Dalto v. Factory Point Nat'l Bank, No. 506-9-06 Rdcv (Cohen, J., Oct. 2, 2008)

STATE OF VERMONT
RUTLAND COUNTY

REBECCA DALTO,	)	
LAURA MITOWSKI,	)	**Rutland Superior Court**
COURTNEY CATALDO,	)	**Docket No. 506-9-06 Rdcv**
	)	
Plaintiffs	)	
v.	)	
	)	
FACTORY POINT NATIONAL BANK,	)	
	)	
Defendant	)	

DECISION ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on Defendant's Motion for Summary Judgment, filed June 13, 2008. Plaintiffs Rebecca Dalto, Laura Mitowski and Courtney (Maguire) Cataldo are represented by James G. Levins, Esq. Defendant Factory Point National Bank is represented by Andrew H. Maass, Esq.

Summary Judgment Standard

Summary judgment is appropriate where there is no genuine issue of material fact and the party is entitled to judgment as a matter of law. V.R.C.P. 56(c)(3). In response to an appropriate motion, judgment must be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, ... show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." V.R.C.P. 56(c)(3). In determining whether a genuine issue of material fact exists, the Court accepts as true allegations made in opposition to the

motion for summary judgment, provided they are supported by evidentiary material. *Robertson v. Mylan Labs*, *Inc.,* 2004 VT 15, ¶ 15, 176 Vt. 356. The nonmoving party then receives the benefit of all reasonable doubts and inferences arising from those facts. *Woolaver v. State*, 2003 VT 71, ¶ 2, 175 Vt. 397. Furthermore, where, as here, "the moving party does not bear the burden of persuasion at trial, it may satisfy its burden of production by showing the court that there is an absence of evidence in the record to support the nonmoving party's case. The burden then shifts to the nonmoving party to persuade the court that there is a triable issue of fact." *Ross v. Times Mirror, Inc.,* 164 Vt. 13, 18 (1995) (internal citations omitted).

Background

The following background facts are not contested for the purposes of the motion for summary judgment, unless otherwise noted.

On Friday afternoon, June 23, 2006, Rebecca Dalto and Laura Mitowski were on duty and working at the Woodstock Avenue, Rutland Branch of Factory Point National Bank. Their co-worker and friend, Courtney Cataldo was off duty at the time, as she was going to be married the next day. Both Ms. Dalto and Ms. Mitowski were to attend Ms. Cataldo's rehearsal dinner that Friday night and the wedding the next day. That Friday afternoon, Ms. Cataldo came into the bank during business hours after getting her fingernails painted in preparation for the wedding. At the time, the only people present in the bank were Ms. Cataldo, Ms. Dalto, Ms. Mitowski, two co-workers and one customer. The customer knew the Plaintiffs well, and had been invited to Ms. Cataldo's wedding. Since he would not be able to attend, the customer attempted to give Ms. Cataldo a $50 bill as a wedding present. Ms. Cataldo refused the gift and the customer allowed the bill

to fall to the floor. Ms. Mitowski picked up the bill and placed it into Ms. Cataldo's shirt. Ms. Cataldo then lifted her shirt in an attempt to dislodge the bill without messing up her freshly painted fingernails.[1] At this point, Ms. Mitowski then attempted to retrieve the bill with her teeth but failed. Ms. Dalto, on the other hand, was successful in retrieving the bill with her teeth. The incident took place in front of the customer, who made no complaint, as well as two other bank employees.[2] It lasted approximately 30 seconds.

Several days later, on June 28, 2006, Ms. Dalto was questioned about the incident by supervisors at the bank. Ms. Dalto apologized, stating that she had gotten caught up in the moment of pre-wedding excitement and that it would not happen again. On Friday, June 30, 2006, Ms. Dalto and Ms. Mitowski were terminated by Factory Point National Bank for conduct that had occurred on June 23, 2006. Upon returning from her honeymoon, Ms. Cataldo was terminated from her employment with Factory Point National Bank. Ms. Dalto had been employed by Factory Point National Bank or its predecessors for 18 years. Ms. Mitowski had been employed by the Bank for 11 years. Ms. Cataldo had been employed by the Bank for 2 years.

