2000 BNH 008 **Note: This is an unreported opinion. Refer to AO 1050-1 regarding citation.**

UNITED STATES BANKRUPTCY COURT
for the
DISTRICT OF NEW HAMPSHIRE

In re: Bk. No. 96-10130-MWV
Chapter 11

Business Express, Inc.,
Debtor

Official Unsecured Creditors' Committee,
Movant
v.

Rex Fornaro,
Respondent

MEMORANDUM OPINION

The Court has before it the Official Unsecured Creditors' Committee ("Committee") objection to the claim of Rex Fornaro ("Fornaro"). This matter originated as a result of the inclusion of the Fornaro claim (Proof of Claim No. 37, as amended by 488) in the Committee's omnibus objection to claims. The proof of claim, as amended, had attached a complaint originally brought in the Connecticut Superior Court and removed to the United States District Court for the District of Connecticut. Fornaro was a former employee of the Debtor, Business Express ("BEX"), and the complaint alleged breach of an employment agreement, wrongful termination, violation of constitutional rights pursuant to Connecticut General Statute § 31-51q, retaliatory discharge pursuant to Connecticut General Statute § 31-51m, and breach of an implied covenant of good faith and fair dealing. The proof of claim alleged damages of $197,856.52 as an unsecured claim, a priority wage claim of $2,000 and, in the box checked "other," future lost wages.

Pursuant to this Court's procedural order dated October 15, 1997, as amended by the Court's order dated February 6, 1998, the objection was deemed a contested matter pursuant to Federal Rule of Bankruptcy Procedure 9014, in which the Committee was deemed the movant and Fornaro the respondent, and making Part VII of the Federal Rules of Bankruptcy Procedure applicable to this matter. The parties then proceeded down a rocky discovery road, which culminated in a two-day trial.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

FACTS

Fornaro was employed as a flight dispatcher by BEX from January 7, 1993 through February 28, 1994, when he was terminated. His place of employment was at the Debtor's headquarters then located in Westport, Connecticut. Prior to his employment with BEX, Fornaro received a Bachelor of Science degree from Ohio State University in 1988, with a concentration in aeronautical related studies. He worked for Continental and American West Airlines, attended the FAA Academy, and received his dispatcher's license in September 1992.

Fornaro did not have a formal employment contract with BEX, nor was he a union member. The first few months of employment consisted largely of dispatcher training. On July 10, 1993, Fornaro made an entry in the dispatcher log complaining about understaffing. (Fornaro Ex. 118.) On October 1, 1993, BEX issued a memorandum distributing its employee handbook, receipt of which was acknowledged by Fornaro on October 7, 1993. (Fornaro Ex. 101.) That handbook included the following provisions:

> This manual is not intended to create, nor should it be construed to constitute, an express or implied contract between Business Express and any of its employees. Except where otherwise specified in an [sic] union agreement or separate written contract, an employee's employment with Business Express is not for a definite term and may be terminated by Business Express or the employee with or without cause.
>
> . . . .
>
> EMPLOYMENT AT WILL
>
> As a business operating in today's legal environment, it is Business Express' belief that it is necessary to clarify the relationship between our employees and the Company.
>
> We hope the relationship between Business Express and its employees will continue to be mutually beneficial. However, the Company wishes to define carefully and clearly the parameters of the relationship. The Company's relationship with its employees is and always will be one of voluntary employment "at will." Neither the employee nor the Company has entered into a contract of employment expressed or implied.

Employment at Business Express is voluntarily entered into for no stated term or period of time. The Company has the right to terminate the employee at any time, with our without cause being shown, in its sole discretion. This means that the Company or the employee is free to conclude an employment relationship at any time.

. . . .

Job Performance Standards

All employees are required to maintain acceptable job performance levels throughout their employment with Business Express. Employees whose job performance deteriorates or employees who are not performing their assigned responsibilities to the satisfaction of their manager may be in jeopardy of having their employment terminated.

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ATTENDANCE & PUNCTUALITY

Business Express believes that good attendance and punctuality are important factors in an employee's job performance and the ultimate success of the Company and its ability to ensure a safe, efficient and economical operation; therefore, poor attendance and tardiness will not be tolerated and may result in disciplinary action up to and including termination of employment.

