[Cite as *Fennessey v. Mt. Carmel Health Sys., Inc.*, 2009-Ohio-3750.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Barbara L. Fennessey,	:	
Plaintiff-Appellant,	:	
		No. 08AP-983
v.	:	(C.P.C. No. 06CVH-01-280)
Mount Carmel Health System, Inc. et al.,	:	(REGULAR CALENDAR)
	:	
Defendants-Appellees.	:	

D E C I S I O N

Rendered on July 30, 2009

Gallagher, Gams, Pryor, Tallan & Littrell, L.L.P., and *Timothy J. Ryan*, for appellant.

Littler Mendelson P.C., James Ferber, and *Jayme P. Smoot*, for appellees.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} Barbara L. Fennessey, plaintiff-appellant, appeals from a judgment of the Franklin County Court of Common Pleas, in which the court granted summary judgment to Mount Carmel Health System, Inc., and Mount Carmel East Hospital (collectively "Mount Carmel"), defendants-appellees.

{¶2} Since September 1976, appellant was employed as a registered nurse by Mount Carmel or Mount Carmel's predecessor. During the time of employment, Mount

Carmel issued an employment manual ("manual") to appellant. While working on October 25, 1999, appellant used physical restraints to confine an unruly patient and then poured water over the patient's face, in violation of hospital protocol. On November 3, 1999, hospital management learned of appellant's actions with the patient and conducted an investigation. After the investigation, Mount Carmel placed appellant on administrative leave. The administrative leave was extended to November 10, 1999, at which time appellant went on a previously scheduled medical leave. Appellant returned from medical leave on January 10, 2000. On that date, Mount Carmel terminated appellant's employment. On the progressive counseling form executed that same day by hospital manager Linda Weatherholt, she indicated the counseling classification as "unsatisfactory work performance" because of "violation of rules or regulations." The form indicated that appellant's behavior constituted "patient mistreatment." Appellant's actions were also reported to the state nursing board, which subsequently indefinitely suspended appellant's nursing license.

{¶3} On January 13, 2000, appellant commenced an appeal of her termination via Mount Carmel's internal three-step non-management appeal process, as outlined in the manual. During step one of the appeal process, appellant filed her appeal and requested that her termination be modified to a suspension or probation, or, alternatively, that she be permitted to resign. On January 20, 2000, appellant and Weatherholt held a discussion, during which there was an alleged agreement that appellant would be permitted to resign and collect payment for her unused leave, to which appellant would not have been entitled had she been terminated for misconduct. Weatherholt told appellant that she would need to sign a release.

{¶4} On February 11, 2000, Weatherholt delivered the release to appellant, but appellant refused to execute it because it contained additional terms not previously discussed. Appellant requested that she continue her appeal and commenced step two of the appeal process. Mount Carmel refused to allow appellant to continue the appeal process, claiming that the January 20, 2000 agreement resolved her appeal, and she could not reopen the appeal process thereafter. After appellant and Mount Carmel representatives exchanged numerous letters regarding the matter, on April 21, 2000, Mount Carmel terminated appellant's employment.

{¶5} After voluntarily dismissing a previously filed action against Mount Carmel, appellant re-filed the present action against Mount Carmel on January 9, 2006, alleging claims for breach of contract and promissory estoppel. On June 29, 2006, Mount Carmel filed a motion for summary judgment, claiming there existed no express or implied contract exempting appellant from being an at-will employee, and Mount Carmel did not make any promise that made her an at-will employee.

{¶6} On September 26, 2008, the trial court granted Mount Carmel's motion for summary judgment. With regard to the promissory estoppel claim, the court found that the manual contained no promise of continued employment and no promises were made by Mount Carmel. With regard to the breach of contract claim, the court found that the manual signed and acknowledged by appellant made clear that she was an at-will employee, and appellant failed to show any fraud in the inducement. Appellant appeals the judgment of the trial court, asserting the following two assignments of error:

> [I.] THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT WHERE THERE IS EVIDENCE IN THE RECORD THAT, A

> PROMISE DID EXIST TO SUPPORT THE PLAINTIFF[']S CAUSE OF ACTION FOR PROMISSORY ESTOPPEL.
>
> [II.] THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT WHERE THERE IS EVIDENCE IN THE RECORD THAT A CONTRACT FOR EMPLOYMENT EXISTED BETWEEN THE PLAINTIFF AND THE DEFENDANT.

