

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

07-P-156

YONG LI

vs.

RAYTHEON COMPANY & others. ✓

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

At issue in this appeal is the propriety of the dismissal, pursuant to Mass.R.Civ.P. 12(b), 365 Mass. 754 (1974), of Yong Li's eight-count complaint against the defendants, and the denial of her motion for leave to amend the complaint for the purpose of adding new claims and defendants. ✓ We affirm the judgment, but do so, in part, for reasons other than those relied upon by the motion judge.

As a threshold matter, we note that in this appeal, Li has chosen to challenge the dismissal of only some of her claims. Any and all claims not addressed in her briefs are deemed waived. See Mass.R.A.P. 16(a)(4), as amended, 367 Mass. 921 (1975); Sullivan v. Chief Justice for Admn. & Mgmt. of the

✓ Ian C. Mitchell, Arthur Buliung, Raytheon EAP, and John Didio. Dismissed from the case below without opposition, the Massachusetts Division of Professional Licensure is not a party to this appeal.

✓ Contrary to Li's assertion in her brief concerning the absence of any "actual entry of judgment," the Superior Court civil docket establishes that a "judgment on Motion to Dismiss (MRCP 12b)" entered on November 8, 2006, dismissing all claims in the case. (Li's Add. at 32; A. 4-5)

Trial Ct., 448 Mass. 15, 36 (2006). In addition, any and all factual assertions in Li's brief that are unsupported by an appropriate reference to the record, carry no weight here, and must be discounted.³ See Jones v. Wayland, 374 Mass. 249, 252 n.3 (1978); Kuban v. Kuban, 48 Mass. App. Ct. 387, 388 n.5 (1999).

Turning to so much of her complaint that Li has chosen to pursue, in counts I and II of her complaint, Li alleged that she was subjected to widespread racial discrimination at work by several individuals in violation of G. L. c. 151B as well as to retaliation following her internal complaint about that discrimination in 2002. In count V, Li alleged that she sustained emotional distress as a result of the improper conduct of the defendants, including their hiding of reports, misrepresentations, and physical intimidation. (S. A. 10-11) In count VII, Li alleged that the defendants tortiously interfered with her advantageous relations by, among other actions, "knowingly induced homicide investigation [in August, 2004], then calculatedly [sic] cover up and distort the truth." (S. A. 11)

Dismissal of claims based on prior pending action. A

³For instance, Li claims, without substantiation, that the Federal court judge denied her motion to add the G. L. c. 151B claims because, among other reasons, of a "mis-communication due to Li's hospitalization."

comparison of the two complaints provided by Raytheon's attorneys demonstrates that Li sued the same Raytheon defendants in a prior pending Federal court action and that Li's claims arose from the same set of operative facts. (S. A. 1-20) All relevant facts alleged in support of her Superior Court complaint occurred and were known to Li before she commenced the Federal court action.⁴ The motion judge dismissed counts I, II, V, and VII of Li's complaint in this Superior Court action pursuant to Mass.R.Civ.P. 12(b)(9), 365 Mass. 755 (1974), based upon the "[p]endency of a prior action in a court of the Commonwealth." However, the United States District Court for the District of Massachusetts is not considered a court of the Commonwealth for the purposes of Mass.R.Civ.P. 12

⁴In her Federal court complaint, Li asserted racial and retaliatory discrimination claims under Title VII of the Civil Rights Act of 1964 as well as many of the same tort claims asserted here (including, as herein relevant, tortious interference with advantageous relations and emotional distress). For reasons left unexplained on this record, Li failed to assert the G. L. c. 151B claims in the Federal action when she had the opportunity to do so as of right. The Federal court docket establishes that after Li was allowed to amend her complaint in whole or in part on several occasions, a Federal court judge denied Li's motion to post her third amended complaint. Shortly thereafter, the same judge denied her motion to amend the complaint to add the G. L. c. 151B claims. We note that the United States Court of Appeals for the First Circuit has recently affirmed the summary judgment dismissing Li's Federal claims. (Li's Add. at 38-39)

(b) (9).⁵ See Doe v. The Governor, 381 Mass. 702, 706 (1980).⁶

Therefore, the motion judge erred in dismissing the claims pursuant to rule 12(b) (9).

In reviewing the judge's decision and order, we may affirm the judge's ruling if there was "any valid ground on which the motion should have been allowed." Conant v. Sherwin L. Kantrovitz, P.C., 29 Mass. App. Ct. 998, 998 (1990). After review we conclude that counts I, II, V, and VII of Li's complaint could properly have been dismissed pursuant to Mass.R.Civ.P. 12(b) (6), 365 Mass. 754 (1974).

The motion judge dismissed the claims against John Didio, pursuant to rule 12(b) (6) for the failure to state a claim upon which relief could be granted. See Schaer v. Brandeis Univ., 432 Mass. 474, 477-478 (2000). Of the four claims in the

⁵Li's emotional distress claims against the Raytheon defendants were barred by the exclusivity provision of the workers' compensation act. See Green v. Wyman-Gordon Co., 422 Mass. 551, 558-560 (1996).

