[Cite as *Vaughn v. Lake Metro. Hous. Auth.*, 2010-Ohio-3686.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

ROBERT G. VAUGHN, et al.,	:	**O P I N I O N**
Plaintiffs-Appellants,	:	**CASE NO. 2009-L-153**
- vs -	:	
LAKE METROPOLITAN HOUSING AUTHORITY, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Court of Common Pleas, Case No. 08 CV 003736.

Judgment: Affirmed.

James V. Loiacono, Denman & Lerner Co., L.P.A., 8039 Broadmoor Road, #21, Mentor, OH 44060 (For Plaintiffs-Appellants).

Suzanne F. Jucaitis, P.O. Box 771661, Lakewood, OH 44107 and *William P. Lang*, 1300 West Ninth Street, #1301, Cleveland, OH 44113 (For Defendants-Appellees).

MARY JANE TRAPP, P.J.

{¶1} Robert G. Vaughn and his wife, Cynthia Vaughn, appeal from a judgment of the Lake County Court of Common Pleas which granted summary judgment in favor of Lake Metropolitan Housing Authority ("LMHA") and the Lake Metropolitan Housing Authority Board of Commissioners ("Board") in a breach of employment contract action. For the following reasons, we affirm.

{¶2} **Substantive Facts and Procedural History**

{¶3} Mr. Vaughn alleged that he entered into a verbal employment agreement with LMHA on July 19, 2005, to be its Section 8 Program Manager. The Board's Resolution 35-2005 passed on that date stated: "Robert Vaughn shall serve a probationary period in this position as defined by the Personnel Policies of the Lake Metropolitan Housing Authority, and upon the successful completion of said probationary period, the Executive Director shall notify the Board."

{¶4} Ten months later, Mr. Vaughn entered into a new verbal employment agreement with LHMA to be its Director. On May 9, 2006, the Board passed a resolution appointing him the Director of LMHA subject to a six-month probationary period. Section 1 of the Board's Resolution 21-2006 stated: "Robert Vaughn is hereby appointed as the Director of the Lake Metropolitan Housing Authority, subject to a six-month probationary period, and will be compensated at the rate of $60,000 per year."

{¶5} There was no subsequent resolution making the initial appointment of Mr. Vaughn permanent at the end of the six-month probationary period. However, Mr. Vaughn believed he would be a "permanent" employee based on the following provision from LMHA's employee manual, titled "The Personnel Policy of Lake Metropolitan Housing Authority" (the "Personnel Policy"), which LMHA distributed to all its employees:

{¶6} "Upon appointment by the Director and approval by the Board, all new supervisory employees shall serve a minimum probationary period of six (6) months ***. At the end of the probationary period, the employee may be eligible for a permanent appointment. *Until so appointed*, prior to the end of the probationary period, the employee shall be considered a probationary employee. *The employee shall remain a*

probationary employee until a permanent appointment is made; provided however, permanent status shall be automatic after one (1) year. The probationary period may be extended to a maximum of one (1) year." (Emphasis added.)

{¶7} Based on the Board's May 9, 2006 resolution and the above provision in the "Personnel Policy," Mr. Vaughn believed that he became the "permanent" Director on November 5, 2006, upon the expiration of his probationary period, and that he would be entitled to hold that position until his retirement, provided he complied with the rules, regulations, terms, conditions, requirements and principals set out in the Personnel Policy. He alleged he shared with other employees the belief and understanding that any disciplinary action would be implemented in a "progressive" manner.

{¶8} On March 29, 2007, ten months after Mr. Vaughn's appointment as the Director, the Board conducted a hearing regarding his employment at a special meeting. Mr. Vaughn was present at the hearing. An employee, Erica Peavey, testified that she saw him consume two or more alcoholic beverages at lunch; and that he made racially insensitive remarks and refused to hire an African-American for a position for which the individual was qualified. After the hearing, the Board voted to terminate Mr. Vaughn's employment.

{¶9} Mr. Vaughn alleged Ms. Peavey was "out to get him" because he had terminated incompetent employees who were her friends, and she was concerned about her own job security. He also alleged that the Board's Chairperson, Cynthia Brooks, and other members of the LMHA administration resented him because he had become aware of "numerous ethical prohibitions" in LMHA's management, which included the hiring of friends, misuse of agency property, and preferential treatment of

certain landlords. He alleged his awareness of the ethical violations is the real reason for his termination.

