UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

BERNARD MOORE, Moore, v. WILLIAMS COLLEGE, Defendants.	)	Civil Action No. 1:09-cv-30208-MAP

DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

The plaintiff Bernard Moore soon will begin serving a lengthy prison sentence as a result of his admitted criminal activity. For almost twenty-five years, Moore has pursued an unlawful scheme of fraud and deceit through which he amassed more than $700,000 in ill-gotten funds from the federal government and numerous private parties through student loan fraud, credit card fraud, and social security benefits fraud.

Williams College, the defendant in this case, is one of Moore's victims. Moore obtained employment with the College on the basis of fraudulently obtained credentials. He then maintained that employment by concealing from the College his ongoing criminal enterprise, which continued unabated after he was hired. He also concealed from the College that he was under investigation by federal authorities, that he agreed in September of 2009 to plead guilty to his crimes, and that the Court accepted his guilty plea in November of 2009.

When the College finally learned of Moore's unlawful acts, it immediately acted to address his employment. The College, in accordance with the Faculty Handbook, informed Moore that his actions warranted termination for adequate cause and offered Moore the opportunity to provide any reason, if he had one, why the College should not proceed with his

termination. Moore, of course, offered no such reason, and therefore the College properly terminated his employment for cause.

Moore subsequently filed this frivolous lawsuit. His Verified Second Amended Complaint ("Complaint") has four counts, each of which fails to state a claim upon which relief can be granted. Count I alleges that the College breached Moore's employment contract by terminating him before the three-year period of his contract had expired, but that claim is without merit on its face because, as Moore himself alleges, he was fired as a result of his admittedly criminal conduct and that conduct -- as a matter of law -- constituted just cause for the College to terminate his employment. Count II alleges that the College violated Moore's rights under COBRA (the Consolidated Omnibus Budget Reconciliation Act) when it did not allow him to continue participating in the College's group health insurance plan following his termination. That claim fails as a matter of law because Moore's admitted criminal conduct constitutes "gross misconduct" within the meaning of COBRA, which made him ineligible to receive continued health insurance benefits under the College's plan. In Count III, Moore claims that the College violated Massachusetts G.L. c. 186, § 14 when it evicted him from College housing upon his termination. That count fails to state a claim because Moore was not a "tenant" of the College but merely was a "licensee;" the College provided Moore with access to College housing only as a condition of his employment, and therefore his eligibility to occupy that housing terminated at the same time as his employment. Finally, Count IV claims that the College violated Moore's rights when it purportedly denied his claim for unemployment benefits after he was terminated. That count fails to state a claim because, by operation of statute, it was the Washington, D.C. Department of Employment Security, not the College, that denied Moore's request for unemployment benefits.

Relevant Factual Background

The relevant facts are taken from the Complaint (the allegations of which, for purposes of this motion only, are assumed to be true) as well as from the public records of Moore's criminal trial and other documents referenced in or necessarily incorporated into the allegations in the Complaint, all of which this Court may consider on a motion to dismiss. *See Freedenfeld Assoc., Inc.*, v. *McTigue*, 531 F.3d 38, 44 (1st Cir. 2008) (facts to be accepted for purposes of assessing a motion to dismiss "may be derived from the complaint, from documents annexed to or fairly incorporated in it, and from matters susceptible to judicial notice"); *Kowalski* v. *Gagne*, 914 F.2d 299, 305 (1st Cir. 1990) ("[i]t is well-accepted that federal courts may take judicial notice of proceedings in other courts if those proceedings have relevance to the matter at hand").

The College initially hired Moore as a Visiting Lecturer effective as of July 1, 2008; Moore's initial appointment was for one year. Complaint at p. 2. Effective as of July 1, 2009, the College appointed Moore as a Visiting Assistant Professor pursuant to a three-year contract. *Id.* As a condition of his employment, Moore was provided access to rental housing through the College. *Id.* at p. 4; Housing Agreement,[1] attached at Tab A; WILLIAMS COLLEGE FACULTY AND ADMINISTRATIVE STAFF HOUSING POLICY, attached at Tab B. The Housing Agreement that Moore executed expressly provided that he was granted only a license to occupy housing provided by the College, and that his eligibility to access the housing was subject to the Williams College Faculty and Staff Housing policy. Housing Agreement at ¶¶ 1, 6.

