

Not Reported in F.Supp., 1993 WL 322837 (S.D.N.Y.), 8 IER Cases 1267

Motions, Pleadings and Filings

United States District Court, S.D. New York.  
Richard **CRIADO**, Plaintiff,  
v.  
**ITT CORPORATION** and Ralph W. Pausig, Defendants.  
Nos. 92 Civ. 3552 (LJF).  
Aug. 16, 1993.

OPINION & ORDER

FREEH, District Judge.

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After a full jury trial and a \$250,000 verdict against it, Defendant **ITT** Corporation ("**ITT**") now moves for judgment as a matter of law pursuant to Rule 50(b) of the Federal Rules of Civil Procedure. Plaintiff Richard **Criado** ("**Criado**") opposes the motion. For the reasons stated below, the motion is denied.

*Background*

Full familiarity with the prior proceedings in this case is assumed and will not be repeated here except where necessary to resolve the motion presently before the Court. Briefly stated, **Criado**, a former pilot for **ITT**, alleges that after he reported his suspicions of possible unethical and illegal conduct occurring in **ITT's** flight department to Ralph Pausig ("**Pausig**"), **ITT's** Senior Vice President, **ITT** discharged him, notwithstanding its express promise not to do so.

On May 24, 1993, after a three and half day trial and two days of deliberation, the jury returned a general verdict accompanied by interrogatories in favor of **Criado** on his claim of a breach of an express limitation to his otherwise at-will employee agreement with **ITT**. The jury awarded **Criado** \$250,000 in compensatory damages.

**ITT** now seeks to set that verdict aside contending that there was no evidence that **ITT** expressly agreed to modify **Criado's** at-will employment. Therefore, according to **ITT**, **Criado** was lawfully discharged. **ITT** further argues, that even if it did create an express limitation to **Criado's** at-will employment, **Criado's** recovery is limited to nominal damages.

**Criado** disputes these arguments and contends that the evidence at trial sufficiently demonstrated that **ITT** completely disregarded its promise not to dismiss him for disclosing to Pausig his suspicions about improper conduct occurring in the **ITT** flight department. As a result, **Criado** argues that he is entitled to recover the entire \$250,000 as compensation for **ITT's** wrongful termination.

*Discussion*

In order to prevail on a Rule 50(b) motion, the moving party must demonstrate that the evidence introduced at trial, when viewed in a manner most favorable to the non-movants, nevertheless mandates a verdict in favor of the movant. *Jund v. Town of Hempstead*, 941 F.2d 1271, 1290 (2d Cir.1991). See also *Newmount Mines, Ltd. v. Hanover Ins. Co.*, 784 F.2d 127, 132 (2d Cir.1986)

(post-trial motion granted only where "there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture.")

a) *The Express Limitation*

"It is [well] settled in New York, that absent an agreement establishing a fixed duration, an employment relationship is presumed to be a hiring at-will terminable at any time by either party." *Sabetay v. Sterling Drug, Inc.*, 514 N.Y.S.2d 209, 211 (Ct.App.1987). However, in situations where an employer expressly agrees to "limit its termination rights, the employer may no longer terminate the employee at-will. *Cucchi v. New York City Off-Track Betting Corp.*, 818 F.Supp. 647 (S.D.N.Y.1993) (citing *Weiner v. McGraw-Hill, Inc.*, 457 N.Y.S.2d 193 (Ct.App.1982)). A finding that an employer expressly agreed to limit its termination rights depends upon a review of the totality of the circumstances. See *Gorrill v. Icelandair/Flugleidir*, 761 F.2d 847, 852-32 (2d. Cir.1985).

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A review of the evidence at trial demonstrates that there was sufficient evidence from which the jury could properly conclude that **ITT** expressly limited its right to dismiss **Criado**, its otherwise at-will employee. Accordingly, **ITT's** motion must be denied.

In an effort to assist the jury with their deliberations, the Court submitted interrogatories to the jury. The answers to these interrogatories indicate that the jury based its finding that **ITT** expressly limited its right to dismiss **Criado** on three separate pieces of evidence-the **ITT** Corporate Code of Conduct (the "Code"), the accompanying October 1, 1991 letter (the "October 1st letter") from Rand Araskog, the President of **ITT**, and certain oral statements Pausig made to **Criado**. **ITT** contends that the terms of the Code and the October 1st letter together with Pausig's oral promises do not as a matter of law create an express limitation to **Criado's** at-will employment. The Court disagrees.

In relevant part the Code states:

If you know or have good grounds for suspecting that any illegal or unethical conduct has occurred or is planned by anyone, you are expected to report it.... Your report which may be anonymous, will be treated confidentially, and you will in no way be penalized for making such a report.

The Code further directed employees, like **Criado**, to report suspected illegal or unethical conduct to: (1) the "Director of Corporate Policy Compliance"; (2) the Deputy Director; or (3) the "Ombudsman".

Like the Code, the October 1st letter did not authorize **Criado** to speak with Pausig but rather directed **ITT** employees to report instances of unethical or criminal conduct to their supervisors or the legal department. Like the Code, the October 1st letter also stated that **ITT** employees would not be penalized for reporting alleged violations.