{¶10} **The Personnel Policy**

{¶11} The "Personnel Policy" relied on by Mr. Vaughn for his claim states the following, in the first page:

{¶12} "The purpose of this document is to provide a summary of personnel policies, practices, benefits, responsibilities and opportunities available to employees ***. Information included in this document is not to be considered a contract and may change by the Board without notice.

{¶13} "The employment of all employees may be terminated, at-will, and nothing set forth in this Personnel Policy or otherwise, either express or implied, shall create any promise or guarantee of continued employment. LMHA is free to end the employment relationship at any time for any reason whatsoever or no reason at all. No representative of LMHA is authorized to make any oral or verbal promise concerning employment which would change the nature of this 'at-will' arrangement. No such oral or written promise should be relied upon by any employee."

{¶14} Mr. Vaughn alleged that he "understood and believed" that the Personnel Policy provides that an employee would not be discharged except for a violation of the guidelines or rules contained in that manual, and that any discipline would be implemented in a "progressive" manner. However, in a section headed "Types of Discipline," the manual states:

{¶15} "Disciplinary action *shall consist of one or more of the following*: (1) [v]erbal warning[;] (2) [w]ritten warning[;] (3) [s]uspension from duty without pay; (4) [d]emotion in position and/or compensation; [and] (5) [t]ermination." (Emphasis added.)

{¶16} In another section headed "Disciplinary Procedure," the manual states:

{¶17} "*** The Board may enforce any type of discipline including verbal warning, written warning, suspension from duty without pay, demotion in position and/or salary and termination."

{¶18} Mr. Vaughn alleges that as a "permanent" employee he could not be terminated without a violation of the rules set forth in the Personnel Policy and that he and other employees believe any disciplinary action would be implemented in a "progressive manner." The Personnel Policy, however, does not reflect such provisions.

{¶19} After his termination, Mr. Vaughn and his spouse filed a complaint against LMHA and its Board, claiming (1) a breach of employment agreement; (2) a negligent breach of employment agreement; (3) defamation, and (4) a failure to follow the employee manual. Mrs. Vaughn asserted a loss of a consortium claim. LMHA and its Board of Commissioners filed a motion for summary judgment, which the trial court granted.

{¶20} The trial court determined that Mr. Vaughn was an at-will employee and the implied contract exception to the employment at-will doctrine does not apply in this case. The court also determined that LMHA, as a political subdivision, is entitled to immunity under R.C. 2744.02 regarding Mr. Vaughn's intentional tort claim of defamation.

{¶21} The Vaughns now appeal, presenting the following assignment of error for our review:

{¶22} "The Lake County Court of Common Pleas erred as a matter of law in finding that no genuine issue of material fact existed and ordering appellants' complaint to be dismissed."

{¶23} **Standard of Review**

{¶24} We review de novo a trial court's order granting summary judgment. *Hapgood v. Conrad*, 11th Dist. No. 2000-T-0058, 2002-Ohio-3363, ¶13, citing *Cole v. Am. Industries and Resources Corp.* (1998), 128 Ohio App.3d 546. "A reviewing court will apply the same standard a trial court is required to apply, which is to determine whether any genuine issues of material fact exist and whether the moving party is entitled to judgment as a matter of law." Id., citing *Parenti v. Goodyear Tire & Rubber Co.* (1990), 66 Ohio App.3d 826, 829.

{¶25} Pursuant to Civil Rule 56(C), summary judgment is proper when (1) the evidence shows "that there is no genuine issue as to any material fact" 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 that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence *** construed most strongly in the party's favor."

{¶26} "Since summary judgment denies the party his or her 'day in court' it is not to be viewed lightly as docket control or as a 'little trial.' The jurisprudence of summary judgment standards has placed burdens on both the moving and the nonmoving party.

In *Dresher v. Burt* [(1996), 75 Ohio St.3d 280], the Supreme Court of Ohio held that the moving party seeking summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record before the trial court that demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. The evidence must be in the record or the motion cannot succeed. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case but must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) that affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. If the moving party has satisfied its initial burden, the nonmoving party has a reciprocal burden outlined in the last sentence of Civ.R. 56(E) to set forth specific facts showing there is a genuine issue for trial. If the nonmoving party fails to do so, summary judgment, if appropriate shall be entered against the nonmoving party based on the principles that have been firmly established in Ohio for quite some time in *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112." *Welch v. Ziccarelli*, 11th Dist. No. 2006-L-229, 2007-Ohio-4374, ¶40.

