

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA**

CHARLESTON

CHRISTOPHER SALDIVAR,

Plaintiff,

v.

Case No. 2:11-cv-00424

AVI FOODSYSTEMS, INC.,

Defendant.

PROPOSED FINDINGS AND RECOMMENDATION

This is an action alleging employment discrimination, tortious interference and defamation filed by the plaintiff, a natural-born United States citizen who is Mexican American, after he was terminated by the defendant for alleged distribution of prescription painkillers to other employees at work. The plaintiff's complaint was filed in the Circuit Court of Kanawha County, West Virginia and removed to this court by the defendant (ECF No. 1). The plaintiff is proceeding *pro se*; thus the case was referred to the undersigned for submission of proposed findings and recommendation for disposition (ECF No. 2). The court conducted a status and scheduling conference with the parties to confirm the plaintiff's ability to pursue this litigation and his familiarity with the Federal Rules of Civil Procedure (ECF No. 13). Following a discovery period which included the plaintiff's deposition, the defendant filed a Motion for Summary Judgment (ECF No. 40), supported by exhibits and a memorandum (ECF No. 41). The court issued a *Roseboro*¹¹ notice to the plaintiff (ECF No. 42). The plaintiff filed a

¹¹ *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975).

response with attached affidavits (ECF No. 45), and the defendant filed a reply (ECF No. 46).

Background and Undisputed Facts

AVI Food Systems, Inc. (“AVI”) has a contract with West Virginia State University (“WVSU”) in Institute, West Virginia, to operate food vending services and dining facilities. The plaintiff worked for AVI at WVSU, in positions of responsibility, from August 12, 2003 until March 29, 2010, when he was terminated.

On March 11, 2010, the plaintiff’s wife, Julie Saldivar, contacted Chief Joseph Saunders, Director of Public Safety at WVSU, to ask for assistance with her son Gabriel Ambriz, who was then employed by AVI. Mrs. Saldivar, who is employed by WVSU, was concerned that Gabriel Ambriz was addicted to prescription painkillers. She told Chief Saunders that another AVI employee, Robert Todd Lamb, had given Ambriz prescription pain medication at work.

Chief Saunders interviewed Ambriz and Lamb and they provided written statements concerning their involvement in the distribution of prescription painkillers among some AVI employees. Mr. Lamb’s statement reads as follows [spelling and punctuation corrected]:

On Monday, 3-1-10, David [Sayre] was buying 25 10 milligrams Lortabs from Chris Saldivar for \$200.00 Dollars. David keep 5 & gave 5 to Von [Vaughn Jarrett] & 5 2[to] me. I gave 6 to Rod Martin. 3-2-10 Gabe called my son James and got my phone #. He called me and said do I have Mexican jumping beans and I said no. On Friday 3-5-10 at the café, I Todd Lamb gave Gabe a 5 milligram so he would leave me alone. He said is that the best u got. I said yes. Gab there no good. On 3-10-10 Rod Martin gave me back the 6 he got from me or the pink ones I got from Chris. Chris told David not 2 tell me he got them from Chris. He Chris owes me 5 for years. When I’m in pain I ask Chris for 1 he said 8 dollars I said no thanks. Chris owes me 5 for years. Gab said that he’s been getting Lortabs from Rod & Chris for years that’s the problem. Sometime in the end of February Rod caught someone else giving Gabe something and Rod said I don’t care

what you do outside of the cafeteria but don't do it here. When David gave a prescription bottle with 15 Lortabs in it, it had Chris Saldivar's name on it. Chris told David to make sure Rod didn't see the pink Lortabs because he would know they came from him (Chris). Chris asked me if I got anything the same day he sold David the pink ones. /s/ Robert T. Lamb (dated March 11, 2010).

(ECF No. 40-8, at 4-5.)

Gabriel Ambriz gave the following statement, dated March 11, 2010:

Todd [Lamb] and I talked about pills. He said he had got them for his back. So we continued to work. I then went into the cooler and was getting something for Rod. Then Todd walked up and gave me one single pill. After that we both continued to work out the rest of the day. We were talking about the pills while we were working. And that's how I came to find out that he had pills. And I'm sorry for bringing shame to my family. And the State Police will never hear of another incident like this again. And it is my deepest apologizes for all this ever happening. When he gave me the pill I took it, and it made me feel high. The pill was orange in color. And had a little V on it. This all took place while at work. The name of the pill was a Lortab but I don't know the milligrams.

Id. at 7-8.

