IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO. **CACE20010660** DIVISION: **05** JUDGE: **Bidwill, Martin J. (05)**

Sandi Adler

Plantiff(s) / Petitioner(s)

v.

Starboard Group Management Company Incorporated, et al

Defendant(s) / Respondent(s)

_____/

Order Granting Motions For Partial Summary Judgment

This matter came before the Court on March 31, 2022, for hearing on the motion for partial summary judgment filed by the defendant, Andrew Levy ("Levy"), and on the motion for partial summary judgment filed by the defendant, Starboard Group Management Company Incorporated ("Starboard"). Having considered the motions, record, argument of counsel, and being otherwise duly advised in the premises, the Court rules as follows:

Undisputed Facts

The following facts remain undisputed as cited by the movants in their summary judgment motion. The Court has confirmed the facts are supported by movants' citations to materials in the record, including documents, electronically stored information, declarations, and other materials.

Adler started working at Starboard on or about January 2019, and during her employment, only Starboard employed her. Although Levy serves as Starboard's chief executive officer and is an officer as well as shareholder, at no time did Levy employ Adler in his individually capacity. Starboard terminated Adler on or about June 1, 2020.

I. The Reasons Stated by Starboard for Terminating Adler.

The undisputed facts in the record are that Starboard terminated Adler for several reasons.

According to Starboard, Adler was unable to perform the job duties assigned to her. Adler failed to attend meetings, failed to meet deadlines, and produced poor work product.
Adler was also disorganized, unable to complete her work on time or accurately, and delayed or failed to return communications. Adler was also absent or tardy on several occasions and failed to notify Starboard. Adler's work habits failed to meet the standard required by Starboard.

Adler also misused or absconded with Starboard's or employee's property. Adler used a Starboard credit card for personal expenses. When addressing deductions from Adler's payroll to repay a loan she owed Starboard, she directed the payroll manager to cease deductions although she did not get authority from anyone at Starboard to do so. Instead, Adler had notified Starboard's payroll manager that Starboard had forgiven her loan. Starboard had not forgiven the loan.

I. Starboard's Use of the Cares Act Funds.

Starboard received funds under the payroll protection program ("PPP") within the Cares Act. The PPP funding was used to pay employee payroll, as detailed in the following table:

PPP Funds Reconciliation

Bank Account	Beginning Bank Balance April 2020 (1)	May 2020 transfers to 53rd payroll account	June 2020 transfers to 53rd payroll account	July 2020 transfers to 53rd payroll account	Bank Fees	Ending Bank Balance
Starboard AL JV	$275,067	($118,016)	($156,754)	$0	($159)	$138
Starboard AL	$868,910	($320,259)	($515,044)	$0	($144)	$33,463
Starboard Cheese	$897,477	($357,522)	($387,689)	($152,000)	($124)	$143
Starboard Mgmt	$972,325	($385,910)	($585,972)	$0	($159)	$285
Starboard RN	$753,322	($246,051)	($412,371)	$0	($164)	$94,737
Starboard RS	$921,767	($331,774)	($514,669)	$0	($144)	$75,180
Starboard SE FL	$959,660	($338,308)	($576,062)	$0	($164)	$45,126

Starboard Space Coast	$1,814,945	($721,259)	($1,092,711)	$0	($159)	$816
Starboard Tampa II	$251,195	($91,998)	($141,669)	$0	($144)	$17,385
Starboard Tampa	$763,090	($288,464)	($436,720)	$0	($144)	$37,762
Starboard DTW Airport	$94,690			$0	($14)	$94,676
Total	**$8,572,448**	**($3,199,560)**	**($4,819,660)**	**($152,000)**	**($1,518)**	**$399,710**

Starboard used more than 60% of the PPP funds to pay its employees – it is actually 95%. Every person paid from PPP Funds by Starboard was a Starboard employee.

Conclusions of Law

On May 1, 2021, the Florida Supreme Court added the following language to Rule 1.510(a): "[t]he summary judgment standard provided for in this rule shall be construed and applied in accordance with the federal summary judgment standard." *In re Amendments to Florida Rule of Civil Procedure 1.510* , 317 So. 3d 72, 75 (Fla. 2021). The Florida Supreme Court further stated "[w]e recognize that '30 years of practice under the trilogy has refined and added to the trilogy.'. . . And naturally, courts applying the new rule must be guided not only by the *Celotex* trilogy, but by the overall body of case law interpreting federal rule 56." *Id*. at 76. Therefore, a "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fla. R. Civ. Proc. 1.510(a). Under this new summary judgment standard, the fact there exists some alleged factual dispute between the parties does not defeat a motion for summary judgment. *Nembhard v. Universal Prop. & Cas. Ins. Co.* , Case No. 3D20-1383, 2021 WL 3640525, at *2 (Fla. 3d DCA Aug. 18, 2021).

