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Fourth Circuit Reverses Decision Holding Employer's Promise Not to Retaliate Modified At-Will Employment, Rejects Breach of Contract Claim

By Nancy Delogu and Steven Kaplan

On November 27, 2012, in *Scott v. Merck & Company, Inc.*,[1] the U.S. Court of Appeals for the Fourth Circuit reversed a jury verdict of more than $500,000 in favor of Jennifer Scott, a former Merck & Co., Inc. employee. The appeals court concluded that the trial court erred in permitting Scott to argue that the company's non-retaliation policy included an enforceable promise not to terminate her employment. Specifically, the appeals court ruled that Scott could not reasonably have believed that the non-retaliation policy included a promise of continued employment, given the express at-will disclaimers contained in the employee handbook in which the non-retaliation policy appeared.

In so ruling, the court of appeals rejected the trial court's conclusion[2] that the company's non-retaliation policy "placed a specific limitation on Merck's otherwise unfettered power to end the employment relationship," and rejected the decision to allow a jury to decide whether Merck breached its supposed promise that it would not retaliate against an employee for reporting certain "important workplace and business issues" to management.

Inasmuch as a second Maryland district court issued an almost identical decision earlier this year in *Signoriello v. Motiva Company*,[3] the *Scott* decision is particularly welcome to Maryland employers who had grown uncertain as to the effectiveness of their at-will statements. Both decisions concluded that a statement that employment was "at-will" could not negate an arguably definite written promise not to retaliate against an employee for reporting alleged misconduct.

Factual Background

Scott, who was hired as an at-will employee, worked as a pharmaceutical sales representative for Merck from 1992 to 2008. In 2005, Scott's supervisor instructed her to charge business expenses incurred by another employee on her credit card because the credit issuer would not issue the coworker a credit card under its lending rules. Scott agreed, albeit reluctantly, believing the arrangement would be temporary. As the requests continued, however, Scott discussed her

1 2012 U.S. App. LEXIS 24461 (4th Cir. Nov. 27, 2012).

2 *Scott v. Merck & Co., Inc.*, 2010 U.S. Dist. LEXIS 126279 (D. Md. Nov. 30, 2010).

3 2012 U.S. Dist. LEXIS 92150 (D. Md. July 3, 2012).

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concerns with her supervisor. The supervisor allegedly responded that Scott would be demoted if she did not continue allowing the charges. During the next year, Scott raised additional concerns with her supervisor relating to other practices and directives she believed were contrary to policy and/or federal regulations. Concurrently, her supervisor allegedly grew increasingly critical of her job performance.

In July 2007, Scott reported her supervisor's actions to Merck's Ombudsman's Office and to its Office of Ethics. Shortly thereafter, she was placed on a performance improvement plan for reasons that Merck maintained were nonretaliatory. Over the ensuing months, Scott reported other issues to the Office of Ethics as it conducted an investigation into her supervisor's actions.

In late 2007, Merck concluded that Scott's supervisor had in fact violated several policies and transferred him to a new position. Despite its findings regarding his policy violations, and the fact that he was no longer her supervisor, Merck allowed him to conduct Scott's 2007 performance evaluation. She was then fired in January 2008.

Merck's "At-Will" Disclaimers and Anti-Retaliation Policies

Merck's employment application provided: "if [Merck] and I enter into an employment relationship, I understand that I have the right to terminate my employment at any time and for any reason and that Merck & Co., Inc. retains a similar right."

Merck's "U.S. Managers' Policies" also contained the following at-will disclaimer:

> Employment at Merck is at-will, which means that employees are not hired for a specific duration of time and that either Merck or the employee may sever the employment relationship at any time, for any reason, with or without notice. Furthermore, none of the Company's written or unwritten programs, policies or practices should be viewed as creating any promises or contractual rights to employment or to the benefits of employment.

Despite these two at-will disclaimers, Scott argued, and the federal district court agreed, that two of Merck's policies modified the at-will employment relationship and created a binding contract. First, Merck's Code of Conduct provided: "We will not tolerate retaliation against any employee for raising a business practice issue in good faith. . . . The fact that an employee has raised concerns in good faith, or has provided information in an investigation, cannot be a basis for denial of benefits, termination, or demotion . . . ." (Emphasis added).

