

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Jimmy Smith

v.

Case No. 21-cv-190-PJB-AKJ

Roger Williams Law School et al.

REPORT AND RECOMMENDATION

Plaintiff Jimmy Smith, proceeding pro se, has sued his alma mater, Roger Williams University Law School ("RWU Law") for racial discrimination. [See Compl. \(Doc. No. 1\); Order \(Doc No. 37\)](#). Presently before the court is Mr. Smith's motion for leave to amend his Complaint. [\(Doc. No. 70\)](#).¹ [See 28 U.S.C. § 1915\(e\)\(2\)](#). For the reasons that follow, the undersigned Magistrate Judge recommends that the district court grant Mr. Smith's motions to amend with respect to his claims of racial

¹Mr. Smith filed his first proposed amended complaint [\(Doc. No. 55\)](#), on December 29, 2021. Although claiming he was filing it "as of right," he also sought leave to amend. [\(Doc. No. 56\)](#). He submitted a "corrected" amended complaint on January 3, 2022. [\(Doc. No. 58\)](#). On March 17, 2022, Mr. Smith filed another motion to amend/correct his complaint. [\(Doc. No. 70\)](#). RWU Law has timely objected to each of Mr. Smith's putative amendments. Owing to Mr. Smith's pro se status, the court, in considering Mr. Smith's motion to amend and proposed amended complaint [\(Doc. Nos. 70 and 70-2\)](#), will take into account the factual and legal assertions in all of his filings in this matter.

discrimination asserted in Counts 1, 9 and 10, and otherwise deny the motion.

Background

In its preliminary review of Mr. Smith's original complaint ([Doc. No. 1](#)), the court summarized his claim against RWU Law as one asserting racial discrimination in violation of [42 U.S.C. § 1981](#). [Nov. 18, 2021 Order \(Doc. No. 37\)](#), at 4-5. Mr. Smith's proposed amendments seek to add claims against RWU Law and a new defendant, Roger Williams University ("RWU"), which Mr. Smith describes as a "separate entity than [RWU Law]." [Pl. Corrected Am. Compl. \(Doc. No. 58\)](#), at 1.

Stripped of legal conclusions, Mr. Smith's proposed amended complaint contains the following allegations.² Mr. Smith, who is an African American, is a 2021 graduate of RWU Law. His allegations are centered around the months preceding his graduation. He claims in this case that RWU Law retaliated against him for filing internal complaints about disciplinary board proceedings, for filing a U.S. Department of Education Office of Civil Rights ("OCR") administrative complaint, and for filing a lawsuit naming RWU Law and others as defendants, [see Smith v. Roger Williams Law Sch., No. 21-cv-133-PJB-AKJ \(D.R.I.\)](#)

²Additional factual allegations will be referenced as necessary, to the extent they pertain to particular legal claims.

(["Smith I"](#)). Mr. Smith further alleges that after he posted information about a Rhode Island politician's family member who was a former RWU Law student, Mr. Smith was barred from an RWU Law Facebook group. Mr. Smith also alleges that his email has been "monitored," that he has been followed by RWU Law personnel into a casino, and that he was robbed by the daughter of an unnamed RWU employee. Mr. Smith asserts that defense counsel has filed documents and taken positions in [Smith I](#) in retaliation for Mr. Smith's filing of that lawsuit.

Mr. Smith alleges that he is the target of RWU Law disciplinary board proceedings. He claims that the disciplinary proceedings are not fair and do not afford him due process. He alleges that the disciplinary board is comprised of biased professors, including a professor who told him she graded him lower because of his handwriting (which he ascribes to his status as an amputee), and a professor who was the subject of a discrimination complaint that Mr. Smith filed several months before. Mr. Smith also states that the RWU Law disciplinary process does provide him with a lawyer or an opportunity to question the complainant. Mr. Smith further alleges that the "defense advisor" assigned to advise him in the disciplinary proceedings of a named defendant in [Smith I](#) - a professor who has had contact with the complainant in the pending disciplinary

proceeding. Mr. Smith believes that the appointment of that individual as his advisor was intended to intimidate Mr. Smith.