[1] In light of Moore's claim concerning his faculty housing, the documents setting forth the terms and conditions of his faculty housing, such as his Housing Agreement and the Williams College Faculty and Administrative Staff Housing Policy are "fairly incorporated" into the Complaint and may be considered for purposes of this motion to dismiss. *Freedenfeld Assoc., Inc.*, v. *McTigue*, 531 F.3d 38, 44 (1st Cir. 2008); *see Diva's Inc.* v. *City of Bangor*, 411 F.3d 30, 38 (1st Cir. 2005) (in assessing claim alleging breach of a settlement agreement, court properly considered settlement agreement submitted by the defendant as part of a motion to dismiss).

On September 30, 2009, Moore agreed to plead guilty to three separate counts of fraud: student aid fraud, bank fraud and social security representative fraud. *See* September 25, 2009 Letter to Kenneth M. Robinson, Esq., attached at Tab C, at pp. 1, 8. In a sworn Statement of the Offense that Moore signed on November 9, 2009, at the time his plea agreement actually was filed with the Court, Moore acknowledged a scheme of deceit and fraud that extended from 1985 through 2009. *See* Statement of the Offense, attached at Tab D. Moore's fraudulent acts included (1) applying to several institutions of higher education using false information, including a false representation that he had earned a Bachelor of Science degree; (2) securing both federal and privately-issued student financial aid -- as recently as September 2008 -- using false names and/or social security numbers; (3) unlawfully receiving and retaining social security disability benefits on behalf of a person who was not disabled and in any event had left Moore's care and custody; and (4) opening more than 90 credit cards -- as recently as 2009 -- using a false name and/or social security number. *Id.* at ¶¶ 2, 3, 6, 8, 12, 15, 17, 19, 21, 26.

When the College learned of Moore's felonious conduct, it immediately acted to address his employment status. On November 10, 2009, Moore spoke with the Acting Dean of the Faculty, who informed Moore that the College was aware of his guilty plea -- a fact that the College did not learn from Moore himself notwithstanding that he had agreed to plead guilty on September 30 -- and that he was suspended without pay effective immediately. Complaint at pp. 3-4. On November 12, the College's Interim President, William Wagner, sent Moore a letter stating that the College had adequate cause to terminate Moore's employment in light of his guilty plea and his failure to inform the College of that plea, among other factors. *Id.* at p. 4. The College offered Moore an opportunity to provide any reason, if he had one, why he should not be terminated for cause, but Moore did not offer any; instead, he responded to President

Wagner with a letter that did not refute or otherwise address in any way the grounds for termination. *Id.* at p. 5. Accordingly, the College terminated Moore's employment effective as of November 16. In addition, because the College provided Moore with access to housing as a condition of his employment, the College simultaneously removed Moore's access to that housing at the time he was terminated. *Id.* at p. 5. Finally, when Moore subsequently sought to request continuation of his health insurance benefits through COBRA, the College informed him that he was not eligible for such continuation because he had been terminated for gross misconduct. *Id.* at p. 5-6.

After the College terminated his employment, Moore also filed for unemployment insurance benefits with the Washington, D.C. Department of Employment Security, which ultimately denied his claim. *Id.* at p. 7-8.

Argument

To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), Moore must provide "more than labels and conclusions [or] a formulaic recitation of the elements of a cause of action." *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 555 (2007). Rather, "[t]he factual allegations in a complaint must possess enough heft to set forth a plausible entitlement to relief." *Gagliardi* v. *Sullivan*, 513 F.3d 301, 305 (1st Cir. 2008) (internal quotations omitted). Dismissal of a complaint is appropriate where it does not set forth sufficient factual allegations "respecting each material element necessary to sustain recovery under some actionable legal theory." *Id.* at 305 (internal quotations omitted). While the well-pleaded factual allegations in the Complaint must be accepted as true for the purposes of this Motion, this Court is not required to "credit bald assertions . . . unsubstantiated conclusions . . . or subjective characterization, optimistic

predictions, or problematic suppositions." *Id.* at 305 (quoting *Wash. Legal Found. v. Mass. Bar Bound.*, 993 F.2d 962, 971 (1st Cir. 1993)) (internal quotations omitted).

