

VT SUPERIOR COURT
WASHINGTON UNIT
STATE OF VERMONT

SUPERIOR COURT
Washington Unit

2016 DEC -9 P 2:04

CIVIL DIVISION
Docket No. 424-7-16 Wncv

NANCY ANNE THORPE
Plaintiff

v.

KINGSBURY COMPANIES, LLC
Defendant

DECISION

Defendant's Motion for Judgment on the Pleadings

Plaintiff Nancy Anne Thorpe claims that her employment as a "controller" with Defendant Kingsbury Companies, LLC was wrongfully terminated due to her age (count 1), in violation of public policy after she internally reported financial misfeasance (count 2), and in violation of a binding discipline policy in the employee handbook (count 3).¹ Kingsbury has filed a Rule 12(c) motion for judgment on the pleadings addressing counts 2 and 3 only. It argues that no actionable public policy is at issue in this case and the handbook did not limit its discretion to terminate Ms. Thorpe's at-will employment.

Discharge in violation of public policy

In count 2, Ms. Thorpe alleges that she was fired because she reported to Kingsbury that one of its owners was paying his spouse though she performed no services for the company, and he was paying his family's personal expenses with Kingsbury funds and then unlawfully deducting them as Kingsbury's business expenses. She claims that her termination was unlawful as violating a public policy. "In Vermont, under an 'at will' employment contract, an employee may be discharged at any time with or without cause, 'unless there is a *clear and compelling* public policy against the reason advanced for the discharge.'" *Payne v. Rozendaal*, 147 Vt. 488, 491 (1986) (citation omitted).

Kingsbury argues that Ms. Thorpe has failed to allege any such clear and compelling public policy and that, at most, her allegations describe private concerns to which this exception to the at-will relationship does not apply. See *id.* at 494. Ms. Thorpe responded by citing several Vermont statutes setting forth duties and obligations that members and managers of limited liability companies have to each other. However, she did not explain how any of these statutes might serve as a basis for a clear and compelling *public* policy that her discharge violates and none is apparent. See *id.* at 492–93 (describing the qualities of the inherently *public* interests the exception protects).

¹ The complaint does not describe the job duties of a "controller" and, in its answer, Kingsbury denies that it has any such position. Nevertheless, the purport of the complaint is clear enough that Ms. Thorpe's role gave her some insight into Kingsbury's financial dealings.

Regardless, the court declines to dismiss the public policy claim now. The allegations of the complaint can be cogently read to assert that an owner of Kingsbury is improperly diverting company funds to personal uses and then manipulating Kingsbury's accounting records both to hide the misfeasance and avoid taxes. Ms. Thorpe specifically alleges that the owner is doing this unlawfully. It is fair to interpret this as a whistleblowing claim about tax fraud. See Stephen P. Pepe and Scott H. Dunham, *Avoiding and Defending Wrongful Discharge Claims* § 1.7 ("Many courts have recognized a common law cause of action when an employee is terminated in retaliation for what is called 'whistleblowing,' a very broad category of situations in which an employee reports, exposes or protests, either publicly or within the organization, either the employer's or a fellow employee's criminal, immoral or otherwise improper activity."). The law on whistleblower claims in the public policy context is not developed in Vermont. This claim will be more effectively "explored in the light of facts as developed by the evidence." *Alger v. Dep't of Labor & Indus.*, 2006 VT 115, ¶ 12, 181 Vt. 309.

The court acknowledges that the allegations are exceptionally vague and include no details of the alleged wrongdoing. However, the purpose of the complaint "is to initiate the cause of action, not prove the merits of the plaintiff's case." *Colby v. Umbrella, Inc.*, 2008 VT 20, ¶ 13, 184 Vt. 1. The mere absence of an allegation or an element is not a proper basis for dismissal. *Id.*; see also 5A Wright & Miller, *Federal Practice and Procedure: Civil 2d* § 1356, at 296 ("The Rule 12(b)(6) motion . . . is not designed to correct inartistic pleadings."). Moreover, though allegations of fraud need to be pleaded with particularity, Rule 9(b), and here they are not, Kingsbury has not objected on this ground. Rule 9(b) is, in any event, a rule of pleading; it is not a rule of dismissal. See Wright & Miller, 5A Fed. Prac. & Proc. Civ. § 1296 ("Courts infrequently dismiss with prejudice for a failure to plead with sufficient particularity, at least not without providing an opportunity to replead. To impose such a drastic sanction for a pleading defect arguably is at odds with the liberal approach the federal rules as a whole take to the pleading phase of litigation [which is all the more liberal in Vermont] and could lead to injustice.").