{¶7} Appellant argues in her first assignment of error that the trial court erred when it granted Mount Carmel's motion for summary judgment when there was evidence that a promise existed to support appellant's promissory estoppel claim. When reviewing a motion for summary judgment, courts must proceed cautiously and award summary judgment only when appropriate. *Franks v. The Lima News* (1996), 109 Ohio App.3d 408. Civ.R. 56(C) provides that, before summary judgment may be granted, it must be determined that (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the non-moving party, that conclusion is adverse to the non-moving party. *State ex rel. Howard v. Ferreri*, 70 Ohio St.3d 587, 589, 1994-Ohio-130. When reviewing the judgment of the trial court, an appellate court reviews the case de novo. *Franks*.

{¶8} Ohio follows the doctrine of employment-at-will, whereby an employment agreement of indefinite duration is presumed to be terminable at will by either party for any reason not contrary to law. *Mers v. Dispatch Printing Co.* (1985), 19 Ohio St.3d 100, 103. However, the terms of discharge may be altered when the conduct of the parties indicates a clear intent to impose different conditions regarding discharge. *Condon v.*

Body, Vickers & Daniels (1994), 99 Ohio App.3d 12, 18. In certain contexts, evidence of customs, company policies, employee handbooks, and oral representations may be used to establish the existence of an implied employment contract or an implied term of that contract. *Mers*, paragraph two of the syllabus. Accordingly, there are two exceptions to the employment-at-will doctrine: promissory estoppel, and an express or implied contract altering the terms for discharge. Id. at 103-04.

{¶9} Appellant's first assignment of error addresses promissory estoppel. An employee may recover under a theory of promissory estoppel in the context of an at-will employment relationship when the employee establishes the following elements: (1) a clear and unambiguous promise; (2) reliance on the promise; (3) the reliance is reasonable and foreseeable; and (4) the party relying on the promise was injured by his or her reliance. *Patrick v. Painesville Commercial Properties, Inc.* (1997), 123 Ohio App.3d 575, 583.

{¶10} Here, the trial court found that summary judgment was warranted because the manual provided that appellant's employment was at will, and Mount Carmel gave no promise of continuous employment to appellant. Appellant argues that the trial court's decision was wrong for two reasons: (1) although the manual contains an at-will disclaimer, it also contains a significant amount of language that illustrates an intention to vary the at-will doctrine depending upon the classification of employee, whether an introductory, non-management or management employee; and (2) although there is no evidence in the record that appellant was specifically and directly promised "continuous employment," appellant received the same promise when she was told that her

employment would not be terminated without appellate review of the decision. We address appellant's contentions together.

{¶11} The manual contains clear language delineating appellant's employment as at will. Upon receiving the manual, appellant signed an acknowledgement, which indicated, in pertinent part:

> I recognize Mount Carmel Health System has the right to change provisions in this manual and other policies. * * * I understand that no representative of Mount Carmel Health System has the authority to make an agreement contrary to the provisions of this manual.
>
> I recognize this manual does not constitute a contract of employment. I understand that, at any time, for any reason, I can separate my employment relationship and that Mount Carmel Health System has the same right regarding my employment status.

{¶12} On the first substantive page of the manual, the manual contained the following language indicating that all employment was at will:

> *110.1 Employment At Will*
>
> An employee of Mount Carmel Health System is an employee at will. The employee or Mount Carmel Health System can terminate the employment relationship at any time for any reason. No statement in this manual will be interpreted or applied as a contract of employment.

{¶13} Although appellant acknowledges the at-will language, appellant claims that other provisions in the manual vary this at-will relationship based upon whether the employee is an introductory employee, non-management employee or management employee. Appellant points to various sections of the manual to support her argument. Section 225.0, New Hire Introductory Period, provides that the first three months of employment for non-managers and the first six months for managers are an introductory

period. Section 225.2, Termination During the New Hire Introductory Period, provides that an employee is hired with the condition that employment may be terminated at any time during the introductory period. Section 430.0, Non-Management Employee Appeal Process, and Section 435.0, Management Employee Appeal Process, provide non-management and management employees, respectively, with similar four-step processes for addressing complaints. Therefore, appellant argues, these provisions modify the pure "at-will" status of employees by instituting policies that must be followed by different types of employees. Appellant maintains there would be no need for these varying policies if Mount Carmel could terminate all employees at will at any time.

