[Cite as *McNeil v. Medcentral Health Sys.*, 2009-Ohio-3389.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

EASTHER MCNEIL

Plaintiff-Appellant

-vs-

MEDCENTRAL HEALTH SYSTEM

Defendant-Appellee

JUDGES:
Hon. W. Scott Gwin, P.J.
Hon. William B. Hoffman, J.
Hon. John W. Wise, J.

Case No. 2008CA0104

O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Richland County Court of Common Pleas, Case No. 2006CV1263H
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	July 7, 2009

APPEARANCES:

For Plaintiff-Appellant

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Hoffman, J.

{¶1} Plaintiff-appellant Easther McNeil appeals the September 24, 2008 Judgment Entry of the Richland County Court of Common Pleas entering summary judgment in favor of Defendant-appellee MedCentral Health Systems.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellant Easther McNeil began working for MedCentral Health Systems (hereinafter "MedCentral") in 1964. As part of his acceptance of employment, Appellant received a copy of MedCentral's Policy and Procedure Manual (hereinafter "Policy Manual"). The Policy Manual contains the following disclaimer:

{¶3} "The contents of the manual present MedCentral Health System's Human Resource policies and programs. The employee should be aware that these policies and programs may be amended at any time, and that depending upon the particular circumstances of a given situation, the hospital's actions may vary from the written policy. Any deviation from the policy and procedure must be approved by the President of MCH.

{¶4} "<u>EMPLOYMENT AT WILL</u>

{¶5} "As such, the contents of this Policy Manual DO NOT CONSTITUTE THE TERMS OF A CONTRACT OF EMPLOYMENT. Nothing contained in this Policy Manual should be construed as a guarantee of continued employment; but rather, employment with MCH is on an at-will basis. This means that the employment relationship may be terminated at any time by either employee or MCH for any reason not expressly prohibited by law. Any written or oral statement to the contrary by a

supervisor, administrator or other agent of MCH is invalid and should not be relied upon by any prospective or existing employee."

{¶6} The Policy Manual provides for a disciplinary suspension for sleeping during working hours.

{¶7} On February 19, 2002, Appellant was found sleeping at MedCentral's main lobby desk. Appellant maintains this occurred during his meal break. MedCentral invoked disciplinary procedures against Appellant pursuant to the terms and conditions of the Policy Manual. Appellant was suspended from work for three days as a result of the incident, and advised sleeping during working hours, whether on meal break or not, was not permitted.

{¶8} On October 9, 2002, Appellant used vulgar and obscene language with a patient/visitor at MedCentral. As a result, Appellant received a three-day disciplinary suspension from work.

{¶9} On October 16, 2002, Appellant was again found sleeping during working hours in a small room in the MedCentral main lobby area.

{¶10} Pursuant to the Policy Manual, Appellant's employment with MedCentral was terminated on October 21, 2002.

{¶11} Following his termination, Appellant filed the within action in the Richland County Court of Common Pleas for wrongful discharge, alleging breach of express and implied contract, promissory estoppel, tortuous interference with an employment contract, and willful and egregious discriminatory wrongful termination of employment.

{¶12} MedCentral filed a motion for summary judgment on all of Appellant's claims. Via Judgment Entry of September 24, 2008, the trial court granted summary judgment in favor of MedCentral.

{¶13} Appellant assigns as error:

{¶14} "I. THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AS A MATTER OF LAW WHEN THERE REMAINED GENUINE ISSUES OF MATERIAL FACT THAT SHOULD BE PRESENTED TO A JURY REGARDING THE ISSUE OF BREACH OF AN IMPLIED CONTRACT.

{¶15} "II. THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AS A MATTER OF LAW WHEN THERE REMAINED GENUINE ISSUES OF MATERIAL FACT THAT SHOULD BE PRESENTED TO A JURY REGARDING THE MATTER OF PROMISSORY ESTOPPEL.

{¶16} "III. THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AS A MATTER OF LAW WHEN THERE REMAINED A GENUINE ISSUE OF MATERIAL FACT AS TO PLAINTIFF BEING INJURED ON HIS CLAIMS NOT ARISING OUT OF CONTRACT."

I, II, and III

{¶17} All three of Appellant's assigned errors raise common and interrelated issues; therefore, we will address the arguments together.

Summary Judgment

{¶18} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36, 506 N.E.2d 212. As

such, an appellate court conducts a de novo review of a trial court's summary judgment. See, e.g., *Grafton v. Ohio Edison Co.,* 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241. Accordingly, appellate courts independently review the record to determine whether summary judgment is appropriate and need not defer to the trial court's decision. *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711, 622 N.E.2d 1153; *Morehead v. Conley* (1991), 75 Ohio App.3d 409, 411-412, 599 N.E.2d 786. Thus, to determine whether a trial court properly granted summary judgment, an appellate court must review the Civ.R. 56 standard as well as the applicable law.