{¶27} **Breach of Contract Claim**

{¶28} "Ohio has long recognized the employment at-will doctrine." *Brown v. Lowe's, Inc*., 11th Dist. No. 2003-T-0059, 2004-Ohio-5457, ¶46, citing *Mers v. Dispatch Printing Co*. (1985), 19 Ohio St.3d 100. Pursuant to the doctrine, unless otherwise agreed, either party may terminate the employment relationship at any time and for any reason not contrary to law. Id., citing *Kiel v. Circuit Design Technology, Inc.* (1988), 55

Ohio App.3d 63, 65. "The common-law doctrine of employment at will generally governs employment relationships in Ohio. Under this doctrine, a general or indefinite hiring is terminable at the will of either the employee or the employer; thus, a discharge without cause does not give rise to an action for damages." *Wiles v. Medina Auto Parts*, 96 Ohio St.3d 240, 2002-Ohio-3994, ¶5. Further, there is a strong presumption in favor of a contract terminable at will. *Brown* at 46, citing *Kiel* at 65.

{¶29} Here, Mr. Vaughn maintains an implied contract existed due to the "Personnel Policy" he received from LMHA. The implied contract exception is one of the exceptions to the employment at-will doctrine. See *Brown* at ¶48-49. Regarding this exception, the Supreme Court of Ohio, in *Mers* held that "[t]he facts and circumstances surrounding an oral employment-at-will agreement, including the character of the employment, custom, the course of dealing between the parties, company policy, or any other fact which may illuminate the question, can be considered by the trier of fact in order to determine the agreement's explicit and implicit terms concerning discharge." Id. at paragraph two of syllabus.

{¶30} In *Brown*, we further explain the notion of the implied contract as follows:

{¶31} "Employee manuals, company handbooks, and similar documents may be important in establishing the terms and conditions of employment, and they may create implied contracts. However, for such documents to be considered valid contracts, there must be a meeting of the minds. Absent the necessary meeting of the minds, a handbook or manual merely constitutes a unilateral statement of company rules and regulations." *Brown* at ¶49 (internal citations and quotations omitted).

{¶32} "Unless there is mutual assent to a contract, handbook, or similar document, the document is merely a list of rules of conduct or policies which can be modified by the employer at any time." Id., citing *Stites v. Napoleon Spring Works, Inc.* (Nov. 15, 1996), 6th Dist. No. F-96-002, 1996 Ohio App. LEXIS 4925. "The parties must have a distinct and common intention which is communicated by each party to the other." Id.

{¶33} Furthermore, "[t]he burden is upon the party asserting the existence of an employment contract *** to prove each element necessary for the formation of the contract." Id. at ¶50, quoting *Able/S.S., Inc. v. KM & E Services, Inc.*, 11th Dist. No. 2000-L-162, 2002-Ohio-6470, ¶34. "Thus, an employee who asserts the existence of an implied contract must prove the existence of each element necessary to the formation or modification of a contract, including offer, acceptance, consideration, and mutual assent." Id. (citations omitted).

{¶34} Mr. Vaughn claims the contents of the Personnel Policy changed the terms of his employment and created an implied contract. Without any elaboration, he asserts on appeal that "it is clear from the statements set forth in the affidavits, the Manual and other documents submitted by the parties that the aforesaid requisite elements – offer, acceptance, consideration, and mutual assent – have been satisfied."

{¶35} Our review of the Personnel Policy, however, indicates it contains a specific disclaimer stating that information in the manual is not to be considered a contract, that employment of all employees may be terminated at will, that nothing in the Personnel Policy shall create any promise of continued employment, and that no representative of LMHA is authorized to change the nature of the at-will arrangement.

{¶36} Thus, even if the Personnel Policy provides for "progressive discipline" as Mr. Vaughn claims, the specific disclaimer precludes an implied contract, as there was no meeting of the minds for any such implied contract. Mr. Vaughn's employment relationship with LMHA was nothing other than at-will employment. In *Brown*, this court encountered similar circumstances and we concluded the disclaimer in a management guide "preclude[d] an implied contract based upon the terms set forth by the progressive disciplinary policy." Id. at ¶53. Because Mr. Vaughn was an at-will employee, LMHA could terminate his employment at will and at any time.