Notifying Manager

Whenever an employee must be absent from work, it is the employee's responsibility to personally notify the manager of the intended absence two hours or more prior to the regular starting time. In addition, an employee is expected to personally notify the manager each day the employee is to be absent. If the employee's manager can not be reached, the employee must contact another member of management in his/her work area.

Tardiness/Punctuality

Employees are considered to be late for their shift if they arrive to work one (1) or more minutes after it has begun. Employees who consistently arrive to work late and show disregard for punctuality will be subject to disciplinary action up to and including termination of employment.

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PERFORMANCE COUNSELING

a. The Company and the employee have a mutual obligation to work together so that the employee can reach and maintain satisfactory performance levels. Performance counseling is a key part of the process.

b. Performance counseling is a recommended management tool to use whenever an employee's performance falls below satisfactory levels. Performance counseling applies to the following types of performance:

- Inability to meet job requirements.
- Unsatisfactory work-related behavior, e.g., excessive absenteeism or tardiness.

- Inability to maintain satisfactory and harmonious working relationships with other employees, the public, or the Company's customers.

c. The objective of performance counseling is improved performance by employees. This will be best accomplished if communication is clear and concise. Employees will be more motivated to improve performance if they understand what is required, and receive encouragement and support from their managers.

d. However, we recognize that despite reasonable efforts, unsatisfactory performance may continue and may require termination of employment.

e. Cases of insubordination, disregard for Company policy, safety violations and misconduct could result in immediate termination, by passing all usual methods of progressive discipline.

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DISCIPLINARY COUNSELING

a. The majority of our employees perform their jobs well on a daily basis. However, on those occasions where corrective action may be necessary, Business Express provides a progressive disciplinary action plan. This allows most affected employees the opportunity to make necessary corrections in their performance.

b. Business Express' Discipline Policy is based on the following concepts:

1. The purpose of discipline is to reinforce the need for observing established Company rules. It should be a constructive measure which will provide information and the opportunity for the employee to improve their job performance [sic].

2. There is no precise formula for applying discipline. Each instance of misconduct must be evaluated individually. However, if discipline is to be effective, it should be applied in a consistent, [sic] and timely manner.

3. Dismissal is not a corrective measure. Therefore, it should be used only when other efforts have failed or if the violation in question precludes other alternatives.

c. While this section represents a progressive form of disciplinary action and is recommended in most cases, there may be circumstances when more severe action is warranted, such as termination of employment for a first offense. In such instances, it is required that the manager consult with Human Resources to review the facts and discuss the proper approach. The following guidelines are outlined to assist in this decision:

Verbal Counselling [sic] or Reprimand

This is the least severe form of disciplinary action and is generally the first step in resolving lesser problem conduct. The counselling [sic] session should be conducted in private by the employee's supervisor and should consist of a discussion of the specific problem areas and the expected results. A written record of the counselling [sic] session should be made by the manager and retained in the employee's personnel file to provide reference should it become necessary to renew the discussion.

Formal Counselling [sic] and Written Warning

If the verbal counseling does not produce the desired results or if infractions continue after the manager has discussed them with the employee, the employee should be counseled a second time and a formal written warning prepared. The purposes of the written warning is [sic] to:

a. Eliminate misunderstandings between the manager and the employee.

b. Ensure that the employee is given notice of unacceptable conduct in time to permit improvement.

c. Ensure that documentation is available to justify the action taken in the event of disciplinary charges.

d. The written warning will impress upon the employee the seriousness of the infraction and will specify the corrective action the employee must take. It will also advise the employee of the consequences if the problem is not corrected. The written warning must be signed by the employee and the manager, or a witness if the employee refuses to sign. A copy of the written warning must be given to the employee and a copy retained by the manager for the employee's personnel file.

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Dismissals

There are certain acts of misconduct which require the immediate termination of the employee. Several examples requiring immediate dismissal without notice are listed on the following pages. The list is not complete. Other acts of misconduct, not included in the list may warrant dismissal. Each occurrence will be evaluated on an individual basis.

The authority to dismiss an employee carries a heavy responsibility and must be exercised with caution to ensure that no injustice is done. An employee should not be dismissed without the prior review and the concurrence of the Human Resources Department.

. . . .

Dismissal

A dismissal is the termination of an employees' employment which has been initiated by the Company usually as a result of a serious infraction or the continued inability to comply with the Company's policies or performance standards.