I. MOORE CANNOT STATE A CLAIM FOR BREACH OF CONTRACT BECAUSE THE COLLEGE HAD JUST CAUSE TO TERMINATE HIS EMPLOYMENT CONTRACT.

Moore alleges in Count I of his Complaint that the College breached his employment contract when it terminated his employment prior to the expiration of its three-year term. Complaint at p. 6. However, he also acknowledges that the College terminated his employment because he pleaded guilty to three counts of fraud in federal district court. *See id.* at pp. 4, 6. As a matter of law, the criminal conduct that Moore confessed to provided the College with ample cause to terminate his employment contract.

Under well-settled Massachusetts law, even a contract otherwise guaranteeing employment for a set period of time may be terminated upon just cause. *See Klein* v. *President and Fellows of Harvard College*, 25 Mass. App. Ct. 204, 208 (1987). In this context, "just cause" means a reasonable basis for dissatisfaction with an employee for reasons such as "failure to conform to usual standards of conduct, or other culpable or inappropriate behavior," or any other cause for discharge "reasonably related, in the employer's honest judgment, to the needs of his business." *Id.* at 208.

Moore's admitted criminal conduct in this case goes far beyond the grounds that courts have accepted as "just cause" to terminate an employment contract. In *Klein*, for example, the Court found that the plaintiff's inability to develop strong working relationships with faculty members constituted just cause to terminate her employment contract. *Id.* at 206. Similarly, in *Engelbrecht v. Northeastern University*, the Court found that the employee's refusal to accept Northeastern's decision not to permit him to enroll in a particular degree program while maintaining his full-time position with the university amounted to insubordination, which was

just cause to terminate his employment contract. 1993 WL 818561, at *7 (Mass. Super. Nov. 16, 1993).

In this case, Moore acknowledges that the College terminated his employment because he pled guilty to three separate counts of fraud. As discussed above, Moore has admitted that his scheme of deceit stretched from 1985 through 2009 and included (1) fraudulently obtaining numerous student loans, from both public and private lenders; (2) obtaining admission to graduate school based on false credentials; (3) credit card fraud and (4) social security fraud. *See* Statement of the Offense at ¶¶ 2, 3, 6, 8, 12, 15, 17, 19, 21, 26. Moore further has acknowledged that his crimes likely will result in a jail term of 33 to 41 months. *See* September 25, 2009 Letter to Kenneth M. Robinson, Esq., at pp. 1, 3. Thus, it is beyond dispute that Moore "failed to confirm to usual standards of conduct" or committed "other culpable or inappropriate behavior" that constitutes just cause to terminate his employment contact. *Klein*, 25 Mass. App. Ct. at 208; *see Nadal-Ginard* v. *Children's Hosp. Corp.*, 1995 WL 1146118, at *7 (Mass. Super. Ct. Dec. 1, 1999) (former employee could not maintain breach of contract action after hospital terminated his employment after 10 years because employee's conviction on felony larceny charges amounted to just cause to terminate employment contract).

Moore also alleges that before he was terminated he alerted the College of his intent to "exhaust his administrative remedies" concerning his termination and requested copies of the College's faculty and personnel policies. Complaint at p. 5. To the extent this allegation can be construed to assert a claim that he was denied some purported contractual right to "process" under the College's Faculty Handbook, his argument fails to state a claim in any event. Even assuming, solely for the purposes of this motion, that the Faculty Handbook somehow constitutes a contract between Moore and the College, the Handbook provides only that the College should

provide "due notice" prior to a termination for "adequate cause."[2] WILLIAMS COLLEGE FACULTY HANDBOOK, TERMINATION OF FACULTY APPOINTMENT FOR CAUSE, attached at Tab E. The College plainly did so, as the Complaint confirms. According to Moore's own allegations, the College provided him with notice on November 12 that it had grounds to terminate his employment based on his guilty plea in federal court, among other reasons, and he was offered an opportunity to respond to the facts that the College identified as constituting cause to terminate his employment. *See* Complaint at pp. 4-5. Moore responded, but in doing so he failed to refute the College's statement of the facts and otherwise failed to offer any reason why the College did not have grounds to terminate him for cause. Accordingly, the College terminated his employment as of November 16. *See id.* Moore thus received any "process" that he was entitled to under the College's Faculty Handbook.