{¶37} Mr. Vaughn places great emphasis on the statement from Resolution 21-2006 that he was appointed as the Director subject to a six-month probationary period and a statement from the Personnel Policy that an employee may be eligible for a "permanent" appointment at the end of the probationary period.

{¶38} The existence of a probationary period, without more, is not necessarily incompatible with an at-will employment relationship. See, e.g., *Brooks v. Miami Valley Hosp*., 2d Dist. No. 23361, 2009-Ohio-6813 (evidence showed the employee was aware of the at-will nature of his employment beyond his probationary period).

{¶39} To establish a claim that the at-will employment relationship is altered after the completion of a probationary period, the employee must produce evidence besides the existence of the probationary period. For instance, in *Litteral v. Ohio Newspaper Ass'n.* (Aug. 30, 1990), 1990 Ohio App. LEXIS 3857, the court stated that an employee handbook which provided for the termination of *probationary* employees "*at any time without prior notice*," but did not address the termination policy for non-probationary employees, constituted evidence of an agreement to modify the at-will

doctrine. Id. at *9, citing *Mers v. Dispatch Printing Co*. (1988), 39 Ohio App.3d 99, 102. See, also, *Postlewait v. Bell Health Care* (Nov. 9, 1994), 5th Dist. No. 94-CA-2, 1994 Ohio App. LEXIS 5234 (where the manual stated the employee may be released without a reason during the probationary period, but provided that discharge must be for just cause for non-probationary employees, reasonable minds could conclude that the employment-at-will relationship was altered after the probationary period was complete).

{¶40} *In contrast*, here, the provision in LMHA's Personnel Policy regarding the provisionary period *lacked any statements* about how a probationary employee could be terminated. There are *no* statements in the Personnel Policy regarding termination policy for probationary *or* non-probationary employees. The only statement in the Personnel Policy regarding employee termination was the following disclaimer: "The employment of *all* employees may be terminated, at will, and nothing set forth in this Personnel Policy or otherwise, either express or implied, shall create any promise or guarantee of continued employment." (Emphasis added.)

{¶41} Moreover, despite the usage of the words "permanent appointment" in the Personnel Policy's probationary period provision, upon which Mr. Vaughn places great weight, the Personnel Policy does *not* define the rights of a "permanent" employee regarding termination. As such, the disclaimer in the Personnel Policy precludes the alteration of employees' at-will status despite the imposition of a probationary period for new employees.

{¶42} Mr. Vaughn failed to demonstrate that a genuine issue of material fact existed regarding his breach of contract claim and, therefore, the trial court properly granted summary judgment in favor of LMHA regarding this claim.

{¶43} **Defamation Claim**

{¶44} Mr. Vaughn also claims he was defamed by LMHA because of the false statements made by its employees. The essential elements of the common-law action of defamation are (a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. *Akron-Canton Waste Oil v. Safety-Kleen Oil Servs.* (1992), 81 Ohio App.3d 591, 601, citing 3 Restatement of the Law 2d, Torts (1977) 155, Section 558.

{¶45} In this case, however, we need not consider whether Mr. Vaughn's allegations created a genuine issue of material fact regarding his defamation claim. A metropolitan housing authority is a political subdivision that performs governmental functions. *See Moore v. Lorain Metro. Hous. Auth.*, 121 Ohio St.3d 455, 2009-Ohio-1250, ¶19; *LRL Properties v. Portage Metro. Hous. Auth.* (Dec. 17, 1999), 11th Dist. No. 98-P-0070, 1999 Ohio App. LEXIS 6130, *16. Section (B) of R.C. 2744.02 enumerates five exceptions to the general grant of immunity: (1) the negligent operation of a motor vehicle by an employee, R.C. 2744.02(B)(1); (2) the negligent performance of proprietary functions, R.C. 2744.02(B)(2); (3) the negligent failure to keep public roads open and in repair, R.C. 2744.02(B)(3); (4) the negligence of employees occurring within or on the grounds of certain buildings used in connection with the performance of governmental functions, R.C. 2744.02(B)(4); (5) express imposition of liability by statute, R.C. 2744.02(B)(5).

{¶46} An intentional tort claim such as a defamation claim does not fit under any of the enumerated exceptions. A political subdivision performing governmental functions is immune from liability for an intentional tort such as defamation. See *LRL* at *17-18. Therefore, LMHA is immune from Mr. Vaughn's defamation claim.

{¶47} Mr. Vaughn's assignment of error is without merit. The judgment of the Portage County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.