I. Summary Judgment Discussion on the Whistleblower Claims.

Adler has sued Levy and Starboard under Florida's Whistleblower Act (the "Act"). A plaintiff must show 3 factors exist to pursue a retaliation claim under the Act: (1) the employee engaged in protected activity; (2) the employee suffered an adverse employment action; and (3) there is a causal

connection between the protected activity and the adverse employment action. *Chaudhry v. Adventist Health Sys. Sunbelt, Inc.* , 305 So. 3d 809, 813-14 (Fla. 5th DCA 2020). In pertinent part, the protected activity includes an employee objecting to, or refusing to participate in, "any activity, policy, or practice of the employer which is in violation of a law, rule, or regulation." Fla. Stat. § 448.102(3). If a plaintiff meets its burden to show a *prima facie* case, the employer may then proffer the legitimate, non-retaliatory reason for the adverse employment action. *Chaudhry*, 305 So. 3d at 813-14 (citing *Rice-Lamar v. City of Fort Lauderdale*, 853 So. 2d 1125, 1133 (Fla. 4th DCA 2003)). The plaintiff then bears the burden to establish there exist genuine issues of material fact showing the reason for terminating the employee was a pretext for retaliatory conduct. *Id.*

A. Analysis for the PPP Whistleblower Claim.

Adler has alleged a PPP Whistleblower claim asserting Starboard and Levy misused or misrepresented the PPP funds it received. Congress passed the Coronavirus Aid, Relief, and Economic Security Act, or CARES Act to respond to the COVID-19-induced economic fallout. *In re Gateway Radiology Consultants, P.A.*, 983 F.3d 1239, 1247 (11th Cir. 2020) (citing Coronavirus Aid, Relief, and Economic Security Act, Pub L. No. 116-136, 134 Stat. 281 (2020)). The Act aimed to help businesses make payroll and pay operating expenses to keep people employed through the economic downturn. *Id.* The PPP is one program in the CARES Act designed to accomplish that goal. *Id.* (citing Coronavirus Aid, Relief, and Economic Security Act, Pub L. No. 116-136 § 1102, 134 Stat. at 286 (codified at 15 U.S.C. § 636(a)(36))).

The principal function for the PPP is to afford small businesses potentially forgivable loans. *See* 15 U.S.C. § 636(a)(36)(D)(I). A business is able to obtain forgiveness when it uses the loaned funds for specified expenses. *See* 15 U.S.C. § 9005(b). Expenses that trigger forgiveness include using the funds to cover payroll, mortgage payments, rent payments, and utility expenses. *Id.* The forgiveness amount depends on the amount the business uses the funds to pay those costs. But the allowable uses for loan funds is longer than the uses listed to qualify for loan forgiveness. For example, payments for health care benefits and interest on debt obligations are allowable uses for the loaned funds, but the business

will not receive forgiveness for the portion used for those expenses or costs. *See id.* § 636(a)(36)(F)(i)(I)–(VII); *id.* § 9005(b).

There is nothing stated in the CARES Act that creates a law, rule, or regulation about what Starboard may inform or tell third parties about receiving PPP funds. Adler repeats the assertion that Starboard instructed Adler to mislead landlords, vendors, and creditors – which Starboard denies – by telling them Starboard did not receive PPP funds. But because there is no governing law, rule, or regulation under the CARES Act addressing, let alone prohibiting, Starboard's public statements about the PPP, there is no violation of it.

Starboard used at least 60% of the PPP funds on payroll as required under the CARES Act. Adler has offered no evidence to show that Starboard used less than 60% of the PPP funds it received for purposes other than its payroll. The undisputed facts show that every person paid under the Starboard payroll with PPP funds was a Starboard employee. Starboard therefore did not violate any law, rule, or regulation when it obtained and used the PPP funds. Without a violation, Adler could not have engaged in protected activity.

