

FILED

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

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CLERK U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,

Plaintiff(s),

and

SHERI CALVO, VERONICA FERREK
and MELISSA SCARBOROUGH,

Intervenor/Plaintiffs,

vs.

CASE NO. 8:99-CV-1371-T-17MAP

RIO BRAVO INTERNATIONAL, INC.,
et al.,

Defendants/
Third Party Plaintiffs,

v.

ROBERT EVANS,

Third Party Defendant.

_____ /

ORDER

This cause is before the Court on the Rule 50 Motion of Third Party Defendant Robert Evans, and the response of Third Party Plaintiff.

In ruling on a Motion for Judgment as a matter of law, the district court must deny the motion unless the evidence, viewed in the light most favorable to the nonmoving party, is such that there can be only one conclusion. There must be a complete lack of evidence for the moving party to prevail.

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I. Rule 50 Motion - Robert Evans

Third Party Defendant Evans raises the issue of whether Rio Bravo has stated that the exclusive remedy for a breach of their policies, as to the breach of contract claim and breach of fiduciary duty claim, was termination of Robert Evans' employment with Rio Bravo.

Rio Bravo argued that compliance with policy statements could supply a term and condition of the implied oral contract that is the subject of third party complaint. Accepting as true that Rio Bravo has established that an implied oral contract existed, after considering all the evidence, the uncontroverted evidence, based on Rio Bravo policy, Exh. 204, p. 23, is that in cases of stealing, Rio Bravo would report it to the police and refer the matter to the court system. Several witnesses have stated that fact. In Ex. 204, Rio Bravo states that it is their policy that if an employee is driving a Rio Bravo vehicle or their own vehicle on Rio Bravo business, Rio Bravo will hold the employee responsible for any accidents, fines or violations. The policy specifically contemplates those instances in which Rio Bravo will refer employees to the court system.

Third Party Defendant argues that Rio Bravo should not be heard to say that their policies do not contemplate when they are going to take an employee to civil court for an event that gives rise to liability for Rio Bravo. This is a State of Florida claim; respondeat superior and dangerous instrumentality doctrine would hold Rio Bravo responsible for an accident caused by a Rio Bravo employee. The sexual harassment policy which is the subject of Rio Bravo's pleading states without reservation of

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rights that an employee may be terminated for violation of the sexual harassment policy.

Ex. 204, p. 30, states the conditions under which an employee may be terminated. One condition for termination is disregard or violation of a posted, known, written or verbal company rule procedure or policy. This is an affirmative statement that if policies are violated, the company will terminate the employee. The only testimony from all witnesses is that there is no reason that anyone who works for Rio Bravo would contemplate that they are going to be sued for violation of the sexual harassment policy. The last witness, Mr. Crenshaw, testified that the Crewmember Handbook was presented to the crewmembers without any opportunity to negotiate. Therefore, any ambiguity in the written document should be construed against the drafter. The Handbook is a contract of adhesion to a crewmember, with no opportunity to change its provisions.

Third Party Defendant argues that Rio Bravo has not proven up the existence of an implied contract, and, if it is found that Rio Bravo has done so, the exclusive remedy is the termination of Robert Evans.

Third Party Defendant argues, as to the breach of fiduciary duty claim, any fiduciary duty arose solely through contractual employment relationship with Rio Bravo. Any limitation contained within the contract would also limit Rio Bravo's ability to bring a cause of action under any theory unless they reserved the ability to sue Robert Evans. Rio Bravo reserved only the ability to terminate the employee at will.

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II. Response - Rio Bravo

Third Party Plaintiff Rio Bravo responds that the fact that Rio Bravo did not state in its handbook that it could sue Robert Evans does not prevent it from suing Robert Evans under any viable theory. For example, an employee could be sued for misappropriation of trade secrets, or indemnification for actions that occurred at the restaurant under the Uniform Contribution of Tortfeasors Act, or a suit for replevin of stolen or wrongfully-taken property. The Court has previously denied a Motion for Judgment on the Pleadings on this issue (Dkt. 322). Third Party Plaintiff argues that an oral contract has been established. Robert Evans signed the sexual harassment policy attesting that he knew of the policy as part of the contractual relationship. Robert Evans violated that term to the extent Plaintiff/Intervenors are able to recover against Rio Bravo in this case.

