VERMONT SUPERIOR COURT

SUPERIOR COURT
Windsor Unit

CIVIL DIVISION
Docket No. 734-11-10 Wrcv

David Allen,
Plaintiff

v.

Carl Groppe, individually and as Board Chair of the Windsor Northwest Supervisory Union Board, Greg White, individually and as Board Vice-Chair of the Windsor Northwest Supervisory Union, Timothy Mock, Individually and as Superintendent or the Windsor Northwest Supervisory Union, and The Windsor Northwest Supervisory Union Board,
Defendants

**Decision on Motion for Summary Judgment**

This case concerns a lawsuit for unlawful termination of employment. Plaintiff David Allen worked as a business manager for the Windsor Northwest Supervisory Union Board between August 2008 and October 2009. Plaintiff alleges that he was terminated from his position after he disclosed unlawful activities occurring at the Windsor Board's offices. Defendants moved for summary judgment on all counts.

Plaintiff has alleged five separate causes of action. Plaintiff claims first that Defendants unlawfully terminated his employment by knowingly relying on false information when making the final decision about his position. Plaintiff's second cause of action is that Defendants terminated Plaintiff's employment in retaliation for Plaintiff's threat to disclose fraudulent activities. Plaintiff's remaining causes of action are that Defendants breached his employment contract by terminating him without cause; that Defendants violated Plaintiff's due process rights by not allowing him to present his entire defense at the termination hearings; and that Defendants breached the duty of good faith in Plaintiff's employment contract.

The case turns on the alleged fraudulent practices Plaintiff discovered in his capacity as business manager for the school district, and Plaintiff's attempts to stop those practices. During his employment, Plaintiff observed employees failing to report leave time, using county resources for personal enjoyment, favoring a school district with political connections, and attempting to embezzle money from the Windsor Board. Plaintiff notes he opposed these

practices and eventually indicated to the Superintendent he intended to notify the Windsor Board about the practices. The termination process started shortly after this conversation.

On October 6, 2009, the Superintendent placed Plaintiff on administrative leave and notified Plaintiff that he would recommend that the Windsor Board terminate Plaintiff's employment as of October 21, 2009. The Superintendent produced negative performance evaluations of Plaintiff. Plaintiff alleges the Superintendent fabricated the negative performance evaluations, and asserts that he received only positive oral feedback during his employment. The Windsor Board held two hearings on the issue at which the Superintendent was allowed to present evidence against Plaintiff and at which Plaintiff was offered the opportunity to rebut that evidence. On October 19, 2009, the Windsor Board notified Plaintiff he would be terminated for cause if he did not resign, but allowed him to resign and receive severance pay, a reference, and collect unemployment benefits. Plaintiff resigned on October 19, 2009. The Windsor Board paid Plaintiff two weeks of severance pay and Plaintiff collected unemployment benefits after his resignation.

## Standard of Review

The Court grants summary judgment if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.R.C.P. 56(c)(3) (2000). The Court makes all reasonable inferences and resolves all doubts in favor of the non-moving party. *Boulton v. CLD Consulting Eng'rs, Inc.*, 2003 VT 72, ¶ 5, 175 Vt. 413. The non-moving party must offer specific disputed facts to be determined at trial. *Dillon v. Champion Jogbra*, 175 Vt. 1, 2–3 (2002).

Defendants claim the Court should accept as true all facts stated in its statement of undisputed material facts because Plaintiff's statement of disputed material facts does not directly address the undisputed statement of material facts. It is true that Vermont Civil Procedure Rule 56(c)(2) requires the opposing party to file "a separate, short, and concise statement of the material facts," and in the past the Vermont Supreme Court has deemed undisputed facts admitted if the opposing party does not file an opposing set of facts. *Webb v. Leclair*, 2007 VT 65, ¶ 5, 182 Vt. 559; see also *Clayton v. Unsworth*, 2010 VT 84, ¶ 28, 188 Vt. 432 (holding the statement of facts must cite to the record). Moreover, the Court may disregard a statement of material facts if it is so disorganized as to require extensive work to figure out which facts are disputed.E.g., *Gallipo v. City of Rutland*, 2005 VT 83, ¶¶ 28, 32, 178 Vt. 244. Nevertheless, the statement submitted by Plaintiff does not rise to this level of confusion, and the summary judgment rules must always be interpreted so as to do substantial justice. 10A Wright, Miller, Kane & Marcus, Federal Practice and Procedure: Civil 3d § 2728. Here, the Court will accept the pleadings as they were submitted, and will apply the normal standard of review, which calls for the court to resolve all disputed issues in favor of the non-moving party. *Boulton*, 2003 VT 72, ¶ 5.