II. MOORE CANNOT STATE A CLAIM UNDER COBRA BECAUSE THE ADMITTED CRIMES FOR WHICH HE WAS TERMINATED CONSTITUTED "GROSS MISCONDUCT," WHICH MADE HIM INELIGIBLE TO CONTINUE PARTICIPATING IN THE COLLEGE'S GROUP HEALTH INSURANCE PLAN.

Moore claims in Count II of the Complaint that the College violated his rights under COBRA when it refused to allow him to continue participating in the College's group health plan after he was terminated. Moore fails to state a claim upon which relief can be granted, because COBRA provides that an employee who is terminated for "gross misconduct" is not eligible to continue participating in a former employer's group health insurance plan. 29 U.S.C. § 1163.

---

[2] The Faculty Handbook provides for additional procedures if the basis for a faculty member's dismissal is "serious shortcomings . . . in the discharge of [a faculty member's] professional duties." *Id.* These provisions are inapplicable here because Moore was not terminated for "shortcomings" in his "professional duties," i.e., teaching and other activities as a professor. Rather, he was terminated because he pleaded guilty to three separate counts of fraud in federal district court. It is self-evident that Moore's fraudulent activities were not undertaken as part of his "professional duties" for the College.

Neither the COBRA statute nor its implementing regulations define the term "gross misconduct," and federal case law on the issue properly has been described as "sparse." *Richard* v. *Industrial Commercial Elec. Corp.*, 337 F. Supp. 2d 279, 281 (D. Mass. 2004). However, the few cases that have addressed the issue amply confirm what common sense suggests: "gross misconduct" certainly includes actions that are "serious enough to warrant a felony conviction." *Zickafoose* v. *UB Services, Inc.*, 23 F. Supp. 2d 652, 656 (S.D. W. Va. 1998) (felony assault constituted "gross misconduct"); *McKnight* v. *School Dist. of Philadelphia*, 171 F. Supp. 2d 446, 456 (E.D. Pa. 2001) (arrest of teacher for sexual assault constituted "gross misconduct" even though charges eventually were dropped); *cf. Schmidt* v. *City of Duluth*, 346 N.W.2d 671, 674 (Minn. Ct. App. 1984) (felony assault to which employee pled guilty constituted gross misconduct sufficient to disqualify employee from unemployment compensation).

Moore asserts that the College should be required to allow him to continue his health coverage under the College's plan because his illegal conduct occurred prior to, and not in connection with, his employment with the College. Complaint at p. 6-7. That argument fails for several reasons.

First, Moore has misrepresented to this Court the period of time in which his criminal conduct occurred. In his Complaint, Moore claims that his criminal conduct occurred only between 2002 and 2006. Complaint at p. 6. However, the Statement of the Offense that he executed under the pains and penalties of perjury as part of his criminal proceedings in the Federal District Court for the District of Columbia tells a very different story: Moore has admitted facts establishing an ongoing scheme of fraud and deceit that stretched from 1985 into 2009. *See* Statement of the Offense, attached at Tab D, at ¶¶ 2, 3, 6, 8, 12, 15, 17, 19, 21, 26.

Thus, by his own admission, Moore's fraudulent conduct included several criminal acts that he committed during his employment with the College.

