Moore v Fordham Univ.
2015 NY Slip Op 30870(U)
April 16, 2015
Sup Ct, New York County
Docket Number: 153246/14
Judge: Anil C. Singh
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

----------X

NICOLE MOORE,

Plaintiff,

Decision and Order
Motion Sequence No. 001
Index No.: 153246/14

- against -

FORDHAM UNIVERSITY,

Defendant.

----------X

ANIL SINGH, J.:

In this employment discrimination action, defendant Fordham University (Fordham) moves, pursuant to CPLR 3211, to dismiss the first cause of action for breach of contract. Plaintiff Nicole Moore (Moore or plaintiff) opposes. For the following reasons, the motion is granted.

Background

Plaintiff, a 41-year-old Fordham alumna, began working in Fordham's alumni relations office in 1997. While employed at Fordham, she earned a graduate degree in education from Fordham's Graduate School of Education, and also earned an advanced certificate from the school in 2013. Throughout her employment, plaintiff regularly received positive feedback and "high marks" on her annual performance evaluations. Plaintiff's work environment began to change in May 2009, when Fordham hired Caitlin Tramel as its director of alumni relations. Tramel was then plaintiff's direct supervisor.

According to plaintiff, she discovered that Tramel, over the course of close to two years, routinely engaged in unethical behavior, including the misappropriation of Fordham funds for personal gain. Plaintiff alleges that in or around June 2009, Tramel sought plaintiff's help in a

scheme to "set up", then assistant director of alumni relations, Sara Hunt, for termination so that Tramel could hire her close friend, Kim Morgan. When plaintiff refused, the working relationship between plaintiff and Tramel began to sour. Morgan was ultimately hired as the associate director of alumni relations.

In March 2010, Moore was responsible for planning a business trip for Tramel to Europe as the host of a Fordham alumni group, which happened to coincide with a mandatory staff retreat that Tramel was supposed to attend. Tramel extended the European trip for her personal use for three days before and one day after the trip began and ended. Tramel ordered plaintiff to lie about the length of the trip, in order to hide the additional days, forcing plaintiff to lie to directors and other senior staffers who were curious about the trip, given the scheduled staff retreat.

Plaintiff attempted to transfer during the spring and summer of 2010. Tramel rebuffed plaintiff's efforts, and told plaintiff that any continued attempts to transfer would jeopardize her career at Fordham.

In June 2010, plaintiff discovered that Tramel used her Fordham corporate credit card for personal use, namely, for a round trip flight for Tramel's mother from Minnesota to New York. Thinking it was an error, plaintiff brought it to Tramel's attention. Tramel became very agitated and threw plaintiff out of her office.

On October 14, 2010, Tramel set up a meeting with Angela Cioffi, a human resources representative, to discuss deficiencies with plaintiff's performance, which plaintiff claims were wholly fabricated. Thereafter, on October 20, 2010, plaintiff was put on a performance improvement plan (PIP). Plaintiff brought in copies of testimonials from deans, administrators

and alumni, as well as documentation of Tramel's alleged misappropriation of funds. According to plaintiff, Cioffi refused to take the documents and pushed them back across the table towards plaintiff. Subsequently, plaintiff began receiving disciplinary write-ups, which were baseless in nature.

In November 2010, plaintiff was ill and had to be treated at a hospital. She emailed her supervisors, before the office opened, to inform them that she would not be able to attend two events that were scheduled that day. Tramel responded saying that plaintiff made a poor choice by emailing her supervisors, rather than calling them.

Subsequent to that event, plaintiff contacted Cioffi to confidentially report Tramel's alleged inappropriate and unethical behavior, and sought to refute Tramel's allegedly "trumped up" charges against plaintiff. Cioffi did not respond for three weeks, and when she did, Cioffi advised that she could not confirm that any communications would be kept confidential.

In late 2010 and into 2011, when plaintiff was reconciling budgets, Tramel refused to allow plaintiff to print out details of a certain budget line, which was to be used only for cultural events, travel and general expenses. When plaintiff questioned Tramel she became very angry, and told her it was "not her concern", again dismissing her from the office.

On March 23, 2011, plaintiff emailed Cioffi and requested assistance based on Tramel's continued harassment, bullying and unethical conduct toward plaintiff. On March 30, 2011, plaintiff again requested a confidential meeting with Cioffi to discuss filing a grievance against Tramel based on her alleged conduct toward plaintiff. On March 31, 2011, Cioffi responded that she could not provide plaintiff any assistance, but told plaintiff she had 10 days to file a grievance.