Discharge in violation of the disciplinary policy

Ms. Thorpe claims that Kingsbury's discretion to terminate her employment was limited by the written discipline policy in the employee handbook and it failed to follow that policy. She does not allege any course of conduct or other basis for limiting Kingsbury's discretion to terminate her employment. Kingsbury asserts that the employee handbook unambiguously did not limit its discretion to terminate her employment.

Generally, "a contract for employment for an indeterminate period of time may be terminated by either party at any time with or without cause." *Jones v. Keogh*, 137 Vt. 562, 563 (1979). "[D]isciplinary procedures are not inconsistent or in conflict with the at-will doctrine. They may, however, create an enforceable promise to use those procedures." *Ross v. Times Mirror, Inc.*, 164 Vt. 13, 21 (1995) (citation omitted). A mere disclaimer attempting to preserve the at-will relationship may be ineffective. *Dillon v. Champion Jogbra, Inc.*, 175 Vt. 1, 7 (2002). "When the terms of a manual are ambiguous . . . or send mixed messages regarding an employee's status, the question of whether the presumptive at-will status has been modified is

properly left to the jury.” *Id.* at 6-7 (original emphasis removed). This is precisely what Ms. Thorpe claims in this case, that a disclaimer in the handbook does no more than send mixed messages about employees’ job security.

There is, however, no ambiguity in the employee handbook, which clearly preserves Kingsbury’s discretion to terminate an employee’s employment consistently with the at-will relationship.² The handbook begins with a “purpose” paragraph describing the president’s discretion to deviate from anything in the handbook. It then says, “That said, the Company’s at-will policy remains constant. The employment relationship between the Company and its employees is on an at-will basis, as described in the At-Will policy below.” Handbook ¶ 1.

The At-Will policy immediately follows:

Kingsbury Companies LLC maintains an at-will employment relationship with its employees. Employment with KCOS is not for any specific term. Nothing in these policies should be construed as being inconsistent with or modifying the Company’s policy of maintaining an at-will employment relationship with its employees. As a result, employment may be ended either by the employee, or by KCOS, for any reason not against the law or for no reason and at any time, with or without notice.

Id. ¶ 1. The progressive discipline policy appears in a paragraph entitled, “Corrective Action.” *Id.* ¶ 11. The preservation of the at-will relationship is reiterated four times in that paragraph:

Generally, *while preserving its rights under KCOS’s At Will policy*, the Company will give an employee three opportunities

However, each situation involving corrective action will be judged on its own merits, and the Company reserves the right to determine, in its sole discretion and *consistent with its At Will employment relationship with its employees*, the appropriate remedy in each situation. . . .

Corrective actions may include, but are not limited to, and of the following, depending on the circumstances: . . . *immediate termination*.

The Company reserves the use of any form of corrective action and in any order as it deems to be appropriate in a particular instance, and reserves the right to dismiss any employee, with or without cause at any time.

Id. ¶ 11 (emphasis added). There are no countervailing assertions in the handbook that create any ambiguity about the preservation of the at-will relationship.

As a matter of law, this claim has no merit.

² The handbook is incorporated into the complaint by reference and was submitted into the record by Kingsbury without objection for purposes of its motion for judgment on the pleadings.

ORDER

For the foregoing reasons, Kingsbury's motion for judgment on the pleadings is denied as to count 2 and granted as to count 3.

The attorneys shall submit a stipulation for a pretrial order no later than December 30, 2016, or a scheduling conference will be set.

Dated at Montpelier, Vermont this 9th day of December 2016.

Mary Miles Teachout
Mary Miles Teachout
Superior Judge