Second, even if it were true that all of Moore's wrongdoing occurred before the College hired him (which it is not), that could not mean that the College is forced to continue Moore's participation in the College's health plan -- even though the College obviously can terminate his employment -- because that would merely reward Moore for concealing his crimes. Moore only obtained employment with the College in 2008, and thus gained access to the College's group health plan, because he concealed his bogus academic credentials, concealed the fact that he had a prior criminal history (from a prior guilty plea to two separate counts of credit card fraud, *see United States* v. *Moore*, 127 F.3d 1107 (9th Cir. 1997) (unpublished disposition)), and concealed the fact that his criminally fraudulent acts continued through the time he was hired by the College. The fact that Moore ultimately was caught and pleaded guilty only after the College hired him cannot compel the College to continue his coverage under COBRA, or else Moore will have insulated himself from the consequences of his misconduct by virtue of having concealed that misconduct from the College. Such a result would be patently unjust. *Cf. Pechacek* v. *Minnesota State Lottery*, 497 N.W.2d 243, 245 (Minn. 1993) (rejecting a former employee's proposed interpretation of a state statute prohibiting the hiring of convicted felons that would purport to allow "continu[ing] the employment of a person . . . who committed a felony before being hired but managed to stall conviction until after starting employment"). Consistent with this view, COBRA contains no temporal limitation on "gross misconduct," i.e., the statute does not limit "gross misconduct" to misconduct occurring during the person's employment with the entity whose health plan is at issue.

Nor is there any merit to Moore's claim that "gross misconduct" applies only to conduct that directly involves his employment. "Nothing in the statute or the legislative history of COBRA indicates that an employee's actions must be intended to affect his or her employer's interest in order to be deemed gross misconduct." *Zickafoose*, 23 F. Supp. 2d at 656. Rather, "gross misconduct for purposes of COBRA includes non-work related behavior if there is a substantial nexus between the behavior and the working environment such that the effects of the intolerable behavior extend into the employment arena." *Id.* at 657 (felonious assault of a coworker, though off-duty and wholly unrelated to the job, constituted "gross misconduct" under COBRA); *McKnight*, 171 F. Supp. 2d at 447 (crimes allegedly committed by employee in his home constituted "gross misconduct" under COBRA); *cf. Ballin* v. *Metropolitan Transit Comm'n*, 525 N.W.2d 11, 13-14 (Minn. Ct. App. 1994) (bus driver's felony conviction for selling marijuana off-duty constituted gross misconduct sufficient to disqualify employee from unemployment compensation).

The reasoning of these cases is fully applicable here. As a Visiting Assistant Professor, Moore held a position of trust and confidence with the College. Like all faculty members, he was to serve as a role model to the College's students, to help shape their thoughts and to influence their actions. Moore's admitted criminally fraudulent conduct, some of which directly involved student loans and his academic credentials, destroyed the trust that the College placed in him and his ability to effectively perform his job duties. The nexus between Moore's criminal acts and his position at the College is strong, and his illegal acts therefore amounted to gross misconduct for purposes of COBRA, rendering him ineligible to continue his coverage under the College's group health insurance plan. Accordingly, Moore's COBRA claim fails.

III. MOORE CANNOT MAINTAIN A CLAIM UNDER G.L. C. 186, § 14 BECAUSE HIS LICENSE TO ACCESS COLLEGE-PROVIDED HOUSING TERMINATED ALONG WITH HIS EMPLOYMENT.

Moore's alleges in Count III of his Complaint that he was improperly denied access to his on-campus housing after he was terminated. Complaint at p. 7. As Moore himself alleges, however, the College provided Moore with access to this housing only as a condition of his employment. Complaint at pp. 4, 7 (describing his "faculty housing"). Therefore, the College was entitled to eliminate Moore's access to such housing once his employment terminated.

Moore seeks to invoke Massachusetts G.L. c. 186, § 14, which by its express terms applies only to "lessor[s]" and "landlords." However, "employer-employee relationships in which the employee is furnished with living accommodations do[] not necessarily create a landlord-tenant relationship." MASSACHUSETTS PRACTICE, LANDLORD AND TENANT LAW, § 1:10. A landlord-tenant relationship exists in an employment context only in "limited circumstances," such as where "(1) payments for occupancy of the premises are received based on a lease; (2) the term of occupancy extends beyond the period of employment; and (3) the employee resided on the premises prior to his period of employment." *Allendale Farm, Inc.* v. *Koch*, 1999 WL 33579241, at *1 (Mass. Super. Aug. 9, 1999). Thus, the Court in *Allendale Farm* dismissed an employee's claim under G.L. c. 186, § 14, because the employee, a produce manager hired by a local farm and provided housing on the farm as part of his compensation, "was a licensee and not a tenant" and therefore was "not entitled to the protections afforded to residential tenants under [G.L. c. 186]." *Id.* at *1.