Plaintiffs Dalto, Mitowski, and Cataldo filed suit alleging (1) Wrongful Termination (breach of implied contract of employment); (2) Breach of the Covenant of Good Faith and Fair Dealing; (3) Defamation; (4) Negligent and Reckless Termination. Plaintiffs have since withdrawn their causes of action for defamation and negligent and reckless termination. Defendant moves for summary judgment as to the first two counts.

Discussion

[1] It is contested as to whether Ms. Cataldo's bra and skin were showing, or whether she had on a second shirt under the one which was lifted.

[2] It is contested as to whether one of the bank employees was able to see the incident.

The substance of Plaintiffs' complaint is that their status as at-will employees was modified by an implied contract, created by the employee handbook and the policies and practices of the Defendant, which established progressive discipline procedures for behavior which makes up the subject matter of this case. They further allege that there was not cause for termination under the modified employment contract. Plaintiffs also allege a breach of the covenant of good faith and fair dealing.

Defendant moves for summary judgment. It argues that (1) the employee handbook is unambiguous and does not modify the at-will employment relationship, (2) the unwritten policies and procedures of the Bank do not modify the at-will employment relationship, and (3) since the employment relationship has not been altered from at-will status, there can be no recovery for breach of the covenant of good faith and fair dealing.

I. Wrongful Termination

In approaching this issue, the Court is mindful at the outset that at-will employment relationships have fallen into disfavor. *Dillon v. Champion Jogbra, Inc.*, 175 Vt. 1, 5 (2002). The trend has been towards recognizing that there is a mutual relationship between the employer and employee, and that "when an employer takes steps to give employees the impression of job security and enjoys the attendant benefits that such an atmosphere confers, it should not then be able to disregard its commitments at random." *Id.*

Courts presume that employment for an indefinite term is an "at-will" agreement, but this "presumption" is simply a general rule of contract construction, which imposes no substantive limit on the right of contracting parties to modify terms of their arrangement or to set forth terms that supersede the terminable at-will arrangement. *Id.*

(citations omitted). An employer may modify an at-will employment agreement *unilaterally*. *Id*. (emphasis added). When determining whether an employer has unilaterally altered an at-will agreement, the Court looks to both the employer's written policies and its practices. *Id*. (citing *Benoir v. Ethan Allen, Inc.*, 147 Vt. 268, 270 (1986)). An employer can bind itself to terminating only for cause through its manual and practices, and may bind itself to only use certain procedures in doing so. *Id*. (citing *Ross*, 164 Vt. at 21-22).

While at least one court has interpreted Vermont case law to hold that the interpretation of employment manuals is always a question for the jury, the Vermont Supreme Court has clarified this position, holding that only when the terms of the manual are *ambiguous* should the question be submitted to the jury. *Id*. at 6 (internal citations omitted). This notion comports with the long-standing law of contract that the interpretation of *unambiguous* writings is a matter of law for the court, as is the determination of *whether* a writing is ambiguous. *Id*. (internal citations omitted). When the terms of a manual are ambiguous, the question of whether the presumptive at-will status has been modified is properly left to the jury. *Id*. at 6-7 (citing *Farnum v. Brattleboro Retreat, Inc.*, 164 Vt. 488, 494 (1995). The presence of a disclaimer stating employment is at-will is not dispositive of the issue, as an employer's practices can provide context for and help inform the determination. *Id*. at 7.

Whether there was modification of the at-will employment arrangement must be analyzed not only in the context of the employee handbook, but also the surrounding circumstances, including the practices and policies of the Defendant. *Id*. at 5. In order to

put the handbook into context, the Court will first examine the surrounding policies and practices of the Defendant bank.