**ITT** argues that because **Criado** did not report his concerns to any of the individuals specified in the Code or the October 1st letter but decided instead to speak with Pausig, his actions were not in conformity with the Code or the October 1st letter. Therefore, according to **ITT** **Criado** cannot utilize the Code or the October 1st letter to support his argument that **ITT** created an express limitation to his otherwise at-will employment agreement.<sup>FN1</sup>

**Criado** argues that even though he did not report his concerns to the specific people listed in the Code or the October 1st letter, it was nevertheless certainly reasonable for him to confide in Pausig, who he knew, and who was the head of **ITT's** personnel department, with the understanding that **Criado** would "not be penalized for making such a report."

The jury clearly and reasonably concluded that **ITT** dismissed **Criado** because he reported to Pausig his concerns about certain decisions being made in the **ITT** flight department. Specifically,

**Criado** was concerned about the possible hiring of James Iannotta ("Iannotta"), whom **Criado** believed, lacked experience and training, to pilot **ITT's** corporate jets. The jury further concluded based upon the Code, the October 1st letter and the oral assurances of Pausig, that such a dismissal was in contravention of **ITT** express promise not to do so.

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While the Code and October 1st letter certainly suggest that **ITT** employees should report their concerns to certain persons, the two documents do not state that failure to do so rescinds **ITT's** express limitation. In other words, **Criado** did not fail to satisfy a condition precedent to **ITT's** promise not to discharge **Criado** by reporting to Pausig, rather than the persons suggested in the Code and the October 1st letter, his concerns about the possible hiring of Iannotta to the **ITT** flight department. Accordingly, the jury was entitled to conclude from the Code, the October 1st letter and Pausig's assurances, that **ITT** expressly modified **Criado's** at-will employment status. See Cucchi v. New York City Off-Track Betting Corp., 818 F.Supp. 647 (S.D.N.Y.1993) (while oral assurances alone are not enough to modify an employee's at-will status, a combination of written statements coupled with an oral assurance may be sufficient to permit a jury to ascertain whether an employer "expressly agreed to limit its termination rights".) (citing Sabetay v. Sterling Drug, Inc., 514 N.Y.S.2d 209 (Ct.App.1987)) (oral assurance of for-cause status just one of four important reasons supporting employee's breach of contract claim).

b) Damages

**ITT** contends that even if the jury did properly conclude from the evidence that **ITT** ignored its express limitation to **Criado's** at-will employment, the jury award of \$250,000 must be nevertheless set aside. According to **ITT**, **Criado** was an at-will employee and subject to discharge at any time for any reason except the reporting of unethical or illegal conduct to the appropriate authorities at **ITT**. Therefore, because **Criado** had no right to continued employment he is only entitled to nominal damages. The Court disagrees.

As **Criado** points out in his post-trial memorandum, a sufficient amount of evidence was introduced at trial for the jury to reasonably conclude that had **Criado** not been discharged for reporting his concerns about the flight department to Pausig he would have continued working for **ITT** for some time. **Criado** had a good record at **ITT**, and had been with, and wished to remain with **ITT's** flight department indefinitely. Thus, it was not pure speculation for the jury to conclude that **Criado**, who was forty-seven years old at the time of trial, would have remained at **ITT** for some reasonable period of time.

In determining damages for breach of contract, it is well settled that the objective is to try and restore the plaintiff to the position he would have had, had the non-breaching party performed. Therefore, according to **ITT**, had there been no breach, **Criado** would still be an at-will employee subject to termination at any time for any reason. If this were a pure breach of contract case, that argument might be correct. However, "an at-will employment arrangement is not contractual and does not create an employment contract." Cucchi at 650, citing, Ingle v. Glamore Motor Sales, Inc., 538 N.Y.S.2d 771, 774 (Ct.App.1989); 3A Corbin On Contracts § 674 at 124-25 (Supp.1992) ("A 'contract' terminable at-will by either party without further obligation or right flowing to either is repugnant to the term 'contract' itself, which carries with it implications of performance and duty, [and] expectations based on promises.").

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In the Court's view, **Criado's** claim may more appropriately described as "quasi-contractual" or simply an infringement of an express limitation to an otherwise at-will employment agreement. In these types of cases, courts have not limited a plaintiff to nominal damages. See e.g., Ohanian v. Avis Rent A Car System, Inc., 779 F.2d 101, 110 (2d Cir.1985) (jury award of \$300,000 representing past and future lost wages and benefits upheld as reasonable); Gorrill v. Icelandair/Flugleidir, 761 F.2d 847, 855 (2d Cir.1985) (pilots awarded damages representing two and half years salary past their termination date). Therefore, as long as there was sufficient evidence for a reasonable jury to

conclude that had **Criado** not been discharged for reporting his reasonable suspicions to Pausig, he would have continued working for **ITT**, then a jury may properly award an appropriate amount to reasonably compensate **Criado** for **ITT's** wrongful discharge. In this case, the jury's award was more than reasonable, especially given the uncontested evidence introduced at trial by Thomas Fitzgerald, **Criado's** expert on economic loss.

*Conclusion*

For the foregoing reasons, **ITT's** motion is denied and the Clerk of the Court shall enter judgment in favor of **Criado** and against **ITT** in the amount of \$250,000.

SO ORDERED.

FN1. **ITT's** additional contention that **Criado** did not rely on the Code or the October 1st letter is dispelled by the evidence. Specifically, **Criado** testified that he read the Code and the October 1st letter. (**Criado** Tr. 82-84). Accordingly, the jury was presented with sufficient evidence to find that **Criado** relied on the Code and the October 1st letter.

S.D.N.Y., 1993.

**Criado v. ITT Corp.**

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