A Pilot's Story: *Criado v. ITT Corp.*

One plaintiff's counsel's inventive strategy to combat employment-at-will doctrine.

By John A. Beranbaum

UNDER WHAT circumstances a company's employee handbook or oral promise rises to the level of a binding contract, and thereby restricts an employer's right to discharge an employee at will, is a hotly litigated issue. The New York courts traditionally have taken a restrictive approach to employee rights. Under New York common law, an employer has an "unfettered right to terminate at will" unless written and oral representations of job security constitute an "express agreement" to limit the right of discharge. *[Sabetay v. Sterling Drug, Inc.,* 69 N.Y.2d 329,337 (1987).] In requiring an "express agreement," the New York courts eschew the more flexible approach of modem contract construction, which finds terms implied in law and in fact and interprets contractual language in light of the parties' reasonable expectations and course of dealings. *[Murphy v. American Home Products Corp.,* 58 N.Y. 293,305 (1983).]

As shown by a recent case, however, the existence of an "express agreement" is not necessarily a self-evident proposition, and may involve a highly nuanced, fact-sensitive determination, in which the parties' reasonable expectations and principles of equity prove decisive. In *Criado v. ITT Corp.,* a jury found that liT's written and oral assurances of confidentiality and non-retaliation were contractually binding, and returned a $250,000 verdict against the company for its unlawful discharge of the plaintiff. [61 FEP Cases 321 (S.D.N.Y. 1993) *("Criado (I)")* (summary judgment opinion); 8 IER Cases 1267 (S.D.N.Y. 1993) *("Criado (II)")* (judgment notwithstanding the verdict opinion).] The district court upheld the verdict, *[Criado (II)]* and m elected not to appeal, as the matter was settled after the district court issued its decision refusing to set aside the jury's verdict.

The Pilot's Story

Richard Criado had been employed by ITT for 23 years as a pilot, flying executives around the world in the company's private fleet of planes. At them hangar, a rumor long had circulated that the director of the Aviation Department intended to hire a vendor's son as a co-pilot. Criado and other m pilots feared for their and others' safety because the vendor's son, although an airplane mechanic, had limited ilight experience. Besides, hiring the son of the Aviation Department's chief vendor smacked of a conilict of interest.

Criado decided to report his suspicions to liT's Senior Vice President for Administration, Ralph Pausig, one of the corporate executives whom he had been flying for years. Before doing so, Criado had Pausig promise that he could speak to Pausig confidentially. Pausig later denied that he ever made such a promise.

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Time Away From Work

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Employee Perceptions

As expected, offerings such as incidental/ personal days, vacation carryover and paid time-off programs that meet employees' basic needs are both highly utilized and highly valued, according to survey respondents who offer these programs. More interesting, however, was the finding that programs used by a relatively small subset of employees also receive high perceived-value ratings from the survey respondents.

For example, while average utilization of paid family leave is relatively low (28%), 70% of the survey respondents offering these programs say their employees place a high value on this benefit. Similarly, significant percentages of respondents offering sabbaticals, adoption leave and paternity leave report that these programs are highly valued by employees, even though less than 5% of eligible employees actually use them.

The same pattern holds true for vacation buying and selling offerings as well. As you would expect, more employees buy vacation (36%) than sell it (10%). But both buying and selling options are valued far more highly than their use would suggest.

The Bottom line

Ultimately, the program utilization/perceived value results show that most survey respondents believe the time-off options they offer have significantly enhanced their overall benefit plans. Indeed, almost 90% of the respondents say these programs have had a positive impact on employees' overall perceptions of flex time.

The survey results also dispel one common myth: the concern among employers that leading edge time-away-from-work programs pose undue burdens on administrative systems. Quite the contrary, more than two thirds of the respondents (70%) with programs in place said their implementation had no significant impact on current administrative systems. What's more, well over half (60%) said their systems needed no modifications during implementation.

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In deciding to speak with Pausig, Criado also relied upon ITI's newly promulgated "Code of Corporate Conduct." The Code announced a new company-wide ombudsman program, and encouraged ITI employees to come forward to report good-faith suspicions of unsafe or unethical conduct, and assured them confidentiality and non-retaliation. In general terms, the Code of Corporate Conduct stated:

> If you know or have good grounds for suspecting that any illegal or unethical conduct has occtirred 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.* [Emphasis added.]

