IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX AT CHRISTIANSTED

JOSE LUIS GARCIA, Plaintiff, v. PUEBLO INTERNATIONAL, INC., d/b/a PUEBLO SUPERMARKET, Defendant.	CIVIL NO. 6/1982 ACTION FOR REINSTATEMENT AND DAMAGES

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PETERSEN, Judge

MEMORANDUM OPINION
July 15, 1983

This is an action by an employee against his employer for damages for wrongful discharge and for reinstatement.

The defendant has moved for Summary Judgment on the basis that the plaintiff is an employee-at-will and has no cause of action against his employer for a termination of the employment relationship.

For the reasons herein stated, defendant's motion for summary judgment will be granted.

FACTS

1. Plaintiff Garcia was an employee of defendant Pueblo Supermarket for approximately eight (8) years and was the manager of the Dairy Department at the Golden Rock Branch.

2. Plaintiff had no oral or written agreement regarding the length of his employment.

3. Plaintiff had a sexual affair with R.F., who at the time was working at the same supermarket as a clerk and was married to L.F., also an employee of Pueblo Supermarket at the LaReine Branch.

4. Plaintiff fathered a child with R.F. during the period when she was living with her husband L.F.

5. Plaintiff notified two executive employees of Pueblo that he was the father of R.F.'s child.

6. L.F. requested the assistance of the defendant's executive employees regarding Plaintiff's conduct with R.F. while plaintiff complained about having been harrassed and provoked by L.F.

7. Plaintiff was summarily discharged by the defendant for conduct in violation of the defendant's rules

and Personnel Policies.

8. Personnel Policy #33 in relevant part provides:

> "An employee is discharged only when his productivity, his conduct or decency is such that he is not pulling his load, that is, he is a drag on his fellow employees and the company".

> "Before discharging an employee for unsatisfactory performance or for misconduct which is not serious enough to discharge immediately for just cause, his General Manager must give the employee two written warnings. . ."

Listed among the offenses as representative of those requiring discharge if serious enough are:

> Disorderly-Disturbing customers or employees.
> Inconsiderate of customers or employers and immoral conduct.

DISCUSSION

It is well settled that the moving party in this case, the defendant, has the burden of demonstrating the absence of a genuine issue as to any material fact. Fairbanks, Morse & Co. v. Consolidated Fisheries Co., 190 F.2d 817, 824 (3d Cir. 1951). Further in considering defendant's motion for summary judgment the "inferences to be drawn from the underlying facts. . . must be viewed in the light most favorable to the party opposing the motion. . ." United States

v. Diebold, Inc., 369 U.S. 654, 655 (1962). In support of its motion for summary judgment defendant has presented an affidavit, the admissions of plaintiff and exhibits. Fed. R. Civ. P. 56(e) provides in relevant part:

> "When a motion for summary judgment is made and supported as provided in this rule an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him" (underscoring supplied).

Plaintiff has responded to defendant's motion merely by submitting his attorney's memorandum in opposition to summary judgment.

Thus, plaintiff, not having submitted any of those evidentiary matters in support of its opposition to the motion is vulnerable to summary judgment, if otherwise appropriate. Schackelford v. P.R. International Airlines, Inc., 16 V.I. 342 (1979).

The question then becomes one of whether Pueblo is entitled to judgment as a matter of law.

In his complaint, plaintiff alleges that he was discharged from defendant's employment for having relations with a Pueblo employee. The admissions, exhibits, affidavit and all other pleadings filed herein show that the defendant had no specific term of employment. Indeed, plaintiff in his memorandum concedes that fact. However, plaintiff in his memorandum claims that an implied promise of permanent employment was made by Pueblo in the absence of a violation of one of its rules and regulations. Plaintiff vigorously contends that the defendant's Personnel Policy was a contract of employment.

Nowhere in the defendant's Personnel Policy is there to be found any reference to the plaintiff's specific duties, job description, length of employment or the compensation to be paid him. The Personnel Policy has been amended, revised and updated unilaterally by Pueblo officials and there is nothing contained therein which prohibits the defendant from withdrawing its rules or procedures at anytime without prior notice to the plaintiff. The Personnel Policy cannot be considered an employment contract simply because it refers in general terms to many of the same subjects with which a contract of employment would cover, such as side benefits, vacation time, holidays, sick leave, hours of work and similar provisions. It is evident, therefore, that the Personnel Policy standing alone is not an employment contract but rather a statement of policies and practices.