Within those 10 days, by letter dated April 1, 2011, relying on Fordham's "Policies and Procedures" and its nonretaliation policy, plaintiff mailed and faxed a letter reporting Tramel's alleged financial misappropriation to Michael Mineo, Fordham's assistant vice president for human resources.

Plaintiff alleges that as a result of Tramel's treatment towards her, she began to suffer significant weight loss and anxiety. On April 5, 2011, plaintiff's physician advised her to take a disability leave from work. On April 7, 2011, plaintiff filed a report/complaint through Fordham's "Integrity hotline" and reported Tramel's alleged financial misappropriations. It is not clear whether the call to the hotline was made before or after she got to work. However, upon arrival that morning, a meeting was held with plaintiff, Cioffi, Tramel and Morgan in attendance, wherein plaintiff presented the women with a doctor's note stating that she should be put on a disability leave. Almost immediately upon presenting the note, Tramel stated that plaintiff was being terminated from her employment with Fordham effective immediately. Tramel stated that she was being terminated for her "failure to follow procedure". She was given a choice of resignation or termination. Plaintiff reluctantly resigned.

According to Fordham's own "Policies and Procedures", "The university strongly encourages employees and other members of the Fordham community to report concerns of misconduct relating to financial reporting or irregularities, misappropriation of property, integrity of research, and other forms of unethical and improper behavior." The policy further provides "it is a longstanding University policy that any member of the University community who attempts to interfere, coerce, discriminate against, or harass (whether overtly or covertly) another person making a report in good faith about potential or suspected improper behavior, will be subject to

prompt and appropriate discipline."

Plaintiff alleges that in terminating plaintiff, defendant breached its express and implied contract with plaintiff when she took advantage of Fordham's Code of Conduct and Nonretaliation policy, in order to report her supervisor's financial misappropriation and misconduct.

Discussion

Under CPLR 3211 (a) (1), "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . defense is founded upon documentary evidence." The court may grant dismissal when the "'documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law'" (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 571 [2005] [citation omitted]).

CPLR 3211 (a) (7) permits the court to dismiss a complaint that fails to state a cause of action. "'A complaint should not be dismissed on a pleading motion so long as, when the plaintiff's allegations are given the benefit of every possible inference, a cause of action exists'" (*Rosen v Raum*, 164 AD2d 809, 811 [1st Dept 1990], quoting *R.H. Sanbar Projects v Gruzen Partnership*, 148 AD2d 316, 318 [1st Dept 1989] [internal citation omitted]). Further, the material allegations of the complaint are deemed to be true and "the proper inquiry is whether a cause of action exists, not whether it has been properly stated" (*Rosen*, 164 AD2d at 811).

Defendant argues that plaintiff's breach of contract claim is barred by the statute of limitations because claims that a private college or university has violated its internal procedures concerning administrative decisions must be asserted in an article 78 proceeding brought within four months of the alleged wrongdoing (*Maas v Cornell Univ.*, 94 NY2d 87, 92 [1999]; *Marks v*

Smith, 65 AD3d 911, 916 [1st Dept 2009]; *Risley v Rubin*, 272 AD2d 198 [1st Dept 2000]; CPLR 217). Plaintiff counters that recently, the First Department has held that not every breach of contract claim against a private institution must be brought as an article 78 proceeding (*O'Neill v New York Univ.*, 97 AD3d 199, 213 [1st Dept 2012]). There, the Court, noting the limited role the judiciary plays while reviewing "highly specialized academic judgments," found that the plaintiff's allegations that the University failed to follow its own conduct and disciplinary policies, which had no relation to a particular academic field or research, did not require "highly specialized academic judgments." Therefore, the Court held that the plaintiff was able to bring a plenary action for breach of contract.

Following the most recent precedent, the court finds that plaintiff's breach of contract claim does not require any highly specialized academic judgment regarding her employment. Therefore, the breach of contract claim is governed by a six-year statute of limitations (CPLR 213). As plaintiff brought this action nearly three years after her resignation, the breach of contract claim is timely.