Mr. Smith also claims that, in addition to the RWU Law disciplinary proceedings, he is the target of RWU "Honor Board" proceedings. Mr. Smith further alleges that the complainant in the aforementioned disciplinary proceedings against him sits on the "Honor Board." Mr. Smith has alleged that the Honor Board proceedings were initiated by the complaint of a student "cherry-picked" by RWU Law to help RWU Law obtain evidence it can use in defending RWU Law in Smith I.

Legal Standards

Under [Fed. R. Civ. P. 15\(a\)](#), "[t]he court should freely give leave [to amend a complaint] when justice so requires." [Fed. R. Civ. P. 15\(a\)\(2\)](#). A request to amend requires the court "to exercise its informed discretion in constructing a balance of pertinent considerations." [Palmer v. Champion Mortg.](#), 465 F.3d 24, 30-31 (1st Cir. 2006); see also [Nikitine v. Wilmington Tr. Co.](#), 715 F.3d 388, 390 (1st Cir. 2013) (court must examine totality of circumstances in ruling on motions to amend). Leave to amend may be denied "when the request is characterized by 'undue delay, bad faith, futility, [or] the absence of due diligence on the movant's part.'" [Nikitine](#), 715 F.3d at 390 (quoting [Palmer](#), 465 F.3d at 30). To assess whether the proposed amendment states actionable claims, this court applies

the standard for preliminary review set forth in its [November 18, 2021, Order \(Doc. No. 37\)](#), which the court does not repeat here.

[Fed. R. Civ. P. 20](#), concerning the permissive joinder of defendants, is implicated by Mr. Smith's attempt to add RWU as a defendant in this action. That rule allows multiple defendants to be joined together in one action if the plaintiff asserts a claim against them jointly or severally, arising from the same transaction or series of transactions, and if a common question of fact or law will arise in the action. See [Fed. R. Civ. P. 20\(a\)\(2\)](#).

A. Joining RWU

As noted above, Mr. Smith has alleged that RWU and RWU Law are separate entities. His proposed amended complaint and other submissions contain no indication that RWU, as distinct from RWU Law, was involved in any of the transactions or interactions with Mr. Smith that led to this lawsuit, or that there is a claim for joint or several liability within Mr. Smith's claims against RWU Law. Accordingly, the district judge should deny Mr. Smith's motion to amend, to the extent that it seeks to add RWU to this case as a defendant.

B. Plaintiff's Claims

1. Racial Discrimination

Mr. Smith claims that RWU Law discriminated against him on the basis of his race, in violation of [42 U.S.C. § 1981](#) (Count 1), [Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d](#) (Count 9), and the [Rhode Island Civil Rights Act \("RICRA"\), R.I. Gen. Laws §§ 42-112-1 et seq.](#) (Count 10). [Section 1981](#) provides, in relevant part, that "[a]ll persons within the jurisdiction of the United States shall have the same right ... to make and enforce contracts ... and to the full and equal benefit of all laws and proceedings ... as is enjoyed by white citizens" [42 U.S.C. § 1981\(a\)](#). Title VI provides that "[n]o person...shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." [42 U.S.C. § 2000d](#). RICRA similarly protects against discrimination based on one's "race, color, religion, sex, disability, age, or country of ancestral origin." [R.I. Gen. Laws § 42-112-1](#). Much of the factual narrative in Mr. Smith's submissions rehashes claims of racial discrimination that the court has already allowed to proceed under section 1981. See [Nov. 18, 2021 Order \(Doc. No. 37\)](#). As the two additional racial discrimination counts in Mr. Smith's proposed amended complaint apply similar legal standards

as his claim under 42 U.S.C. § 1981, see Doe v. Brown Univ., 505 F. Supp. 3d 65, 79 n.10 and 81 (D.R.I. 2020), the motion to amend should be granted as to Mr. Smith's claims for racial discrimination as set forth in Counts 1, 9 and 10.

