IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

JOHNSON SHIPRIT, Plaintiff, v. STS ENTERPRISES, INC. Defendant.	)	Civil Action No. 99-0490 **ORDER GRANTING DEFENDANT'S MOTION TO DISMISS**

I. PROCEDURAL BACKGROUND

This matter came before the court on November 10, 1999, at 9:00 a.m. in Courtroom 223 on Defendant's motion to dismiss. John D. Osborn, Esq. appeared on behalf of the Defendant, STS Enterprises, Inc. Joseph A. Arriola, Esq. appeared on behalf of the Plaintiff, Johnson Shiprit. The court, having heard and considered the arguments of counsel and being fully informed of the premises, now renders its decision.

II. FACTS

On January 1, 1992, a memorandum was issued to "All STS Employees" regarding the consequences for taking a leave of absence or changing a work schedule without giving notice to a supervisor at least one day in advance. *See* Plaintiff's Complaint, Exhibit E. The memorandum states **[p. 2]** that non-compliance with the memorandum will subject the employee to disciplinary action.

STS also provides its employees with a "Personnel Policy" in the form of an employment manual. *See* Plaintiff's Complaint, Exhibit D, at page 3. The "Personnel Policy" addresses such employment issues as sick leave, discipline, and discharge.

On February 20, 1998, Plaintiff worked eight hours while suffering from a tooth infection. Plaintiff's suprvisor granted Plaintiff's request to leave work at 5:15 p.m.

On February 21, 1998, Plaintiff failed to report to work at 8:00 a.m. as scheduled.

On February 23, 1998, Defendant informed Plaintiff by letter that he was suspended without pay for seven days for "not taking care [of] his assigned schedule La Fiesta shuttle [at] 17:15 on

February 21, 1998, without informing [his] supervisor." Plaintiff's Complaint, Exhibit B. The letter also stated that "any future violations of company policy or failure to perform in accordance with [STS] standards shall result in immediate dismissal without further warning letter." Plaintiff's Complaint, Exhibit B.

On June 21, 1998, Plaintiff was to report to work at 8:00 a.m. but telephoned Defendant and stated that he would not be able to come into work until 10:00 a.m. for personal reasons.

On June 22, 1998, Plaintiff reported to work and received a letter which stated: "[t]his is to officially inform you that your employment with [STS] is hereby terminated, effective immediately." Complaint, Exhibit C. The letter further stated that "[o]n February 21, 1998, you received a final warning letter and suspension for failure to report to duty for your assigned schedule [and] you were informed in that letter of the eventual result if you further violate company policy or fail to perform in accordance with company standards." Plaintiff's Complaint, Exhibit C.

On August 31, 1999, Plaintiff filed a complaint against Defendant alleging wrongful termination of employment.

On October 14, 1999, Defendant filed a motion to dismiss pursuant to Com. R. Civ. P. 12(b)(6). **[p. 3]**

II. ISSUE

Whether the court shall grant Defendant's motion to dismiss pursuant to Com. R. Civ. P. 12(b)(6) on the ground that Plaintiff's complaint alleging wrongful termination of employment fails to state a claim upon which relief can be granted because Plaintiff is an employee "at-will" who can be terminated at any time, with or without cause.

IV. ANALYSIS

Defendant moves the court to dismiss the present civil action with prejudice pursuant to Com. R. Civ. P. 12(b)(6), for failure to state a claim upon which relief can be granted. Com. R. Civ. P. 12(b)(6).

In considering a motion to dismiss for failure to state a claim upon which relief can be granted, "the Court must accept the allegations in the complaint as true and construe them in the light most favorable to the plaintiff." *Govendo v. Micronesian Garment Mfg., Inc.*, 2 N.M.I. 270, 283 (1991), *citing Abramson v. Brownstein*, 897 F.2d 389 (9th Cir. 1990); *see also, Bolalin v. Guam*

Publications, Inc., 4 N.M.I. 176, 179 (1994). Dismissal is improper unless the court is absolutely certain that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Id.*, *see also, Hishon v. King & Spaulding*, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232, 81 L.Ed.2d 59 (1984) Defendant carries the burden in the present matter as "[t]he defendant must . . . demonstrate that, even after taking the well pleaded facts as true, the plaintiff still fails to state a claim for relief." *Govendo v. Marianas Public Land Corp.*, 2 N.M.I. 482, 490 (1992).

Here, Defendant contends that Plaintiff's complaint alleging wrongful termination of employment fails to state a claim because Plaintiff is an "at-will" employee who can be terminated at any time, with or without cause.

Plaintiff does not dispute that he is an "at-will" employee, but contends that exceptions to the employment "at-will" doctrine are applicable. Specifically, Plaintiff argues that Defendant's January 1, 1992, memorandum and Defendant's "Personnel Policy" establish disciplinary procedures that are contractually binding on Defendant but were not followed in Plaintiff's termination. **[p. 4]**

A. Employment "At-Will" Doctrine.

The common law employment "at-will" doctrine has not been addressed in the Commonwealth, therefore the court must turn to the common law pursuant to 7 CMC § 3401, which states in pertinent part:

> In all proceedings, the rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed as generally understood and applied in the United States, shall be the rules of decision in the courts of the Commonwealth, in the absence of written law or local customary law to the contrary . . . .