In New York, it is well settled that "an employment relationship is presumed to be a hiring at will, terminable at any time by either party" for any reason (*Sabetay v Sterling Drug*, 69 NY2d 329, 333 [1987]; *Lobosco v New York Tel. Co./NYNEX*, 96 NY2d 312, 316 [2001]). However, "[a]n employee may rebut this presumption, if he [or she] demonstrates that his [or her] employer made him [or her] aware of an 'express written policy limiting the employer's right of discharge' and that the employee relied upon that policy to his [or her] detriment" (*O'Neill v New York Univ.*, 97 AD3d at 210; *see also Lobosco*, 96 NY2d at 316). A court, may, as plaintiff argues herein,

> "look[] to whether there [is] an express provision in an employee handbook stating that employers could terminate employees only for cause, whether the employer also orally assured the employee that there would be no termination without just cause and whether the employee turned down other employment opportunities in reliance upon the assurances"

(*O'Neill*, 97 AD3d at 206). In *Mulder v Donaldson, Lufkin & Jenrette* (208 AD2d 301, 306-307 [1st Dept 1995]), the First Department left open the "potential for a cause of action for breach of express contract based upon a provision in the defendant's employment manual which specifically provided that an employee who reports wrongdoing 'will be protected against reprisals" (*Sullivan v Harnish*, 81 AD3d 117, 124 [1st Dept 2010], *affd* 19 NY3d 259 [2012]).

In order to

> "establish that such policies are a part of the employment contract, an employee alleging breach of implied contract must prove that (1) an express written policy limiting the employer's right of discharge exists, (2) the employer (or one of its authorized representatives) made the employee aware of this policy, and (3) the employee detrimentally relied on the policy in accepting or continuing employment"

(*Baron v Port Auth. of N.Y. & N.J.*, 271 F3d 81, 85 [2001]). Moreover, the Court of Appeals advises that "[r]outinely issued employee manuals, handbooks and policy statements should not lightly be converted into binding employment agreements" (*Lobosco*, 96 NY2d at 317). That being said, "a general disclaimer in an employee handbook does not as a matter of law foreclose a finding that specific provisions within the handbook are 'express limitations'" (*Baron*, 271 F3d at 86). It has long been held that "[n]o obligation can be implied, however, which would be inconsistent with other terms of the contractual relationship ... [and] it would be incongruous to say that an inference may be drawn that the employer impliedly agreed to a provision which

would be destructive of his right of termination" (*Murphy v American Home Prods. Corp.*, 58 NY2d 293, 304- 305 [1983]; *see also Sabetay v Sterling Drug*, 69 NY2d at 335-336).

Defendant argues that Fordham's retaliation policy, by its terms, is limited to disclosures made to a "public body" and therefore does not protect plaintiff. Specifically, the retaliation policy states: "No administrator with supervisory authority will take adverse employment action against any individual in retaliation for disclosing to a public body an actionable claim of wrongful conduct" (Tucker affirmation, exhibit C). Plaintiff does not dispute that she did not report the alleged wrongdoing to a public body, therefore, defendant argues, she cannot rely on the retaliation policy to support her breach of contract claim (*Matter of DePetris v Union Settlement Assn.*, 86 NY2d 406, 410 [1995]; *see also Candella v Banco Indus. de Venezuela, C.A.*, 26 Misc 3d 1214(A), 2009 NY Slip Op 52721(U) [Sup Ct, NY County Nov. 19, 2009] [breach of contract action dismissed where employee, who complained of improper conduct, failed to submit a "Suspicious Activity Report" as specifically outlined in the employment manual]).

The retaliation policy goes on to state that "employees are encouraged to disclose allegations of wrongful conduct to the Office of Legal Counsel, the Office of Human Resources Management and/or the Office of Internal Audit. Information and identities revealed will be held in confidence as appropriate and in accordance with the law" (Tucker affirmation, exhibit C). Plaintiff alleges that on two separate instances, which happened to coincide with meetings scheduled to discuss her performance issues, she went to speak to Cioffi about Tramel's alleged wrongful conduct. However, once Cioffi said that she could not guarantee the information would be kept confidential, plaintiff took no further action. Approximately, one week before she was

terminated, plaintiff sent a letter to the vice president of human resources, however, this is not a sufficient "public body".

