IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

PAUL C. BONE, JR.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 01-2245V
	)	
CSX INTERMODAL, INC.,	)	
	)	
Defendant.	)	

ORDER GRANTING DEFENDANT CSX'S MOTION TO DISMISS

This diversity case arises out of the termination of the plaintiff's contract as a truck driver with the defendant CSX Intermodal, Inc. (CSX) because of a positive drug test. Now before the court is the August 20, 2001 motion of CSX, pursuant to Rule 12(b)(6), to dismiss the complaint against it for failure to state a claim upon which relief can be granted.

The allegations in the complaint, as previously summarized in the court's June 27, 2001 and August 7, 2001 orders, are as follows: On July 30, 1998, the plaintiff, Paul C. Bone, Jr., entered a "Contractor Operating Agreement" with CSX in which he agreed to haul freight for CSX as an independent contractor using his own equipment. The contract provided that the performance of the agreement would be in accordance with all the rules and regulations of the United States Department of Transportation

(USDOT); it required drivers of equipment "to satisfactorily complete a drug screening test as required by and under the conditions specified by the DOT, prior to operation by that person;" and it required the plaintiff to "[c]omply with all other applicable federal, state or local regulations." In addition, CSX was participating in the state of Tennessee's Drug-Free Workplace Program, Tenn. Code Ann. §§ 50-9-101 to 50-9-112, which also required CSX drivers to submit to drug testing pursuant to the state statute, and CSX's participation in the program was known to Bone.

On August 12, 2000, Bone injured his back while working on a trailer he had just attached to his tractor. At his supervisor's request, he was examined by CSX's doctor at the facility of Concentra. The doctor ordered him to submit to a drug test. Concentra collected a urine specimen and sent it to LabOne for testing. LabOne transmitted the results to MedReview for review. MedReview reported that the test was positive for marijuana. As a result, on August 17, 2000, CSX terminated Bone's contract. Bone claims that he has applied for six similar jobs since his termination and has been rejected.

The complaint alleges that the drug test was not required by the USDOT regulations, that the urine specimen collected by Concentra was not sealed in the presence of Bone as required by

USDOT regulations, and that Concentra improperly used a Federal Drug Testing Custody and Control Form in transmitting the urine specimen to LabOne for testing. In his complaint, Bone asserts six separate causes of action against CSX: (1) violation of Tenn. Code Ann. § 50-9-107(a) & (c); (2) defamation; (3) negligence; (4) wrongful termination; (5) breach of contractual covenant of good faith and fair dealing; and (6) invasion of privacy. (Compl. Counts One, Two, Three, Four, Five and Six.)

A motion under Rule 12(b)(6) tests whether a claim has been adequately stated in the complaint. A 12(b)(6) motion should only be granted if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 42, 45-46 (1957). In considering the motion, the court accepts all factual allegations in the complaint as true, *Windsor v. The Tennessean*, 719 F.2d 155, 158 (6th Cir. 1983), and all inferences are construed in the plaintiff's favor, *Sinay v. Lamson & Sessions Co.*, 948 F.2d 1037, 1039-1040 (6th Cir. 1991). The court, however, need not accept as true the plaintiff's legal conclusions and unwarranted factual inferences. *Mixon v. Ohio*, 193 F.3d 389, 399-400 (6th Cir. 1999).

A. Plaintiff's Claim for Violation of Tenn. Code Ann. §§ 50-9-107(a) & (c)

CSX argues that even if the allegations against it are true,

the provisions of Tennessee's Drug-Free Workplace Programs Act, codified at Tenn. Code Ann. §§ 50-9-107(a) & (c), do not create a cause of action in favor a private citizen to redress violations of the statute.[1] This court ruled in an earlier order granting Concentra's motion to dismiss that Tenn. Code. Ann. §§ 50-9-107(a) & (c) does not create a cause of action in favor of a private citizen to redress violations of the statute.[2] In so finding, the court held that Tennessee's Drug-Free Workplace Program Act does not expressly grant a cause of action to an employee and that the legislature did not intend to create a private cause of action. As indicated in the earlier order, the focus of the Act is on the covered employer, and each section is directed primarily to duties, obligations, rights, and remedies of the covered employer, not the employee. Rather than provide remedies to employees, the Act penalizes employees by providing for termination and loss of worker's compensation benefits if an employee tests positive for drugs. The public policy evidenced by the Drug-Free Workplace Programs Act is dismissal of employees for drug use. *Stein v. Davidson Hotel Co.*, 945 S.W.2d 714, 718 (Tenn. 1997). Only

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[1] **CSX also argues that the state statute is preempted by federal law.**

