THE PASCHOS LAW UPDATE NEWSLETTER
THOMAS PASCHOS & ASSOCIATES P.C. ATTORNEYS AT LAW

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I. EMPLOYMENT LAW

Employee Handbook Did Not Create an Implied Contract Between Employer and Employee

In *Torres v. Riverstone Residential*, 2011 WL 4056209 (D.N.J. September 12, 2011), Plaintiff Doris Torres was terminated from her employment as an assistant property manager with defendant Riverstone Operating Company, Inc. ("Riverstone"). She then brought this action, alleging, among other things, that in firing her, Riverstone committed a breach of contract.

Torres began working for Riverstone in 2002, and in August 2006, she became a property manager for the Riverstone-managed Curling Club Apartments. She never signed an employment contract with Riverstone, and she conceded that her employment with Riverstone was at will. She did, however, receive an Associate Handbook ("Handbook") and sign an Associate Handbook Acknowledgment Form ("Acknowledgment"). The Acknowledgment contains the following language:

By signing this Acknowledgment, I hereby agree that I am an "at will" Associate.... [T]he Company and I both have the right to terminate the employment relationship at any time, for any reason, with or without cause or notice. I understand that the Associate Handbook is a general guide only and that the provisions of the Handbook in no way constitute an employment contract or guarantee employment. I also understand that any contracts relating to my employment must be in writing and signed by the Chief Executive Officer of the Company.

Torres's responsibilities at the Curling Club included managing the property and employees, keeping track of budgeting and expenses and dealing with tenants. In 2008 and 2009, there were several complaints about Torres' conduct from her superiors, co-workers, and Curling Club residents. In addition, in the summer of 2009, Torres scored below the required benchmark 90% in several "audio shop" exercise and audits of her work.

In September 2009, Torres accepted the lesser position of assistant property manager at the Curling Club after being told "that she was not fulfilling the needs as a Property Manager and not hitting the benchmarks that Riverstone set forth." One month later, Torres completed another audio shop and scored an 81.3%. On October 21, 2009, Torres was terminated from her employment with Riverstone based on her audio shop score and she was advised that the score was "just barely over the passing mark ... and the contents failed to meet company standards on how to handle a prospective resident sale."

Torres filed a complaint in the Superior Court of New Jersey alleging, among other things, a breach of contract, stating that “defendants breached plaintiff's employment contract and wrongfully failed to judge plaintiff on the basis of merit and ability and wrongfully and without cause terminated Plaintiff.” Plaintiff also alleged a breach of the implied covenant of good faith and fair dealing. Riverstone removed on diversity grounds, and subsequently filed motions for summary judgment.

In support of its motion, Riverstone argued that Torres was an at-will employee, subject to termination at any time, with or without notice or cause. Torres, however, contended that the Handbook contained a promise that Riverstone's employees could not be fired after scoring higher than an 80% on an audio shop. Riverstone countered that the Handbook made no such promise and that it clearly and conspicuously disclaimed any promise of continued employment.

The court found that Torres had correctly pointed out that under certain circumstances “[a]n employment manual may alter an employee's at-will status by creating an implied contract between an employer and employee.” The Court set forth the test for determining whether an employment manual creates an enforceable obligation, stating that “[t]he basic test for determining whether an employment contract can be implied turns on the reasonable expectation of the employees.” The court noted that an employer may shield itself from implied obligations by including a “clear and prominent disclaimer.”

Here, the court held that the breach of contract claim failed because no reasonable juror could conclude that defendant's handbook created an enforceable obligation restricting its right to discharge plaintiff at will where both the handbook and the acknowledgement that she signed contained clear and conspicuous disclaimers that defeat the creation of any enforceable right. As such, the breach of the covenant of good faith and fair dealing claim failed in the absence of a contract.