2. Criminal claims

Counts 12, 13 and 16 of Mr. Smith's proposed amended complaint assert violations of federal criminal law under Title 18 of the United States Code, which are not actionable in this civil action. See Cok v. Cosentino, 876 F.2d 1, 2 (1st Cir. 1989) (per curiam) (stating that only the United States as prosecutor can bring a complaint under 18 U.S.C. §§ 241-242); Stone v. Warfield, 184 F.R.D. 553, 555 (D. Md. 1999) (stating that individual citizens have no private right of action to institute federal criminal prosecutions); cf. Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973) (a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another); 28 U.S.C. § 516 (conduct of litigation in which the United States is a party is reserved to officers of the Department of Justice, under the direction of the Attorney General). Accordingly, the district judge should deny plaintiff's motion to amend to the extent it alleges violation of criminal laws as set forth in Counts 12, 13, and 16.

3. Massachusetts law

In Count 11, Mr. Smith seeks to add a claim based on alleged violations of the [Massachusetts Civil Rights Act, Mass. Gen. Laws ch. 12, §11H](#). There are no allegations in any of Mr. Smith's submissions, however, to suggest that Massachusetts law would apply to this case. RWU Law is a Rhode Island entity and the acts Mr. Smith complains of took place in Rhode Island in connection with his attendance at RWU Law. Plaintiff's motion to amend should therefore be denied with respect to the claims asserted in Count 11.

4. Federal Constitutional claims

In Count 3, Mr. Smith alleges violations of his civil rights, pursuant to [42 U.S.C. § 1983](#). It is well-settled, however, that such a claim cannot be asserted against private entities, such as RWU Law. See [Georgia v. McCollum, 505 U.S. 42, 53 \(1992\)](#) (citing [Polk Cty. v. Dodson, 454 U.S. 312 \(1981\)](#)). A private party is deemed to be a state actor for purposes of § 1983 only under limited circumstances, which are not present here. See generally [Blum v. Yaretsky, 457 U.S. 991, 1004-05 \(1982\)](#) (describing circumstances under which a private actor can be deemed to be a state actor for purposes of § 1983). Accordingly, the district judge should deny plaintiff's motion to amend as to the claims asserted in Count 3.

5. Rhode Island Constitutional claim

In Count 19, Mr. Smith asserts a claim under [Article I, Section 21 of the Rhode Island Constitution](#), which provides that “citizens have a right in a peaceable manner to assemble for their common good, and to apply to those invested with the powers of government, for redress of grievances, or for other purposes, by petition, address, or remonstrance. No law abridging the freedom of speech shall be enacted.” The Rhode Island Supreme Court has never recognized a private right of action under this provision of the State’s Constitution, and this court is not free to create one. See [Doe v. Trs. Of Boston Coll.](#), 942 F.3d 527, 535 (1st Cir. 2019) (“A litigant who chooses federal court over state court cannot expect this court to . . . blaze new and unprecedented jurisprudential trails as to state law.”). Plaintiff’s motion to amend should therefore be denied as to Count 19, as he cannot assert a claim under the Rhode Island Constitution.

6. Rhode Island Whistleblowers’ Protection Act

In Count 20, Mr. Smith asserts a claim under the [Rhode Island Whistleblowers’ Protection Act](#) (“the Act”), [R.I. Gen Laws § 28-50-3](#). That statute provides that “[a]n employer shall not discharge . . . an employee . . . [b]ecause the employee . . . reports or is about to report to a public body . . . a violation [of a law or regulation] which the employee knows or reasonably

believes has occurred or is about to occur. . . .” [Senra v. Town of Smithfield](#), 715 F.3d 34, 42 (1st Cir. 2013).