7 CMC § 3401, *see also Ada v. Sablan*, 1 N.M.I. 415, 425 (1990). The employment "at-will" doctrine provides that employment for an indefinite term may be terminated at any time or for no reason by either the employee or the employer without legal liability. *See Cotter v. Desert Palace, Inc.*, 880 F.2d 1142, 1145 (9th Cir. 1989). Plaintiff fails to establish that he was anything but an employee for an indefinite term. As such, under the common law employment "at-will" doctrine, Plaintiff could be terminated at any time, with or without cause. Plaintiff, however, argues that exceptions to the general rule are applicable. These arguments are implied from the complaint, as they were not explicitly stated until Plaintiff filed its opposition to Defendant's motion to dismiss.

B. Exceptions to Employment "At-Will" Doctrine.

There are three general exceptions to the rule that an "at-will" employee may be terminated at any time, with or without cause. *See Huey v. Honeywell, Inc.*, 82 F.3d 327, 330-331 (9th Cir. 1996); *see also Sorensen v. Comm Tek, Inc.*, 799 P. 70, 72 (Idaho 1990) (Employer's right to terminate an "at-will" employee with or without cause can be limited by an express or implied agreement).

> First, the public policy exception to the at-will doctrine permits an at-will employee to recover for wrongful discharge upon a finding that the employer's conduct undermined an important public policy. Second, an exception based on contract law allows an at-will employee to recover for wrongful discharge upon proof of an implied-in-fact promise of employment for a specific duration. Such an implied-in-fact promise can be found in the circumstances surrounding the employment relationship, including assurances of job security in company personnel manuals or memoranda. Third, courts have found an implied-in-law covenant of good faith and fair dealing in employment contracts and have held employers liable in both contract and tort for breach of this covenant. **[p. 5]**

Huey, supra at 331.

Plaintiff alleges that Defendant's actions have created an implied-in-fact promise of employment for a specific duration and an implied-in-law covenant of good faith and fair dealing. Plaintiff does not contend that the public policy exception applies.

1. Implied-in-Fact Promise of Employment for a Specific Duration.

Plaintiff contends that Defendant's January 1, 1992, memorandum and "Personnel Policy" create an implied-in-fact promise of employment for a specific duration, thus changing Plaintiff's status from that of an "at-will" employee to one who may only be terminated "for cause."

The January 1, 1992, memorandum addresses the consequences for taking a leave of absence or changing a work schedule without giving notice. Pursuant to the memorandum: a first offense results in a written warning; a second offense results in a three day suspension; a third offense results in a one week suspension; and a fourth offense is grounds for termination of employment. *See* Plaintiff's Complaint, Exhibit E. The memorandum, however, states that its "regulations stand for a period of 1yr [sic]." *Id.* Plaintiff contends that the memorandum was an implied term of an employment contract that Defendant violated as he was terminated after three, rather than four, "offenses." However, Plaintiff did not establish an extension of the memorandum's policy to the present date. As such, the procedures set forth in the January 1, 1992, memorandum expired on

January 2, 1993. Thus, Plaintiff's argument that the memorandum acted to modify the employment relationship between Plaintiff and Defendant fails. The existence of the memorandum does not evidence an implied-in-fact promise of employment for a specific duration transforming Plaintiff's employment status from that of an "at-will" employee to that of one only terminable "for cause."

Second, Plaintiff contends that, like a labor agreement, an employee handbook or policy manual is the governing instrument of the workplace. Plaintiff notes that Defendant's "Personnel Policy" states:

> The Company shall have the right to discipline any employee by written reprimand, suspend an employee without pay for any number of days, or terminate the employment of any employee upon any circumstances constituting misconduct connected with the employment on the part of the employee. Misconduct is defined as conduct evincing such willful **[p. 6]** or wanton disregard of the Company's interest and is found in deliberate violations or disregard of standards of behavior which the Company has the right to expect of its employees.

Plaintiff's Complaint, Exhibit D, at 5. Plaintiff argues that the "Personnel Policy" is an implied-in-fact promise of employment for a specific duration. Plaintiff argues that Defendant impliedly agreed not to terminate employment unless Plaintiff engaged in conduct defined as being "willful or wanton disregard of the Company's interest." Defendant, however, notes that the "Personnel Policy" explicitly states:

> As an employee of [STS] . . . you should be familiar with the regulations governing the day-to-day conduct that affects you. **This policy are [sic] general and are not intended to cover every situation, and are subject to modification by the Company from time to time. This is not an employment contract**.