[2] **For a more detailed analysis, see this court's June 7, 2001 order granting defendant Concentra's motion to dismiss.**

employers that follow the requirements of the Act in implementing a drug-free workplace are covered by the Act. Tenn. Code Ann. § 50-9-103(5) (1999); *Hackney v. DRD Mgmt., Inc.*, No. E1999-02107-COA-R3-CV, 1999 WL 1577977, at *6 (Tenn. Ct. App. March 31, 1999). If the legislature intended for the Act to provide a private cause of action for employees against their employers, it could have included the necessary language, but it did not do so. The court concludes, as it did in its earlier orders, that no private right of action is implied under the statute against an employer who chooses to participate in drug testing of its employees, and CSX's motion to dismiss this claim is granted.

B. Plaintiff's Claim of Negligence Against CSX

In order to establish negligence under Tennessee law, one must prove: "(1) a duty of care owed by defendant to plaintiff; (2) conduct falling below the applicable standard of care that amounts to a breach of that duty; (3) an injury or loss; (4) cause in fact; and (5) proximate, or legal, cause." *McClung v. Delta Square Ltd. P.*, 937 S.W.2d 891, 894 (Tenn. 1996). CSX's motion to dismiss is directed primarily to the causation elements: cause in fact and proximate cause.[3] In Tennessee, no claim for negligence can

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[3] **The plaintiff's response to this portion of CSX's motion addresses the duty element of a negligence claim. CSX has not argued lack of duty in its motion; thus, the existence of a duty is not at issue at this time, and the court makes no determination in**

succeed in the absence of any one of the elements. *Haynes v. Hamilton County*, 883 S.W.2d 606, 611-12 (Tenn. 1994) (citing *Bradshaw v. Daniel*, 854 S.W.2d 865, 869 (Tenn. 1993) and *McClenahan v. Cooley*, 806 S.W.2d 767, 774 (Tenn. 1991).

As to the use of the form and the positive test results, the complaint fails to plead causation, an essential element of a claim for negligence, between any actions on the part of CSX and the positive drug screen.[4] Bone's complaint fails to establish a causal connection between the actions of CSX, the use of a DOT form by Concentra, and the positive test results. It further fails to allege any facts supporting actions of CSX which caused the drug test to be positive. By failing to assert that any of these events were caused by CSX in any way, Bone has omitted the requisite minimal factual assertions needed to support a claim of negligence. For these reasons, the court finds that Bone has failed to state a claim of negligence against CSX.

C. <u>Plaintiff's Claim for Defamation</u>

Under Tennessee law, to establish a cause of action for defamation, the plaintiff must plead and prove that: (1) a party

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this regard.

[4] The complaint pleads a cause of action for negligence in one conclusory sentence: "Plaintiff asserts against Defendant CSXI a claim of negligence." (Compl. Count Six.)

published a statement; (2) with knowledge that the statement was false and defaming to the other; or (3) with reckless disregard for the truth of the statement; or (4) with negligence in failing to ascertain the truth of the statement. *Sullivan v. Baptist Mem. Hosp.*, 995 S.W.2d 569, 571 (Tenn. 1999).

CSX asserts that it published the results of the drug test only to Bone's future employers who specifically sought that information. For that reason, CSX contends that it has a qualified or conditional privilege to make the communications in question. Tennessee recognizes a conditional public interest privilege in situations such as the one at bar to prevent such defamation actions:

> Qualified privilege extends to all communications made in good faith upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty to a person having a corresponding interest or duty . . . . The rule announced is necessary in order that full and unrestricted communication concerning a matter in which the parties have an interest may be had. It is grounded in public policy as well as reason.

Southern Ice Co. v . Black, 198 S.W. 861, 863 (Tenn. 1916). When a statement has been found to be conditionally privileged, the only way to succeed in a defamation claim is to prove actual or express malice. *Pate v. Service Merchandise Co.*, 959 S.W.2d 569 (Tenn. Ct.

App. 1997). Bone did not plead any facts in his complaint that would support an allegation of actual or express malice on the part of CSX. Bone pled only in his complaint that CSX, on February 1, 2001, in response to an inquiry for employment verification from L & O Trucking, faxed a written response indicating that Bone tested positive for a controlled substance. (Compl. ¶ 24.)