The following are examples of acts which may warrant dismissal on the first offense:

. . . .

kk. Failure to maintain an acceptable level of dependability. The Company expects you to report to work regularly and on time. Your Department's ability to perform its assigned functions relies upon the dependability of its employees, and frequent absenteeism or tardiness will not be tolerated.

ll. Failure to observe Company established starting and stopping times of work shifts, rest and lunch periods. This not only involves the Company's management of efficient work operation schedules, but from a personal standpoint, it also involves simple fairness and consideration towards others.

. . . .

APPEAL PROCESS

Former employees who disagree with a manager's decision to terminate their employment are encouraged to follow the Company grievance procedure to appeal the decision.

a. Former employees must follow the "chain of command" and write a letter to the next management level above that of the individual who terminated their employment. A reasonable length of time must be allowed (usually 10 corporate business days) for the manager to review and investigate the appeal request.

b. A personal meeting will be scheduled at each management level with the former employee to allow for a thorough face-to-face discussion of why the employee disagrees with the termination decision.

c. If the outcome of the appeal is unsatisfactory to the former employee and he or she requests further review, he or she must continue to follow the "chain of command" in ascending order of management all the way to the President. Each request for a renewed appeal must be accompanied by an updated letter from the former employee who must explain in detail their [sic] reasons for dissatisfaction with the finding. During the appeal process, a designated person from the Human Resources Department may be functioning as a facilitator.

(Fornaro Ex. 101.)

On January 29, 1994, an anonymous call was placed to the Federal Aviation Agency. The aviation safety hotline brief (Committee Ex. 8) reflecting this call contained the following information:

Narrative Description of Complaint/Safety Issue:
Caller was transferred by FAA Duty Offices to ASA-400 at his residence at 12:30 a.m. Anonymous caller provided non-specific statement that the airline is understaffed, including all operational aspects for positions covered by Part 121. Caller cited scheduling of flight operations (flight crews) as an issue.

Close-Out Remarks:
Non-specific, anonymous report does not provide sufficient information to warrant initiating investigation. Information copy to ANE-200. Closed by hotline program manager.

Did caller want Name Kept Confidential?: Yes Anonymous Caller: Yes

. . . .

Enforcement Investigation Initiated?: No Call Closed: 1/31/94
Other Action Taken?: No Insufficient Information: Yes

(Committee Ex. 8.)

Fornaro testified that he was the caller. On February 28, 1994, Fornaro was terminated by BEX. Fornaro's personnel file contained five employee disciplinary reports, all of which were signed by his immediate supervisor, Mary DePaola, but not by Fornaro. The first four reports indicated Fornaro was spoken to about being late on July 10, 1993, July 14, 1993, September 17, 1993, and October 12, 1993. (Committee Exs. 1-4.) The fifth report is dated January 4, 1994 and indicates it is a final warning for unexcused absences and tardiness and indicates he was told that the next time he would be terminated. (Committee Ex. 5.) A key log (Committee Ex. 6) indicates Fornaro was late on February 25, 26, 27 and 28, 1994.

PROCEDURAL

At the outset of the trial, the Court denied Fornaro's motion to amend his proof of claim to increase the economic damages. At the conclusion of the trial, the Court denied Fornaro's motion to leave the record open for further expert testimony. The Court granted his motion to amend the proof of claim to add a clause seeking reinstatement, reserving any decision as to whether reinstatement was even possible should the Court find for Fornaro. Subsequent to the trial, Fornaro filed a motion for interim order requiring correction of employment records. After a hearing, the Court took it under advisement, indicating that it would be decided in conjunction with this opinion.

DISCUSSION

The first issue the Court will discuss is whether there was an employment agreement and, if so, whether it was breached resulting in the wrongful termination of Fornaro under Connecticut law.[1] The record is clear, and the Court finds that there was no express written employment agreement between Fornaro and BEX.

[1]The parties agree Connecticut law controls.