The foregoing principles compel the same result in this case. Moore makes no allegation (nor could he) that he occupied any housing made available to him by the College at any time prior to his employment, or that it was anticipated that his occupancy would extend beyond his employment. *See generally* Complaint. To the contrary, Moore himself describes the housing at

issue as "faculty housing," Complaint at pp. 4, 7, which of course is only available to those who are on the faculty. Moreover, the Housing Agreement that Moore executed expressly declares that he was granted only a license to occupy housing provided by the College during his employment. *See* Housing Agreement, attached at Tab A. Indeed, the College made rental housing available to Moore only as a condition of his employment, as it attempts to do for all eligible faculty and staff. *See* WILLIAMS COLLEGE FACULTY AND ADMINISTRATIVE STAFF HOUSING POLICY, attached at Tab B. As set forth explicitly in the housing policy, access to such housing is made available "to assist faculty and administrative staff in finding accommodations in Williamstown," where the real estate market otherwise is tight. *Id.* As the housing policy makes clear, due to market conditions in the Williamstown area, "there are considerable pressures on the [College's housing] system," and in fact the College cannot even guarantee access to housing to all employees who otherwise would be eligible. *Id.* With such a limited supply of available housing, any employee necessarily forfeits the ability to access College-provided housing upon termination of their employment. Therefore, because the College provided Moore with a license to access housing as a condition of, and convenience for, his employment, Moore did not enter into a landlord-tenant relationship with the College, and G.L. c. 186, § 14 does not apply to him. Rather, Moore's eligibility to occupy College-provided housing was coterminous with his employment, and following his guilty plea to three separate counts of fraud, and thus his termination, the College properly removed Moore's access to his on-campus apartment.

IV. MOORE CANNOT STATE A CLAIM AGAINST THE COLLEGE FOR DENIAL OF UNEMPLOYMENT BENEFITS BECAUSE THE COLLEGE DID NOT DENY THEM.

In Count IV of the Complaint, Moore alleges that the College wrongfully "denied" his claim for unemployment benefits. Complaint at p. 8. This claim fails on its face, however, for

the simple reason that the College does not have the authority to grant or deny unemployment benefits. As Moore himself alleges, he applied for unemployment benefits not to the College but to the Washington, D.C. Department of Employment Security, the agency responsible for administering the unemployment benefits regime in the District of Columbia. Complaint at p. 8; D.C. CODE § 51-101, *et seq.* Under the District of Columbia Unemployment Compensation Act ("DCUCA"), it was the Department of Employment Security, not the College, that determined whether Moore was eligible for benefits, not the College. *See* D.C. CODE, § 51-111. If Moore disagreed with the Department Employment Security's decision, he could have appealed its decision within the agency, which he apparently did not do. *See id.* He also could have sought review of the Department of Employment Security's decision in the District of Columbia Court of Appeals, in accordance with the DCUCA and the District of Columbia Administrative Procedure Act. *See* D.C. CODE § 51-112. In any event, his claim against the College relating to the denial of unemployment benefits must be dismissed.

Conclusion

Moore's Complaint should be dismissed in its entirety.

WILLIAMS COLLEGE

/s/ Daryl J. Lapp

Daryl J. Lapp (BBO # 554980)
Robert G. Young (BBO # 650541)
EDWARDS ANGELL PALMER & DODGE LLP
111 Huntington Avenue
Boston, Massachusetts 02199-7613
(617) 239-0100 (telephone)
(617) 227-4420 (facsimile)
dlapp@eapdlaw.com
ryoung@eapdlaw.com

Dated: January 11, 2010

CERTIFICATE OF SERVICE

I certify that on this 11th day of January 2010, I caused to be filed electronically a true copy of this Memorandum in Support of Motion to Dismiss using the CM/ECF system, and served the same by first-class mail upon the plaintiff at the following address:

Bernard Moore
4849 Connecticut Avenue, NW #631
Washington, DC 20008

/s/ Daryl J. Lapp
Daryl J. Lapp