Further, the statement made by CSX to L & O Trucking was necessary, not only for the interest any future employer may have in Bone's drug test results, but also because CSX was required by federal regulations to do so. 49 C.F.R. § 382.405(h) states that an employer "shall release information regarding a driver's records as directed by the specific, written consent of the driver authorizing release of the information to an identified third person." Attached to Bone's complaint is a copy of the request from L & O Trucking which includes a release signed by Bone authorizing CSX to provide information to L & O Trucking Company. The release states: "I am authorizing you to release any and all information regarding my services, character, and conduct while I was employed by your company and you are released from any and all liability which may result from furnishing such information." Bone was aware that this information would include the results of his drug test, yet he authorized its release along with any other information CSX could provide regarding his employment with the

company. Thus, CSX was simply following Bone's own instructions as well as federal law. In summary, Bone has failed to state a claim of defamation against CSX, and CSX's motion to dismiss this claim is granted.

D. Plaintiff's Claim for Wrongful Termination

In his complaint, Bone pleads a one-sentence claim of wrongful termination: "Plaintiff asserts against Defendant CSXI a claim of wrongful termination." (Compl. ¶ 26.) Bone asserts no facts in the complaint on which this claim of wrongful termination is based. Indeed, Bone does not even allege in the complaint that the positive drug test result was false or incorrect. Nor does Bone allege in his complaint that CSX did anything improper in administering the drug test or terminating Bone for a positive drug test. The only factual allegation of conduct on the part of CSX is that CSX ordered a drug test which "was not required by the USDOT regulations because the 'accident' which caused Mr. Bone's injury did not occur while he was operating the truck." (Compl. ¶ 14.) Although the complaint alleges that the drug test was not required, the complaint does not allege that the drug test was impermissible under USDOT regulations or state law as a random drug test.

Assuming *arguendo,* that Bone's wrongful discharge cause of action is premised on the administration of the drug test by CSX allegedly in contravention of USDOT regulations, this fact in and

of itself does not give rise to an action for wrongful termination under Tennessee law. "[Tennessee] courts have recognized a very limited cause of action for wrongful discharge based on a violation of clear public policy." *Stein v. Davidson Hotel Co.*, 1996 Tenn. App. LEXIS 280, at *15 (Tenn. Ct. App. May 8, 1996), *aff'd* 945 S.W.2d 714 (Tenn. 1997)("). *See also Rushing v. Hershey Chocolate-Memphis,* No. 99-5802, 2000 U.S. App. LEXIS 27392, at *9 (6th Cir. October 19, 2000). The court finds no allegation of a violation of clear public policy.

Moreover, in accordance with the terms of the agreement between the parties, Bone is an independent contractor. Neither party disputes this fact. As an independent contractor, Bone has no claim for wrongful termination. Although Tennessee has not squarely addressed this issue, many other courts have concluded that an independent contractor may not sue his employer for wrongful termination. Courts in California, North Carolina, Wisconsin, Oklahoma, Minnesota and Indiana have all held that a plaintiff cannot recover for wrongful termination unless he is an employee rather than an independent contractor. *See Abramson v. NME Hosps., Inc.,* 241 Cal. Rptr. 396, 399 (Cal. Ct. App. 1987); *Robinson v. Ladd Furniture, Inc.,* 872 F. Supp. 248, 253 (M.D.N.C. 1994); *Ziehlsdorf v. American Family Ins. Group,* 461 N.W.2d 448, 450 (Wisc. Ct. App. 1990); *Rosenfeld v. Thirteenth Street Corp.,*

1989 Okla. LEXIS 105, at *22 (Okla. 1989); *HDH, Inc. v. Rush Trucking, Inc.*, 1992 Minn. App. LEXIS 453, *4-*5 (Minn. Ct. App. 1992); *Morgan Drive Away, Inc. v. Brant,* 489 N.E.2d 933, 933-34 (Ind. 1986). This court concludes that the Tennessee Supreme Court would agree with the premise that a cause of action for wrongful termination is not available to an independent contractor. Accordingly, Bone's claim for wrongful termination cannot stand, and CSX's motion to dismiss this claim is granted.

Interestingly, in his written response to CSX's motion to dismiss, Bone argues that his claim of wrongful termination is based on the lack of a thirty-day written notice of termination. This issue has nothing to do with a cause of action for wrongful termination and was not pled in the complaint, but rather is relevant to a possible breach of contract claim against CSX, which Bone has not pled in his complaint either. Nevertheless, CSX has obliged Bone by counter-arguing the same point. Although it is irrelevant to the claim of wrongful termination, both parties have briefed the issue and the court will discuss the claim anyway.

The contract between CSX and Bone states that:

> This agreement shall continue in effect for a period of thirty (30) days from execution, and thereafter continuously for successive thirty (30) day periods, unless canceled by CONTRACTOR or CSXI by oral notice followed by written notice sent by certified mail to the last known address to the other party.

