Myers v. Dutton, No. 215-5-06 Wmcv (Wesley, J., Sept. 22, 2006)

STATE OF VERMONT
WINDHAM COUNTY
ALPHONSO MYERS,

Plaintiff,

v. WINDHAM SUPERIOR COURT

DOCKET NO. 215-5-06 Wmcv

PAUL DUTTON d/b/a
DUTTON BERRY FARM,
Defendant.

ORDER ON DEFENDANT'S MOTION TO DISMISS

Plaintiff Myers, a former seasonal employee of Defendant Dutton, brought this three-count complaint alleging that Dutton retaliated against him by blacklisting and/or failing to rehire him after the off-season, in violation of federal regulations and in breach of express and implied contractual promises. Dutton has moved to dismiss, primarily on the grounds that the federal regulations Myers relies on do not give rise to a private cause of action. As Myers concedes that the federal regulations do not support a private cause of action, the Court grants the motion to dismiss Myers' first count claiming a violation of those regulations. Contrary to Dutton's suggestion, however, the enforcement limitations in the federal regulatory scheme do not preclude Myers' pursuit of state law claims in Counts Two and Three for breach of express and implied contractual agreements if he can otherwise establish the elements of these claims. Here, Myers' allegations clearly state a breach of express contract claim based on retaliatory

blacklisting, and present the possibility of an implied contract claim based on a failure to rehire after the off-season without good cause. Moreover, once the action is limited to breach of contract, it presents no statute of limitations problems. Accordingly, Dutton's motion to dismiss is **GRANTED** as to Count One and **DENIED** as to Counts Two and Three.

Background [1]

Every year, from spring through fall, several hundred Jamaican workers come to Vermont to provide migrant labor for the agricultural industry. These workers come as part of a much larger federal program, referred to as the "H-2A" program based on the sub-section of the McCarron-Walter Immigration and Nationality Act ("INA") which defines the type of temporary visa issued to these foreign workers. See 8 U.S.C. § 1101(a)(15)(H)(ii)(a). Screening and recruitment of Jamaican workers is done by the Jamaican Ministry of Labour and Social Security; and a division of this Ministry, the Jamaican Central Labour Organization ("JCLO"), serves as the liason matching up workers and growers here. At the end of each year the grower-employers submit JCLO a list of the workers they employed that year and would like to employ again the following year – the "preferred worker" list. Workers who are not placed on the "preferred worker" list, for whatever reasons, become effectively blacklisted.

[1] A motion to dismiss will be granted only if, accepting the allegations of the complaint as true and giving the plaintiff the benefit of all reasonable inferences, it is beyond doubt that there exist no facts or circumstances that would entitle the plaintiff to relief. See *Richards v. Town of Norwich*, 169 Vt. 44 (1999). Thus, in describing the background, the Court is accepting the truth of the allegations of Myers' complaint, and viewing them in a light favorable to him.

The details of the H-2A workers' stay and the conditions of their labor and lives are regulated by the federal government, and employers seeking to take advantage of this source of labor must agree to abide by these regulations. Among other things, federal regulations require program employers to make certain assurances to workers in a written job offer, see 20 C.F.R. § 655.103. One of the assurances that must be made is that a worker will not be blacklisted (or otherwise retaliated against) for filing an administrative complaint or consulting a legal aid attorney, see *id*. at § 655.103(g). Further, the regulations provide that there must be a written contract between the employer and the workers containing these assurances, and if there is not a separate one, the written job offer between the employer and the workers recruited pursuant to it will be construed to include the terms required by regulation. See 29 C.F.R. §§ 501.10(d) & 501.15.

Plaintiff Myers worked for Defendant Dutton through the H-2A program in 2001. In October of 2001, Myers consulted a legal aid attorney and filed a formal complaint against Dutton with the Department of Labor, the administrative agency that administers the H-2A program, alleging several violations including unsafe transportation, substandard housing conditions, and improper documentation of wages and deductions. The following season Myers was not rehired to work for Dutton or any other grower in the H-2A program. He has not been rehired to work in the years since then, despite repeated requests.

Analysis

As noted above, federal regulations ostensibly provide H-2A workers with numerous protections, including a prohibition on retaliatory actions against workers who attempt to enforce the regulatory protections by consulting an attorney or filing an administrative complaint:

> No person shall intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any person who has (a) filed a complaint under or related to section 216 of the INA or these regulations; . . . or (e) consulted with an employee of a legal assistance program or an attorney on matters related to section 216 of the INA or to this sub-part or any other DOL regulation promulgated pursuant to section 216 of the INA.