To establish a violation the Act, a plaintiff must show: (1) that he engaged in protected whistleblowing conduct as defined by the Act; (2) that he suffered an adverse employment action at the time or thereafter; and (3) that the adverse action was causally related to the protected conduct. [Ryder v. Pearson Educ., Inc.](#), 486 F.Supp.3d 489 (2020). Here, Mr. Smith asserts that he was “employed” by RWU Law because he was enrolled there. [Proposed Am. Compl. \(Doc. No. 70-2\)](#) ¶¶ 3-7. Plaintiff has provided no authority for this legal conclusion and the court is unaware of any. The district judge should therefore deny plaintiff’s motion to amend with respect to the claim asserted in Count 20.

7. Tortious Interference With Contract

In Count 2, Mr. Smith asserts that RWU Law interfered with his contracts with RWU, with a food delivery service, and with the United States. In order to establish a claim for tortious interference with a contractual relationship, plaintiffs must establish the following four elements: “(1) [T]he existence of a contract; (2) the alleged wrongdoer’s knowledge of the contract; (3) his [or her] intentional interference; and (4) damages resulting therefrom.” [Fogarty v. Palumbo](#), 163 A.3d 526, 538 (R.I. 2017).

Here, Mr. Smith's conclusory assertion of being a party to a "contract with the United States" are vague and unsubstantiated. Similarly, there are no factual allegations in any of Mr. Smith's submissions that could support a claim that RWU Law was aware of Mr. Smith's contract with a food delivery service. Finally, there are no factual allegations in any of Mr. Smith's submissions that support his claim that he had a contract with RWU, or that RWU Law interfered with any such contract. The district judge should therefore deny plaintiff's motion to amend to the extent it asserts a claim for tortious interference with contract, as stated in Count 2.

8. Disability Discrimination

In Count 4, Mr. Smith asserts that an RWU Law professor gave him a lower grade due to his handwriting, which he attributes to a disabling condition affecting his writing hand. He further asserts that his complaints were not taken seriously because of his "perceived disability (low IQ or mental illness)." [Proposed Am. Compl. \(Doc. No. 70-2\)](#) ¶¶ 223-25. These conclusory allegations, which lack factual support in the record, are insufficient to state a claim for disability discrimination.³ Accordingly, the motion to amend should be

³Mr. Smith alleges that he is missing part of the first two fingers on his right hand near the first knuckle and that he is right-handed. [Proposed Am. Compl. \(Doc. No. 70-2\)](#) ¶¶ 72-74. While he also claims that he handwrote certain exams, [id.](#) at ¶

denied to the extent that it asserts a claim for disability discrimination, as asserted in Count 4.

9. Breach of contract (Count 5)

Mr. Smith alleges that RWU Law breached its contract with him. "The relevant terms of the contractual relationship between a student and a university's typically include language found in the student handbook." [Havlik v. Johnson & Wales Univ.](#), 509 F.3d 25, 34 (1st Cir. 2007) (citing Rhode Island law). As Mr. Smith is already prosecuting a breach of contract claim in Smith I, amending the instant complaint to add a duplicative claim would run counter to the court's responsibility to "examine totality of circumstances in ruling on motions to amend." [Nikitine](#), 715 F.3d at 390. The district judge should therefore deny the motion to amend to the extent it seeks to add a claim for breach of contract in Count 5.

10. Covenant of Good Faith and Fair Dealing

Mr. Smith alleges in Count 6 that RWU Law's actions breached the covenant of good faith and fair dealing. "[V]irtually every contract contains an implied covenant of good faith and fair dealing between the parties." [Ferreira v. Child & Fam. Servs.](#), 222 A.3d 69, 76 (R.I. 2019). This implied covenant provides a safeguard to ensure that contractual aims

76, there are no facts suggesting that he sought or was denied any accommodation for his disability.

are satisfied, and that parties do not act to “destroy[] or injure[] the right of the other party to receive the fruits of the contract.” [McNulty v. Chip](#), 116 A.3d 173, 185 (R.I. 2015) (quoting 17A Am. Jur. 2d Contracts § 370 at 365 (2004)).

