

IN THE HIGH COURT
OF THE
REPUBLIC OF THE MARSHALL ISLANDS

DAMIEN CAPELLE,)
)
 Plaintiff,)
 v.)
)
 COLLEGE OF THE MARSHALL)
 ISLANDS,)
)
 Defendant.)
 _____)

CIVIL ACTION NO. 2011-095

DECISION

FILED

MAR 14 2013

Shaw
ASST. CLERK OF COURTS
REPUBLIC OF MARSHALL ISLANDS

Plaintiff Damian Capelle filed a complaint against defendant College of the Marshall Islands (“CMI”) and certain individual defendants on May 19, 2011 for wrongful termination and breach of contract. Trial was held on May 16, 2012. At trial the court heard testimony from Damian Capelle and Rachel Solomon in plaintiff’s case in chief, and from Donna Seppy and Robert Wilson in CMI’s defense. Numerous exhibits were admitted for plaintiff and defendant. Written closing arguments were submitted by the parties, the last filed on January 28, 2013.

The court finds that defendant wrongfully terminated plaintiff and defendant shall pay plaintiff damages in the amount of \$18,249.

I. FACTS

Damian Capelle had worked continuously for CMI¹ since 2004 on the basis of successive two year term contracts, the last of which began on August 21, 2010. His job title in the last

¹Judgment was entered, without objection, for defendants Robert Wilson, Donna Seppy and Angelina La’aw at the close of plaintiff’s case. Defendant Kenneth Woodbury was dismissed without prejudice at the same time.

contract² was Coordinator of Student Athletics and Recreation at an annual salary of \$18,249. While he had in the past received generally good personnel reviews, on December 14, 2010 he received a letter from his immediate supervisor, Rachel Solomon, Director for Student Engagement, advising him of problems with attendance. Later in January there were two instances of contact with Capelle recorded by Donna Seppy, the newly hired interim Dean of Student Services and Capelle's second level supervisor. On January 12, 2011, he met with Seppy to discuss "his request to relocate office space."³ The following day he met with Seppy to request time off to "fix my truck."⁴

On February 2, 2011 Capelle was requested to attend a meeting with four representatives of the College: Robert Wilson, Human Resources Director; Donna Seppy, interim Dean of Student Services; Robert Rivercomb, Director of the ABC Toolbox Program, Arrak Campus; and Angelina La'aw, Human Resources assistant director. At the meeting he was presented with a memo entitled "Disciplinary Action/Failure to Abide by the College's Standards of Conduct and Work Performance."⁵ The memo stated he was subject to immediate termination for failure to adhere to the standard of conducts. Further, it stated he would be terminated immediately unless he accepted a position at the Arrak Campus as Assistant Director of the ABC Toolbox Program at the same salary he was currently receiving, but with certain conditions attached. The memo provided that he should respond by 5:00 p.m. the following day, February 3, 2011.

²Plaintiff's Exhibit I.

³Plaintiff's Exhibit L.

⁴*Ibid.*

⁵Plaintiff's Exhibit N, Defendants' Exhibit A.

Failure to respond by that time would be considered refusal to accept the position and result in his termination effective February 3, 2011.

At the February 2 meeting, there was some discussion of grievance procedures (testimony of Damian Capelle, Tr. 43⁶; testimony of Donna Seppy, Tr. 95- 96; testimony of Robert Wilson, Tr.133, 134.) Wilson told Capelle he would have 24 hours to file any grievance (Tr. 135.) Specifics of the charges mentioned in the memo did not come up (Tr. 100.) Plaintiff did not expressly accept or reject the offer in the memo at the meeting (Tr. 103, 104.) There was no discussion of the proposed new position for plaintiff (Tr.70.)

Following the meeting, Capelle met briefly with his immediate supervisor Rachel Solomon, HR Director Wilson, and President of the College Kenneth Woodbury. At the meeting with Woodbury, “he wasn’t really, my impression, was supportive of me as the President I though he was gonna be supportive, and be like okay bring in the Supervisor, bring in Bob, nothing happened then.” (Tr. 25.) Instead, Woodbury said ‘you need to take what they’re offering.’ (Tr. 25.) Feeling he had run out of options (Tr. 25), the following day, February 3, 2011, Capelle turned in his keys, received clearance papers, and sent out an email directing inquiries to his supervisor (Tr 61-63.)