29 C.F.R. § 501.3. Nevertheless, the regulatory scheme gives the Wage and Hour Division of the Department of Labor ("DOL") responsibility for investigation and enforcement, without mentioning any direct action for enforcement by workers. 29 C.F.R. § 501.15. The scheme does allow workers to file complaints with the DOL, see 29 C.F.R. 501.5(d). Rather, whether and when to investigate or take any enforcement action with respect to a complaint is totally within the discretion of the DOL, see 29 C.F.R. § 501.16. There are no deadlines, and there is not even any requirement that the DOL inform the worker who filed the complaint whether any investigation or action is being pursued. See generally, Michael Holley, *Disadvantaged by Design: How the Law Inhibits Agricultural Guest Workers From Enforcing Their Rights*, 18 Hofstra Lab. & Emp. L.J 575, 598-601 (2001). Moreover, efforts of H-2A workers to enforce federal regulations in federal court directly have been rejected, in part because federal courts have ruled that the purpose of regulating the treatment of foreign H-2A workers *is not to protect foreign H-2A workers*, but to protect US workers by lessening the financial advantage of hiring foreign workers. See, e.g., *Nieto-Santos v. Fletcher Farms*, 743 F.2d 638, 641 (9th Cir.1984).

Thus, despite the seeming irony, H-2A workers have no legal recourse under federal law to enforce the conditions of their foreign worker contracts established by federal regulation. Without citation to authority, Dutton contends this compels the conclusion that they have no legal recourse of any type in any court. However, in *Nieto-Santos,* the court's conclusion that

there was no federal subject matter jurisdiction was based in part on the assumption that there *was an available breach of contract action in state court*, and "a cause of action for breach of an employment contract is traditionally relegated to state rather than federal law." 743 F.2d at 641. Indeed, the federal regulatory scheme facilitates rather than precludes a state court remedy by specifying that employers must have contracts with their workers, implying an intent to make the employers' promises enforceable, albeit not in federal court. Even the commentators who criticize the unfairness of the system assume that state law breach of contract claims are available. See Holley, *supra* at 608 (stating that because "the federal government has largely abdicated responsibility" for protecting H-2A workers, "the task has fallen to the state court system" where the foreign workers are more likely to face local bias); Alejandro V. Cortes, *The H-2A Farmworker: The Latest Incarnation of the Judicially Handicapped and Why the Use of Mediation to Resolve Employment Disputes Will Improve Their Rights,* 21 Ohio St. J. On Disp. Resol 409, 420 (2006) ("shut out from the federal court system and given practically no protection from the federal administrative system," H-2A workers must rely on state courts, which are often inadequate due to local bias).

Thus, the Court concludes that an H-2A worker may bring a state law breach of contract claim if the elements of such a claim are met, even if the alleged breach would also constitute a violation of a federal regulation the DOL is charged with enforcing. Accord *Aguirre v. Workman*, No. 1998-CA-001367-MR (Dec. 8, 2000, Ky. Ct. App.). Cf. also *Shah v. Wilco Systems, Inc.*, 126 F.Supp.2d 641, 647, 652 (S.D.N.Y. 2000) (rejecting private cause of action based directly on violation of other regulations implementing INA program, but addressing breach of contract claim separately, on its merits, under state law).

The Court therefore turns to the sufficiency of the allegations here. With respect to Count Two, the breach of express contract claim, the complaint alleges that Dutton signed a written contract in which it promised not to blacklist or take other adverse action against Myers in retaliation for his consulting with an attorney or filing an administrative complaint; that Dutton breached that contract by blacklisting Myers or otherwise indicating to the JCLO that it did not want him back after he consulted an attorney and filed an administrative complaint; and that Myers has been damaged as a result of that breach. Thus, the complaint states a cause of action for breach of contract.

Count Three asserts breach of an implied promise on the part of Dutton, based on long-established practice, to continue to rehire Myers each year unless there was good cause not to. There are limitations on the kinds of facts and circumstances in which a promise of continued employment in the absence of good cause for termination has been implied in other contexts. See, e.g., *Dillon v. Champion Jogbra, Inc.,* 175 Vt. 1 (2002). Moreover, the extent to which an individual employer in the program is even in a position to decide to rehire a particular worker or not is unclear. Nonetheless, these observations merely highlight the need to further explore factual issues that go beyond the complaint. Based on the complaint alone, the Court cannot say that it is beyond doubt as a matter of law that there are no facts or circumstances that would entitle Myers to relief under this theory.[2]

[2] Dutton has asserted alternative defenses based on the statute of limitations, statute of frauds, and failure to name the JCLO as a defendant. None of these are worthy of extended discussion. The complaint was filed within six years of the alleged retaliatory acts, and thus within the limitations period for breach of contract actions. The suggested statute of frauds problem would apply equally to any situation in which a promise to continue employment may be implied; yet we know such promises can be and are sometimes implied, presumably because performance within one year is possible even if a longer period is anticipated. Lastly, the

existence of an additional (or even an alternative) wrongdoer who has not been named as a defendant is certainly not a reason to dismiss the action against the named defendant.

ORDER

Dutton's motion to dismiss is **GRANTED as to Count One and DENIED as to Counts Two and Three.**

Dated at Newfane, Vermont, this ____ day of September, 2006.

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John P. Wesley
Presiding Judge