

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

William Hobek,)	C/A No. 2:16-CV-3840-RMG-MGB
)	
Plaintiff,)	
)	
v.)	REPORT & RECOMMENDATION
)	OF MAGISTRATE JUDGE
The Boeing Company,)	
)	
Defendant.)	
_____)	

This matter is before the court on the Defendant’s Motion to Dismiss in Part. (Dkt. No. 6.) In his Complaint, the Plaintiff alleges causes of action for age discrimination under the Age Discrimination Employment Act and for wrongful termination in violation of public policy. (Dkt No. 1-1.) The Plaintiff filed his Complaint in the Court of Common Pleas for Charleston County. (Dkt. No. 1-1.) Boeing removed this action to federal court on December 8, 2016. (Dkt. No. 1.) Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(A), and Local Rule 73.02(B)(2)(g), D.S.C., all pretrial matters in employment discrimination cases are referred to a United States Magistrate Judge.

Alleged Facts

The Plaintiff formerly worked as a quality manager for Boeing. (Dkt. No. 1-1 ¶19.) During the final two years of his employment at Boeing, the Plaintiff began to have “serious concerns regarding the Quality and Safety” of the aircraft being manufactured by Boeing. (*Id.* ¶¶ 24-26.) The Plaintiff reported his concerns to his supervisors but the concerns were not addressed. (*Id.* ¶¶ 24, 25, 29, and 31.) The Plaintiff then addressed his concerns to Boeing’s ethics department in August of 2015 and February of 2016 but again his complaints were ignored. (*Id.* ¶¶ 35, 36, and 40.)

The Plaintiff was transferred to a different supervisor in March of 2016. (Dkt No. 1-1 ¶42.) The Plaintiff alleges that he was transferred in retaliation for his complaints and the transfer was made with the intent to terminate the Plaintiff’s employment. (*Id.* ¶42.) On April 5, 2016, the supervisor placed the Plaintiff on a Performance Improvement Plan (“PIP”). (*Id.* ¶44.) The Plaintiff’s supervisor continued to discipline the Plaintiff for “pretextual and petty” reasons in retaliation for making complaints. (*Id.* ¶47.) The Plaintiff was terminated on May 5, 2016. (*Id.* ¶55.) The Plaintiff alleges that his discipline and termination were due to his age and in retaliation for his complaints regarding quality and safety. (*Id.* ¶¶ 59-61 and 66.)

Following his termination, the Plaintiff entered Boeing’s Alternative Dispute Resolution (“ADR”) process. (Dkt. No. 1-1 ¶¶55-58.) The Plaintiff alleges that Boeing changed the ADR process during his appeal to retaliate against the Plaintiff and to “prevent the Plaintiff from addressing [Boeing’s] Safety and Quality Failures, [Boeing’s] discrimination in violation of the Law against Older Americans and [Boeing’s] wrongful termination of the Plaintiff.” (*Id.* ¶58.) (capitalization in original).

Standard of Review

On a motion to dismiss pursuant to Rule 12(b)(6), a “complaint must be dismissed if it does not allege ‘enough facts to state a claim to relief that is plausible on its face.’” *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “In reviewing a motion to dismiss an action pursuant to Rule 12(b)(6) . . . [a court] must determine whether it is plausible that the factual allegations in the complaint are ‘enough to raise a right to relief above the speculative level.’” *Andrew v. Clark*, 561 F.3d 261, 266 (4th Cir. 2009) (quoting *Twombly*, 550 U.S. at 555). “A plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation

of the elements of a cause of action will not do.” *Twombly*, 550 U.S. 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

For purposes of a motion to dismiss, the district court must “take all of the factual allegations in the complaint as true.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “In considering a motion to dismiss, [the court] accept[s] the complainant's well-pleaded allegations as true and view[s] the complaint in the light most favorable to the non-moving party.” *Stansbury v. McDonald's Corp.*, 36 F. App'x 98, 98-99 (4th Cir. 2002) (citing *Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir.1993)). However, while the court must draw all reasonable inferences in favor of the plaintiff, it need not accept the “legal conclusions drawn from the facts,...unwarranted inferences, unreasonable conclusions or arguments.” *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 253 (4th Cir. 2009) (citing *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999); *Giarratano*, 521 F.3d at 298).