Plaintiffs have proffered evidence (in the form of depositions, of themselves and bank managers, and employee records) tending to show that the bank used progressive discipline procedures in circumstances other than those expressly delineated in the employee handbook, such as dress code violations and employee overdrafts. Plaintiffs specifically point to progressive disciplinary practices followed by the bank in regards to numerous infractions involving employee BR. Plaintiff's Exhibit 5. These infractions included repeated issues with balancing the teller's cash drawer at the end of the day, excessive personal phone calls, lack of punctuality, lack of personal responsibility which affected customers, and lack of professionalism with customers (such as giving one drive-through customer "the finger"). Plaintiffs also proffer the employment records of employee RM, who was provided with progressive discipline procedures after having problems with punctuality, excessive personal phone calls, and rudeness towards co-workers. Plaintiff's Exhibit 12. These records demonstrate that progressive discipline policies were employed by Defendant bank outside the realm of dress code and employee overdraft violations.

Plaintiffs also proffer evidence asserting that the Defendant took no disciplinary action in regards to situations analogous to their own behavior, described *supra*. Plaintiffs assert that several employees sent inappropriate e-mails to other employees. At least one e-mail contained pictures of a naked man. These e-mails apparently were shrugged off by bank management as "jokes." No disciplinary action was taken and it

appears Defendant did not inquire as to who sent the e-mails. Deposition of Timothy Kononan, pp. 77-79.

Furthermore, several employees testified that the bank threw a Halloween theme party in 2004 entitled "Hogs and Heifers", which was held in the back office of another branch of the Defendant bank. Bras were hung from the ceiling and bottles of alcohol were prominently displayed. Plaintiff's Exhibit 4. Plaintiffs assert that employees were dressed inappropriately with skin and bare midriffs showing for customers to see during business hours. Deposition of Rebecca Dalto, p. 39. Pictures were also taken of the party and posted on Defendant bank's intranet for all employees to see. Deposition of Rebecca Dalto, p. 37. There was no disciplinary action taken. Deposition of Jill Smith, p. 14.

Finally, Plaintiffs also proffer evidence of other tolerated behavior, including an instance where a co-worker wore lingerie underwear over her work clothes in the drive-up window, while a bank manager took photographs. These photographs were sent to bank employees via e-mail. Deposition of Courtney Cataldo, p. 37. Another example occurred when a male co-worker twice sent chocolate thongs to Plaintiff Mitowski. Plaintiff Mitowski informed a bank manager of the behavior and provided him with the chocolate thong. The male co-worker was not terminated for this behavior. Deposition of Paul Beaulieu, pp. 70-71.

Defendant argues that plaintiffs were at-will employees and could be terminated for any reason, or for no reason at all. Defendant proffers the Factory Point National Bank employee handbook in order to prove the existence of at-will employment status as a matter of law, arguing that the document should be interpreted as unambiguous by the Court. Defendant points to four sections of the handbook: (1) the introduction containing

a contract disclaimer, (2) dress responsibilities, (3) employee overdrafts, and (4) disciplinary action.

The Court will examine each in turn, beginning with the introduction containing a disclaimer. The disclaimer states:

> This Handbook also does not confer any contractual right, either express or implied, to remain in FPNB's employ. Nor does it guarantee any fixed terms and conditions of your employment. Your employment with FPNB is not for any specific time and may be terminated at will, with or without cause and without prior notice, by FPNB or you may resign for any reason at any time. Also, no supervisor or FPNB manager or representative has the authority to enter into any agreement for employment for any specified period of time, or to make any agreement that is contrary to the above.

Defendant's Exhibit F, p. 2.