(Contract ¶ 25.)[5,6] In *Kippen v. American Automatic Typewriter Co.*, the Ninth Circuit found that the defendant could be terminated for cause from his franchise contract for alcohol consumption irrespective of his status of employee or independent contractor. *Kippen*, 324 F.2d 742 (9th Cir. 1963). *Kippen* was cited with approval by the Tennessee Court of Appeals when it found that "[t]he distinction [between employee and independent contractor] is of no logical significance when considering the employer's right to terminate an employment contract for cause." *Curtis v. Reeves*, 736 S.W.2d 108, 112 (Tenn. Ct. App. 1987). Further, the court in *Curtis* agreed with the following C.J.S. reference:

> As a general proposition, any act of the servant which injures or has a tendency to injure his master's business, interests, or reputation will justify the dismissal of the servant. . . . .

56 C.J.S. *Master and Servant,* § 42(a). As a freight carrier governed in part by federal laws and regulations, CSX had the right to terminate Bone when he failed the drug test. Pursuant to the

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[5] The full copy of the contract was not attached to the complaint. Upon request, the complete contract was faxed at a later date to this court by CSX's counsel.

[6] The method of terminating a contract after thirty day's notice is indicative of an independent contractor-employer relationship. *See Maisers v. Arrow Transfer and Storage Co.*, 639 S.W.2d 654, 656 (Tenn. 1982)(citing *Curtis v. Hamilton Block Co.*, 466 S.W.2d 220 (1971)).

Code of Federal Regulations, if an employer has actual knowledge that a driver has tested positive for a controlled substance, the employer can no longer permit him to perform "safety-sensitive functions." 49 C.F.R. § 382.215. Driving an eighteen-wheeled truck on crowded highways is just such a "safety-sensitive function," requiring all possible care and alertness on the part of the operator.

Another Tennessee court of appeals court has held a reasonable notice of termination is not necessary in some situations. *Roberts v. Federal Express*, 1991 Tenn App. LEXIS 494 (Tenn. Ct. App. June 18, 1991). The plaintiff in *Roberts* sued his employer upon termination, claiming that he did not receive reasonable notice of termination implicit in an at will employment contract. The court held that because the plaintiff had violated company policy and the law by smoking marijuana and allegedly stealing some of his employer's goods, no dismissal notice was warranted even if there was a notice requirement implicit in an at will employment contract. *Id.* at *16.

Additionally, a state court in Illinois has addressed a contract provision similar to the one involved in the present case. *H. Vincent Allen & Associates, Inc. v. Weiss*, 379 N.E.2d 765 (Ill. 1978). In *Weiss*, an employee brought an action against his employer for terminating him without the contractually provided

ninety-day notice. The contract was otherwise silent as to duration. *Weiss,* 379 N.E.2d at 772. The court found that the contract was for employment at will subject to termination by either party after submitting a ninety-day notice. Nevertheless, the court emphasized that "this fact does not and cannot eliminate the basic principle of the law regarding employment contracts which gives the employer the right of discharge for good cause even though such right is not stated in the agreement . . . ."

Regardless of Bone's status as an employee or independent contractor, CSX was not required to give thirty days written notice to Bone as stated in the contract. The positive drug test results were grounds for termination, whether stated in the contract as grounds or not. Federal regulations, state law, and CSX's concern for safety and liability exposure were sufficient reasons to discharge Bone for cause, making notice unnecessary. Bone therefore has failed to state a wrongful termination claim upon which relief can be granted.

E. <u>Plaintiff's Claim for Breach of Contractual Covenant of Good Faith and Fair Dealing</u>

Bone argues that by terminating him, CSX breached the contractually implied covenant of good faith and fair dealing. Tennessee, however, recognizes an implied covenant of good faith and fair dealing in employment-at-will contracts only in very

narrow circumstances. *Shelby v. Delta Air Lines, Inc.,* 842 F. Supp. 999, 1013 (M.D. Tenn. 1993)(explaining that the theory that good faith and fair dealing is implied in every employment contract is a theory few courts have accepted); *Whittaker v. Care-More, Inc.*, 621 S.W. 2d 395 (Tenn. Ct. App. 1981); *contra Williams v. Maremont* , 776 S.W.2d 78, 81 (Tenn. Ct. App. 1988).

Nevertheless, Bone has alleged no facts to support his claim, simply stating in his complaint, "Plaintiff asserts against Defendant CSXI a claim of breach of contractual covenant of good faith and fair dealing." Without more factual basis, this court is left with the inevitable conclusion that no claim has been stated with respect to this issue.