Analysis

Boeing's Motion is a partial motion to dismiss seeking to have the district court dismiss the Plaintiff's claim for wrongful termination in violation of public policy. Boeing argues that the Plaintiff has failed to state a viable claim for wrongful discharge in violation of public policy because he has an existing statutory remedy and he has not alleged facts to show a violation of a clear mandate of public policy. (Dkt. No. 6.) The Plaintiff argues that a statutory remedy does not exist for the Plaintiff and that he has alleged sufficient facts to support a violation of a clear mandate of public policy. (Dkt. No. 13.)

Absent a specific contract, employment in South Carolina is at-will. *Mathis v. Brown & Brown of S. Carolina, Inc.*, 389 S.C. 299, 309, 698 S.E.2d 773, 778 (2010); *see also Taghivand v. Rite Aid Corp*, 411 S.C 240, 768 S.E.2d 385 (2015). “An at-will employee may be terminated

at any time for any reason or for no reason, with or without cause.” *Mathis*, 389 S.C. at 310. “Under the ‘public policy exception’ to the at-will employment doctrine, however, an at-will employee has a cause of action in tort for wrongful termination where there is a retaliatory termination of the at-will employee in violation of a clear mandate of public policy.” *Barron v. Labor Finders of S. Carolina*, 393 S.C. 609, 614, 713 S.E.2d 634, 636-37 (2011). The public policy exception does not apply in cases where there is an existing statutory remedy. *Id.* at 615, 713 S.E.2d at 637. The public policy exception “is not designed to overlap an employee’s statutory or contractual rights to challenge a discharge, but rather to provide a remedy for a clear violation of public policy where no other reasonable means of redress exists.” *Stiles v. Am. Gen. Life Ins. Co.*, 335 S.C. 222, 228, 516 S.E.2d 449, 452 (1999).

Existing Statutory Remedy

Boeing argues that the Plaintiff’s claim alleging retaliation for complaints regarding the safety and quality of aircraft is not proper as a wrongful discharge claim for violation of public policy because the Plaintiff has an existing statutory remedy under the Wendall H. Ford Air and Investment Reform Act for the 21st Century (“AIR21”), 49 U.S.C. § 42121. (Dkt. No. 6 at 4-6.) The Plaintiff argues that the complaints that led to the retaliation were not limited to safety but included quality, performance, and discrimination as well. (Dkt. No. 13 at 8.) The Plaintiff additionally argues that AIR21 does not apply because it only “protects employee[s] who provide information or participate in proceedings related to violations of [AIR21].” (*Id.*)

AIR21 “creates a detailed administrative regime to protect whistleblowers who inform their employers or the federal government about violations of federal laws relating to air carrier safety.” *Bombardier, Inc. v. United States Dep’t of Labor*, 145 F. Supp. 3d 21, 25 (D.D.C. 2015). In pertinent part, AIR21 provides as follows:

(a) Discrimination against airline employees.--No air carrier¹ or contractor or subcontractor of an air carrier² may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)--

(1) **provided**, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided **to the employer** or Federal Government **information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;**

(2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;

....

(b) Department of Labor complaint procedure.--

(1) **Filing and notification.**--A person who believes that he or she has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, not later than 90 days after the date on which such violation occurs, file (or have any person file on his or her behalf) a complaint with the Secretary of Labor alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary of Labor shall notify, in writing, the person named in the complaint and the Administrator of the Federal Aviation Administration of the filing of the complaint, of the allegations contained in the complaint, of the substance of evidence supporting the complaint, and of the opportunities that will be afforded to such person under paragraph (2).

¹ “‘air carrier’ means a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation.” 49 U.S.C.A. § 40102.

² The Plaintiff has not disputed that Boeing is an “air carrier or contractor or subcontractor of an air carrier” under AIR21. Administrative law courts have allowed employees who engaged in protected activities under AIR21 to proceed against Boeing and other airplane and airplane component manufacturers under AIR21. *See In the Matter of: John J. Woods v. Boeing-South Carolina*, ARB Case No. 13-035, 2014 WL 1314287 (March 20, 2014); *In the Matter of: Charles D. Ferguson v. Boeing Company*, ARB Case No. 04-084, 2005 WL 3619263 (March 20, 2014); *Michael Leon v. Securaplane Techs., Inc.*, ARB Case No. 11-069, 2013 WL 1874817 (April 15, 2013) *petition for review denied*, *Leon v. Securaplane Techs. Inc.*, 595 F. App’x 710, 711 (9th Cir. 2015).

49 U.S.C. § 42121 (emphasis added).

The Plaintiff argues that AIR21 is limited to reports regarding safety and does not include quality complaints or age discrimination. (Dkt. No. 13 at 8.) The Plaintiff asserts that his reports to Boeing included “safety, quality, performance, and discrimination” and therefore are outside the scope of AIR21. (*Id.*) “A motion to dismiss tests the sufficiency of a complaint, and [a court’s] evaluation is thus generally limited to a review of the allegations of the complaint itself.” *Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 165–66 (4th Cir. 2016) (internal citation and quotations omitted).

The Plaintiff’s Complaint is clear that the public policy allegedly violated was “because he reported Safety and Quality issues regarding the aircraft produced by the Defendant.” (Dkt. No. 1-1 ¶ 66.) The Plaintiff alleges that he informed Boeing that its interpretation of quality documents was “incorrect and needed to be corrected to follow the law.” (*Id.* ¶ 31.) The Plaintiff alleges that the concerns he raised “were significant as the Safety of the planes being produced by the Charleston facility were directly affected.” (*Id.* ¶ 36.) Under the heading “For a Second Cause of Action Wrongful Termination” the Plaintiff alleges “the Defendant wrongfully terminated the Plaintiff in violation of public policy when it terminated him because he reported Safety and Quality issues regarding the aircraft produced by the Defendant.” (*Id.* ¶83.)

The Complaint limits the wrongful termination claim to termination for safety and quality reports, which in aircraft manufacturing are one in the same. The quality of aircraft manufacturing necessarily affects safety of the aircraft. In addition to the clear language of the Complaint, the Plaintiff obviously has a statutory remedy for discrimination as he alleges a discrimination claim under the Age Discrimination in Employment Act. (Dkt. No. 1-1 at 25.) *See Addison v. CMH Homes, Inc.*, 47 F. Supp. 3d 404, 428 (D.S.C. 2014) (holding a statutory

remedy precluded a wrongful termination in violation of public policy claim where the public policy claims were based on the same allegations as the Plaintiff's Title VII claims.)

Reviewing the plain language of the statute, AIR21 provides a statutory remedy for individuals who were retaliated against for providing information to their employer that related to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States. 49 U.S.C. § 42121. The Plaintiff argues that “the Plaintiff was terminated for his refusal to violate the law by passing a plane that did not meet the safety standards and Quality [sic] standards.” (Dkt. No. 13 at 14-15.) By the Plaintiff's own argument, the allegations surrounding his termination fall within the statutory remedy found in AIR21.

The Plaintiff also argues that protections in AIR21 are limited to employees who make a report under AIR21. (Dkt. No. 13 at 8.) The Plaintiff cites 49 U.S.C. § 42121 to support his assertion. The Plaintiff's failure to exercise his rights under AIR21 does not create a cause of action in court. Section 42121 clearly states that the protection applies to reporting “information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States.” 49 U.S.C. § 42121(a). The remedy for any form of retaliation based on reporting is outlined in § 42121(b). The public policy exception “is not designed to overlap an employee's statutory or contractual rights to challenge a discharge, but rather to provide a remedy for a clear violation of public policy where no other reasonable means of redress exists.” *Stiles v. Am. Gen. Life Ins. Co.*, 335 S.C. 222, 228, 516 S.E.2d 449, 452 (1999). The Plaintiff has a reasonable means of redress under AIR21 based on his allegations.

This court concludes that the Plaintiff had an existing statutory remedy for the allegations supporting the wrongful discharge in violation of public policy claim.

Sufficiency of Facts Alleged

Boeing additionally argues that the Plaintiff has not alleged facts to support a clear mandate of public policy. (Dkt. No. 6 at 6-9.) South Carolina courts have recognized only two instances where the public policy exception to at-will employment was actionable: “(1) where an employer requires an employee, as a condition of continued employment, to break the law...and (2) where an employer's termination is itself illegal...” *Taghivand*, 411 S.C. at 243, 768 S.E.2d at 387 (citing *Ludwick v. This Minute of Carolina, Inc.*, 287 S.C. 219, 225, 337 S.E.2d 213, 216 (1985)(holding that an employee could maintain a wrongful discharge in violation of public policy claim where he was forced to choose between disobeying a subpoena or losing his job); *Culler v. Blue Ridge Elec. Coop., Inc.*, 309 S.C. 243, 422 S.E.2d 91 (1992) (holding that termination of an employee because he refused to contribute to a political action fund would violate a state criminal statute and therefore was actionable as a claim for wrongful discharge in violation of public policy). The public policy exception “is not limited to these situations,” but no others have been recognized by South Carolina courts. *Id.* (quoting *Barron*, 393 S.C. at 614, 713 S.E.2d at 637).

Boeing argues that the Plaintiff has not identified what clear mandate of public policy his termination violated. The Complaint does not allege that Boeing required the Plaintiff to violate criminal law or that his termination was itself illegal. *See Martin v. Boeing Co.*, No. 2:16-cv-02797-DCN, 2016 WL 7239914, at *3 (D.S.C. Dec. 15, 2016). As discussed *supra*, the Plaintiff argues that he was terminated because he refused “to violate the law by passing a plane that did not meet the safety standards and Quality [sic] standards.” (Dkt. No. 13 at 14-15.) However, the

Plaintiff had a statutory remedy for such allegations. Courts in this district have held that there is no “clear mandate of public policy supporting the rights of employees to internally complain about alleged violations of FAA regulations.” *Desmarais v. Sci. Research Corp.*, 145 F. Supp. 3d 595, 599 (D.S.C. 2015); *Martin v. Boeing Co.*, No. 2:16-CV-02797-DCN, 2016 WL 7239914, at *4 (D.S.C. Dec. 15, 2016).

Additionally, the Plaintiff does not state in his Complaint what specific law he was required to break as a condition of his employment or how his termination was in itself illegal. (Dkt. No. 1-1 ¶ 86 (alleging that the Plaintiff’s termination violated “South Carolina law” in general)). This court concludes that Plaintiff has not alleged any facts that would support finding the existence of a public policy exception to at-will employment.³ *See Barron*, 713 S.E.2d at 637.

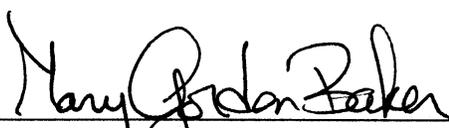
Recommendation

Accordingly, the Magistrate Judge **RECOMMENDS** that the Defendant’s Motion to Dismiss in Part (Dkt. No. 6) be **GRANTED**.

IT IS SO RECOMMENDED.

June 6, 2016

Charleston, South Carolina



MARY GORDON BAKER
UNITED STATES MAGISTRATE JUDGE

³ The court notes that quality and safety in airplane manufacturing generally implicates the public’s interest. However, the public policy exception is “a very narrow exception” under South Carolina law. *Gray v. Am. Homepatient, Inc.*, No. 2:14-cv-1207-DCN, 2014 WL 7965987, at *2 (D.S.C. Oct. 24, 2014), *report and recommendation adopted*, No. 2:14-cv-01207-DCN, 2015 WL 892780 (D.S.C. Mar. 3, 2015). The Plaintiff’s allegations in the Complaint are not sufficient to make a claim for wrongful discharge in violation of public policy.

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. **Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections.** “[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must ‘only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.’” *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee’s note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); see Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

**Robin L. Blume, Clerk
United States District Court
Post Office Box 835
Charleston, South Carolina 29402**

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).