## Discussion

Constructive Discharge, Unlawful Termination, and Retaliatory Termination

Plaintiff argues that he was constructively discharged from his position. The general rule is that a claim of wrongful discharge is unavailable to an employee who has resigned rather than been terminated, but there is a well-established exception that permits employees to pursue a claim of wrongful discharge when the employer forced the employee to resign. *Boulton v. CLD Consulting Eng'rs, Inc.*, 2003 VT 72, ¶ 10, 175 Vt. 413. The resignation must be involuntary and involuntariness "must be the product of purposeful actions directed at obtaining a resignation." *In re Bushey*, 142 Vt. 290, 298 (1982).

Plaintiff focuses in large part upon his allegations that the work environment was hostile, and that the employees treated each other disrespectfully. But these allegations do not create a genuine issue of fact with respect to constructive discharge because there is no evidence that Defendants created these conditions. See *Bushey*, 142 Vt. at 298 (holding that proof of involuntariness requires evidence that the employer undertook "purposeful actions directed at obtaining a resignation"). If there is to be a claim based on a constructive discharge in this case, therefore, it must be based on the fact that Plaintiff was given a choice to resign or be fired. This raises the question of whether an employee may pursue a theory of wrongful discharge when he has been chosen the benefits of resignation in response to a direct request to "resign or be fired."

The issue has not been addressed squarely in Vermont. In *Nadeau v. Imtec, Inc.*, an employee sued for wrongful discharge after choosing to receive the benefits of resignation (a reference and severance pay) instead of being fired; the Vermont Supreme Court addressed the merits of his termination without addressing the question of whether his resignation barred the suit. 164 Vt. 471, 474–77 (1995).

Other states have taken different views over whether to allow claims for constructive discharge where the employee chooses the benefits of resignation over termination. For example, Oregon has recognized that "the resignation of an employee who unconditionally has been told 'resign or be fired' may be found to be a discharge by the trier of fact." *Sheets v. F.E. Knight*, 779 P.2d 1000, 1005 (Or. 1989), *abrogated on other grounds by McGanty v. Staudenraus*, 901 P.2d 841 (Or. 1995); see also *Colores v. Bd. of Tr.*, 130 Cal.Rptr.2d 347, 365–67 (Cal. Ct. App. 2003) (allowing an employee to sue for constructive discharge after entering disability retirement). In contrast, Georgia prohibits claims for wrongful termination where the employee resigned. *Clark v. Chick-Fil-A, Inc.*, 449 S.E.2d 313, 315 (Ga. Ct. App. 1994). The Georgia rule applies where the "employee resigned under pressure and at the employer's request even if the employee knew that termination action would be taken in absence of resignation." *Id.*

It is a close question whether a voluntary resignation should bar a suit for wrongful discharge when an employee is offered the choice between resignation and separation and chooses the benefits of resignation. The question is even closer when, as here, the employee's contract does not require cause for termination; in such cases the amount of duress is minimized by the fact that the employer is not threatening to take some adverse employment action that would be prohibited by contract. However, even the cases relied upon by Defendants leave open the possibility that an employee might still have an opportunity to prove an involuntary discharge

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in cases where the resignation is "extorted as a cover for wrongdoing." *Molinar v. Western Elec. Co.*, 525 F.2d 521, 530 (1st Cir. 1975). Here, as discussed below, Plaintiff's evidence is sufficient to establish at least a prima facie case that his discharge was effectuated as retaliation for his proposal to disclose evidence of fraud and waste in the school district budget. Under such circumstances, this Court predicts that the Vermont Supreme Court would concur with the Oregon position that it would be an inequitable rule to "hold liable an employer who wrongfully discharges an employee but to immunize from liability an employer who, for equally improper reasons, induces an employee to resign rather than be fired." *Sheets*, 779 P.2d at 1005.