Oral Assurances of Employer’s Representatives Regarding Reinstatement After Disability Leave Could Constitute a Contract

In *Kuker v. Eclipsys Corp*., No. 10-CV-5544 (CCC-JAD)(D.N.J. September 15, 2011), plaintiff, Kristine Kuker, filed a Complaint against her employer, defendant, Eclipsys Corp., alleging unlawful termination while she was on medical disability leave. At issue here was plaintiff’s motion to amend her Complaint to add a claim for breach of contract. In support of this claim, plaintiff alleged that while she was on medical disability leave, defendant made oral representations to her assuring her that she would be reinstated once plaintiff had recovered from her medical infliction. Notwithstanding these assurances, plaintiff alleges that defendant terminated her without prior notice or warning that her leave of absence would affect her continued employment.

Defendant opposed the motion on the grounds that the proposed breach of contract claim is futile because plaintiff could not establish that she had an actual or implied contract with defendant for her continued employment. Defendant also argued that because plaintiff was hired as an at-will employee, Defendant’s right to terminate was not limited in any way. The at-will-status could not be modified absent written agreement signed by defendant’s President. Finally,

defendant argued that plaintiff failed to allege any consideration in exchange for the purported oral assurances.

The court held that plaintiff's allegations, if true, could support a finding that the oral representations made by defendant's representatives created a contract by which defendant agreed to reinstate plaintiff as an at-will employee once she recovered. The court also held that plaintiff's reliance on these representations in not seeking other employment and in not attempting to return to work earlier or to work from home, if true, could support a finding of valid consideration for such contract.

Furthermore, the court held that the purported existence of defendant's policy that only the President could enter into agreements to modify an employee's at-will status is irrelevant and has no bearing on whether defendant entered into a contract to reinstate plaintiff. The court noted that plaintiff was not arguing that the purported contract changed her status as an at-will employee, rather, plaintiff was alleging that defendant agreed to reinstate her as an at-will employee. The court found this distinction to be critical. The court held that plaintiff's allegations, if true, could make out a plausible claim for breach of a contract.

II. INSURANCE COVERAGE LITIGATION

To Have Standing to Appeal a Declaratory Judgment Action, the Injured Party Must Have a Direct Interest in the Litigation

In *American Automobile Ins. Co. v. Murray*, --- F.3d ---, 2011 WL 3966114 (3d. Pa. September 7, 2011), on March 23, 2006, nineteen-year-old Stephen Meloni drove his vehicle while intoxicated and struck a pole, killing his passenger, Jessica Easter. James S. Easter, Jr. individually and as the Administrator of the Estate of his daughter Jessica, filed a lawsuit on October 25, 2006, against Ennie and Steven L. Meloni in the Philadelphia County Court of Common Pleas ("Easter lawsuit"). Easter alleged that Ennie illegally sold alcohol to nineteen-year-old Gary Grato, who then supplied that alcohol to Meloni causing him to operate his vehicle negligently and recklessly.

In response to the lawsuit, Ennie sought a defense and indemnification from its general liability insurer, Century Surety Company ("Century"). Century provided Ennie with a defense under a reservation of rights and then filed a declaratory judgment action in the United States District Court for the Eastern District of Pennsylvania. The District Court granted summary judgment to Century, declaring that Century did not owe Ennie a defense or indemnification for the Easter lawsuit because the insurance policy in effect during the relevant time period contained a liquor liability exclusion.

On November 27, 2007, Ennie filed a lawsuit ("Ennie lawsuit") against its insurance agent, Tyrone Murray, alleging that Murray negligently failed to place liquor liability insurance coverage for Ennie. Ennie claimed that it consulted with Murray through its principal Thai Poeng on August 23, 2000, with the purpose of obtaining insurance that would protect the company from any and

all risks arising out of the business of operating a beer distributorship. Ennie alleged that in 2002, Murray sold it the Century insurance policy under the pretense that it protected Ennie from these risks. With this belief, Ennie renewed that policy annually through Murray. Murray confirmed that Poeng renewed the Century policy that was in effect during March 2006 in December 2005, and that the policy did not contain liquor liability coverage. Hence, Ennie alleged that Murray, as a licensed commercial insurance agent, breached his duty to advise it properly of the necessity or availability of liquor liability coverage. Ennie contended that due to this breach of duty, it was required to pay the costs of its own defense in the Easter lawsuit and has been subjected to a potential adverse judgment arising out of the lawsuit.