{¶14} We disagree that the provisions listed above altered the at-will status of appellant's employment with Mount Carmel. Initially, it has been held that, when an employee manual contains numerous references to at-will employment, reasonable minds cannot differ in determining that the employee cannot reasonably rely on the discipline protocol, like the appeal process in the present case, as a condition precedent to being terminated. See *Tucker v. Life Line Screening of Am., Inc.*, 3d Dist. No. 7-04-05, 2005-Ohio-3236, ¶16. Notwithstanding, none of the above provisions were a promise or assurance about the length or terms of appellant's employment. The promise forming the basis of a promissory estoppel claim must be specific. A promise of future benefits without a specific promise of continued employment does not support a promissory estoppel exception to the employment-at-will doctrine. *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, paragraph two of the syllabus. In essence, what appellant is asserting here is that the manual promised her the future benefit of an appeal process. However, without a concurrent promise of continued employment, the promise

of this future benefit cannot support her promissory estoppel claim. Appellant simply cannot point to any clear and ambiguous promise of continued employment. Although appellant also claimed that she was told orally that she was entitled to an appellate process before being hired, appellant admitted in her deposition testimony that no one at Mount Carmel ever guaranteed her orally or in writing that she would be employed for a specific period.

{¶15} Although we appreciate appellant's point that the manual's appeal process seems contradictory to at-will employment, there simply exists no language in the appeal provisions that guarantees continued employment, which is vital to a promissory estoppel claim. Despite appellant's claims that the introductory period and appeal process provisions for management and non-management employees demonstrate exceptions to the at-will rule, it is inescapable that Section 110.1 specifically provides that employment for all employees is at will. Section 110.1 contains no exceptions, and we cannot read any into it without some specific language in the manual indicating such an exception. For these reasons, we find there remain no genuine issues of material fact on appellant's promissory estoppel claim. Therefore, the trial court did not err when it granted summary judgment to Mount Carmel on appellant's promissory estoppel claim. Appellant's first assignment of error is overruled.

{¶16} Appellant argues in her second assignment of error that the trial court erred when it granted Mount Carmel's motion for summary judgment when there was evidence that a contract for employment existed between appellant and Mount Carmel to support appellant's breach of contract claim. In order to prove the existence of an implied contract, a plaintiff bears the heavy burden of demonstrating (1) assurances on the part of the

employer that satisfactory work performance was connected to job security; (2) a subjective belief on the part of the employee that he could expect continued employment; and (3) indications that the employer shared the expectation of continued employment. *Craddock v. Flood Co.*, 9th Dist. No. 23882, 2008-Ohio-112, ¶7. Whether a plaintiff proceeds under a theory of implied contract or promissory estoppel, specific representations leading to an expectation of continued employment are essential. *Wing*, paragraph two of the syllabus.

{¶17} Here, appellant maintains that there existed an implied contract of employment between her and Mount Carmel based upon the progressive counseling and appeal process provisions in the manual. The appeal process was outlined above. With regard to progressive counseling, Section 420.0, Progressive Counseling, provides that Mount Carmel "has adopted a process of progressive counseling" "designed to give each employee the opportunity to correct improper work habits, conduct, or behavior." Step one of the progressive counseling process is verbal counseling; step two is written counseling; step three is final written counseling; and step four is termination of employment. Section 420.0 provides that the steps occur in progressive stages; however, the step taken depends upon the seriousness of the offense. Steps two, three, and four all indicate that the prior steps may be omitted if the incident is of a serious nature. Further, step four provides that termination of employment may become necessary when the prior steps have not produced the desired change or the misconduct is so severe that immediate termination is warranted. Appellant maintains that Mount Carmel had always followed the progressive discipline and appeal processes while she was employed there,

she was trained that these processes were mandatory, and she was told by Mount Carmel representatives that these processes were not discretionary.