Capelle sought legal advice from Micronesian Legal Services Corporation and attorney Robert Catz undertook his representation. Catz gave notice of his client’s intention to sue the College for damages in his letter of February 15, 2013⁷ to President of the College

⁶References to the transcript of the May 16, 2012 trial will be abbreviated as Tr. followed by the page number.

⁷Plaintiff’s Exhibit P.

Kenneth Woodbury. On February 24, 2011, he followed up with a letter⁸ to President Woodbury demanding a hearing to contest the unfounded allegations of misconduct contained in the February memo. The College responded to Catz on February 25, 2011⁹ asserting that Capelle had been informed of his right to use the grievance procedure at the February 2, 2011 meeting and that the manner of doing so was through a written request to the President submitted "by the end of the next day, i.e., in twenty four hours." It advised Capelle's failure to do so lost him the protections of the College's human resource policies.

After the loss of his job with the College, plaintiff sought other work at a salary close to what he was earning at the College to support his family and pay off loans (Tr. 36.) He ultimately found work with the Marshall Islands Police Department as a Lieutenant in the Internal Affairs Division in February of 2012 (Tr. 4) which position he held at the time of trial.

II. DISCUSSION

A. Plaintiff was terminated by Defendant.

The parties disagree about how to characterize the effect of the February 2, 2011 memo.¹⁰ Plaintiff asserts the effect of the memo and the meeting of that date was to terminate the plaintiff. Defendant contends the effect of the memo and meeting was a transfer pursuant to the College's requirements and plaintiff "self-terminated." The court finds the effect of the memo and meeting was the termination of the plaintiff by the defendant.

The subject line of the memo established the nature of the memo: "Disciplinary

⁸Plaintiff's Exhibit Q.

⁹Plaintiff's Exhibit R.

¹⁰Plaintiff's Exhibit N, Defendants' Exhibit A.

Action/Failure to Abide by the College's Standards of Conduct and Work Performance." By its own language, the memo was explicitly a "disciplinary action." Indeed, throughout the entire memo there was never the mention of the word "transfer." The first sentence of the memo continued in this vein, stating the purpose of the memo. "The purpose of this Memo is to notify you in writing of your failure to abide by the College's General Standards of Conduct and Work Performance." Again, there was no mention of a transfer being the subject of the memo. The balance of page one and through half of page two of the memo set out the standards of conduct to which plaintiff allegedly failed to adhere and behaviors which established cause for disciplinary action, "up to and including termination of employment."

The memo continued: "By all rights you should be immediately terminated from employment because of the above mentioned failures in your conduct." Despite this, the memo stated "you will be afforded a final opportunity, in a different position, to prove that you can abide by the standards of conduct expected of an employee of the College." That "opportunity" was for the "period of (90) ninety days" to start immediately as Toolbox Programs Coordinator at the Arrak Campus. During that time, the memo listed five "expectations." If those expectations were not met, "whatever the cause," the result would be plaintiff's "immediate, on that day, termination from employment at the College."

The memo went on to state that if plaintiff did not accept this "opportunity," "this letter shall serve as notice of your immediate termination from employment with the College of the Marshall Islands for failure to abide by the College's standard of employee conduct." The February 2 memo required that he return it with an indication of acceptance or otherwise of the position "as offered" by five p.m., Thursday, February 3, 2011. The memo went on to set down in no uncertain terms that "[f]ailure to return this letter, with your decision and signature, will be

interpreted to mean that you do not accept the position as offered resulting in your termination from employment with the College effective February 3, 2011."

Whether the offered position constituted a lawful transfer under section 5.2.8 of the College of the Marshall Islands Human Resources Policy and Procedure Manual, August 2009¹¹ ("Manual") or not is immaterial to the effect of plaintiff's failure to return the February 2 memo by 5 p.m. that Thursday. Failure to accept the position as offered specifically resulted in plaintiff's "immediate termination from employment with the College of the Marshall Islands for failure to abide by the College's standard of employee conduct." He was terminated by his employer by the terms of the memo. Offering the plaintiff an alternative position did not excuse the College from following the procedural requirements for termination of an employee set out in the Manual.

