-day time period for service of process under Rule 4(j) has expired, the moving defendants contend that dismissal is appropriate. Furthermore, Thompson argues that service upon him was defective because the sheriff's return incorrectly stated that he was personally served at DPC.

Additionally, Thompson and Robinson suggest that Stoppel has failed to state a claim for which relief can be granted against them, on the basis that the Whistleblowers' Protection Act does not provide a cause of action against individual state officials and employees. Because Stoppel's civil conspiracy claim

is dependent upon the viability of her statutory action, Thompson and Robinson contend that the conspiracy claim against them must fail as well.

In response, Stoppel filed a motion to amend her Complaint to add DHSS as a defendant, stating that the agency is a "proper" defendant to her claims and noting that the body of her original Complaint actually describes DHSS as "Defendant." According to Stoppel, she intended to name and serve DHSS as a defendant in her initial Complaint, and her failure to do so was an inadvertent oversight. In addition, Stoppel submits that the individual defendants named in the original Complaint could be subject to liability under the Act, which defines an "employer" to include individuals under certain circumstances. Finally, Stoppel moves for an extension of time to effect service upon Thompson, Robinson, and Henry, which she contends is justified by the sheriff's error regarding service upon Thompson and by Henry's current residence in Maryland.

IV. Analysis

A. Stoppel's Motion to Amend

With two significant caveats regarding the scope of this conclusion, the Court finds that Stoppel is entitled to amend her Complaint to add DHSS as a defendant. Stoppel's right to such an amendment is grounded in Rule 15(a), which provides as follows:

> *A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served* . . . . Otherwise, a

> party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.[4]

Although Court personnel were instructed to have Stoppel present a motion to amend because of the pending motion to dismiss, Stoppel's amendment is controlled by Rule 15(a)'s provision for one amendment "as a matter of course" prior to the filing of a responsive pleading, because none of the existing defendants had filed a responsive pleading prior to Stoppel's motion to amend.

In so holding, the Court necessarily concludes that a motion to dismiss is not a responsive pleading that would require Stoppel to seek leave of the Court to file an amended Complaint. This conclusion is based upon Rule 7(a), which provides a list of the pleadings allowed by the Court's rules:

> There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is served under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served.

The rule then indicates that its list of permitted pleadings is exhaustive, with two specific exceptions not at issue here:

> *No other pleading shall be allowed*, except that the Court may order a reply to an answer or a third-party answer.[5]

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[4] Super. Ct. Civ. R. 15(a) (emphasis added).

[5] Super. Ct. Civ. R. 7(a) (emphasis added).

Nothing in Rule 7 suggests that a motion to dismiss—or a motion of any kind—would constitute a pleading.

The Court is further guided by the Court of Chancery's Rule 15(aaa), which states in relevant part:

> Notwithstanding subsection (a) of this Rule, a party that wishes to respond to a motion to dismiss . . . by amending its pleading must file an amended complaint, or a motion to amend in conformity with this Rule, no later than the time such party's answering brief in response to either of the foregoing motions is due to be filed.

Subsection (a) of Chancery Court Rule 15 mirrors the language of this Court's Rule 15(a) in providing for a one-time amendment "as a matter of course at any time before a responsive pleading is served." Thus, Chancery Court Rule 15(aaa) contemplates circumstances under which a party may file such an amended complaint by right, and not by motion, while a motion to dismiss is pending—which is only possible if the motion to dismiss is not a responsive pleading. This Court has no reason to construe the term "responsive pleading" differently under its rules.

The Court recognizes that prior decisions from other judges in this Court have stated or implied that a motion to dismiss is treated as a responsive pleading for Rule 15(a) purposes.[6] Nevertheless, based upon the language of Rule 7 and

[6] *See, e.g.*, *Eaton v. Raven Transport, Inc.*, 2010 WL 424458, at *4 (Del. Super. Jan. 26, 2010) ("[Defendant] correctly asserts that its Motion to Dismiss is a responsive pleading . . . ."); *Mell v. New Castle Cty.*, 835 A.2d 141, 144 n.4 (Del. Super. Sept. 9, 2003).

Rule 15, as well as consistent decisions from this Court and other jurisdictions applying similar language in former Federal Rule of Civil Procedure 15,[7] the Court is satisfied that a motion to dismiss does not constitute a responsive pleading. As such, Stoppel is entitled to amend her Complaint to name DHSS as a defendant without leave of the Court. Her motion to amend—which in essence proved to be a cautionary measure—should therefore be granted.