In Shaw v. Kresge Company 328 N.E.2d 775 (1975) the employee was discharged without a hearing. He had no contract for any specified period. The employer had a policy handbook for employees providing that upon receipt of three warning slips for misbehavior in any year, an employee could be brought before an advisory committee for discipline or discharge. The employee, however was summarily dismissed and argued that the policy handbook was a contract of employment. The court stated:

> "Even assuming the handbook relied upon . . .constituted a part of the contract, in the absence on the part of the employer that the employment would continue for a period of time that is either definite or capable of determination, the employment relationship is terminable at the will of the employer. . . there being no binding promise on part of the employee that he would continue in the employment, it must also be regarded as terminable at his discretion as well. For want of mutuality of obligation or consideration, such a contract would be unenforceable in respect of that which remains executory".

See also Weiner v. Mc-Graw Hill, Inc. 442 N.Y.S.2d 11 (1981); Beidler v. Grace Inc., 461 F.Supp. 1013 (E.D. Pa.

1978) aff'd 609 F.2d 500 (3d Cir. 1979); Boresen v. Rohm & Haas, Inc., 526 F.Supp. 1230 (E.D. Pa. 1981). There was no informed understanding or mutual assent nor any evidence of a clear intent that Garcia would remain employed for a definite period of time. Moreover, Garcia was free to leave Pueblo's employ at his discretion. In addition, the plaintiff has failed to present a genuine issue of any additional, separate or special consideration or special circumstances to overcome the presumptive construction that the relationship was terminable at will. For it to be enforceable, the employment agreement must be for a definite period or there must be executed consideration other than the promise by the employee to render services [1/]. Ryan v. J.C. Penny Co., Inc. 627 F.2d 836 (7th Cir. 1980). Accordingly, this court concludes that Garcia was an employee-at-will.

It has been well established that there is no non-statutory cause of action for an employer's termination of an at-will employment relationship. 581 F.2d 335; Davis v. U.S. Steel Supply, 581 F.2d 335 (3d Cir. 1978); Fortune v.

1/ For an example of an executed contract see Toni v. Kingan & Co., 15 N.E.2d 80 (1938) (Promise of permanent employment in settlement of claim for damages for personal injury; employee's consideration is the release of the company from liability).

National Cash Register Co., 364 N.E.2d 1251 (1977); Yaindl v. Ingersoll-Rand Co. etc. 422 A.2d 611 (1980). This rule has been widely criticized by many. The power of large corporate employers over employees caused one commentator to remark:

> "We have become a nation of employees. We are dependent upon others for our means of livelihood, and most of our people have become completely dependent upon wages. If they lose their jobs they lose every resource, except for the relief supplied by the various forms of social security. Such independence of the mass of the people upon others for all of their income is something new in the world. For our generation, the substance of life is in another man's hands".

67 Col. L. Rev. 1404 (1967). Tennenbaw, A Philosophy of Labor 9 (1951), from Blades, Laurence, "Employment at Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power."

A growing number of courts have recently recognized the principle that when the discharge of an at-will employee threatens public policy the employee may have a cause of action against the employer for wrongful discharge. See e.g., Frampton v. Central Indiana Gas Co., 297 N.E. 425 (1973) (employee dismissed for filing claim for workman's compensation); Monge v. Beche Rubber Co., (employee dismissed because she refused to date foreman); Nees v. Hocks, 536 P.2d 512 (1975); Beuther v. Fawler & Williams, 386 A.2d 119 (1978) (employee terminated in retaliation for having performed his obligation to serve on jury); Petermann v. International Brotherhood of Teamsters, 344 P.2d 25 (1959) (employee dismissed for his refusal to commit perjury); Perks v. Firestone Tire & Rubber Co., 611 F.2d 1363 (3d Cir. 1979) (dismissal of an employee for refusal to submit to a polygraph examination following an auditor's investigation of improper gratuities). This limitation on the absolute right to discharge an at-will employee is based on an awareness of the fact that an employer's interest in managing his business efficiently and profitably and as he chooses must yield to the right of the employee to earn a living and to the interest of the public in assuming that the employer does not act in an arbitrary and capricious manner.

Plaintiff likewise claims that his discharge violated public policy. However, he has failed to raise a genuine issue (Fed. Rules Civ. Pro. 56(e))thus making it unnecessary for this court to consider and adopt the public policy exception to the instant case. The bare allegations of Garcia's complaint do not provide a sufficient factual predicate for determining whether any declared mandate of public policy was involved. Accordingly, defendant's motion for summary judgment must be granted as a matter of law.

EILEEN R. PETERSEN
Judge