In addition, "Merck's Corporate Policy 57: Retaliation" provided:

> Retaliation and threats of retaliation against employees who raise concerns, or against individuals who appropriately bring important workplace and business issues to the attention of management, are serious violations of Merck's values and standards and will not be tolerated . . . . All directors, officers, and employees are strictly prohibited from engaging in retaliation and retribution . . . which is directed against an individual on the basis of or in reaction to that individual making a good faith report to the Company . . . of suspected violations of law, regulations, policy, or procedures, or Our Values and Standards.

Maryland's At-Will Employment Law

Under Maryland law, the general rule is that statements of policy in an employee handbook or other publication do not create an enforceable contract as long as they are not "offers" by which a company intends to be bound. An exception exists, however, if: (1) the policy statements expressly limit the employer's discretion to terminate an individual's at-will employment; and (2) the employee justifiably relied on those representations.

In this case, the district court found that Merck's policy statements were sufficiently definite and specific to create a binding offer. In that regard, one of Merck's anti-retaliation policies stated that, if an employee raises a concern in "good faith," the company "cannot" use that concern "as a basis for denial of benefits, termination, or demotion." Relying on those terms, Scott "accepted" the offer by reporting her supervisor's misconduct to management to her apparent detriment. Although the court recognized that Merck's policy was, in some sense, aspirational, the

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court noted that the policy also stated that retaliation is "unacceptable" and "will not be tolerated."

The district court then concluded that the at-will disclaimers were insufficient to defeat Scott's reasonable expectation that Merck would not terminate her for filing an internal complaint against her supervisor because the policy itself contained a "specific benefit that clearly implicates grounds for termination."

The Fourth Circuit Reverses the District Court's Decision

Ultimately, the U.S. Court of Appeals for the Fourth Circuit reversed the district court's decision because Scott could not, as a matter of law, demonstrate that her reliance was reasonable in the face of the at-will disclaimers. Specifically, the Fourth Circuit held that an at-will employee must show ***both*** that the policy statement upon which she relied limited the employer's discretion to terminate her employment ***and*** that she was justified in relying on that statement.

Notably, it is not unusual for employer policies against retaliation to state clearly that an employer will not tolerate retaliation. For example, in *Signoriello, Jr. v. Motiva Co.*, the employer's non-retaliation policy similarly provided: "You can be absolutely sure that retaliation of any kind directed against anyone who reports an issue concerning the Code of conduct will not be tolerated. Motiva will protect its employees against retaliation; in turn, it expects employees who know or suspect that retaliation has taken place to report it through the Helpline or directly to the Compliance Office." How then should an employee know when reliance on a non-retaliation promise is justified?

When the promise not to retaliate exists alongside an unambiguous at-will disclaimer, the Fourth Circuit concluded that the at-will statement precludes justifiable reliance on the more specific policy statement, not the other way around. Significantly, citing *Fournier v. U.S. Fidelity & Guaranty Company*,[4] the Fourth Circuit noted that under Maryland law it was immaterial that the at-will disclaimers appeared in locations apart from the non-retaliation policies. In other words, regardless of how definite a policy promise may seem, a clear statement that no promise of continued employment is intended by any such policy will prevail as a matter of Maryland law.

After reviewing the two Merck disclaimers, the Fourth Circuit held that the "plain language of these policies demonstrates that Merck clearly and conspicuously informed Scott that her employment was at-will." Therefore, she could not maintain a breach of contract action against her employer following her termination.

Lessons for Employers

Despite the apparent victory, a Maryland state court is not bound by a Fourth Circuit decision applying Maryland law, and arguments that an employer promised more than at-will employment could fall on more sympathetic ears in the Maryland courts. Maryland law requires an "unambiguous disclaimer" of any intent to create a binding contract, but, once such a clear disclaimer is made, reliance on written policies appearing to promise more will be unjustified. As always then, an employer would do well to draw its at-will employment policy to employees' attention, and to obtain acknowledgments whenever possible.

Of course, a clear statement of at-will employment can limit only contract claims arising out of an alleged promise not to retaliate; regardless of any promise, many laws specifically prohibit employers from retaliating against individuals who report misconduct or suspected violations of the law, and each of those laws typically creates its own cause of action to enforce those anti-retaliation policies. Retaliation cases across all employment sectors are on the rise. In 2011, for example, the U.S. Equal Employment Opportunity Commission reported that more than one-third of discrimination charges it received also contained allegations of retaliation. To protect against these claims, employers should develop anti-retaliation policies and train managers and supervisors on their policy to comply with those laws.

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4 569 A.2d 1299, 1301-05 (Md. Ct. Spec. App. 1990).

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