Defendant suggests that plaintiff's actions on February 3, 2011 constituted some sort of "abandonment" or "self-termination" of his employment with the College. The actions referenced by defendant are that the plaintiff turned in his keys, filled out his clearance form and sent out a good-bye email.¹² None of these actions are inconsistent with a determination that defendant terminated the plaintiff. Reference to the Employee Clearance Form¹³ indicates in the instructions that the employee must complete the form "prior to separation." Part of that process is turning in his keys (see entry for "Physical Plant.") Completing those tasks is not inconsistent with the termination of plaintiff by defendant pursuant to the February 2 memo, because they are

¹¹Plaintiff's Exhibit M.

¹²Defendant CMI's Closing Argument, filed January 28, 2013, p. 5.

¹³Defendant's Exhibit D.

to be done *before* separation. Similarly the referenced email¹⁴ does not show or even suggest the plaintiff was not terminated under the terms of the February 2 memo. On its face, it was sent at 5:26 p.m. on February 3, after his termination under the February 2 memo, which by its terms, terminated plaintiff immediately if it was not returned by "5pm, Thursday, February 3, 2011." These actions do not show plaintiff was not terminated by defendant.

To the contrary, the College treated the plaintiff as terminated. The Personal Action Form¹⁵ requested by Donna Seppy, certified by Robert Wilson and approved by President Woodbury on February 8, 2011, designated the action as a "termination" not a resignation or "other" action. The effective date of the action was February 3, 2011, consistent with the termination effected by the February 2, 2011 memo. The surrounding circumstances and explicit language of the memo itself show it was a disciplinary action, specifically an involuntary termination.

B. The College wrongfully terminated plaintiff by failing to follow its own procedures to terminate plaintiff.

The College of the Marshall Islands Act of 1992 specifically provides that an employee of the College may be dismissed only as provided in the personnel regulations of the College.¹⁶

¹⁴Defendant's Exhibit C.

¹⁵Plaintiff's Exhibit O.

¹⁶14 MIRC Sec. 211(3): "Except for officials of the College serving at the pleasure of the Board, every official, faculty member, and other employee of the College shall be entitled to hold his or her position during good behavior, subject to suspension, demotion, layoff, or dismissal only as provided in the personnel regulations of the College; provided that the tenure of a contract employee is the term stated in his or her contract."

The Manual represents those regulations.¹⁷

Section 9.2.1(b) of the Manual sets out the procedure for "Cessation With Cause," and includes the following steps:

- 1) a confidential discussion between the Human Resources Director and the employee about the grounds for dismissal;
- 2) if the matter remains unresolved, the HR director notifies the President of the college, who then appoints an investigating committee;
- 3) the committee reviews the grounds and gives a written report within 10 days of the notification to the President;
- 4) a hearing may then be requested by the President, committee or employee, which must be held within 30 days of the request;
- 5) the hearing committee submits a written recommendation to the President;
- 6) the President prepares a written statement including the hearing committee's recommendation, which is submitted to the Board of Regents;
- 7) The Board may sustain or not concur with the recommendation of the hearing committee. If there is no concurrence, the matter is returned to the hearing committee which submits a second decision to the Board through the President;
- 8) The Board may sustain, overrule, or alter the decision. The Board's decision is final and is conveyed to the employee by the President and HR director.

Without regard to these procedures, the February 2 memo states "Should you decide not to accept the opportunity described above, this letter shall serve as notice of your *immediate*

¹⁷Manual, Sec. 1.2.1: "This Manual articulates the Human Resources policies, rules and *regulations* enacted under the authority of the College's Board of Regents." (emphasis added)

termination from employment with the College of the Marshall Islands for failure to abide by the College's standard of employee conduct." (emphasis added.) In fact, there is no procedure for "immediate termination" in the Manual. Indeed, the Manual provides that during the process for cessation for cause, "[s]uspension of the employee during the proceedings is permissible only if there is a threat of harm to the employee or others" (Section 9.2.1(b)(vii).) Only in such an extreme case would "suspension" be justifiable during the termination process. Such extreme circumstances were not presented in this case. If suspension would not have been justified in the present case, it is difficult to see how an "immediate termination," a more drastic response which is not recognized by the policies set out in the Manual, could be permitted. The plaintiff was terminated without regard to his procedural rights set out in the Manual.