Stoppel's amendment raises at least two potentially significant issues that are not before the Court at this time, but which should be kept in mind by her counsel. First, the Court cannot discern from the limited facts before it whether the late addition of DHSS as a defendant presents an issue with regard to the statute of limitations, and thus it does not address whether the amendment will relate back to the filing date of the initial Complaint pursuant to Rule 15(c). Second, the related question of whether the period to effect service will restart as to DHSS with the

[7] *See, e.g.*, *Hall v. Maritek*, 2009 WL 1160372, at *2 n.6 (Del. Super. Apr. 29, 2009); *Fletcher-Harlee Corp. v. Pote Concrete Contractors, Inc.*, 482 F.3d 247, 252 (3d Cir. 2007) ("[A] motion to dismiss is not a responsive pleading and . . . Rule 15(a), therefore, allows one amendment as a matter of right up to the point at which the district court grants the motion to dismiss and enters final judgment."); *Kelly v. Del. River Joint Comm'n*, 187 F.2d 93, 93 (3d Cir. 1951). Amendments to Federal Rule of Civil Procedure 15(a) made in 2009 now provide that a party seeking to amend a pleading to which a responsive pleading is required may make one amendment as a matter of course "21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier." FED. R. CIV. P. 15(a)(1)(B). As the commentary to the newly-revised Federal Rule 15 states, "[Under former Rule 15(a),] [s]erving a motion attacking the pleading did not terminate the right to amend, *because a motion is not a 'pleading' as defined in Rule 7*." FED. R. CIV. P. 15 advisory committee's note (emphasis added).

filing of the amended Complaint is not before the Court at this time, but has been the subject of decisions in other jurisdictions.[8]

B. Thompson and Robinson's Motion to Dismiss Whistleblowers' Act Claims

Previous cases have called upon this Court to assess the Whistleblowers' Act's applicability against individual state officers, officials, and employees alleged to have engaged in retaliatory conduct against employee-claimants. In *Tomei v. Sharp*, plaintiff Tomei contended that she was terminated from a job with the Delaware Department of Labor (DOL) based upon whistleblowing actions she took during her previous employment at a federal agency.[9] After a detailed examination of the language and history of the Act, the Court dismissed Tomei's individual claims against the Secretary of the Delaware Department of Labor and against the Director of Department's Division of Employment and Training. The Court explained three alternative reasons why the individual defendants could not be held liable:

> First, Tomei was an employee of the State, not of the two individuals. Second, the State is liable for the financial obligations that could

[8] *See, e.g.*, *McClenney v. Campbellton-Graceville Hosp.*, 1999 WL 639815, at *3-5 (N.D. Fla. June 28, 1999) (analyzing cases decided under parallel federal rules).

[9] 902 A.2d 757 (Del. Super. 2006), *aff'd on other grounds*, 918 A.2d 1171, 2007 WL 249176 (Del. 2007) (TABLE). Stoppel correctly notes that the moving defendants' choice to cite the Superior Court's opinion in *Tomei* as "affirmed" without further elaboration is misleading, as the Supreme Court's ruling addressed only a portion of the Superior Court's opinion not relevant to the issue in this case. Counsel is cautioned to take greater care in the future to provide *precise* subsequent histories of cited authorities.

> result from a successful action under the Whistleblower Act, and duty-bound to comply with any of the non-monetary remedies, if ordered. Third, the definition of employer in the Act does not include individuals.[10]

This Court has relied upon *Tomei* in at least two cases dismissing Whistleblowers' Act claims brought against individual state officials or employees working in the same agency or entity as the plaintiff.[11]

Stoppel suggests that the Court should now depart from *Tomei* and subsequent cases to find that the Act's definition of "employer" encompasses individual supervising officials and employees. Stoppel relies upon the definition of "employer" contained in 19 *Del. C.* § 1702(2), which encompasses "any person" and further elaborates that "[o]ne shall employ another if services are performed for wages or under any contract of hire, written or oral, express or implied."[12] Stoppel contends that she "indisputably performed" services for wages "at the behest of Defendants Robinson and Thompson."[13]

Stoppel's argument fails to persuade the Court that either Robinson or Thompson can be considered her "employer" within the meaning of the Whistleblowers' Act. Section 1702 of the Act defines an "employee" eligible for

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[10] *Id.* at 767.

[11] *See Meltzer v. City of Wilmington*, 2008 WL 4899230, at *2 (Del. Super. Aug. 6, 2008); *Postell v. Eggers*, 2008 WL 134830, at *5 (Del. Super. Jan. 15, 2008).

[12] 19 *Del. C.* § 1702(2).

[13] Pl.'s Resp. to Defs. Robinson and Thompson's Mot. to Dismiss ¶ 3.

protection as, in part, "a person *employed* full or part-time *by any employer*."[14] Neither of the moving defendants paid Stoppel's wages or contracted for her hire in their individual capacities. While the moving defendants' supervisory roles may have entailed ordering Stoppel to "perform services" and otherwise acting on behalf of Stoppel's employer (*i.e.*, DHSS), such activities do not confer employer status under the Act.[15]

Thus, the Court finds that Stoppel fails to state a claim against the moving defendants for violation of the Whistleblowers' Act, such that dismissal is required by Rule 12(b)(6). Because neither Robinson nor Thompson could commit violations of the Whistleblowers' Act as individuals, Stoppel's related civil conspiracy claims against each of them must therefore be dismissed as well.[16]

C. Failure to Effect Service Against Thompson, Robinson, and Henry

Robinson and Thompson also allege that Stoppel failed to effect proper service against any of the individual defendants within the time limitations set

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[14] 19 *Del. C.* § 1702(1) (emphasis added).