The next question is whether Plaintiff has adduced sufficient evidence to create a genuine issue of fact as to whether his termination was unlawful. See *Boulton*, 2003 VT 72, ¶ 10 (explaining that "constructive discharge" is not a cause of action, but rather a theory that permits plaintiffs to sue for unlawful termination even though they technically resigned). Plaintiff is proceeding on a theory that his termination was unlawful because the reasons for his termination violated a clear and compelling principle of public policy. See *LoPresi v. Rutland Reg'l Health Servs., Inc.*, 2004 VT 105, ¶ 18, 177 Vt. 316 (explaining that an at-will employee may be fired for almost any reason, but not for a reason that would be contrary to public policy). The question of whether a termination violates public policy is an issue of law for the Court to decide. *Madden v. Omega Optical, Inc.*, 165 Vt. 306, 314 n.3 (1996).

Plaintiff alleges that he was terminated in retaliation for his actions in seeking to disclose instances of fraud and waste in the school district budget. A prima facie case of retaliatory discharge requires evidence that: "(1) the plaintiff engaged in a protected activity; (2) the employer was aware of the activity; (3) the plaintiff suffered adverse employment consequences as a result of the activity; and (4) there was a causal connection between the activity and the consequences." *Griffis v. Cedar Hill Health Care Corp.*, 2008 VT 125, ¶ 12, 185 Vt. 74. Disclosure of illegal activities, even if made internally rather than to law enforcement, is a protected activity at common law. *Parr v. Triplett Corp.*, 727 F. Supp. 1163, 1166–67 (N.D. Ill. 1989).

In this case, the evidence in sufficient to establish that Plaintiff made allegations of fraudulent accounting practices, unrecorded leave, and improper use of county resources, and that he communicated these allegations to the board in the form of at least "generalized comments" or "casual conversations" prior to any adverse employment actions by the school district. Plaintiff's deposition and verified complaint further establish, for purposes of summary judgment, that Plaintiff told the Superintendent that he intended to disclose more allegations to the Board, and that the Superintendent responded by sending a notice of termination letter to Plaintiff with a fabricated performance history. A reasonable inference further exists that the Windsor Board eventually accepted the Superintendent's version of events and terminated Plaintiff in order to prevent further disclosures. In short, there is enough in the record to make out the prima facie claim of retaliatory discharge. *Griffis*, 2008 VT 125, ¶ 12; *Madden*, 165 Vt. at 314. At trial, of course, the evidence will again be subject to review to determine whether it is sufficient to support a jury verdict in Plaintiff's favor. V.R.C.P. 50(a)(1).

Breach of Contract

Plaintiff also claims Defendants breached his employment contract by terminating him without just cause. A threshold legal question here is whether the terms of Plaintiff's employment at the time of his termination were controlled by an August 2008 employment agreement or instead by a December 2008 employment agreement. The material difference between the two contracts is that the August 2008 employment agreement required "cause" for termination, whereas the December 2008 agreement allowed termination without cause upon fourteen days notice.

Plaintiff argues that the December 2008 agreement was not valid because it was not signed by a representative of the School Board but rather by the Superintendent, who lacked statutory authority to sign employment agreements at the time these events took place. See 16 V.S.A. § 242(3) (2008); 16 V.S.A. § 261a(7) (2008). However, even assuming that the Superintendent lacked authority, the Windsor Board ratified the 2008 December agreement. Ratification occurs where a principal has knowledge of the material facts of the agreement and accepts the benefits of the agreement. See *Nason v. Addison County Trust Co.*, 104 Vt. 183, 186 (1932). Here, the Windsor Board knew of the contract, paid Plaintiff a salary, and accepted Plaintiff's work. Therefore, the December 2008 agreement applies and Defendants did not need cause to terminate Plaintiff.