Fornaro, however, argues that in certain instances Connecticut law recognizes an implied employment contract. Torosyan v. Boehringer Ingelheim Pharmaceuticals, Inc., 234 Conn. 1, 7, 662 A.2d 89 (1995); Magnan v.Anaconda Indus., 193 Conn. 558, 564, 479 A.2d 781 (1984). Specifically, Fornaro argues that the inclusion of the grievance and appeal procedures in the employee handbook created an implied employment agreement which BEX breached. This Court disagrees. First, there is no evidence that at the time Fornaro was hired, there was any promise of continued employment, either written or oral. The handbook was distributed in October 1993, some nine months after Fornaro was hired. Unlike some cases where a presentation may have been changed to the detriment of the employee by a subsequent company policy, that is not the case here. Torosyan, 234 Conn. at 14. The handbook is clear that he was an employee at will, which arrangement could be terminated by either BEX or Fornaro, with or without cause, and that the handbook itself does not create an employment contract. The Court notes that the handbook was not only distributed to at will employees, but also to those with employment agreements or union contracts. The Court further finds that the fact that the disciplinary reports were not signed by Fornaro, which they should have been according to the handbook, creates no greater rights since he was, in fact, an employee at will. Since an employee at will can be terminated without cause, there is no breach of a contract of employment.

For the sake of judicial expediency in the case of an appeal, the Court further finds that there was cause to terminate Fornaro. First and foremost, there is credible evidence of his tardiness. Mary DePaola, his immediate supervisor while Fornaro was employed by BEX and who is no longer employed by BEX or its successor, testified that Fornaro was tardy on numerous occasions. Although she had no real explanation as to why Fornaro's signature was not on the disciplinary reports, she testified that on the occasions indicated on the reports, she talked to Fornaro and then prepared and signed the reports, which were then put in the personnel folder. The Court has no reason to doubt the veracity of her testimony.

Mr. Heller, who was Ms. DePaola's immediate supervisor and is also no longer with BEX or its successor, testified that he had talked to Fornaro on at least one occasion about his tardiness and put a note

in the file to that effect. He further testified that he was responsible for obtaining the key log for the week of February 29, 1994 and reviewed it prior to terminating Fornaro on February 29, 1994. Once again, the Court has no reason to doubt the veracity of his testimony.

Further, Ms. DePaola and Mr. Heller testified that on February 29, 1994, they had no knowledge that Fornaro made the anonymous report to the FAA and indeed did not know of it until recently approached by the Committee in connection with this litigation.

There is conflicting testimony as to why the appeal process contained in the handbook never took place. Fornaro alleges he was essentially stonewalled. Heller and DePaola testified that on at least one occasion, Fornaro did not show up for his scheduled meeting. In any case, since this Court has found that there was cause for termination, the fact that the appeal process did not occur is irrelevant to its decision.

Finally, there was a significant amount of testimony from Fornaro on the need for annual recurrent training within one year and one month (including a one month grace period) of the completion of his initial training. He argues that because he completed the initial training in January 1993, the recurrent training had to take place, at the latest, by February 1994. He testified that he had not been scheduled for the recurrent training at the time he was terminated, February 28, 1994. The Court surmises that his argument is that they wanted to fire him and used tardiness as an excuse. The Court does not buy this argument. First, the evidence is confusing as to when the training ended that tripped the one year and one month period. (Fornaro Ex. 112.) Second, the argument is inconsistent with his claim, to be discussed hereafter, for a retaliatory termination and violation of his constitutional rights.

The second issue before the Court is whether Fornaro was terminated in violation of Connecticut General Statute § 31-51m, commonly referred to as the Connecticut Whistleblower's Statute. That statute states in part "(b) No employer shall discharge . . . any employee because the employee . . . reports, verbally or in writing, a violation or a suspected violation of any state or federal law or regulation . . . to a public body . . . . The provisions of this subsection shall not be applicable when the employee knows that such report is false. LaFond v. Gen. Physics Servs. Corp., 50 F.3d 165 (2nd Cir. 1995).

In LaFond, the court, referring to the standard enumerated in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, L. Ed. 2d 668 (1973) stated that the employee (LaFond) has the burden to establish a *prima facie* case under section 31-51m. "To establish a *prima facie* case, LaFond must show (1) that he engaged in a protected activity, as defined by § 31-51m(b); (2) that he was subsequently discharged from his employment; and (3) that there was a causal connection between his participation in the protected activity and his discharge. The nature of LaFond's burden of proof at the *prima facie* state is *de minimus*." LaFond, 50 F.3d at 173 (internal citations omitted). The facts in the LaFond case were that LaFond, after notifying management of certain alleged violations of law, sent a signed letter to a government agency with a copy of the allegations presented to management. After an investigation, which failed to substantiate nearly all of the allegations, LaFond was discharged in writing, specifically on the basis of the allegations. The facts in this case are totally different from LaFond, and the Court finds that Fornaro has not met his burden, even though *de minimus,* of establishing a *prima facie* case.