At the hearing on the motions for summary judgment, Adler conceded this point. Therefore, the Court, based on the record, argument of counsel, and the concession by Adler, enters summary judgment in Levy's and Starboard's favor on the PPP whistleblower claim.

A. Analysis for the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") Whistleblower Claim.

For the FDUTPA Whistleblower claim, Adler must show Levy and Starboard violated FDUTPA. To violate FDUTPA, 3 factors must be present: "(1) a deceptive act or unfair practice; (2) causation; and (3) actual damages." *Stewart Agency, Inc. v. Arrigo Enterprises, Inc.* , 266 So. 3d 207, 212 (Fla. 4th DCA 2019). The defendant must also have engaged in "trade or commerce," which

> means the advertising, soliciting, providing, offering, or distributing, whether by sale, rental, or otherwise, of any good or service, or any property, whether tangible or intangible, or any other article, commodity, or thing of value, wherever situated. "Trade or commerce" shall include

> the conduct of any trade or commerce, however denominated, including any nonprofit or not-for-profit person or activity.

Fla. Stat. § 501.203. Actual damages under FDUTPA are the difference between the market value for the product or service in the condition delivered and its market value in the condition the defendant should have delivered it under the contract. *Rodriguez v. Recovery Performance & Marine, LLC*, 38 So. 3d 178, 180 (Fla. 3d DCA 2010). FDUTPA protects "a consumer from unfair or deceptive acts or practices which diminish the value or worth of the goods or services purchased by the consumer." *Id.* FDUPTA does not apply to the following:

> (3) A claim for personal injury or death or <u>a claim for damage to property other than the property that is the subject of the consumer transaction.</u>
>
> * * *
>
> (7)(a) Causes of action pertaining to commercial real property located in this state if the parties to the action executed a written lease or contract that expressly provides for the process of resolution of any dispute and the award of damages, attorney's fees, and costs, if any; or
>
> (b) Causes of action concerning failure to maintain real property if the Florida Statutes:
>
> 1. Require the owner to comply with applicable building, housing, and health codes;
>
> 2. Require the owner to maintain buildings and improvements in common areas in a good state of repair and maintenance and maintain the common areas in a good state of appearance, safety, and cleanliness; and
>
> 3. Provide a cause of action for failure to maintain the real property and provide legal or equitable remedies, including the award of attorney's fees.

Fla. Stat. § 501.212 (emphasis added).

Adler has alleged the FDUPTA Whistleblower claim contending Starboard instructed her to mislead landlords, vendors, and creditors by telling them that it did not receive PPP funds so she could negotiate relief from Starboard's payment obligations. Adler has offered no evidence to show the purported misinformation can form the basis for a claim under FDUTPA. As an initial matter, the

alleged conduct does not constitute trade or commerce because Adler does not claim Starboard asked her to advertise, solicit, provide, offer, or distribute, whether by sale, rental, or otherwise, any good or service, or any property.

But also, Adler has alleged conduct that entails either a claim to property (money) not the subject of a consumer transaction or a claim related to real property. *See* Fla. Stat. §§ 501.212(3); 501.212(7). The claim turns on Starboard negotiating an existing debt with its creditors and landlords given its financial troubles. Those are claims to property or claims related to real property – both barred from a FDUTPA claim. The alleged conduct therefore does not violate FDUTPA.

The facts Adler has alleged also do not show any cognizable damages. The damages available to protect a consumer from unfair or deceptive acts or practices is the difference in value or worth of the goods or services purchased by the consumer. *Rodriguez*, 38 So. 3d at 180. When a plaintiff cannot articulate a recoverable loss under FDUTPA, there is no violation. *Id.*

The claimed conduct does not establish a recoverable loss by the creditors and landlords because there is no difference in the market values for the product or service Starboard must have delivered versus what it should have delivered. On the contrary, Starboard was receiving the products and services rather than delivering them. FDUTPA does not fit with the Whistleblower Claim Adler has attempted to allege under the Act.

At the hearing on the motions for summary judgment, Adler conceded this point. The Court, therefore, based on the record, argument of counsel, and the concession by Adler, enters summary judgment in Levy and Starboard's favor on the FDUTPA whistleblower claim.

