Soalablai v. Palau Nat'l Communications Corp., 13 ROP 199 (Tr. Div. 2005)

PRISCILLA SOALABLAI,
Plaintiff,

v.

PALAU NATIONAL COMMUNICATIONS CORPORATION,
Defendant.

CIVIL ACTION NO. 03-282

Supreme Court, Trial Division
Republic of Palau

Decided: September 27, 2005

LARRY W. MILLER, Associate Justice:

Following a trial in February of this year, and the submission of written oral arguments in April and July, this matter is now before the Court for decision. This opinion constitutes the Court's findings of fact and conclusions of law.

The historical facts are not in dispute. Plaintiff Priscilla Soalablai was Assistant General Manager/Chief Financial Officer of defendant Palau National Communications Corporation ("PNCC"). After many apparently positive years with the company, ⊥200 an FBI investigation arising out of Saipan, followed by an investigation by the Special Prosecutor here, brought to light that she had used her PNCC business calling and credit cards to charge thousands of dollars worth of personal calls to the company. The exact figure was never made clear on the record (and may no longer be calculable), but plaintiff entered into a settlement agreement with the Office of the Special Prosecutor by which -- although she did not admit to any wrongdoing -- she agreed to pay $15,000.00 in restitution to PNCC in addition to a $5,000.00 civil penalty. Almost simultaneously with her execution of the settlement agreement (actually a day earlier), plaintiff was placed on administrative leave with pay. Two weeks later, she was informed by memorandum from PNCC's general manger, Ed Carter, of his preliminary decision to terminate her employment. Referring to her agreement with the Special Prosecutor, the memo stated:

> The documents and records supporting your admission reveal that you routinely placed lengthy long distance telephone calls to family members and friends and either charged them to the PNCC calling card issued to you or charged them to your hotel bills when you were traveling on behalf of PNCC and attending off-island conventions and seminars.
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> Your actions as set forth above are a clear violation of PNCC's Personnel Policy Rules and Regulations (Part D.1.B.(1),(7) & (8)), which specifically prohibit stealing, improper use of PNCC property, and falsifying PNCC records or documents and which support the dismissal of a PNCC employee.

The memo placed her on leave without pay and outlined her rights pursuant to the PNCC Personnel Policy.[1]

There followed a series of submissions by plaintiff and her counsel, first to Ed Carter, and then to the PNCC Board of Directors, responding to the charges against her, but ultimately to no avail. Carter issued a Notice of Dismissal on June 20, 2003, the Board upheld his decision by letter dated July 21, 2003, and finally denied her request for reconsideration by letter of July 31, 2003. This action was filed on August 29, 2003, seeking, *inter alia* , a declaration that her termination was contrary to law as well as backpay and other damages.

The parties devote their closing arguments to disputing whether the facts set forth above justified plaintiff's termination. Plaintiff argues that those facts do not amount to "stealing," "improper use of PNCC property," or "[f]alsifying PNCC records or documents" that were the stated bases for her dismissal. She contends, among other things, that it was not improper to use her PNCC calling and credit cards so long as she paid for the charges incurred, and says that she always intended to do that, but that there was no mechanism in place to transfer those charges to her personal account.

⊥201 PNCC responds that it was improper according to written policy for plaintiff to use her business credit cards for personal use, that she did not ever reveal that she had done so -- much less begin to pay the resulting charges -- until the matter came under investigation, and that, to the extent that there needed to be some mechanism in place to ensure that the charges were properly reflected as personal in nature, it was plaintiff's responsibility, as chief financial officer, to implement such a mechanism.

While not wishing to raise new issues, [2] the Court believes that some legal framework is necessary in which to consider the conflicting interpretations of the facts offered by the parties. Specifically, as the Supreme Court of California has posed the question:

> When an employee . . . is fired for misconduct and challenges the termination in court, what is the role of the jury in deciding whether misconduct occurred? Does it decide whether the acts that led to the decision to terminate happened? Or is its role to decide whether the employer had reasonable grounds for *believing* they happened and otherwise acted fairly?

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[1] A revised memorandum, issued on June 6, 2003, set forth additional matters concerning plaintiff's travel vouchers for the years 2000 and 2002 that were said to constitute independent and additional grounds for dismissal.

[2] The Court thus foregoes any consideration of the effect on this action, if any, of PNCC's status as a public corporation wholly-owned by the national government. See 15 PNC § 311(a). Likewise, the Court assumes for purposes of this case that the explicit language of the PNCC Personnel Policy, to the effect that "the[] employer/employee relationship with PNCC will be strictly governed in accordance with the provisions [t]hereof", makes those provisions a part of the contract between plaintiff and PNCC and obviates any need to canvass the differing approaches courts have taken in dealing with the impact of employee manuals. *Compare* 82 Am. Jur. 2d Wrongful Discharge § 22 (2003) *with id.* § 23.

Soalablai v. Palau Nat'l Communications Corp., 13 ROP 199 (Tr. Div. 2005) *Cotran v. Rollins Hudig Hall Int'l* , 17 Cal. 4 th 93, 948 P.2d 412, 414 (1998) (emphasis in original).