Bone argues in his written response to CSX's motion to dismiss that CSX breached its covenant of good faith and fair dealing by administering a drug test that was not compliant with USDOT standards. Again, the complaint fails to plead that the drug test was administered in contravention of the USDOT regulations, state law, or the contract. The contract, moreover, states that CSX would adhere to the laws of the state as well as the federal government. Tennessee's Drug-Free Workplace Program Act permits any lawful testing of employees for drugs in addition to the minimum testing required by the statute. Tenn. Code Ann. § 50-9-106 (b).

More importantly, the claim of breach of contractual good faith and fair dealing itself cannot stand alone; it "is not a cause of action in and of itself but as a part of breach of contract cause of action." *Lyons v. Farmers Ins. Exch.*, 26 S.W.3d 888, 894 (Tenn. Ct. App. 2000). Bone has failed to plead sufficiently a breach of contract claim upon which relief can be granted, and as this claim for breach of contractual covenant of good faith and fair dealing cannot stand as a separate action, this claim must be dismissed.

F. Plaintiff's Claim for Tortious Invasion of Privacy

Bone argues in response to CSX's motion to dismiss that CSX invaded his privacy by intruding upon his seclusion, one of the four privacy law torts recognized in Tennessee.[7] *See Major v. Charter Lakeside Hospital, Inc.*, 1990 Tenn. App. LEXIS 621, *10-11 (Tenn Ct. App. 1990); *Rest. 2d Torts § 652B.*

Under Tennessee law, to establish a claim for intrusion, Bone must show: 1) CSX intentionally intruded upon his solitude or seclusion; 2) CSX is subject to liability to Bone for invasion of his privacy; and 3) the intrusion must be highly offensive to a reasonable person. *Rest. 2d, Torts § 652B.* Bone's allegation of a

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[7] **The complaint itself does not specify intrusion upon seclusion but merely pleads invasion of privacy generally: "Plaintiff asserts against defendant CSXI a claim of tortious invasion of privacy." (Compl. Count Five.)**

privacy intrusion is deficient, however, for two reasons. First, Bone has not set forth any facts that would establish the elements necessary to state a claim of intrusion upon his seclusion. He has not demonstrated how or why CSX would be liable to him for the actual drug test or the positive result. He also has not pled that the test was highly offensive to him. Second, as previously stated, he has not alleged that CSX improperly conducted a random drug test; he merely alleges that a post-accident drug test was not required by the USDOT regulations because he was not operating his vehicle at the time of the accident. (Compl. ¶ 14.)

In *Stein v. Davidson Hotel Co.*, an employee argued that she was "forced" to take a drug test by her employer and therefore the test was an intrusion upon her seclusion. *Stein*, 1996 Tenn. App. LEXIS 280, *25 (Tenn. Ct. App. May 8, 1996), *aff'd* 945 S.W.2d 714 (Tenn. 1997). The court pointed out, however, that the employee had signed a form consenting to be tested for drugs and had thereby waived her right to sue for invasion of privacy. *Id.* at *26. Further, the court noted that the employee had been put on notice of the drug testing policy far in advance of the actual test and had expressed no concerns about it. *Id.* Other courts agree that when an employee has notice that he could be tested for drugs, he cannot assert an invasion of privacy claim against his employer. *See Rushing v. Hershey Chocolate-Memphis*, 2000 U.S. App. LEXIS

27392, *9 (October 19, 2000)(stating that "Tennessee and other courts have indicated that employers may require an employee to take drug tests related to employment without committing an invasion of privacy."); *Baggs v. Eagle-Pilcher Indus.*, 750 F. Supp. 264, 272 (W.D. Mich. 1990)(explaining that because the need for drug testing originates from the business relationship, employers may delve into normally private areas of an employee's life).

In the case at bar, Bone signed a contract with CSX which expressly stated that he could be subjected to drug screening and that CSX followed state and federal regulations regarding transportation services. (Contract ¶ 10(f),(g).) CSX follows Tennessee's Drug-Free Workplace Program, Tenn. Code Ann. § 50-9-107 (a) & (c), which allows employers to test for drugs and alcohol. Further, Bone knew that he could be subjected to random drug testing and in fact stated in his complaint that "[d]uring his employ with CSXI, [he] participated in random drug testing." (Compl. ¶ 8.)

Because Bone has failed to allege all elements of the claim of intrusion upon his seclusion, and because of Tennessee's reluctance to allow such a claim to be brought at all against employers, the court finds that Bone has failed to state a claim for invasion of privacy.

For the foregoing reasons, CSX's motion to dismiss is granted in the entirety. As there are no more remaining claims or

defendants, the clerk is directed to enter final judgment.

IT IS SO ORDERED this 11th day of October, 2001.

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE