UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 14-23821-CIV-WILLIAMS

LEONARDO COSTA,

Plaintiff,

vs.

JP MORGAN CHASE BANK, N.A., and
ROY HALLAK,

Defendants.
_____/

ORDER

THIS MATTER is before the Court on Defendants JP Morgan Chase Bank ("JP Morgan") and Roy Hallak's motion to dismiss (DE 8), to which Plaintiff filed a response in opposition (DE 14), and Defendants filed a reply (DE 19).

I. BACKGROUND

Plaintiff, a Brazilian citizen, began working for JP Morgan as a bank teller in February of 2011. (DE 3 ¶¶ 1, 4c). In 2013, JP Morgan district manager Alan Durant recruited Plaintiff to help open a new branch in Miami Beach. (DE 3 ¶¶ 1, 11-12). Mr. Durant promised to send Plaintiff to a series 6 securities licensing class and to support Plaintiff's certification as a small business specialist. (DE 3 ¶ 12). In October of 2013, Plaintiff transferred to the newly-opened Miami Beach branch. (DE 3 ¶ 13). The manager of the Miami Beach branch was Roy Hallak, a Cuban-American. (DE 3 ¶ 13). After transferring, "Mr. Costa learned that Mr. Hallak treated non-U.S. citizen clients differently from U.S. citizens, veering from JP Morgan's policies and procedures by imposing on them stricter identification and deposit requirements." (DE 3 ¶ 13).

Plaintiff alleges that he was treated differently than U.S. citizens and non-Brazilian employees. (DE 3 ¶¶ 1, 15). For example, although Plaintiff was scheduled to take the series 6 securities licensing class on January 6, 2014, Mr. Hallak postponed Plaintiff's class date, stating that Plaintiff was needed at the bank. (DE 3 ¶ 15a). Plaintiff later learned that Mr. Hallak planned to have a Cuban-American banker take the class before Plaintiff. (DE 3 ¶ 15a). Likewise, Plaintiff contends that Mr. Hallak permitted two bankers to receive investment sale credit for the referral of a single investment sale, contrary to JP Morgan's policies. (DE 3 ¶ 15b). Plaintiff was also approved for JP Morgan's tuition reimbursement plan. However, the plan requires a branch manager's approval to add a second school to the plan and Mr. Hallak refused to give Plaintiff the necessary approval to add a second school. (DE 3 ¶ 15c).

In February of 2014, Plaintiff complained verbally to the assistant branch manager about the way Mr. Hallak was treating Plaintiff, "explaining that he was being targeted by Mr. Hallak." (DE 3 ¶ 16). Shortly thereafter, on February 19, 2014, Mr. Hallak brought Plaintiff into his office and urged Plaintiff to admit that he had violated company policy for a Brazilian client. (DE 3 ¶ 17). Plaintiff, certain that he had done nothing wrong, refused to admit he had violated any company policy. (DE 3 ¶ 17). That same day, Plaintiff reported Mr. Hallak's discriminatory treatment toward Plaintiff and non-U.S. citizen clients to Pam J. Bennett from "HR Business Partners." (DE 3 ¶ 18). Ms. Bennett told Plaintiff that she was assigning his report to Talin Kahwajian and gave Plaintiff Ms. Kahwajian's contact information. (DE 3 ¶ 18).

Plaintiff, using his accrued leave, took the next week off from work. (DE 3 ¶ 19). During that week, Plaintiff called Ms. Kahwajian nearly every day and left several

messages, but she never returned his calls. (DE 3 ¶ 19). On February 26, 2014, while Plaintiff was on leave, Mr. Hallak informed HR Business Partners that Plaintiff had falsified bank documents in violation of JP Morgan's code of conduct. (DE 3 ¶ 19). Three days after returning to work, Mr. Hallak called Plaintiff into his office and, in the presence of the assistant manager, fired Plaintiff for falsifying bank records. (DE 3 ¶ 20). Mr. Hallak told Plaintiff that he had spoken with Ms. Kahwajian and knew about Plaintiff's complaints to HR Business Partners. (DE 3 ¶ 20).

Following his termination, a Form U-5 – a standard form used in the securities industry to report the termination of a registered representative's association with a broker-dealer – was filed indicating that Plaintiff had been involuntarily discharged and stating that he had failed to follow bank policy when changing a bank customer's address. (DE 3 ¶ 21). After being fired, Plaintiff actively sought employment in the financial industry. (DE 3 ¶ 22). Although Plaintiff received an offer from New York Life, that offer was rescinded when New York Life learned about the statements on Plaintiff's U-5 form. (DE 3 ¶ 22).

Plaintiff's complaint advances seven counts against the Defendants: (1) national origin discrimination in violation of Title VII against JP Morgan; (2) retaliation in violation of Title VII against JP Morgan; (3) discrimination based on alienage in violation of § 1981 against Defendants; (4) retaliation in violation of § 1981 against Defendants; (5) retaliation in violation of § 1981 for Plaintiff's opposition to discrimination against non-U.S. citizen clients against Defendants; (6) defamation against Defendants; and (7) tortious interference by Mr. Hallak with Mr. Costa's advantageous business relationship with JP Morgan. Defendants have moved to dismiss Counts 3, 4, 5, 6, and 7.

II. LEGAL STANDARD

To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must plead sufficient facts to state a claim that is "plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The Court's consideration is limited to the allegations in the complaint. *See GSW, Inc. v. Long Cnty.*, 999 F.2d 1508, 1510 (11th Cir. 1993). All factual allegations are accepted as true and all reasonable inferences are drawn in the plaintiff's favor. *See Speaker v. U.S. Dep't. of Health & Human Servs. Ctrs. for Disease Control & Prevention*, 623 F.3d 1371, 1379 (11th Cir. 2010). Although a plaintiff need not provide "detailed factual allegations," a plaintiff's complaint must provide "more than labels and conclusions." *Twombly*, 550 U.S. at 555 (internal citations and quotations omitted). "[A] formulaic recitation of the elements of a cause of action will not do." *Id.* Rule 12(b)(6) does not allow dismissal of a complaint because the court anticipates "actual proof of those facts is improbable," but the "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Watts v. Fla. Int'l Univ.*, 495 F.3d 1289 (11th Cir. 2007).

III. ANALYSIS

Defendants have moved to dismiss Counts 3, 4, and 5, each of which asserts a claim under 42 U.S.C. § 1981, on the grounds that Plaintiff does not allege racial discrimination and § 1981 does not address national origin discrimination. Plaintiff counters that he is asserting claims for alienage discrimination and that his complaint sufficiently alleges that he is not a U.S. citizen and that Defendants treated him and other non-U.S. citizens differently than U.S. citizens. (*See, e.g.,* DE 3 at ¶ 1, 4c). "Refusing to hire an individual on the basis of alienage is illegal under 42 U.S.C. §

1981." *Wright v. Southland Corp.*, 187 F.3d 1287, 1298 n.12 (11th Cir. 1999); *see also Batch v. Jefferson Cnty. Child Dev. Council*, 183 F. App'x 861, 863 n.1 (11th Cir. 2006) ("§ 1981 is a statutory remedy for claims of discrimination based on race or alienage only"); *Anderson v. Conboy*, 156 F.3d 167, 169 (2d Cir. 1998) ("We hold that Section 1981, at least since the 1991 amendment, proscribes private alienage discrimination with respect to the rights set forth in the statute."); *Chacko v. Texas A & M Univ.*, 149 F.3d 1175 (5th Cir. 1998) (holding that the law is clearly established that alienage discrimination is covered by § 1981). The Court finds that Plaintiff has adequately stated a claim for alienage discrimination under 42 U.S.C. § 1981.

Defendants also argue that Plaintiff's § 1981 claims should be dismissed because Plaintiff has failed to provide any authority that his complaints about Mr. Hallak's actions constitute protected conduct under § 1981. (DE 19 at 4). In addition, Defendants contend that Plaintiff's § 1981 retaliation claim should be dismissed because it is based upon Defendants' alleged discrimination in contracts with persons other than Plaintiff. (DE 8 at 6). Both contentions are misplaced.

It is well-settled that § 1981 encompasses retaliation claims. *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 446 (2008). The Court applies the same legal standard in a § 1981 action as it does in a Title VII case. *See Butler v. Ala. Dep't of Transp.,* 536 F.3d 1209, 1215 (11th Cir. 2008); *Goldsmith v. Bagby Elevator Co.*, 513 F.3d 1261, 1277 (11th Cir. 2008). To state a claim for retaliation under 42 U.S.C. § 1981, a Plaintiff must show that (1) he engaged in a statutorily protected expression; (2) he suffered an adverse employment action; and (3) the adverse action was causally related to the protected expression. *Tucker v. Talladega City Schools*, 171 F. App'x 289, 296 (11th

Cir. 2006). An employee may engage in protected activity by informally voicing complaints of discrimination to his supervisors or by following his employer's formal grievance procedures. *See, e.g., Shannon v. Bellsouth Telecomm., Inc.*, 292 F.3d 712, 715 n.2 (11th Cir. 2002). Plaintiff alleges that he complained to his supervisor and to HR Business Partners regarding Mr. Hallak's purportedly discriminatory conduct. These allegations are sufficient to show that Plaintiff engaged in protected activity.

A claim for retaliation under 42 U.S.C. § 1981 is viable if the plaintiff was personally the victim of discrimination or if the plaintiff took a position opposing discrimination. *See Tucker*, 171 F. App'x at 295 (§ 1981 "includes retaliation for a plaintiff's opposition to race discrimination, whether or not he personally is the victim of that race discrimination"). Title 42 U.S.C. § 1981 "readily covers a company's refusal to enter into a contract with a potential customer on the basis of race, as well as a company's setting of discriminatory contractual terms on the basis of race." *Klinger v. BIA, Inc.*, No. 11 C 05346, 2011 WL 4945021, at *2 (N.D. Ill. Oct. 18, 2011) (finding plaintiff stated a claim for retaliation under § 1981 when she alleged she had been fired for complaining about defendants refusal to enter into contracts with African Americans and their charging frican Americans a higher rate to enter the club and their). Thus, "if the opposed discrimination is discrimination in the making of contracts—such as with respect to the customers and potential customers here—" then the plaintiff may state a claim under § 1981. *Id.* at * 3 ("[P]ermitting [plaintiff's] § 1981 claim is straightforward: § 1981 prohibits discrimination in the making of contracts, including contracts with customers; § 1981 also prohibits retaliation against a person who opposes prohibited discrimination; thus, [plaintiff] states a claim for retaliation because she allegedly

opposed [Defendants'] discrimination against its customers and prospective customers."). The Court finds that taking Plaintiff's allegations as true and drawing all reasonable inferences in his favor, Plaintiff has adequately stated a claim for retaliation under 42 U.S.C. § 1981.

Defendants assert that Plaintiff's defamation claim (Count 6) should be dismissed for several reasons. To state a claim for defamation, a plaintiff must allege that (1) the defendant published a false statement (2) about the plaintiff (3) to a third party and (4) that the falsity of the statement caused injury to the plaintiff. *Valencia v. Citibank Int'l*, 728 So. 2d 330, 330 (Fla. Dist. Ct. App. 1999). Plaintiff alleges that "Mr. Hallak's statements that Mr. Costa had falsified bank records in violation of JP Morgan's Code of Conduct, which were communicated by Mr. Hallak to HR Business Partners, Assistant Branch Manager Mr. Ferrand, and Global Security Investigator Mr. Torano, each of which communications constituted intracorporate publications and were: false and defamatory; incompatible with Mr. Costa's trade or profession; and stated maliciously with intent to injure Mr. Costa." (DE 3 ¶ 48). Plaintiff also contends that "Mr. Hallak's primary motive in speaking and writing negatively about Mr. Costa was to injure Mr. Costa" and that "Mr. Hallak made the defamatory remarks within his role as Branch Manager for JP Morgan, which renders JP Morgan also liable for the remarks." (DE 3 ¶¶ 49-50). Plaintiff asserts that "JP Morgan injured Mr. Costa's reputation by improperly publishing false statements about him on his Form U-5" and that those statements were published "without any reasonable belief in the truth of the statements and with the malicious intent to injure Mr. Costa." (DE 3 ¶¶ 51-52). Plaintiff concludes that Mr.

Hallak's statements as well as the U-5 form constituted "defamation per se as they adversely affected Mr. Costa in his trade and profession." (DE 3 ¶ 53).

Defendants argue that Plaintiff's defamation claim must be dismissed because it is based upon the U-5 form, which Defendants have attached to their motion to dismiss. Because the U-5 form shows that it was filed by JP Morgan Securities, LLC and not by either of the Defendants, the Defendants contend that they have not made or published a false statement and thus cannot be liable for defamation. In response, Plaintiff argues that the Court may not consider the U-5 form without converting Defendants' motion to dismiss into a motion for summary judgment. (DE 14 at 3-4). Plaintiff is mistaken.

It is beyond peradventure that a court may consider undisputed documents central to and referenced in a complaint without converting a motion to dismiss into a motion for summary judgment. *See, e.g., Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir. 2005) ("Our prior decisions also make clear that a document need not be physically attached to a pleading to be incorporated by reference into it; if the document's contents are alleged in a complaint and no party questions those contents, we may consider such a document provided it meets the centrality requirement imposed in Horsley."); *Horsley v. Feldt*, 304 F.3d 1125, 1134 (11th Cir. 2002) (a court may consider documents central to the plaintiffs' claim and undisputed under the incorporation by reference doctrine without converting the motion into summary judgment). Thus, the Court may properly consider the U-5 form without converting the Defendants' motion to dismiss into a motion for summary judgment. Notably, Plaintiff does not quarrel with Defendants' assertion that Defendants did not publish or file the U-5 form. Accordingly,

the Court finds that, to the extent that Plaintiff's defamation claim is premised on the U-5 form, Plaintiff has not stated a plausible claim upon which relief may be granted.

Having found that Plaintiff cannot state a plausible claim for defamation based upon the U-5 form because Defendants did not publish that form, the Court analyzes whether Plaintiff has stated a plausible claim for defamation based upon Mr. Hallak's "intracorporate publications." (DE 3 ¶ 48). Defendants argue that Plaintiff's defamation claim must be dismissed because the statements were made among bank employees and were therefore not published to third parties. (DE 8 at 4). Florida recognizes a "qualified privilege" which provides that "[o]ne who publishes defamatory matter concerning another is not liable for the publication if (a) the matter is published upon an occasion that makes it conditionally privileged and (b) the privilege is not abused." *Nodar v. Galbreath,* 462 So.2d 803, 809 (Fla. 1984) (quoting Restatement (Second) of Torts § 593 (1976)). The essential elements of the qualified privilege are: (1) good faith; (2) an interest in the subject by the speaker or a subject in which the speaker has a duty to speak; (3) a corresponding interest or duty in the listener or reader; (4) a proper occasion; and (5) publication in a proper manner. *Id.* Courts have recognized that "statements made by employees to other employees fall within the 'qualified privilege' ambit." *See e.g.*, *Glynn v. City of Kissimmee*, 383 So. 2d 774, 776 (Fla. Dist. Ct. App. 1980); *Am. Airlines, Inc. v. Geddes*, 960 So. 2d 830, 834 (Fla. Dist. Ct. App. 2007).

However, qualified privilege is a defense and the burden of proving it rests with the defendant. *Glynn*, 383 So. 2d at 776. The privilege may be overcome by a showing of express malice, which has been defined as ill will, hostility, and evil intention to injure and defame. *Pierson v. Orlando Reg'l Healthcare Sys., Inc.*, No. 6:08CV466-ORL-

28GJK, 2010 WL 1408391, at *10 (M.D. Fla. Apr. 6, 2010) *aff'd,* 451 F. App'x 862 (11th Cir. 2012). Likewise, the qualified privilege vanishes if the statement is made to too wide an audience. *Spears v. Albertson's, Inc.*, 848 So. 2d 1176, 1179 (Fla. Dist. Ct. App. 2003). Plaintiff alleges that Mr. Hallak "made the defamatory remarks within his role as branch manager" to other employees and that the remarks were "false and defamatory" and made "maliciously with the intent to injure Mr. Costa." (DE 3 ¶¶ 47-50). While Defendants' assertions that they cannot be liable for defamation because the statements were not published to third parties and because Defendants are protected by qualified privilege may ultimately have merit, at this stage of the litigation, taking all of Plaintiff's allegations as true and drawing all reasonable inferences in Plaintiff's favor, the Court finds Plaintiff has stated a claim for defamation.

Defendants have also moved to dismiss Plaintiff's tortious interference claim (Count 7). In order to state a claim for tortious interference with a business relationship, a plaintiff must allege (1) the existence of a business relationship; (2) knowledge of the relationship on the part of the defendant; (3) an intentional and unjustified interference with the relationship by the defendant; and (4) damage to the plaintiff as a result of the breach of the relationship. *See W.D. Sales & Brokerage LLC v. Barnhill's Buffet of Tenn., Inc.*, 362 F. App'x 142, 143 (11th Cir. 2010).

Defendants assert that because Mr. Hallak is Chase's employee or agent, he cannot, as a matter of law, be liable for tortious interference with a contract to which his principal is a party because that interference in privileged. (DE 8 at 7). A party's interference with another's business relationship is justified where the "defendant is not a stranger to a business relationship [or] if the defendant has any beneficial or economic

interest in, or control over, that relationship." *Treco Int'l S.A. v. Kromka*, 706 F. Supp. 2d 1283, 1289 (S.D Fla. 2010). Plaintiff counters that he has adequately alleged each of the elements necessary to state a claim for tortious interference. Further, Plaintiff contends that although an employee usually cannot be liable for tortious interference with a contract to which his principal is a party, such a "privilege to interfere" does not apply when the employee acts solely with ulterior purposes and without an honest belief that his actions would benefit his employer. (DE 14 at 7). Plaintiff alleges that "to the extent Mr. Hallak used his position as Branch Manager to accomplish the actions set out more particularly above, he did so because of a personal agenda rather out of any sense of benefitting JP Morgan." (DE 3 at ¶ 58).

Because the assertion of a privilege to interfere in an otherwise protected business relationship is an affirmative defense, "[t]his privilege argument . . . is unavailing on a motion to dismiss." *Persaud v. Bank of Am., N.A.*, No. 14-21819-CIV, 2014 WL 4260853, at *15 (S.D. Fla. Aug. 28, 2014); *see also Int'l Sales & Serv., Inc. v. Austral Insulated Prods., Inc.,* 262 F.3d 1152, 1161 (11th Cir. 2001) ("[After] a plaintiff pleads and proves a prima facie case for tortious interference, the burden is on the defendant to avoid liability by showing his action is privileged," and "whether an action is privileged is a jury question."); *Lakeland Reg'l Med. Ctr., Inc. v. Astellas U.S. LLC,* 2011 WL 3035226, at *11 (M.D. Fla. July 25, 2011) ("Justification or privilege to interfere with a contract is an affirmative defense to a tortious interference action. However, the mere presence of a possible affirmative defense, which has not yet been proven, does not present a basis for the dismissal of this claim."); *Wilson v. EverBank, N.A.*, 77 F. Supp.

3d 1202, 1240 (S.D. Fla. 2015) (finding that the assertion of a privilege to interfere "cannot bar Plaintiffs' tortious interference claims" at the motion to dismiss stage).

The Court finds that Plaintiff has asserted sufficient facts to state a plausible claim for tortious interference with an advantageous business relationship. While the Defendants' qualified privilege argument may ultimately be well-taken, it is not appropriately decided on a motion to dismiss.

IV. CONCLUSION

Consequently, for the reasons set forth above, Defendants' motion to dismiss (DE 8) is **DENIED.** Defendants shall file an answer to the complaint within 14 days from the date of this Order.

DONE AND ORDERED in chambers in Miami, Florida, this 5th day of November, 2015.

KATHLEEN M. WILLIAMS
UNITED STATES DISTRICT JUDGE