On March 15, 2010, Chief Saunders interviewed and obtained statements from David Sayre and Vaughn Jarrett. David Sayre's written statement reads as follows [spelling and punctuation corrected]:

Chris approached me one day and showed me a pink Lortab 10 and asked me how much I could get out of them. I told him 8 dollars so he said he could sell me 25. I told Todd about it and he gave me the money and I purchased them from Chris and took them to Todd and Vaughn also gave me money for 5 and then 2 weeks later Todd gave me the money again and I bought 20 off Chris and gave them all to Todd. Vaughn told me Chris used to sell him the pills for 6 and I cut him out. The other day me and Todd went to Cedar Grove on my break and he purchased 20 yellow Lortabs off my childhood friend, Wayne Harrison, and Gabe sent 40 \$1 with us for 5 of them and Todd said he would get them to him and he did. Back in November, I sold Gab 3 Lortabs. Rod and Chris called me into the office and said do not sell or give Gab any pills he has a problem. Since that day I have not, even though Gab would approach me every day looking for pills. Thursday a week ago Todd purchased 60 Xanaxes off a guy named Ralph and he wanted to trade them for Lortabs. I don't know if

he did but he gave me 13 of them and I took them and went to work acting crazy and got sent home. /s/ David Sayre

Id. at 9-10.

Vaughn Jarrett's statement reads [spelling corrected]:

I bought pink Vicodin 4 from Chris Saldivar. I paid \$7 each at a total of 30 or 28 – something like that. That has been weeks ago.

I bought 5 pink Vicodin from Dave about a week ago. I paid eight dollars each, the total being \$40.00. /s/ Vaughn Jarrett²

Id. at 12.

Chief Saunders attempted to interview the plaintiff, who stated, "I don't know nothing. I know I didn't do anything. I know that I never did anything – nobody – nothing." (ECF No. 40-3, Saldivar Depo., at 182.)

Chief Saunders provided copies of the witnesses' statements to AVI. District Manager Deborah Savage reviewed the statements and contacted each of the witnesses to verify the accuracy of their statements. Messrs. Lamb, Ambriz, Sayre and Jarrett confirmed the substance of their statements. Mr. Jarrett met personally with Ms. Savage and agreed that he had signed his written statement and the information in the statement was correct. Mr. Jarrett told Ms. Savage that he had purchased "pink pills" which were prescription painkillers from the plaintiff and from Mr. Sayre. (ECF No. 40-7, at 2.) Ms. Savage also met personally with Messrs. Sayre and Ambriz; she spoke by telephone with Mr. Lamb. Each man confirmed the substance of his respective statement.

Ms. Savage met with the plaintiff; he denied that he sold pills to Sayre or Lamb. At her request, the plaintiff provided a statement which reads, in pertinent part, as follows:

² Vaughn Jarrett's statement is written in handwriting which is markedly different from his signature.

Out of all this “I am being accused of selling pills to Dave Sayre and Todd Lamb”. I have never sold nor given anything to these two individuals. In the past, not thinking of any consciences [sic], I gave Vaughn Jarret [sic] a couple of pills for his back pain at no charged [sic]. /s/ Chris Saldivar

(ECF No. 40-7, at 16.)

AVI decided to terminate the plaintiff, Ambriz, Jarrett, Lamb and Sayre because AVI “believed that each individual engaged in the unlawful distribution of prescription pain medications at AVI’s WVSU account.” *Id.* at 3. Mr. Lamb resigned before he was notified of the termination. *Id.* The Separation Reports are found at ECF No. 40-7, at 17-31. Messrs. Jarrett, Lamb and Sayre are Caucasian. *Id.* at 4.

The plaintiff asserts that there are genuine issues of material fact in that he disputes the truth of the statements. (ECF No. 45, at 1-4.) He points out that they are not notarized and were not given under oath. *Id.*, at 1. The plaintiff claims that Mr. Jarrett’s statement was coerced, and filed an affidavit from Mr. Jarrett as follows:

I, Vaughn Jarrett am stating regarding the matter of my statement from the WVSU Campus Police regarding Chris R. Saldivar that statement was falsified. The statement was not written by me, nor did I know what was in it. “I was told by an officer to sign it or I was going to jail.” I have never bought or received any prescription pills from Chris R. Saldivar at any time. /s/ Vaughn Jarrett

(ECF No. 45-1, at 1.) The court notes that the plaintiff admitted to distributing pills to Jarrett, but Jarrett has now denied receiving any pills from the plaintiff. The plaintiff submitted an affidavit which states that the pills were Advil. *Id.* at 2. The plaintiff denies that he was ever prescribed Vicodin or Lortabs. *Id.* AVI obtained the plaintiff’s prescription records which indicate that he filled prescriptions for 390 pain pills in February, 2010, including multiple prescriptions for Lortab. (ECF No. 41, at 4 n.4.)

The plaintiff does not dispute that the statements were given to Chief Saunders and to AVI. (ECF No. 40-3, at 206-07.) During his deposition, the plaintiff stated

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