A second issue is that the December 2008 contract expired at the end of June 2009, but Plaintiff continued working for the Windsor Board until his termination on October 19, 2009. Plaintiff argues that this fact raises doubts about the terms of Plaintiff's employment at the time of termination. But the general rule here is that if an employee continues working after the expiration of a contract, then the employee has an implied contract with the same terms as the written contract. *Borg-Warner v. Ostertag*, 118 N.W.2d 900, 902–903 (Wis. 1963). His December 2008 contract was therefore in effect at the time of his termination; just cause was not required.

Plaintiff argues in the alternative that the terms of his employment agreement were modified by a "proxy employee handbook" known as the Master Agreement. It is true that employment manuals and policies can modify at-will employment relationships in such a way as to give an employee additional protections. *Dillon v. Champion Jogbra, Inc.*, 175 Vt. 1, 5 (2002). But the Master Agreement is not an employment manual: it is the express collective-bargaining agreement between the school district and its teachers, and there is no apparent connection between the Master Agreement and Plaintiff's position as business manager. Moreover, Plaintiff's own December 2008 contract contains a merger clause making clear that it "supersedes prior agreements, arrangements, and understandings, written or oral, between the parties." For these reasons, the Court cannot conclude that there are any genuine issues of fact with respect to the question of the terms of Plaintiff's employment: the December 2008 contract controls, and it permits termination without cause upon fourteen days notice. Summary judgment will be granted on the contractual claims.

Due Process

Plaintiff claims Defendants violated his due process rights by not allowing him to present evidence of the Superintendent's wrongdoings at his termination hearings. Here, although it is true that a public employee must receive notice and a hearing prior to termination from employment, *Herrera v. Union No. 39 School Dist.*, 2006 VT 83, ¶¶ 24–27, 181 Vt. 198; *In re Towle*, 164 Vt. 145, 153 (1995), the evidence in this case is not sufficient to create a genuine factual issue on the question of whether Plaintiff received adequate due process at his termination hearing. It is undisputed that Plaintiff received notice several days before the hearing, and that Defendants permitted Plaintiff to present hours of testimony on his behalf and to refute the evidence against him. No more was required under the circumstances to vindicate Plaintiff's due process rights. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (indicating due process only requires employees be given the opportunity to be heard in a "meaningful manner").

Good Faith

Finally, Plaintiff claims Defendants violated the duty of good faith in his contract when the Superintendent prevented Plaintiff from exercising his rights under the contract. "[T]he covenant of good faith and fair dealing is an implied promise that protects against conduct which violates community standards of decency, fairness or reasonableness." *Ferrisburgh Realty Investors v. Schumacher*, 2010 VT 6, ¶ 26, 187 Vt. 309 (internal quotations omitted). Plaintiff may assert a claim for a violation of the covenant of good faith that is separate from a breach of contract claim if the claims stem from different conduct. *Id.*

Plaintiff has not asserted sufficient facts for a reasonable jury to conclude the Superintendent violated the duty of good faith. The complaint does not indicate how Defendants violated the covenant of good faith. Plaintiff's response to the motion for summary judgment indicates the Superintendent prevented Plaintiff from exercising his rights under the contract. However, Plaintiff does not explain which rights the Superintendent violated. Presumably, Plaintiff means the Superintendent violated his right to a just-cause termination. However, the implied contract stemming from the December 2008 Agreement did not require cause. Therefore, Plaintiff's claim that Defendants violated the covenant of good faith fails as a matter of law.

**Order**

Defendants' Motion for Summary Judgment (MPR #6), filed May 1, 2012, is ***granted*** as to Counts 3, 4, and 5 (breach of contract, due process, and breach of the covenant of good faith and fair dealing) and ***denied*** as to Counts 1 and 2 (unlawful termination and retaliatory termination).

Dated at Woodstock, Vermont on November 7, 2012

Harold Eaton
Superior Court Judge

FILED
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