⁶The appropriate action would have been for the judge to exercise his discretion, by virtue of his right to control disposition of the docket, to grant a stay of this action pending the outcome of the Federal litigation. See Municipal Lighting Commn. of Peabody v. Stathos, 13 Mass. App. Ct. 990, 991 (1982). If a stay had been granted, subsequent events (the dismissal of the Federal claims and the affirmance of that dismissal by the First Circuit) reveal that the issue of the propriety of the motion judge's dismissal would be moot because all claims that parallel the Federal claims are now barred by res judicata.

complaint not waived by Li in this appeal, only one (count V, alleging "negligent/reckless/intentional infliction of emotional distress") was asserted against Didio. We agree with the motion judge that Li could prove no set of facts in support of her emotional distress claims that would entitle her to relief. See Foley v. Polaroid Corp., 400 Mass. 82, 97-100 (1987); Quinn v. Walsh, 49 Mass. App. Ct. 696, 706-707 (2000).

Li's claim of racial discrimination by Raytheon pursuant to G. L. c. 151B is based upon allegations that Raytheon, in effect, supported misconduct by its supervisor Buliung. This claim fails, however, because nowhere does she allege that Buliung discriminated against her on the basis of race.

The retaliation claim brought by Li is centered on her allegations that Raytheon and the individual defendants (1) caused her to have a "mental evaluation as a means of reprisal or to control anti-discrimination complaint," and (2) sent her a letter, which she viewed as a threat to terminate her "while she was exercising her right of Family Medical Leave Act (FMLA)." Here, Li failed to allege the required element that she suffered an adverse employment action. See Tate v. Department of Mental Health, 419 Mass. 356, 364 (1995); MacCormack v. Boston Edison Co., 423 Mass. 652, 662 (1996). Neither the meeting with a human resource supervisor and Didio

nor the letter sent during Li's FMLA leave constitute adverse employment actions. Accordingly, her claim for retaliation fails.

Li's claim of tortious interference with advantageous business relations also fails. Here, she alleges that defendants Mitchell and Buliung "took business advantage and exploited plaintiff's vulnerability" apparently by misrepresenting certain facts to Didio. Those misrepresentations, she alleges, led Didio to question her as to whether she thought of hurting others. Didio's inquiries and later actions, she says, "produced a delusion environment around plaintiff and caused her severe mental disorder with psychotic feature."[✓]

To prevail on a claim of tortious interference with business relationships, Li must demonstrate that (1) she had a business relationship with a third party; (2) the defendants knowingly induced a breaking of the relationship; (3) the defendants' interference with the relationship was intentional

[✓] On August 30, 2004, Li emailed the chairman and CEO of Raytheon stating, "John Didio with his professional skill poisoned my brain, he treated me, a victim as a potential murder, this is evil behavior! As I'm sitting in my office and working, but quiet offenly, [sic] I want to scream!!!" In response to this email, Raytheon placed Li on administrative leave, requiring her to see an EAP-referred psychiatrist, and requiring a satisfactory evaluation from an EAP counselor as a condition for her return to active employment.

and improper in motive or means; and (4) Li was harmed by the defendants' actions. Blackstone v. Cashman, 448 Mass. 255, 260 (2007). Where the defendants are officials of the employer acting within the scope of their employment, they are shielded from liability unless the Li demonstrates that their actions were motivated by actual malice, defined as "a spiteful, malignant purpose, unrelated to the legitimate corporate interest." Id. at 260-261.

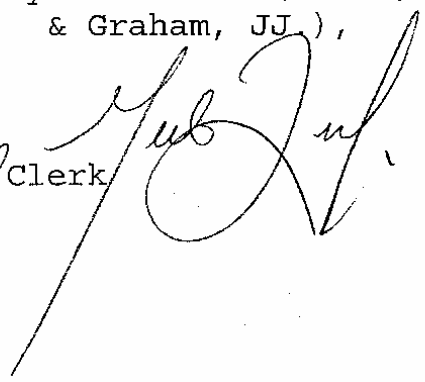
Here, Li failed to allege, among other things, that the defendants interfered with her business relationship with a third party, nor has she identified how she was harmed by the defendants' alleged conduct. Accordingly, this count of the complaint fails to state a claim.

Motion to amend. We review the judge's denial of a motion to amend the complaint for abuse of discretion. See Mancuso v. Kinchla, 60 Mass. App. Ct. 558, 572 (2004). Here, Li has failed to provide this court with any analysis at all, reasoned or otherwise, of the abuse of discretion issue. See Berman v. Linnane, 434 Mass. 301, 305 (2001); Patel v. Amresco SBA Holdings, Inc., 69 Mass. App. Ct. 192, 196-197 (2007). Li has thus failed to meet her burden of demonstrating error in the

judge's ruling. ✓ See Mancuso v. Kinchla, supra.

Judgment affirmed.

By the Court (Cowan, Cohen
& Graham, JJ.),

Print Assisted Clerk 

Entered: March 25, 2008.

✓ We also note that in dereliction of her duties as the appellant, Li has failed to provide us with copies of any of the motions decided in the Superior Court, or any opposition memoranda. Given these record inadequacies, there is no need to review the propriety of the denial of her motion to amend. See Chokel v. Genzyme Corp., 449 Mass. 272, 279-280 (2007).