As to the fiduciary duty claim, the claim arises outside of any contractual relationship. It is implied as a matter of law that employees have a fiduciary duty to their employer. Part of that duty is to comply with policies. The policy of Rio Bravo was against sexual harassment. To the extent that Plaintiff/Intervenors and/or the EEOC are able to recover from Rio Bravo in this case, Robert Evans violated his fiduciary duty by violating the policy against sexual harassment. Fiduciary duty is not tied to any specific contractual relationship; it arises as a matter of law. Any limitation on the fiduciary duty of Robert Evans cannot be implied from the Crewmember Handbook.

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III. Reply - Robert Evans

Third Party Defendant argues that the examples above are specifically referred to in the Handbook since they involve stealing. As to indemnification, Third Party Defendant was not sued under the Uniform Contribution of Tortfeasors Act. Third Party Defendant argues that Third Party Plaintiff waived the right to sue for breach of fiduciary duty by not stating that explicitly in the Handbook.

Discussion:

In the previous Motion for Judgment on the Pleadings, the Court acknowledged that under Title VII there is no right to contribution or indemnity, but, under state law claims, other courts have found a right to indemnity or contribution. See Biggs v. Surrey Broad. Co., 811 P.2d 111 (Okla.Ct.App. 1991) (employer entitled to indemnity under state law against its employee for amounts paid in settlement of civil rights claim for sexual harassment and discrimination perpetrated by employee); Donajkowski v. Alpena Power Co., 596 N.W.2d 574 (1998).

The Court notes that Third Party Defendant urged the Court to find that the argument of Third Party Plaintiffs elevates form over substance, and requested the Court to follow the dictate of Congress and the Florida Legislature to prevent Third Party Plaintiffs from shifting liability by indemnity or contribution.

The Court previously considered that the factual situation in this case is in the nature of an intentional tort. Florida law allows for indemnity and contribution claims, and Florida has

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adopted the Uniform Contribution among Tortfeasors Act., Sec. 768.31, Florida Statutes. In a general way, Florida law does support an action for breach of contract. However, the Court has given further consideration to cases involving assertion of rights based on employee manuals, and the Court reconsiders its previous ruling.

The employer/employee relationship is the oral contract in this case. The policies outlined in the Crewmember Handbook are not the terms of the contract; they are unilateral expressions of firm policy. Under Florida law, an at-will employee cannot rely on an employee manual as a basis for enforceable contract rights. Florida courts have rejected attempts by employees to create enforceable contract rights based on the policies outlined in employee manuals.

Under Florida law, policy statements contained in employment manuals do not give rise to enforceable contract rights in Florida unless they contain specific language which expresses the parties' explicit mutual agreement that the manual constitutes a separate employment contract. Muller v. Stromberg Carlson Corp., 427 So.2d 266 (Fla. 2d DCA 1983). Unless Rio Bravo establishes such a separate written agreement, there can be no breach of contract action. If employees cannot rely on the employer manual for enforceable contract rights, the Court cannot find that an employer can do so.

There was an oral contract of an indefinite term between Rio Bravo and Rob Evans. He agreed to perform an Assistant Manager's duties and Rio Bravo agreed to compensate him for his performance. The Court is not aware that there is any separate

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agreement that transforms the unilateral policies of Rio Bravo, including its sexual harassment policy, into enforceable contract rights. Therefore, the Court **grants** the Rule 50 Motion for breach of contract.

II. Breach of Fiduciary Duty

Under Florida law, a fiduciary relationship is defined as follows:

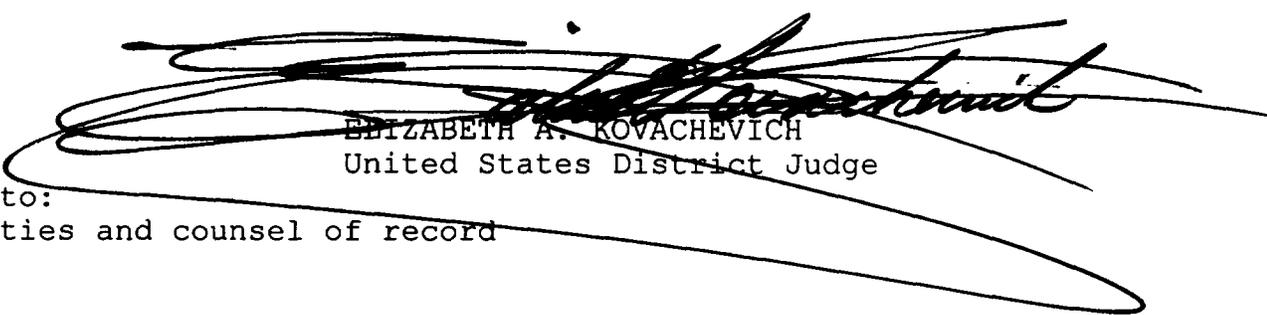
The relation and duties need not be legal; they may be moral, social, domestic or personal. If a relation of trust and confidence exists between the parties (that is to say, where confidence is reposed by one party and a trust accepted by the other, or where confidence has been acquired and abused), that is sufficient as a predicate for relief.