Dispositive here, though, is that “[t]here is, under Rhode Island law, no independently actionable covenant of good faith or fair dealing implicit in the university/student relationship.” [Russell v. Salve Regina Coll.](#), 649 F. Supp. 391, 400 (D.R.I. 1986). Accordingly, the district judge should deny plaintiff’s motion to amend to the extent it includes a claim for breach of the covenant of good faith and fair dealing, as asserted in Count 6.

11. Employment Discrimination

Invoking Title VII of the Civil Rights Act of 1964, Mr. Smith asserts in Count 7 that he was a victim of gender discrimination in his employment with the defendants. To bring an action for employment discrimination under Title VII, an employee must first file an administrative charge with either (1) the Equal Employment Opportunity Commission (within 180 days of the alleged unlawful employment practice) or (2) a parallel state agency. [42 U.S.C. § 2000e-5\(e\)\(1\)](#); [Aly v. Mohegan Council, Boy Scouts of America](#), 711 F.3d 34, 41 (1st Cir. 2013). Mr. Smith has not stated, and nothing in the record suggests, that Mr. Smith has pursued the required administrative remedies

or that he should be excused from doing so. See [Romero-Perez v. U.S. Dep't of Just.](#), 780 F. Supp. 2d 162, 168 (D.P.R. 2011)

(noting that exhaustion can be waived if it would have caused “undue prejudice, irreparable harm or unusual hardship” or if administrative process would have been “futile”). The district judge should deny the motion to amend to the extent it asserts, in Count 7, a claim under Title VII.

12. Title IX

In Count 8, Mr. Smith asserts that he was a victim of discrimination under Title IX of the Education Amendments of 1972, [20 U.S.C. § 1681\(a\)](#). Title IX provides that “[n]o person. . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” [20 U.S.C. § 1681\(a\)](#). Among other things, it “bar[s] the imposition of university discipline where gender is a motivating factor in the decision to discipline.” See [Doe v. Columbia Univ.](#), 831 F.3d 46, 53 (2d Cir. 2016).

Mr. Smith has alleged no facts linking his gender to any disciplinary action imposed against him. Accordingly, the district judge should deny his motion to amend as to Count 8 asserting a claim for gender discrimination under Title IX.

13. Libel and Defamation

In Count 14, Mr. Smith asserts a claim for defamation. His proposed amended complaint states, without detail, that defense counsel and RWU Law have made “disparaginng remarks concerning [his] ability in the legal field and published them to a third party.” [Proposed. Am. Compl. \(Doc. No. 70-2\)](#) ¶¶ 150-51. He also alleges, without any detail or other factual support, that the defendants sent information, gleaned from illegally opening his mail, to the Massachusetts Bar to hinder his ability to becoming a lawyer. [Id.](#) ¶ 207.

Under Rhode Island law, a claim for defamation requires proof of: (1) the utterance of a false and defamatory statement concerning another; (2) an unprivileged communication to a third party; (3) fault amounting to at least negligence; and (4) damages, unless the statement is actionable irrespective of special harm. [Nassa v. Hook-SupeRx, Inc., 790 A.2d 368, 373 n.10 \(R.I. 2002\)](#). Mr. Smith’s defamation claim fails at the first step, as his submissions are devoid of any description of “false and defamatory statements.” [Id.](#) Nor does he allege any facts indicative of fault or harm resulting from the alleged defamation. The district judge should therefore deny Mr. Smith’s motion to amend to the extent it seeks, in Count 14, to add a claim for defamation to this action.