The mere inclusion of boilerplate language providing that the employee relationship is at-will does not preclude the creation of an implied contract. *Farnum*, 164 Vt. at 494. The effectiveness of such a disclaimer depends on the circumstances. *Ross*, 164 Vt. at 19. Evaluated in the context of the surrounding circumstances—in particular the aforementioned policies and practices of Factory Point National Bank—this disclaimer is not dispositive of the issue of whether there is a genuine issue of fact as to at-will status modification. See *Farnum*, 164 Vt. at 495 (stating that disclaimer provisions "must be evaluated in the context of all the other provisions in the handbooks and any other circumstances bearing on the status of the employment agreement.").

Defendant points to three other sections in the employee handbook for its assertion that the writing is unambiguous. Two sections, entitled "Dress Responsibilities" and "Employee Overdrafts", lay out detailed discipline procedures for these categories of offenses. Defendant's Exhibit F, p. 8 and p. 28-29. Defendant argues

that these two sections must be put in the context of another section, entitled "Disciplinary Action."

The "Disciplinary Action" section of the handbook states: "It is not possible to list all of the rules and procedures or all possible grounds for disciplinary action. Some possible reasons for such actions may include, but are not limited to . . . ." The handbook lists multiple categories of actions, such as dishonesty, theft, and disclosure of confidential information, among others, that may be grounds for disciplinary action in this non-exhaustive list. Defendant's Exhibit F, p. 30. The handbook does *not* list the behavior by the Plaintiffs, described *supra*, as one of the possible reasons for disciplinary action. The handbook then states "FPNB retains sole discretion to determine in each instance the appropriate form of discipline, including immediate termination." Defendant's Exhibit F, p. 31. Defendant argues that when read together, these three sections of the employee handbook unambiguously establish that dress code violations and employee overdrafts were the only situations in which employees were afforded progressive discipline, and that no implied contract is created from this language.

Put in the context of the surrounding policies and practices of the Defendant bank (and coupled with the fact that the handbook, in the "Disciplinary Action" section, does not expressly include situations involving the plaintiffs' behavior), the Court cannot find that the handbook is an unambiguous writing. Therefore, interpretation of whether the writing modified the at-will employment arrangement is best left to a jury. See *Dillon*, 175 Vt. at 6-7 (stating "[w]hen the terms of a manual are ambiguous, the question of whether the presumptive at-will status has been modified is properly left to the jury.")

Defendant also asserts that signed documents by each of the Plaintiffs which acknowledges receipt of the handbook and re-affirms their status as at-will employees precludes the creation of an implied employment contract as a matter of law. (Defendant's Exhibit G). These documents containing boilerplate terminology are not dispositive of the issue of at-will employment modification because an employer may *unilaterally* modify the at-will employment agreement. See *Farnum*, 164 Vt. at 494 (stating "[t]he mere inclusion of boilerplate language providing that the employee relationship is at will cannot negate any implied contract and procedural protections created by an employee handbook."); see also *Dillon*, 175 Vt. at 5 (stating "an employer may modify an at-will employment agreement unilaterally.").

Defendant argues that the facts in *Vigil v. Expressjet Airlines, Inc*., No. 1:05-CV-84, 2006 WL 3304191 (D.Vt. Nov. 13, 2006), are analogous to that of the present case. In *Vigil*, the employee-plaintiff relied solely on the employee handbook to establish an implied contract. *Id*. at *8. The plaintiff presented no evidence that tended to show that the employer-defendant's treatment of him ran afoul of a company-wide practice. *Id*. In the instant case, Plaintiffs do not rely solely on an employee handbook, but rather have provided evidence that unwritten company-wide practices and policies were established by other precedents, and were not followed in regards to their termination. Therefore, this Court does not find *Vigil* to be persuasive

It is not the Court's function to *weigh* the evidence when assessing the merits of a motion for summary judgment, but to determine whether a triable issue of fact exists. *Booska v. Hubbard Insurance Agency, Inc.*, 160 Vt. 305, 309 (1993). Here, Plaintiff's have fulfilled their burden by persuading the Court that there is a triable issue of fact as to

the modification of at-will employment status by Defendant bank's employee handbook, and practices and policies.