> California and the majority of U.S. states[3] have answered the question as follows:
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> The proper inquiry for the jury . . . is not, 'Did the employee *in fact* commit the act leading to dismissal?' It is 'Was the factual basis on which the employer concluded a dischargeable act had been committed reached honestly, after an appropriate investigation and for reasons that are not arbitrary or pretextual?'

Id. at 421-22 (emphasis in original). Or, as another court has put it, "the fact finder must focus not on whether the employee actually committed misconduct; instead, the focus must be on whether the employer reasonably determined it had cause to terminate." *Conner v. City of Forest Acres*, 348 S.C. 454, 560 S.E.2d 606, 611 (2002). This approach, it has been said, "strikes a balance between the employer's interest in making needed personnel decisions and the employee's interest in continued employment," *Baldwin v. Sisters of Providence in Washington* , 112 Wash. 2d 127, 769 P.2d 298, 304 (1989), by ⊥202 "recogniz[ing] that an employer's justification for discharging an employee should not be taken at face value but also recogniz[ing] that a judge or jury should not be called upon to second-guess an employer's business decisions." *Uintah Basin Medical Ctr. v. Hardy*, 110 P.3d 168, 175 (Utah App. 2005).

Although a minority of courts have used other approaches, [4] the Court believes that the majority standard is appropriate in this case. [5] Applying that standard, it finds that PNCC's determination to dismiss plaintiff should be upheld. Plaintiff does not contest the accuracy of the underlying facts relied on by PNCC's general manager and its board of directors, nor does she contend that they were merely a pretext masking some other motivation they had for firing her. Rather, it is her position, as noted above, that the facts simply did not provide a sufficient basis for her dismissal. Thus, the only question is whether, based on these facts, PNCC "reasonably determined it had cause to terminate?" The answer, it seems to the Court, is plainly yes.

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[3] *See Towson University v. Conte*, 384 Md. 68, 862 A.2d 941, 950-51 (2004) (citing cases).

[4] Some states require a *de novo* review of the employer's action. *E.g., Toussaint v. Blue Cross & Blue Shield of Mich.* , 408 Mich. 579, 292 N.W.2d 880, 895 (1980) ("The jury as trier of fact decides whether the employee was, in fact, discharged for unsatisfactory work."). Although *Gaudio v. Griffin Health Servs. Corp.* , 249 Conn. 523, 733 A.2d 197 (1999), is sometimes cited as exemplifying the opposite extreme of giving complete deference to an employer's action, *see id.* at 208 ("[A]n employer who wishes to terminate an employee for cause must do nothing more rigorous than 'proffer a proper reason for dismissal.'"), the dissenting opinion in that case suggests that the jury instructions upheld by the court "allow[] de novo review" and urges adoption of the majority rule. *See id.* at 220.

[5] In the vast majority of cases where the facts are disputed, a court is better suited to policing the fairness of the decision-making process than to reweighing the facts and substituting its employment decisions for the employer's. The most compelling case for applying *de novo* review, *see* n.4 *supra*, would be one in which it was clear by the time of trial that the employer had gotten its facts wrong. In such a case, though, it ought to be easy to show under the majority standard that an employer had acted unreasonably and/or in bad faith. If a case arose where an employer had acted reasonably and fairly but still made a mistake, one would imagine (or at least hope) that settlement would be likely.

"Stealing" – to take the most serious charge against plaintiff – is "the generic designation for dishonest taking" and "may include a broad range of dishonest acts that result in appropriation of the property of another ..." 50 Am. Jur. 2d Larceny § 5 (1995). It is plaintiff's position that she never took anything from PNCC because she always intended to pay the cost of the calls she had made. The Special Prosecutor did not charge plaintiff with committing any crime, nor would it be appropriate for the Court to conclude that she did. Nevertheless, the Court cannot say that it was unreasonable in the circumstances for PNCC's management to draw the opposite inference – that she had no intent to pay for the calls (and would not have if the outside investigations had not brought them to light) – from her failure to take any steps to do so before that time. Years had passed from the time when plaintiff had begun to make the calls, yet she had not paid for a single one of them, nor even acknowledged to anyone that it was her responsibility to do so. For this reason, the evidence that sometime during this period plaintiff increased her allotment to pay off other amounts owing to the company is of little weight. Indeed, even at the increased rate, plaintiff was a long way from paying off the debts that were ⊥203 acknowledged. Likewise, plaintiff's protestation that she never made any attempt to evade responsibility to pay for the calls must be considered in the light of the further fact that one of her responsibilities as chief financial officer was to report to the general manager concerning overdue accounts of PNCC employees. It appears that plaintiff's own name should have been at or near the top of the list, but it never was.

Could PNCC have chosen, even in the face of these facts, to give plaintiff the benefit of the doubt and keep her with the company? The answer is yes, and it is not the Court's role to say what it should or shouldn't have done. It is sufficient, the Court believes, to say that it was not unreasonable for the company to have lost its trust in plaintiff and to choose to part ways with her. Judgment will accordingly be entered in favor of PNCC and against plaintiff.