In response to the Ennie lawsuit, Murray sought a defense under his professional liability policy with AAIC. Murray, as an insurance agent with The Agents & Brokers of Infinity Property Casualty Corp., enrolled online for his own insurance coverage through AAIC, which provided a "claims made and reported" errors and omissions liability policy. The first AAIC policy was issued to Murray on January 1, 2006, providing coverage from January 1, 2006 through January 1, 2007. The policy was properly renewed and Murray continued to receive coverage from AAIC for the period of January 1, 2007 through January 1, 2008.

Prior to his relationship with AAIC, Murray was covered under a liability policy from United States Liability Insurance Company ("USLIC") from the period of November 24, 2004 through November 24, 2005. That policy had a retroactive date of November 24, 2004. Hence, Murray had a lapse in professional liability coverage from November 25, 2005 through December 31, 2005, immediately proceeding the January 1, 2006 effective date of the first AAIC policy.

Murray tendered his defense of the Ennie lawsuit to AAIC, and AAIC provided Murray with a defense under a reservation of rights to deny coverage and to seek recompense of all costs expended if it was determined that the AAIC policy did not provide Murray coverage. On May 8, 2008, AAIC filed the declaratory judgment action against Murray, Ennie, and Easter in the Eastern District of Pennsylvania, and subsequently filed a motion for summary judgment claiming that Murray's actions that were the basis for the Ennie lawsuit were not covered under the AAIC policy. Ennie and Easter cross-moved for summary judgment. The main issues in dispute were the determination of the policy's retroactive date, the date upon which the wrongful acts occurred, and whether the wrongful acts took place wholly after the retroactive date. Easter and Ennie argued that AAIC must provide coverage because the retroactive date for the policy was November 24, 2004, and Murray's wrongful act of failing to insure Ennie for liquor liability insurance on March 21, 2006, occurred after the retroactive date. AAIC, on the other hand, maintained that Ennie was not covered under the policy because the retroactive date of the policy was January 1, 2006, and Murray's wrongful act of failing to provide liquor liability insurance occurred in 2002 and continued at each policy renewal.

The District Court granted summary judgment to AAIC, finding that Murray's wrongful act did not occur wholly after the AAIC policy's January 1, 2006 retroactive date and, therefore, Murray was not covered under the policy. Ennie and Easter filed notices of appeal from the District Court's judgment.

The Appeals Court raised the issue of standing sua sponte to determine whether Easter and Ennie are permitted to challenge the District Court's order. In a prior case, Federal Kemper Insurance Co. v. Rauscher, 807 F.2d 345 (3d Cir.1986), the court held that the critical determination for standing to sue in this scenario was “whether the rights of an injured party within the procedural context of a declaratory judgment action are truly derivative of the rights of the co-defendant insured.” If the rights of the injured party are derivative and not independent, then there would be no “case or controversy,” as there would be no “real dispute” between the injured party and the insurance company. The court recognized that a “case or controversy” must exist between the insurance company and the injured third party under such circumstances, since the insurance company brought the declaratory judgment action against the injured third party in the hope of attaining a binding judgment against both the insured and the injured party.

Applying the principles set forth in Rauscher, the court concluded that Ennie had standing to appeal the District Court's order in this declaratory judgment action. The court found that Ennie was the directly injured party and that he had a particularized interest in the lawsuit because a determination of Murray's coverage would dictate its ability to receive the full benefit of the Ennie lawsuit.

On the other hand, the court held that the holding in Rauscher did not extend to Easter, as he was an injured party twice removed. Unlike Ennie, Easter's interests in this lawsuit are purely derivative of the injured third party's interests. Essentially, the only interest Easter has in the lawsuit is the potential pecuniary gain that will flow to him through Ennie, since he has failed to make any claims directly against the insured.

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