{¶18} As mentioned above, employee handbooks, customs, company policies, and oral representations can constitute evidence of an implied employment contract removing a plaintiff from the set of at-will employees. *Mers*, citing *Hedrick v. Ctr. for Comprehensive Alcoholism Treatment* (1982), 7 Ohio App.3d 211. There is, however, a heavy burden on the party relying on an implied contract to demonstrate the existence of each element necessary to the formation of a contract including, inter alia, the exchange of bilateral promises, consideration, and mutual assent. *Sagonowsky v. The Andersons, Inc.*, 6th Dist. No. L-03-1168, 2005-Ohio-326, ¶14. Both parties must have intended for the language in handbooks or manuals to be legally binding. *Smiddy v. Kinko's, Inc.*, 1st Dist. No. C-020222, 2003-Ohio-446, ¶20. In other words, the employee's belief that the handbook affords him contractual rights does not mean that it does unless the employer intends it to do so. Id.

{¶19} Initially, as to any oral representations regarding the progressive discipline and appeal processes, oral representations will alter the at-will employment agreement only if the parties have a "meeting of the minds" that such representations are considered valid contracts altering the terms of discharge. *Turner v. SPS Technologies, Inc.* (June 4, 1987), 8th Dist. No. 51945. In order to satisfy this requirement, the parties must have a "distinct and common intention which is communicated by each party to the other." *Cohen & Co. v. Messina* (1985), 24 Ohio App.3d 22, 24. Appellant has presented no evidence of oral representations rising to the level or a "meeting of the minds" to alter the terms of discharge. Although appellant may claim representatives of Mount Carmel made

statements indicating that the progressive discipline and appeal processes were mandatory, there was no evidence that the parties ever discussed or meant for the terms of the manual to be altered in any way. Indeed, the acknowledgement signed by appellant when she received the manual specifically warns that no representative of Mount Carmel has the authority to make an agreement contrary to the provisions of the manual. Therefore, we find any oral representations relied upon by appellant were insufficient to form an express or implied contract.

{¶20} We also note that whether the disciplinary procedure above is a true "progressive" procedure is debatable. Steps two, three, and four indicate that any step may be taken if the incident is of a serious nature, and step four provides that immediate termination of employment may occur if the misconduct is so severe that urgent action is warranted. Where a disciplinary policy is not stated in absolute terms, but is qualified by noting that, depending on the seriousness of the offense, any or all of the steps preliminary to discharge may be skipped, the disciplinary procedure is not mandatory; rather, the employer is merely publishing the possible penalties that may be taken for violating company policies, while maintaining discretion as to which penalty will be used. *Sagonowsky*, citing *Gargasz v. Nordson Corp.* (1991), 68 Ohio App.3d 149. Under such circumstances, the employee remains an at-will employee who could be terminated at any time. Id. at ¶81.

{¶21} Notwithstanding, it has been reasoned that finding a progressive disciplinary procedure creates an implied contract that would eradicate the use of employment manuals or policies and procedure manuals in at-will employment relationships; that is, any time an employer chose to list disciplinary procedures in an

employment manual, and then abided by its agreement to follow those procedures, a disciplined employee would rise above her at-will status and gain the employment protection of a contract. See *Howell v. Whitehurst Co.*, 6th Dist. No. L-05-1154, 2005-Ohio-6136, ¶55. We agree that the mere existence of the disciplinary procedure in the manual here fails to change the employment status from at will.

{¶22} Importantly, there is no evidence here that the parties intended to create a contract from the manual. As explained above, employer handbooks do not create employee rights that alter the at-will nature of employment unless the parties have a meeting of the minds indicating that such items are to be considered valid contracts altering the terms for discharge. *Bartlett v. Daniel Drake Mem. Hosp.* (1991), 75 Ohio App.3d 334, 338. In the absence of mutual assent, a handbook is merely a unilateral statement of rules and policies which creates no rights or obligations. *Napier v. Centerville City Schools*, 157 Ohio App.3d 503, 2004-Ohio-3089, ¶15, citing *Adams v. K-Mart Corp.* (Feb. 5, 1999), 2d Dist. No. 98CA75, citing *Henning v. Marriott Hotel & Resorts, Inc.* (May 25, 1995), 2d Dist. No. 14926.

