

UNITED STATES OF AMERICA
BEFORE THE NATIONAL CREDIT UNION ADMINISTRATION

In the Matter of

XXXX

Docket No. BD - 01-15

Creditor Claim
XXXX Federal Credit Union

Decision and Order on Appeal

Decision

This matter comes before the National Credit Union Administration Board (Board) pursuant to §709.8 of NCUA Regulations (12 C.F.R. §709.8), as an appeal of the decision by the Agent for the Liquidating Agent (ALA) for XXXX Federal Credit Union ([FCU]) to disallow a claim by XXXX, [FCU]'s XXXX and XXXX, requesting payment of accrued, unused sick leave.

Background and Initial Determination

[FCU], located in the northeast section of [XXXX city] with assets of approximately \$14.3 million, was placed into conservatorship on [XXXX date]. The credit union had been victimized by fraud involving insiders, allegedly including XXXX, as well as other employees and credit union members. The fraud was discovered when [FCU]'s outside auditor alerted NCUA examiner staff to certain irregularities in the loan files. Immediately upon appointment, the conservator terminated XXXX from her position as XXX and repudiated any existing or implied employment and benefit contracts. The Board placed [FCU] into liquidation on .

On July 9, 2014, XXXX, through her attorney, filed a creditor claim with the ALA seeking to recover accrued, unpaid sick and vacation pay allegedly owed to her as of the date of her termination of employment. The claim did not specify dollar amounts alleged to be owed, and instead simply indicated that she was seeking the amounts for both categories of leave as reflected in [FCU]'s personnel records. The ALA responded on December 10, 2014, indicating that a claim in the amount of \$XX.XX would be allowed, representing accrued, unpaid vacation pay, but that the claim for accrued, unused sick leave had been disallowed in full. The ALA explained in its response to XXXX that the sick leave portion of her claim was being denied because circumstances surrounding her termination included conduct that could have resulted in termination for cause under applicable provisions of the [FCU] Employee Manual.

Through her attorney, XXXX filed an appeal with the NCUA Board by letter dated February 4, 2015, requesting a review of the ALA's initial determination to deny her claim for the value of her accrued, unused sick leave.¹ The appeal did not dispute or otherwise refer to the ALA's determination with respect to the vacation pay, which amount has been paid to XXXX.

Discussion and Analysis

The FCU Act provides that the conservator shall, by operation of law, succeed to all rights, titles, powers and privileges of the credit union, including the authority to operate the credit union and conduct all business of the credit union. 12 U.S.C. §1787(b)(2). This authority includes the power to make personnel decisions, including the decision to terminate XXXX's employment immediately following the appointment of the conservator. XXXX has not challenged the conservator's decision in this respect or challenged the conservator's exercise of the power of repudiation in connection with her employment termination. *See* 12 U.S.C. §1787(c)(1). The only issue presented in this appeal is whether the ALA properly determined that XXXX was not entitled to receive payment of the value of her accrued, unused sick leave.

Following its appointment, the ALA retained Lillie & Company, LLC, an independent auditing firm, to investigate allegations of fraudulent conduct by former [FCU] employees. The report prepared by the firm following its investigation (Report) implicated XXXX in a series of fraudulent loan transactions aimed at defrauding [FCU] and its members. The scheme involved the submission of loan applications containing fictitious information and the diversion of loan proceeds to the benefit of an individual with ties to a local automobile dealership. This individual or his associates would deliver large amounts of cash to a [FCU] branch to keep the loans current. Once the scheme was uncovered, the cash payments ceased and the loans went into default. Attempts by the conservator and the ALA to repossess vehicles pledged to secure the loans were largely unsuccessful.

According to the Report, the processing and approval of the fraudulent loans was done with the knowledge and at the direction of XXXX. The Report notes that two other [FCU] employees indicated that XXXX had knowledge of the fraud, and one of them also stated that XXXX threatened her with termination if she were to notify the board of directors or NCUA about her concerns. The ALA used the Report in support of a claim filed by the ALA under [FCU]'s fidelity bond. The bond carrier acknowledged liability under the bond and made payment in the full amount of the coverage.

As specified in [FCU]'s Employee Manual, sick leave is to be accrued and any unused balance may be carried over from one year to the next. Any accrued but unused balance of sick leave is potentially recoverable and payable to the employee on retirement or termination, except that the Employee Manual specifically provides that, in order to be eligible to receive it, the termination must have been for a reason other than "for cause." Thus, an employee who is terminated "for cause" is not entitled to receive accrued, unused sick leave.