While plaintiff argues that the court should look to the totality of all of the policies and documents to establish a contractual obligation, after a review of these documents, the court is not persuaded as such. Defendant argues that its Code of Conduct does not limit the University's right to discharge, but rather simply lists violations of the Code. The court agrees (Tucker affirmation, exhibit C). Defendants also contend that the University's "Intergrity Hotline EthicsPoint" web page and a letter authored by University President Father Joseph McShane S.J. do not support a cause of action for breach of contract because they are not self-contained policies and do not limit the University's right to discharge (*see* Tucker affirmation, exhibits D and E). Merely encouraging one to disclose allegations of wrongdoing, does not create a contractual obligation (*see Candella v Banco Indus. de Venezuela, C.A.*, 26 Misc 3d 1214(A), 2009 NY Slip Op 52721(U)). Moreover, plaintiff may have recovery in a claim for retaliation under the state and city human rights laws.

Defendant asserts that plaintiff has not identified an express written policy that limits the right to discharge under the circumstances in order to rebut the at-will presumption, and, therefore, the breach of contract claim must be dismissed. Furthermore, the employee handbook disclaimer precludes plaintiff's reliance on the policies to form a binding contract. The disclaimer specifically states:

> "This Handbook is provided to advise Fordham University administrators of the manner in which matters affecting their employment are normally administered. The statements contained herein reflect the general policies and procedures of the University with respect to its administrators. ***This Handbook, however, is not intended, nor should it be construed to be, a***

> ***binding, enforceable contract between the University and its administrators, either individually or as a group. The University has and reserves the right, in its sole discretion, to change, modify, interpret, or depart from this Handbook when it deems it necessary and appropriate for proper University goverance.*** However, when and if changes are made, the University will provide notice of the change as soon as practicable, including but not limited to, notice through various means of electronic communication by authorized University officials.
>
> ***This Handbook supercedes and replaces all prior handbooks, memoranda, policies, descriptions, oral or written, affecting University administrators and pertaining to the terms and conditions affecting their employment."***

Here, the disclaimer provides that neither the handbook nor its policies create or form a basis of a contract between the university and its employees (*Lobosco*, 96 NY2d at 317 [holding that an employee is precluded from relying on a policy contained in a handbook to rebut the at-will presumption if the handbook contains a disclaimer]; *Gomariz v Foote, Cone & Belding Communications*, 228 AD2d 316, 317 [1st Dept 1996] [handbook disclaimer "that it did not constitute an employee contract" "did not place an express contractual limitation upon the employer's unfettered right to terminate that at-will employment"]). Plaintiff's contention that the handbook is ambiguous and inconspicuous is without merit (*see Matter of Thomas v Mastercard Advisors, LLC*, 74 AD3d 464 [1st Dept 2010]; *Miller v Huntington Hosp.*, 15 AD3d 548 [2d Dept 2005]). Based on the foregoing, plaintiff cannot sustain a breach of contract claim.

Further, plaintiff cannot maintain a breach of contract claim because she voluntarily resigned from her employment. While plaintiff claims that she was constructively discharged from her employment at the April 7, 2011 meeting, plaintiff chose to resign when given the option to resign in lieu of termination. Her resignation bars her from sustaining a cause of action for breach of contract (*see People v Grasso,* 54 AD3d 180, 211 [1st Dept 2008]; *Levitz v Robbins*

Music Corp., 6 AD2d 1027, 1027 [1st Dept 1958] ["resignation is ordinarily a voluntary act, and the fact that plaintiff was threatened with discharge does not constitute such duress as to render the resignation involuntary"]; *see also Hennigan v Driscoll*, 2009 WL 31992201, *9, 2009 US Dist LEXIS 90881, *26-27 [ND NY Sept. 30, 2009, 5:06-CV-426 (FJS/GJD)] ["where a plaintiff is an at-will employee, the threat of termination is never deemed coercive"]).

Based on the foregoing, the court need not address the remaining arguments.

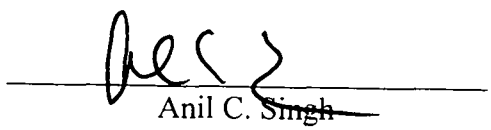
Conclusion

Accordingly, it is

ORDERED that the motion by defendant Fordham University to dismiss the first cause of action for breach of contract is granted and the first cause of action of the complaint is dismissed; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry.

Date: April 16, 2015
New York, New York



Anil C. Singh