{¶23} Here, as detailed above, the manual contained specific and unambiguous disclaimers that the policies in the manual did not constitute a written contract of employment. Such disclaimers, absent fraud in the inducement, preclude the use of a written employee handbook to demonstrate an implied contract of employment. See *Wing*, paragraph one of the syllabus. See also *Shepard v. Griffin Servs., Inc.*, 2d Dist. No. 19032, 2002-Ohio-2283, citing *Wing* (many of handbooks contain disclaimers, which require the employee to acknowledge that the document does not create an employment contract, and such negate any inference of contractual obligations between the parties);

Rolsen v. Lazarus, Inc. (Sept. 29, 2000), 1st Dist. No. C-990588 (although company had policy of progressive discipline in the employee handbook, and such a practice was not followed, it did not create a contract, as the handbook expressly disclaimed it created any contractual rights, and the employee signed a statement indicating her understanding that nothing in the handbook was to be construed as a direct or implied contract of employment). There being no fraud in the inducement claimed in the present case, the disclaimers are formidable evidence that Mount Carmel did not intend to afford appellant contractual rights and there was no meeting of the minds between the parties to alter the terms of discharge. See also *Bartlett* at 338 (employer's "Employee Discipline" and "Predisciplinary Conference and Appeal Procedure" provisions in personnel manual were mere unilateral statements of the hospital's procedure for the invocation of disciplinary action against an employee, and do not create an implied employment agreement between the parties).

{¶24} Courts have also considered the right to unilaterally alter an employee handbook as an indication of lack of mutual assent. *Finsterwald-Maiden v. AAA S. Cent. Ohio* (1996), 115 Ohio App.3d 442, 447. If employers have the right to make gratuitous statements concerning employment policies, it logically follows that employees may not rely upon those statements as manifesting a mutual intent to be bound by the pre-existing terms of those policies. *Olive v. Columbia/HCA Healthcare Corp.* (Mar. 9, 2000), 8th Dist. No. 75249. Both the manual and the acknowledgement signed by appellant here indicated that Mount Carmel had the right to change provisions in the manual and other policies. In addition to the language in the acknowledgment that Mount Carmel had the right to change provisions in the manual and other policies, the manual also provided

under "Conditions of Employment" that Mount Carmel management had the right to amend, revise, or eliminate policies and procedures as needed, thereby further demonstrating a lack of mutual assent. Accordingly, the progressive discipline and appeal procedures were merely unilateral statements of rules that could be amended or ignored at any time.

{¶25} Courts have also held that where there exists at-will language in an employment application and manual, as well as disclaimer language disavowing statements to the contrary, there can be no inference of contractual obligations between the parties. See, e.g., *Mastromatteo v. Brown & Williamson Tobacco Corp.*, 2d Dist. No. CIV.A. 20216, 2004-Ohio-3776, ¶18, citing *Shepard*, and *Napier*. In the present case, as discussed above, the acknowledgement signed by appellant upon receipt of the manual indicated explicitly that all employees could be terminated at any time for any reason. The manual also stated in Section 110.1 that all employees were at will, and Mount Carmel could terminate their employment at any time for any reason. In addition, the acknowledgement specifically disclaimed that no representative of Mount Carmel had authority to make agreements to the contrary. Thus, there existed both at-will language and language disclaiming statements to the contrary, as discussed in *Mastromatteo*.

{¶26} Furthermore, although appellant argues that she was treated differently than other employees who were subjected to progressive discipline and permitted to fully participate in the appeal process, this fact is immaterial since they were all employees-at-will. Even if appellant was treated differently, such unequal treatment did not affect the legality of her termination absent a showing of prohibited discrimination. See *Smiddy* at ¶23 (although plaintiffs argue that they were treated differently than other employees

identified for expense account irregularities, this fact was immaterial since they were employees-at-will). Thus, we find appellant's claim, in this respect, to be of no consequence.

{¶27} For these reasons, there remained no issues of material fact on appellant's breach of contract claim. Reasonable minds could only conclude that there existed no contract, express or implied, between appellant and Mount Carmel, and Mount Carmel was not required to afford appellant the progressive counseling and appellate processes included in the manual before terminating her employment because she was an at-will employee. Therefore, the trial court properly granted summary judgment in favor of Mount Carmel on appellant's claim for breach of contract. Appellant's second assignment of error is overruled.

{¶28} Accordingly, appellant's first and second assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BRYANT and SADLER, JJ., concur.

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