[15] Stoppel also contends that because the Act's protections extend to reports of underlying "violations" committed by "an employer, or an agent thereof," the Court should construe the Act's definition of "employer" to include individuals. *See* 19 *Del. C.* § 1702(6). Nothing in the text of the Act supports this argument—and, indeed, the fact that the statute separately refers to violations committed by "an employer, or an agent thereof" supports that the Act's definition of "employer" does *not* include its agents.

[16] *Connolly v. Labowitz*, 519 A.2d 138, 143 (Del. Super. 1986) ("To be actionable a civil conspiracy must embody an underlying wrong which would be actionable in the absence of the conspiracy.").

forth in Rule 4(j). While Robinson and Thompson are entitled to dismissal pursuant to Rule 12(b)(6), as discussed above, this alternative ground for dismissal applies to all three individual defendants.

The moving defendants argue that Stoppel failed to comply with 10 *Del. C.* § 3103, which states as follows:

> No service of summons upon the State, or upon any administrative office, agency, department, board or commission of the state government, or upon any officer of the state government concerning any matter arising in connection with the exercise of his or her official powers or duties, shall be complete until such service is made upon the person of the Attorney General or upon the person of the State Solicitor or upon the person of the Chief Deputy Attorney General.[17]

Stoppel does not dispute the applicability of § 3103, nor does she deny that service has not been made upon the persons designated by the statute. Instead, Stoppel's response suggests that her failure to effect service upon Thompson resulted from an inaccuracy in the sheriff's return, which erroneously stated that the sheriff had served Thompson personally. Stoppel filed a motion for extension of time to perfect service upon the individual defendants, in which she argues that good cause for an extension of time exists based upon the sheriff's error and the fact that Henry "now resides out-of-state, and Plaintiff will need to make application in Maryland in order to effectuate service of process."[18]

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[17] 10 *Del. C.* § 3103(c).

[18] Pl.'s Mot. for Extension of Time to Perfect Service 1.

Superior Court Civil Rule 4(j) provides as follows:

> If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

Establishing the existence of "good cause" under Rule 4 "requires a showing of good faith and excusable neglect," such that the plaintiff's failure to obtain service within 120 days of filing arose in spite of its making "all possible efforts to comply with Rule 4."[19]

Stoppel's motion for extension of time was filed on October 26, 2010, more than seven months after her initial Complaint was filed. The explanations offered by Stoppel regarding the sheriff's error in stating that Thompson was personally served and Henry's move to Maryland do not constitute good cause for her separate failure to comply with § 3103 by serving the Attorney General, State Solicitor, or Chief Deputy Attorney General. Indeed, Stoppel's response and motion to extend time do not address § 3103 at all. At least with regard to Defendants Thompson and Robinson, the sheriff's error—of which Plaintiff was apparently unaware during the 120-day period for service—could not have affected Stoppel's failure to comply with § 3103. Thus, even if the sheriff *had* served

[19] *Larimore v. Stella*, 2003 WL 22064107, at *2 (Del. Super. Aug. 23, 2003) (quoting *Franklin v. Millsboro Nursing & Rehab. Ctr., Inc.*, C.A. No. 95C-11-008 (Del. Super. June 10, 1997)).

Thompson personally, service would not have been completed within the 120-day time period, and Stoppel has offered no explanation justifying that circumstance.

As to service upon Henry, although Stoppel requested and obtained the appointment of a special process server in early July 2010, no return has been filed. Stoppel was obviously aware that service had never been effected upon Henry, and her motion for extension of time—which was filed on October 26, 2010—offers no explanation for how Henry's Maryland residency has occasioned the ensuing delay.[20]

In the absence of any explanation for the particular defects in service raised by the moving defendants, the Court cannot find that Stoppel has demonstrated good cause, let alone that she has made all possible efforts to comply with the Rule 4 time limitations. An extension of time to serve would be inappropriate under these circumstances, and the Court will therefore grant moving defendants' motion to dismiss all claims against Thompson, Robinson, and Henry on the basis of Stoppel's failures to complete service timely and properly.

[20] While it is Stoppel's failure to offer *any* explanation that provides the basis for the Court's decision, the Court also notes that simply entering Defendant Henry's name into a free online search engine such as Google should have revealed a publicly-available press release from 2008 indicating that Henry had obtained a position in Maryland and identifying her new employer, as well as information suggesting that this employment continued into 2010. While this information obviously would not have been conclusive as to her location at the time Stoppel was pursuing service, it does indicate that Henry could not be considered to have been hiding her whereabouts.

V. Conclusion

For the foregoing reasons, Stoppel's motion to amend is **GRANTED**, and her motion for extension of time to perfect service is **DENIED**. Based upon Stoppel's failure to state a claim upon which relief can be granted against the moving defendants, and her failure to perfect timely and sufficient service upon the three individual defendants named in her initial Complaint, the motion to dismiss is **GRANTED** as to her claims against Defendants Thompson, Robinson, and Henry.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

Original to Prothonotary
cc: Jeffrey K. Martin, Esq.
Joseph C. Schoell, Esq.