Plaintiff's Complaint, Exhibit D, Section A at 1 (emphasis added). Defendant further notes that the "Personnel Policy" states that "[e]mployment beyond the probationary period means solely that certain employment benefits provided herein will be granted to him, but it does not mean that his/her employment has been guaranteed for any period of time." Plaintiff's Complaint, Exhibit D, Section B at 1.

In *Demasse v. ITT Corp.*, the Ninth Circuit Court of Appeals stated that:

> Employers are certainly free to issue no personnel manual at all or to issue a personnel manual that clearly and conspicuously tells their employees that the manual is not part of the employment contract and that their jobs are terminable at the will of the employer with or without reasons. Such actions, either not issuing a personnel manual or issuing one with clear language of limitation, instill no reasonable expectations of job security and do not give employees any reason to rely on representations in the manual.

Demasse v. ITT Corp., 111 F.3d 730, 732-733 (9th Cir. 1997). Also, "[a]n explicit and conspicuous disclaimer in an employee personnel manual, stating that no contract rights exist or the policies within are not intended to create contractual rights, demonstrates the employer's intent [that] the manual be only a guide for the employee." *Jose v. Norwest Bank North Dakota, et al.*, 599 N.W.2d 293, 297 (S.D. 1999). In the present matter, Defendant's "Personnel Policy" clearly states that the policy is not an employment contract and is subject to modification by Defendant. *See* Plaintiff's Complaint, **[p. 7]** Exhibit D, Subsection A, at 1. The "Personnel Policy" further states that "[e]mployment beyond the probationary period . . . does not mean that his/her employment has been guaranteed for any period of time." *See* Plaintiff's Complaint, Exhibit D, Subsection B(3), at 1. The disclaimers are explicit and conspicuous in that they are both found on the first page and within the first two subsections of the "Personnel Policy." As such, the court finds that Defendant's "Personnel Policy" did not change Plaintiff's employment status from that of an "at-will" employee to that of an employee only terminable "for cause."

3. Implied-in-Law Covenant of Good Faith and Fair Dealing.

Plaintiff alternatively contends that his termination violated an implied covenant of good faith and fair dealing. A limited number of jurisdictions recognize such an exception to the employment "at-will" doctrine. *See e.g. Sorensen v. Comm Tek, Inc.*, 799 P.2d 70 (Idaho 1990); *see also Metcalf v. Intermountain Gas Co.*, 778 P.2d 744 (Idaho 1989). Other jurisdictions do not recognize such an exception. *See e.g. Parnar v. Americana Hotels, Inc.*, 652 P.2d 625 (Haw. 1982); *see also Therien v. United Air Lines, Inc.*, 670 F.Supp 1517 (D. Colo. 1987).

"The implied-in-law covenant of good faith and fair dealing protects the right of the parties to receive the benefits of the agreement that they have entered into." *Parker v. Boise Telco Federal Credit Union*, 923 P.2d 493, 501 (Id. Ct. App. 1992). "[A]ny action which violates, nullifies or significantly impairs any benefit or right which either party has in the employment contract, whether express or implied, is a violation of the covenant . . . ." *Metcalf*, *supra* at 149. Plaintiff contends that his termination impaired benefits and rights implied in his employment relationship by virtue of the memorandum and the "Personnel Policy" which Plaintiff feels established procedures for termination that were not followed by Defendant. However, "[t]he covenant of good faith is read into contracts to protect the express covenants or promises of the contract, not to protect some

general public policy interest not directly tied to the contract's purposes." *See Foley v. Interactive Data Corp.*, 765 P.2d 373 (Cal. 1988). As such, the implied covenant of good faith and fair dealing cannot be invoked to contradict an express covenant of the contract. Here, the "Personnel Policy" explicitly states that "this is not an employment contract." Plaintiff's Complaint, Exhibit D, at 1. The covenant of good **[p. 8]** faith and fair dealing "does not protect the employee from a 'no cause' termination because tenure was never a benefit inherent in the at-will agreement." *Parker, supra* at 501. As such, the court finds Plaintiff's argument that the implied covenant of good faith and fair dealing changes the employment relationship to be without merit.

V. CONCLUSION

For the foregoing reasons, the court finds that Plaintiff was an "at-will" employee, terminable with or without cause. Furthermore, the court finds that the memorandum and the "Personnel Policy" do not present enforceable contract terms, either express or implied, which might change the nature of the employment relationship to one in which Plaintiff could only be terminated "for cause." The court also finds that no exception to the employment "at-will" doctrine is applicable. Therefore, Defendant has met its burden and has demonstrated that, even after taking the well pleaded facts as true, Plaintiff fails to state a claim upon which relief can be granted. As such, Defendant's motion to dismiss is **GRANTED**.

Local or resident employees in the Commonwealth are not governed by the same rules and regulations as that of non-resident workers. Therefore, the "employment at-will doctrine" may allow an employer to terminate employment with or without cause, subject to the application of exceptions to the general doctrine. There are no applicable exceptions to the doctrine in this case.

So ORDERED this 13 day of December, 1999.

/s/ Juan T. Lizama
JUAN T. LIZAMA, Associate Judge