First, there is a question whether he engaged in a protected activity. The telephone complaint to the FAA was anonymous. The FAA hotline brief indicated the caller "provided non-specific statement that the airline is understaffed, including all operational aspects for positions covered by Part 121. Caller cited scheduling of flight operations (flight crews) as an issue." (Committee Ex. 8.)

The brief further went on to say that the non-specific information was insufficient to warrant an investigation, that the matter was closed by the hotline manager, and no investigation was initiated. Whether this type of anonymous, non-specific call is a protected activity is a question that this Court does not have to answer because, although Fornaro meets the second prong, i.e., that he was terminated, the Court finds that he has failed to establish the causal relationship between the call and his termination, even under a *de minimus* burden. First, Fornaro relies on the fact that the letter from the FAA forwarding the hotline brief indicates that a copy of the report "was provided to the FAA's New England regional office where surveillance of Business Express' operations and maintenance is conducted." (Fornaro Ex. 107.) It does not say when it was forwarded or to whom, and there is no evidence of what action, if any, the regional

office took. Other evidence of BEX's knowledge includes a statement, clearly hearsay, from Fornaro that he heard on January 31, 1994 a crew scheduler, Tom DeMarco that someone had complained to the FAA. (Transcript, p. 195.) Mr. DeMarco did not testify. Fornaro made conclusory statements that Mr. Heller knew of the complaint because on February 4, 1994, he questioned Fornaro about his previous relationship with the FAA (transcript, p. 198) and that, on the morning of January 31, 1994, BEX knew of the complaint. (Transcript, Vol. 2, p. 117.) There is simply insufficient evidence of BEX's knowledge of the complaint. On the contrary, both Ms. DePaola and Mr. Heller, whose testimony the Court has already found to be credible, testified that they had no knowledge of the complaint when they discharged Mr. Fornaro. This Court, realizing that findings in cases like this most often are the result of inferences, finds that the record before this Court is insufficient to find the required causal relationship between the anonymous call and the discharge.

Had the relationship been present, the Court would still have found that BEX articulated a legitimate, non-retaliatory reason for the discharge, i.e., tardiness, and that Fornaro had not established by a preponderance of the evidence that that reason was a pretext. LaFond, 50 F.3d at 174.

The final issue presented is whether BEX violated Connecticut General Statute § 31-51q by terminating Fornaro because of his exercise of his constitutional rights under the First Amendment.

> Any employer, including the state and any instrumentality or political subdivision thereof, who subjects any employee to discipline or discharge on account of the exercise by such employee of rights guaranteed by the first amendment to the United States Constitution or section 3, 4 or 14 of article first of the Constitution of the state, provided such activity does not substantially or materially interfere with the employee's bona fide job performance or the working relationship between the employee and the employer, shall be liable to such employee for damages caused by such discipline or discharge, including punitive damages, and for reasonable attorney's fees as part of the costs of any such action for damages. If the court determines that such action for damages was brought without substantial justification, the court may award costs and reasonable attorney's fees to the employer.

CONN. GEN. STAT. § 31-51q. Fornaro alleges that he was discharged for exercising his right of free speech, i.e., calling the FAA, which violates section 31-51q. The Court disagrees. The Court has found above that there is insufficient evidence that BEX even had knowledge of the complaint when Fornaro was terminated

and specifically that neither Ms. DePaola nor Mr. Heller had any knowledge of the complaint when Fornaro was terminated. Consequently, this ground for damages must also fail.

The objection of the Committee to Fornaro's proof of claim is sustained, and Fornaro's proof of claim is disallowed.

Fornaro's Motion for Interim Order Requiring Correction of Employment Records is denied.

This opinion constitutes the Court's findings and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate order consistent with this opinion.

DATED this 11th day of February, 2000, at Manchester, New Hampshire.

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Mark W. Vaughn
Chief Judge