A. The Legitimate, Non-Retaliatory Reason for the Adverse Employment Action.

Even if Adler had been able to establish a *prima facie* retaliation claim, the undisputed facts are sufficient to show the reasons Starboard terminated Adler were legitimate and non-retaliatory. Adler therefore must demonstrate the reasons Starboard has provided for terminating her were a pretext for the retaliation she has alleged. An employer may not retaliate against an employee because the employee has "objected to, or refused to participate in, any activity, policy, or practice of the employer which is in

violation of a law, rule, or regulation." *Sierminski v. Transouth Fin. Corp.*, 216 F.3d 945, 950 (11th Cir. 2000)(quoting Fla. Stat. § 448.102(3). Therefore, a plaintiff must establish her refusal caused her termination. *Id; see also Chaudhry* , 305 So. 3d at 814. If an employee establishes a *prima facie* retaliation claim, then the employer may show there was a legitimate reason for terminating the employee to rebut the claim. *See Chaudhry* , 305 So. 3d at 814; *see also Padron v. BellSouth Telecommunications, Inc.* , 196 F. Supp. 2d 1250, 1256 (S.D. Fla. 2002), aff'd sub nom. *Padron v. Bellsouth*, 62 F. App'x 317 (11th Cir. 2003). The employer need only provide credible evidence showing the legitimate reasons for terminating the employee: "[t]he employer does not bear the burden of persuasion." *Padron*, 196 F. Supp. 2d at 1256. The employee bears the burden to show engaging in the protected activity was the "but for" cause for the termination:

> Accordingly, we agree with the Fourth District's conclusion in *Wright* and find that *Nassar* requires the use of a "but for" rather than a "motivating factor" causation standard when analyzing claims under Florida's Whistle Blower's Act. Thus, we hold that the trial court abused its discretion by refusing to give the *Nassar*-based "but for" causation jury instruction requested by Florida Hospital. Under the circumstances and given the evidence presented, a new trial on liability and causation is required using an appropriate "but for" jury instruction.

Chaudhry, 305 So. 3d at 817. No longer is it sufficient to show the protected activity was a "motivating factor" for the adverse employment decision.

Other than Adler claiming Starboard terminated her because she objected to the purported practices she alleged in the complaint, there are no facts or evidence in the record to make the causal connection between the alleged protected activity and the adverse employment decision. But the undisputed facts show there exist several legitimate reasons for Starboard's decision to terminate Adler. *See* page 2, *supra.* For this additional reason, the Court grants the motions for summary judgment in favor of Levy and Starboard.

A. Discussion for Whistleblower Claims Alleged Against Levy.

Florida common law does not include liability for retaliatory discharge. *Tracey-Meddoff v. J. Altman Hair & Beauty Ctr., Inc.*, 899 So. 2d 1167, 1168 (Fla. 4th DCA 2005) (citing *Arrow Air, Inc. v.*

Walsh, 645 So. 2d 422, 424 (Fla.1994)). Any liability under Florida law must therefore come from the Act. *Id*. The Act imposes liability only on an "employer" defined under Section 448.101(3): "'Employer' means any private individual, firm, partnership, institution, corporation, or association that employs ten or more persons. Employer does not include officers, directors, or shareholders for the firm, partnership, institution, corporation of association." *Id.*; *see also Tracey-Meddoff* , 899 So. 2d at 1168 (citing *Holly v. Auld*, 450 So. 2d 217, 219 (Fla.1984)).

Adler has alleged various facts against Levy (*see* Complaint ¶¶ 11, 12, 14) but none support a claim under the Act. There are no facts alleged to establish Levy employed Adler directly in his individual capacity. There is no dispute Adler worked only for Starboard. Ex. A ¶ 7; Ex. B ¶¶ 52-53. Adler has alleged (and there is no dispute) Levy is the chief executive officer for Starboard. Ex. A ¶ 5; Ex. B ¶ 54. There is also no dispute Levy is, at most, a Starboard officer, director, or shareholder. Ex. A ¶ 5; Ex. B ¶ 55.

The decision in *Tracey–Meddoff* is instructive. The *Tracey–Meddoff* plaintiff sued the employer's owners, directors, and officers under the Act. 899 So. 2d at 1167. The plaintiff attempted to argue the defendants were personally liable for tortious acts committed within the scope of their employment. *Id.* at 1168. But the *Tracey–Meddoff* court held that no personal liability attached because Florida common law does not recognize retaliatory discharge as a tort. *Id.* The court refused to read into the Act those who purportedly acted on the employer's behalf.