Defendant does not contend that it followed these procedures for the termination of Capelle. Rather it argues that if plaintiff felt the proper procedures were not being followed, he was obligated to file a grievance. By not filing a grievance, the College asserts, plaintiff failed to exhaust his administrative remedies, so that he lost his opportunity to complain of the alleged procedural deficiencies.

C. Plaintiff did not lose the right to bring this action because of a failure to exhaust his administrative remedies.

The court is not persuaded by defendant's exhaustion argument for two reasons. First, the College failed to properly notify plaintiff of his appeal rights. As noted above, the February 2 memo was a disciplinary action. Section 4.5.5 of the Manual sets out the procedures for written notification of disciplinary action. Section 4.5.5(a) of the Manual provides in part: "The Employee has the right to appeal such action under paragraph 4.6.2, Grievance Resolution Procedure." Critically, Section 4.5.5(b) sets out the requirements for notice of the disciplinary

action:

The notice shall specify grounds and conditions and include:

- i. The date of determination
- ii. The nature of the determination and the effective date.
- iii. The reasons for the determination as stated.
- iv. The rights of the Employee to examine his/her Human Resources file and examine all written evidence which has a bearing on such determination.
- v. The rights of the Employee to appeal the decision of the President. This requirement may be satisfied by referring to or including a copy of the relevant Human Resources policies.

The February 2 memo was deficient. It failed to include plaintiff's right to examine his file and, perhaps more importantly, it failed to include his rights to appeal the decision. While testimony suggested that reference was made to the grievance procedure at the February 2 meeting, there is no suggestion that the time for filing such appeal under the Manual was mentioned. On direct examination, Robert Wilson, the Human Resources Director was asked by defense counsel about the discussion of grievance procedures at the February 2 meeting with plaintiff: "Q: You didn't say anything about five days did you? A: No." In contrast to the policies set out in the Manual, plaintiff was told he had only twenty four hours to file any appeal or grievance of the termination. On cross examination of Robert Wilson confirmed his view that plaintiff had only twenty four hours from the February 2, 2011 meeting to submit any grievance (Tr. 122, 135.)

There was a clear failure by the College to comply with the requirements for notification of the employee of disciplinary action, specifically in relation to his rights to appeal the decision. Because of that failure, the time for filing such appeal never started to run. In *Romulus v. Anchorage School Dist.*,¹⁸ "Romulus was told he was suspended, but not informed that after ten days, he would be barred from contesting the adverse action." The court noted: "ASD never

¹⁸*Romulus v. Anchorage School Dist.*, 910 P.2d 610, at 615 (1996).

informed Romulus that under the Exempt Manual, he had ten days to grieve his unpaid suspension." The Court found "due process requires prior notice where an agency invokes a relatively brief time bar to block the administrative appeal of an employment termination decision."

Strict compliance with administrative procedures relating to notice has been found to be necessary for an agency asserting a failure to exhaust administrative remedies. In *Sun Refining & Marketing Co. v. Brennan*, the court determined that the fifteen day period for filing an appeal from a decision of the Board of Building Appeals did not start to run against the refining company because the Board did not comply with the procedural requirement that notice of the Board's decision must be mailed directly to the affected party, even though the Board did mail copy to company's attorney.¹⁹

Secondly, plaintiff is excused for any failure because his attempt to exercise the appeal rights would have been futile. Even had plaintiff been properly informed of his right to appeal the decision, his attempt to exercise it would have been futile because of defendant's position that once terminated, he was no longer subject to the protection of the Manual. This was made clear in the letter to plaintiff's counsel in response to his February 15 and 24, 2011 letters to the President. In that response letter dated February 25, 2011, it was stated that Damian was told he could use the grievance procedure. However, "he was told that a written request to the President would be necessary to initiate the process for review of the disciplinary action and the proposed transfer and that such request would need to be received in the Human Resources Department by