Quinn v. Phipps, 93 Fla. 805, 113 So. 419, 421 (1927). A fiduciary relationship may be implied by law, and such relationships are "premised upon the specific factual situation surrounding the transaction and the relationship of the parties. Capital Bank v. MVB, Inc., 644 So.2d 515, 518 (Fla. 3d DCA 1994). A fiduciary relation exists between two persons when one of them is under a duty to act for the other on matters within the scope of the relation. In this case, Rob Evans was a managerial employee for Defendant, and acted on its behalf.

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After consideration, the Court finds that issues remain for the trier of fact as to the claim for breach of fiduciary duty. The Court therefore **denies** the Rule 50 Motion as to breach of fiduciary duty.

~~DONE~~ and ORDERED in Chambers, in Tampa, Florida on this 18th day of June, 2003.



ELIZABETH A. KOVACHEVICH
United States District Judge

Copies to:
All parties and counsel of record

Date Printed: 06/19/2003

Notice sent to:

Copies distributed in court

— Michael J. Farrell, Esq.
Equal Employment Opportunity Commission
Miami District Office
One Biscayne Tower
2 S. Biscayne Blvd., Suite 2700
Miami, FL 33131

— Delner Franklin-Thomas, Esq.
Equal Employment Opportunity Commission
Miami District Office
One Biscayne Tower
2 S. Biscayne Blvd., Suite 2700
Miami, FL 33131

— Gilbert Carrillo, Esq.
Equal Employment Opportunity Commission
Miami District Office
One Biscayne Tower
2 S. Biscayne Blvd., Suite 2700
Miami, FL 33131

— Kenneth Lawrence Gillespie, Esq.
Equal Employment Opportunity Commission
Miami District Office
One Biscayne Tower
2 S. Biscayne Blvd., Suite 2700
Miami, FL 33131

— Carla J. Von Greiff, Esq.
Equal Employment Opportunity Commission
Tampa Area Office
501 E. Polk St., Suite 1020
Tampa, FL 33602

— Peter W. Zinober, Esq.
Zinober & McCrea, P.A.
201 E. Kennedy Blvd., Suite 800
Tampa, FL 33602

— Scott T. Silverman, Esq.
Zinober & McCrea, P.A.
201 E. Kennedy Blvd., Suite 800
Tampa, FL 33602

— Christopher D. Gray, Esq.
Florin, Roebig & Walker, P.A.
777 Alderman Rd.
Palm Harbor, FL 34683

— Angela E. Outten, Esq.
Florin, Roebig & Walker, P.A.
777 Alderman Rd.

Palm Harbor, FL 34683

- Wolfgang M. Florin, Esq.
Florin, Roebig & Walker, P.A.
777 Alderman Rd.
Palm Harbor, FL 34683

- Mark G. Rodriguez, Esq.
Law Offices of Mark G. Rodriguez, P.A.
501 E. Kennedy Blvd., Suite 1200
Tampa, FL 33602

- Kevin Douglas Zwetsch, Esq.
Fowler White Boggs Banker, P.A.
501 E. Kennedy Blvd.
P.O. Box 1438
Tampa, FL 33601-1438

- Scott A. Fisher, Esq.
Fowler White Boggs Banker, P.A.
501 E. Kennedy Blvd.
P.O. Box 1438
Tampa, FL 33601-1438

- John William Robinson IV, Esq.
Fowler White Boggs Banker, P.A.
501 E. Kennedy Blvd.
P.O. Box 1438
Tampa, FL 33601-1438