The Act does not create a cause of action against Starboard's officers, directors, or shareholders, and therefore the claims Adler has alleged under the Act against Levy fail as a matter of law. Even if Adler had not conceded summary judgment on the Whistleblower claims, the Court must still enter summary judgment for Levy for the claims alleged under the Act.

I. Summary Judgment Analysis for the Assault by Ratification Claims.

A defendant cannot ratify a criminal act or intentional tort committed outside its authority. *Riddle v. Aero Mayflower Transit Co.* , 73 So. 2d 71, 72 (Fla. 1954) (ratification does not occur "[e]ven

if defendant secured a lawyer to represent his servant and retained the servant in his employment after serving his jail sentence . . . ."); *see also M R & R Trucking Co. v. Griffin* , 198 So. 2d 879, 884 (Fla. 1st DCA 1967); *Goss v. Human Services Associates, Inc.* , 79 So. 3d 127, 132 (Fla. 5th DCA 2012). An employee's conduct falls within the course and scope of employment when it (1) is conduct the master hired the employee to perform, (2) occurs substantially within the time and space limits authorized or required by the work the employee must perform, and (3) serves the master's purpose. *Id.* "Generally, sexual assaults and batteries by employees are held to be outside the scope of an employee's employment and, therefore, insufficient to impose vicarious liability on the employer." *Agriturf Mgmt., Inc. v. Roe* , 656 So. 2d 954, 955 (Fla. 2d DCA 1995) (quoting *Nazareth v. Herndon Ambulance Serv., Inc.*, 467 So. 2d 1076, 1078 (Fla. 5th DCA 1985)).

The only support for ratification submitted by Adler is that Levy purportedly commented when Holbrook made the purported statements to Adler. Even assuming Adler brought forward proof that Levy made the statements, individually and for Starboard, it would not change that the assault alleged is an intentional tort. Florida law therefore does not attach liability to an employer.

The Court has reviewed the *Goss* decision and has decided it is binding authority. In *Goss*, the court reasoned that, although the alleged sexual assault occurred at work, it was not within the course and scope of the employee's employment because the act did not further the employee's employment with the defendant. *Id.* (citing *Iglesia Cristiana La Casa Del Senor, Inc. v. L.M.* , 783 So. 2d 353, 358 (Fla. 3d DCA 2001) (a pastor's conduct was independent and self-serving occurring outside the course and scope of employment)); *Agriturf Mgmt.* , 656 So. 2d at 955 (employee's job-related conduct was within course and scope but did not extend to alleged sexual abuse). So too here. Sexual assault falls outside the course and scope of Holbrook's employment.

Adler relied on *Byrd, et al., v. Richardson–Greenshields Securities, Inc.* , for the proposition that "[p]ublic policy now requires that employers be held accountable in tort for the sexually harassing environments they permit to exist, whether the tort claim is premised on a remedial statute or on the common law." 552 So. 2d 1099, 1104 (Fla. 1989). But the Court has reviewed *Byrd* and determined the

quote Adler cited is dicta. The holding for *Byrd* is that Florida's worker compensation statutes do not bar a tort claim arising from sexual harassment. That is not the same as being able to use assault by ratification to hold Starboard and Levy vicariously liable for the alleged sexual harassment.

There is no evidence that supports a finding Holbrook committed the alleged assault while within the scope of his employment. Adler cannot offer any evidence to show Starboard hired Holbrook to commit the alleged assault or that it served Starboard's purpose in any way. To the contrary, Starboard did not hire Holbrook to engage in the purported assault and it would not serve Starboard's purpose. *Goss*, 79 So. 3d at 132.

Even if Adler presented evidence that she suffered an assault, she cannot make Starboard and Levy liable for that assault under Florida law. The ratification doctrine does not change this outcome. The assault by ratification claim Adler has alleged therefore fails because, even if true, the conduct is not within the scope of Holbrook's employment. The Court therefore grants summary judgment in Starboard's and Levy's favor.

ORDERED and **ADJUDGED** as follows:

1. The Motion for Summary Judgment submitted by LEVY is hereby **GRANTED**.
2. The Motion for Partial Summary Judgment submitted by STARBOARD is hereby **GRANTED**.
3. The Court will enter a final judgment upon submission of a separate final judgment.

DONE AND ORDERED in Chambers at Broward County, Florida on 7th day of April, 2022.

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Hon. Martin Bidwill
CIRCUIT JUDGE
Electronically Signed by Martin Bidwill

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