¹ According to personnel records of [FCU], as of the date of conservatorship XXXX had accrued sick leave credit in the amount of 168 hours, which at her salary translates to \$XX.XX.

There is sufficient evidence to conclude that the conservator had a substantial basis on which to terminate XXXX for cause. The [FCU] Employee Manual defines “cause” as, among other things, participating in any scheme or plan to defraud the credit union or its members. Another specific basis of “for cause” termination is the failure by an employee to report the falsifying or altering of credit union records of which the employee has knowledge. As discussed above and as documented in the Report, XXXX knew of and approved the funding of loans to otherwise unqualified individuals based on fictitious documentation. Losses resulting from these fraudulent loans significantly impaired [FCU]’s financial condition and resulted in its liquidation.

The degree of participation by XXXX in the fraudulent loan scheme was not fully known by the conservator on the date of its appointment, and the conservator’s termination notice to XXXX does not recite any specific cause in support of the determination. The Board notes, however, that the discovery after the fact of XXXX’s knowledge of and involvement in the fraud may serve as a *post hoc* rationalization for her termination.

Case law supports the position that knowledge obtained after the effective date of a termination can be applied retroactively to render the termination as having been “for cause.” According to the Supreme Court of Arizona, “[t]he overwhelming majority of courts hold that if an employer can demonstrate that it would have fired an employee, had it known of prior misconduct, then the employee’s claim for breach of contract is barred. . . .” *O’Day v. McDonnell Douglas Helicopter Co.*, 191 Ariz. 535, 959 P. 2d 792, 795 (Az. 1998). Federal courts in Pennsylvania have interpreted Pennsylvania employment law to allow after-acquired evidence to be used to support an employer’s claim that an employee was terminated for cause. *See e.g., Dobinsky v. Crompton & Knowles Colors, Inc.*, No. 3:02CV1291, 2004 WL 2303686, at *1-7 (M.D. Penn. Mar. 30, 2004) (citing *O’Day* with approval and noting that the Pennsylvania Supreme Court would adopt the so called after-acquired evidence doctrine if faced with the issue); *see also Danois v. i3 Archive Inc.*, No. CIV.A. 11-3856, 2013 WL 3556083, at *18 (E.D. Pa. July 12, 2013) (noting that under Pennsylvania law after-acquired evidence may affect the status of an employee’s termination). The general rule in these types of cases is that the employer must establish that “the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge.” *Dobinsky, supra*, at *6 (citing *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995)).

In this case, [FCU]’s Employee Manual specifically provides that participation in a scheme or plan to defraud the credit union or its members, as well as knowing of such a scheme and failing to report it, are grounds for immediate dismissal. The Employee Manual further provides that employees are on notice that such a violation could “result in filing a report with the Federal Bureau of Investigation (FBI), the local U.S. Attorney, the National Credit Union Administration Regional Office and when appropriate, the District Attorney’s Office for the City of XXXX.” The conservator for [FCU] did turn over copies of pertinent documents to the FBI in this case and an investigation is still underway. In view of the seriousness of the offense and XXXX’s role in it, the conservator would have had cause to, and would have, terminated XXXX on those grounds alone had it known all the circumstances at the time of her termination. Applying the after-acquired evidence doctrine to the facts of this case, XXXX was terminated for cause.

Conclusion

There is ample evidence in this case to indicate that XXXX was aware of and complicit in the fraudulent loan scheme that led to the demise of [FCU]. Her involvement in the scheme provides a sufficient basis to conclude that the conservator would have terminated her employment for cause had it been aware of the circumstances at the time she was terminated. In view of this evidence, and since the [FCU] Employee Manual provides that employees terminated for cause are not entitled to receive accrued, unused sick leave, XXXX's claim for the value of her accrued, unused sick leave was properly denied by the ALA.

Order

For the reasons set forth above, it is ORDERED as follows:

The decision of the ALA for [FCU] denying XXXX's claim for accrued, unused sick leave is affirmed and the appeal of XXXX is denied.

The Board's decision constitutes a final agency determination, which is reviewable in accordance with the provisions of Chapter 7, Title 5, United States Code.² Such action must be filed within 60 days of the date of this final determination.

So **Ordered** this 30th day of April, 2015, by the National Credit Union Administration Board.

_____/S/_____

Gerard Poliquin
Secretary of the Board

² It should be noted that the regulation describing judicial review of Board decisions on creditor claims (12 C.F.R. §709.8(c)(1)(iv)(B)) erroneously refers to review by the U.S. Court of Appeals, instead of the federal District Court. Venue is correctly described in the regulation.