14. Negligence

In Count 15, Mr. Smith alleges that RWU Law “negligently sent impermissive material to the Massachusetts Bar.” [Proposed Am. Compl. \(Doc. No. 70-2\)](#) ¶ 237-38. To state a claim of negligence, Mr. Smith must allege (1) a legally cognizable duty; (2) a breach of that duty; (3) proximate causation between the alleged conduct and the resulting injury; and (4) actual loss or damages resulted. [Doe v. R.I. Sch. of Design](#), 516 F. Supp. 3d 188, 194 (D.R.I. 2021) (citing [Daniels v. Fluette](#), 64 A.3d 302, 304-05 (R.I. 2013)). Mr. Smith’s vague factual allegations do not state a claim for relief. Mr. Smith’s filings neither indicate what he alleges was improperly sent to the Massachusetts Bar, nor what he means by “impermissive,” nor whether and to what extent he was injured by RWU Law’s alleged transgression. The motion to amend should be denied to the extent it seeks to add, in Count 15, a claim for negligence.

15. Emotional distress

In Counts 17 and 18, Mr. Smith alleges that the conduct of RWU Law constituted intentional and negligent infliction of emotional distress.

Mr. Smith’s claims for negligent infliction of emotional distress fail to state any claim for relief because, Rhode Island law limits recovery under a theory of negligent infliction of emotional distress only to “those within the zone-

of-danger who are physically endangered by the acts of a negligent defendant, and bystanders related to a victim whom they witness being injured.” [Williams v. Johnson & Johnson](#), No. 1:20-CV-00544-MSM-LDA, 2022 WL 157929, at *7 (D.R.I. Jan. 18, 2022) (citations and internal quotations omitted).

Further, “Rhode Island law is crystal-clear that without proof of physical symptoms, no claim for either intentional or negligent infliction of emotional distress can succeed” [Colizzo v. Highgate Hotels, L.P.](#), No. 1:21-CV-00257-MSM-LDA, 2022 WL 225599, at *1 (D.R.I. Jan. 26, 2022).

Mr. Smith has not asserted any facts which suggest he was either physically endangered, related to a victim who was physically injured, or has suffered physical symptoms as a result of distress. Mr. Smith cannot proceed, therefore, on claims alleging the intentional or negligent infliction of emotional distress, and his motion to amend should be denied as to Counts 17 and 18 asserting such claims.

Conclusion

Based on the foregoing, the undersigned Magistrate Judge recommends that the district judge:

--grant Mr. Smith’s motion to amend (Doc. No. 70), but only as to his claims of racial discrimination, as set forth in counts 1, 9, and 10 of his most recent proposed amended complaint (Doc. No. 70-2);

--deny plaintiff's motion to amend insofar as it seeks to add RWU as a party;

--deny plaintiff's previous motion to amend (Doc. No 56) as moot;

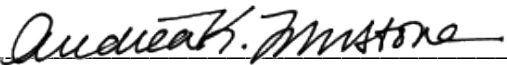
--deny defendant's motion to strike (Doc. No. 60) as moot.

In addition, should the district judge adopt these recommendations, it is also recommended that the defendant be allowed 21 days from the time of such adoption to either file an answer with respect to the newly added claims, or to replace or supplement its [pending motion to dismiss \(Doc. No. 41\)](#) to address those claims; and allow supplemental objections or replies to be filed in accordance with the Federal Rules of Civil Procedure.

Any objections to this Report and Recommendation must be filed within fourteen days of receipt of this notice. [See Fed. R. Civ. P. 72\(b\)\(2\)](#). The fourteen-day period may be extended upon motion.

Only those issues raised in the objection(s) to this Report and Recommendation are subject to review in the district court. [See Sch. Union No. 37 v. United Nat'l Ins. Co.](#), 617 F.3d 554, 564 (1st Cir. 2010). Any issues not preserved by such objection(s) are precluded on appeal. [See id.](#) Failure to file any objections within the specified time waives the right to

appeal the district court's Order. See [Santos-Santos v. Torres-Centeno](#), 842 F.3d 163, 168 (1st Cir. 2016).


Andrea K. Johnstone
United States Magistrate Judge

April 18, 2022

cc: counsel of record
Jimmy Smith, pro se