More specifically, the Code directed employees to report suspected illegal or unethical conduct to one of three officials, including the company Ombudsman, a newly created position. Although he was the senior executive in charge of personnel at m, Pausig was not one of the listed officials.

Criado met with Pausig secretly and disclosed his suspicions about the likely hiring of the vendor's son. Criado also hinted at financially questionable practices within the Aviation Department. Despite his pledge of confidentiality, Pausig divulged Criado's identity in the course of investigating Criado's suspicions. In short order, the Aviation Department director fired Criado for disloyalty.

Evaluating the Plaintiff's Case

While the equities of the case seemed compelling-a long-term employee fired after being induced to report suspected wrongdoing by oral and written assurances of confidentiality and non-retaliation-the New York Court of Appeals, in defending the employment at-will doctrine, had been unmoved by treatment more egregious than what Criado endured.

For instance, in *Murphy,* above, the court dismissed the complaint of a 59-year-old employee, with 23 years' tenure, who alleged that he was wrongfully discharged for disclosing to senior management $50 million in accounting and pension improprieties.

In *Sabetay,* the court dismissed the complaint brought by a fired employee who had come forward to report illegal company activities in reliance upon a company policy that not only encouraged employees to report business improprieties, but threatened them with discharge for failure to do so.

Confronted with an unforgiving employment-at-will doctrine, our first strategy as plaintiff's counsel was to refocus the nature of the claim through alternative theories. The complaint, filed in the United States District Court for the District of New York on diversity grounds, pled claims against ITI and its officials, including a stahttory whistleblower claim, intentional and constructive fraud, negligent misrepresentation, tortious breach of confidences, and national origin discrimination. As to the last claim, Criado was Cuban, and the Aviation Department head used anti-Cuban slurs when speaking about him.

The alternative pleading strategy proved of limited success. District Court Judge Louis Freeh permitted plaintiff's constructive fraud claim against the executive, Pausig, to go to the jury, along with the breach of contract claim against ITI. *[Criado I.]* However, the jury determined that Criado and Pausig did not have a fiduciary relationship-the prerequisite to a finding of constructive, as opposed to intentional, fraud -and thus any breach by Pausig of his pledge of confidentiality was not actionable. Ultimately, New York's employment-at-will doctrine could not be avoided, and the dispute boiled down to whether Pausig's oral assurance of confidentiality and the above-cited provisions of the Code constituted an "express limitation" to ill's right to discharge.

Countering Defendant's Trial Strategy

At trial, ITI's counsel took two tacks. First, they set out to discredit Criado, portraying him as a crackpot and petty thief, someone so driven by ambition that he sought to topple his boss through malicious and false accusations.

However, ill's efforts at character assassination were blunted by Criado himself. On the stand, he came across as warm and forthright, someone whose greatest fault was a misplaced sense of loyalty. On cross-examination, in response to why he spoke to Pausig rather than the Ombudsman identified in the company's literature, Criado said: "He [Pausig] gives me his promise of confidentiality. Why should I doubt him? Have [I] ever had a reason to doubt an ill executive? Never. I placed those people on a pedestal. I shouldn't have.... I had a wrong perception of them. Boy how wrong I was."

ITI's other trial strategy was a narrowly legalistic one, arguing that regardless of whether Pausig made a promise of confidentiality, he was not identified in the Code as an official to whom an employee could speak without fear of retaliation. As if to clinch its plain reading of the Code, ITI introduced as an exhibit a bright green blow-up of the poster hanging in the Aviation Department that identified those officials to whom an employee could report with impunity. Neither Pausig nor his office were listed in the poster.

ITI's hyperliteral approach failed. The plaintiff was a long-time employee, who was encouraged by oral and written representations to disclose suspected wrongdoing, and then was subjected to the employment world's equivalent of capital punishment for misreading the fine print in an employer's handout. In closing, we pointed to the blown-up poster and said that ITI "should be putting up big, bright posters that say

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'trust us at your own risk' or that say 'trust us, but make sure you go to the right person.' Or better yet...'don't trust us at all.' ... [If ITT's argument] is right, what m should have done underneath the part that says if you want confidentiality, call the ombudsman [was] put a warning, 'beware, if you contact anyone else, you can be fired."'