¹⁹*Sun Refining & Marketing Co. v. Brennan*, 31 Ohio St.3d 306 (1987).

the end of the next day, i.e. in twenty four hours."²⁰ Had he attempted to utilize the procedure in the Manual, which provided for five days, after the twenty four hours noted in the College's February 25 letter, it would have been rejected, as he had "lost the protection afforded by the human resource policies of the College."²¹

A twenty four hour period for filing a grievance to protest his involuntary termination, in contravention of his procedural rights set out in the Manual, is inconsistent with due process.

D. The College is liable to Plaintiff for \$18,249.

The measure of plaintiff's damages is the value of the balance of his contract, less the value of any employment he gained before the end of his contract. His two year contract with the College commenced on August 21, 2010 at an annual salary of \$18,249. He was terminated on February 3, 2011. He began work for the National Police in February of 2012. His exact salary as a Lieutenant for Internal Affairs was not presented at trial, but he testified "I needed to find a job that had a salary that was close enough to my old salary so that I can pay off the loans." (Tr. 36.) In the absence of better information, the court finds he started his new position one year after he was terminated at the same salary as his old position with CMI. The value of one year under his CMI contract, based upon the evidence presented at trial, was his annual salary.

No evidence was presented to support plaintiff's claim for \$5,000.00 in compensatory damages for "out-of-pocket expenses incurred looking for employment and paying loan fees for late payments during the unemployed period"²² and no award is made for such.

²⁰Plaintiff's Exhibit R.

²¹*Ibid.*

²²Plaintiff's Closing Argument/Brief, filed January 4, 2013, p. 23.

Plaintiff has requested punitive damages. The court believes the College is not liable for punitive damages. The College of the Marshall Islands Act of 1992 provides: “In as much as the College is chartered as a nonprofit corporation by the Nitijela, it is hereby provided that the limits of liability applicable to the Republic shall apply to any suit brought against the College in the courts of the Republic.”²³ The Government Liability Act provides: “The Government shall not be liable for interest prior to judgment or for punitive damages.”²⁴ In any case, the court does not believe punitive damages are justified in this case. The Supreme Court has stated “punitive damages are awarded to punish a person ‘for his outrageous conduct and to deter him and other like him from similar conduct in the future.’ Restatement (Second) of Torts § 908(1) (1964).”²⁵ The Supreme Court quoted the Restatement further:

Since the purpose of punitive damages is not compensation of the plaintiff but punishment of the defendant and deterrence, these damages can be awarded only for conduct for which this remedy is appropriate – which is to say, conduct involving some element of outrage similar to that usually found in crime. Restatement (Second) of Torts § 908 cmt b (1964).

The conduct involved here does not involve some element of outrage similar to that usually found in crime.

III. CONCLUSION

Plaintiff Damian Capelle was involuntarily terminated from his employment with the College by the February 2, 2011 memo from defendant to him. The termination was wrongful in that it failed to follow the procedures set out in the College’s Human Resources Policy and

²³14 MIRC Section 226(a).

²⁴3 MIRC 1005(4).

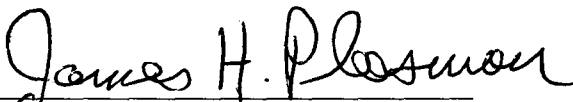
²⁵*Guaschino v. Reimers and Reimers*, 2 MILR 49, 56 (1995)

Procedure Manual. Capelle was not barred from bringing this action for failure to exhaust administrative remedies because of the College's failure to comply with the requirements for notification of the employee of disciplinary action and the futility of attempting to exercise those remedies. Based upon the wrongful termination of plaintiff, he suffered \$18,249.00 in damages for which the defendant is liable.

ORDER

Based upon the forgoing, it is hereby ORDERED that judgment is entered in favor of the plaintiff Damian Capelle against defendant College of the Marshall Islands in the amount of \$18,249.

Date: March 14, 2013.



James H. Plasman
Associate Justice, High Court