Since there is a triable issue of fact as to the modification of the at-will employment agreement, the second question that must be resolved is whether there is a triable issue of fact as to "just cause." See *Havill v. Woodstock Soapstone Co.*, 172 Vt. 625, 628 (2001) (stating "[p]ersonnel policies that commit an employer to a progressive discipline system present a triable issue of fact on whether an employer may terminate an employee only for just cause."). The Vermont Supreme Court has set forth the following standard for determining whether "just cause" exists:

> The ultimate criterion of just cause is whether the employer acted reasonably in discharging the employee because of misconduct. To be upheld, discharge for just cause must meet two criteria of reasonableness: one, that it is reasonable to discharge the employee because of certain conduct, and the other, that the employee had fair notice, express or fairly implied, that such conduct would be grounds for discharge.

Dulude v. Fletcher Allen Health Care, Inc., 174 Vt. 74, 80 (2002).

First, there is a genuine issue of material fact as to the actual conduct that took place. The parties have presented contradictory evidence as to whether Plaintiff Cataldo's bra and skin were visible. There is also a dispute as to whether one of the co-workers was able to witness the event. Furthermore, there is no video evidence of the event. Defendant asserts that the incident took place out of view of security video cameras, even though the incident took place in the bank, during business hours, and near the teller line where customers are routinely located. Deposition of Paul Beaulieu, pp. 28-29. Plaintiffs have proffered evidence, as discussed *supra*, to persuade the Court that there is a triable issue of fact as to whether the discharge was reasonable, and whether the

Plaintiff employees had fair notice that such conduct would be grounds for discharge. For these reasons, summary judgment on the issue of "just cause" is inappropriate.

II. Breach of the Implied Covenant of Good Faith and Fair Dealing

Vermont law recognizes that an implied covenant of good faith and fair dealing prevails in every contract. *Shaw v. E. I. DuPont De Nemours & Co.*, 126 Vt. 206, 209 (1966). This covenant applies to employment contracts. *Marcoux-Norton v. Kmart Corp.*, 907 F.Supp. 766, 775 (D.Vt. 1993) (citing *McHugh v. University of Vermont*, 758 F.Supp. 945, 953 (D.Vt. 1991)); Cf. *Ross*, 164 Vt. at 22 (stating "we decline to recognize the implied covenant of good faith and fair dealing as means of recovery where the employment relationship is unmodified and at-will…").

An underlying principle implied in every contract is that neither party shall do anything to injure or destroy the rights of the other party to receive the benefits of the agreement. *Shaw*, 126 Vt. at 209. "The implied covenant of good faith and fair dealing ensures that parties to a contract act with faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." *Carmichael v. Adirondack Bottled Gas Corp. of Vermont*, 161 Vt. 200, 208 (1993) (citing Restatement (Second) of Contracts § 205 cmt. a).

In this case, viewed in the light most favorable to the non-moving party, the evidence regarding the establishment of company-wide practices and the circumstances under which the Plaintiffs were terminated creates a genuine issue of fact as to whether there was a breach of the implied covenant of good faith and fair dealing. A reasonable jury could conclude that a breach occurred based on evidence that there was an employment agreement which modified at-will status, and that the Defendant bank

injured the rights of the plaintiffs to enjoy the benefits of that agreement by terminating them on grounds that were not consistent with their justified expectations.

For the above reasons, it is for a jury to decide, after a trial on the merits, (1) whether Factory Point National Bank created an implied employment contract through its employee handbook, practices and policies, which modified the at-will employment agreement, (2) whether Plaintiffs' behavior constituted "just cause" for termination under such an implied employment contract, and (3) whether Factory Point National Bank breached the implied covenant of good faith and fair dealing.

ORDER

Defendants' Motion for Summary Judgment, filed June 13, 2008, is DENIED.

Dated at Rutland, Vermont this _____ day of _____, 2008.

_____
Hon. William Cohen
Superior Court Judge