While the "let's not get too technical" argument evidently was well received by the jury-almost all of the $250,000 that the jury awarded Criado was for future damages, that is, the projected differential in salary and benefits between his job at ITT and his new, lower paying job -it was not so clear that Judge Freeh, in deciding defendant's motion for judgment notwithstanding the verdict, would be similarly swayed to discount the finer points of the Code's text.

The District Court's Decision

The court, in its analysis, first held that under New York law, an oral assurance of job security cannot, alone, amount to an express limitation on the right to discharge. *[Criado II,* 8 IER Cases at 1269.] Thus, under the court's analysis, Pausig's promise, by itself, would not protect Criado; plaintiff would have to show that the Code established an express limitation of m's right to discharge.

The court ultimately upheld the jury's finding -made explicit in its answer to a jury interrogatory-that the Code and an accompanying letter from ITT's chief executive officer created an express limitation ofm's termination rights. In so doing, the court remained faithful to New York's "express agreement" requirement, but construed the standard narrowly. In response to the argument that Criado spoke to the wrong official, the court wrote:

> While the Code and October 1 letter certainly suggest that m employees should report their concerns to certain persons, the two documents do not state that failure to do so rescinds m's express limitation. In other words, Criado did not fail to satisfy a condition precedent to m's promise not to discharge Criado by reporting [his concerns] to Pausig, rather than the persons suggested in tlle Code and October 1letter. *[Criado (II),* 8 IER Cases at 1269.]

The court, in so many words, held that as long as the employer's manual contains an explicit provision limiting the right of discharge, any conditions to or revocations of the job security promise must be explicit and cannot be implied or "suggested." Thus, the Code's general promise of non-retaliation ("you will in no way be penalized for making such a report") was binding in the absence of a clear statement that protection would be withdrawn if the employee reported his suspicions to a person other than those listed in the Code or, if the employee did not otherwise follow the outlined procedures.

Upholding Express Limitation

The district court's decision is the converse of *Sabetay.* In *Sabetay,* the Court of Appeals rejected the concept of a limitation of termination rights by implication; in *Criado,* the district court rejected rescission of the express limitation by implication. *Sabetay* held that an employee manual's enumeration of specific grounds for termination does not implicitly make those the only permissible grounds for termination. Using a similar rationale, the district court determined that the Code's enumeration of those officials to whom employees could report with impunity does not mean, by implication, that reporting to some other official nullifies the explicit promise of nonretaliation.

The result reached by the district court was the same as would result from an analysis of ITT's and Criado's transactions oy customary methods of contract construction. The district court implicitly gave primary importance to the reasonable expectations of the parties, particularly those of Criado; likewise, the decision comports with the long-standing principle of resolving ambiguities in the written instrument against the drafter, in this is ITT.

In this way, the *Criado* opinion is consistent with other federal court decisions which, when interpreting New York's employment-at-will doctrine, focus less than state court decisions on the formal requirement of an "express limitation," and are more inclined to weigh the real-life circumstances surrounding the employment relationship as an interpretive tool.

Facts and Circumstances

While much of the legal import of *Criado* is peculiar to the idiosyncrasies of New York common law, the decision also represents tllat strain of wrongful discharge cases that avoid a hyperliteral reading of an employee handbook or policy statement and look to the totality of facts and circumstances, the reasonable expectations of the parties, and principles of equity. *[See, e.g., Zaccardi v. Zale Corp.,856* F.2d 1473 (10th Cir. 1988); *Wooley v. Hoffnum-InRoche, Inc., 491* A.2d 1257 (1985); *Niehaus v. Delaware Vallet;Medical Center,* 8 IER Cases 1318 (Pa. Super. 1993).]

Employers act at their peril when they rely upon the fine print of policy manuals to renege on broad promises of non-retaliation or job security in which an employee reasonably reposes his or her trust.

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