{¶19} Civ.R. 56(C) provides:

{¶20} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, 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 or stipulation construed most strongly in the party's favor."

{¶21} Thus, a trial court may not grant summary judgment unless the evidentiary materials demonstrate that: (1) no genuine issue as to any material fact remains to be litigated; (2) after the evidence is construed most strongly in the nonmoving party's

favor, reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party; and (3) the moving party is entitled to judgment as a matter of law. *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429-30, 674 N.E.2d 1164.

Implied Contract

{¶22} Initially, we note Appellant's argument MedCentral fraudulently induced him into the employment relationship due to a material misrepresentation is waived on appeal. A review of the record before this Court indicates Appellant did not raise this argument before the trial court; therefore, he cannot raise this issue for the first time on appeal.

{¶23} As a general rule in Ohio, employee handbooks do not constitute an employment contract. *Stembridge v. Summit Acad. Mgmt.,* 2006-Ohio-4076. The handbook is simply a unilateral statement of rules and policies creating no obligations or rights. *Tohline v. Cent. Trus. Co*. (1988), 48 Ohio App.3d 280.

{¶24} The Ninth District Court of Appeals addressed the issue raised herein in *Stembridge v. Summit Acad. Mgt.*, supra,

{¶25} "An employment relationship is terminable at the will of either party unless expressly stated otherwise. (Citation omitted). *Henkel v. Educational Research Council of Am.* (1976), 45 Ohio St.2d 249, 255, 344 N.E.2d 118. However, the employment-at-will doctrine is the subject of two exceptions: (1) the existence of an implied or express contract which alters the terms of discharge; and (2) the existence of promissory estoppel where representations or promises were made to an employee. *Mers v. Dispatch Printing Co.* (1985), 19 Ohio St.3d 100, 104, 483 N.E.2d 150. Appellant has

argued that his employee handbook constitutes an exception to the employment-at-will doctrine.

{¶26} "Generally, employee handbooks do not constitute an employment contract. *Rudy v. Loral Defense Sys.* (1993), 85 Ohio App.3d 148, 152, 619 N.E.2d 449. This Court has previously held that " 'employee manuals and handbooks are usually insufficient, by themselves, to create a contractual obligation upon an employer.' " *Gargasz v. Nordson Corp.* (1991), 68 Ohio App.3d 149, 155, 587 N.E.2d 475, quoting *Manofsky v. Goodyear Tire & Rubber Co.* (1990), 69 Ohio App.3d 663, 591 N.E.2d 752. Evidence of an employee handbook may be considered when deciding whether an implied contract exists, but its existence alone is not dispositive of the question. *Wright v. Honda of Am. Mfg., Inc.* (1995), 73 Ohio St.3d 571, 574-575, 653 N.E.2d 381.

{¶27} "In *Karnes v. Doctors Hospital* (1990), 51 Ohio St.3d 139, 141, 555 N.E.2d 280, the Ohio Supreme Court held that an employee handbook that expressly disclaimed any employment contract could not be characterized as an employment contract. This Court has also addressed disclaimers and found that " '[a]bsent fraud in the inducement, a disclaimer in an employee handbook stating that employment is at will precludes an employment contract other than at will based upon the terms of the employee handbook.' " *Westenbarger v. St. Thomas Med. Ctr.* (June 29, 1994), 9th Dist. No. 16119, at 7, quoting *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, 570 N.E.2d 1095, paragraph one of the syllabus."

{¶28} During Appellant's deposition testimony, the following exchange took place:

{¶29} "Q. Well, did you understand if you look at Exhibit A that for a second offense of sleeping on the job you'd be discharged?

{¶30} "A. Sleeping on the job.

{¶31} "Q. All right.

{¶32} "A. But not sleeping at work. There's a difference between - -

{¶33} "Q. Well, the policy infraction on Exhibit J is sleeping during working hours. You're not contesting that you were asleep and you're not contesting that it was during working hours, correct? You're claiming that it was during your break.

{¶34} "A. I was on my break.

{¶35} "Q. And you told them that and they still disciplined you.

{¶36} "A. Right. See, maybe I'm getting it mixed up between work and job. What's work? Work and job. Define the job.

{¶37} "Q. Well, we'll talk about that, but I want you to - - I want to go back to what it was that happened on - - in February of 2002. You received a suspension. You acknowledge receiving the suspension and signing it. You were given an opportunity to respond to it. You said I was on my break, just took it in the wrong place. Now, does that mean that you felt you were allowed to sleep during your break?

{¶38} "A. Yes.

{¶39} "Q. And you told them that at that time? Obviously, you wrote it down, right?

{¶40} "A. Yeah.

{¶41} "Q. And they said no, that's not the way it works, you're not allowed to sleep on your break; isn't that right?

{¶42} "A. Probably so.

{¶43} "Q. All right. So as of February 11th, 2002, or when you signed this on February 19th, 2002, excuse me, you were aware that your supervisors, including Paul -- Ronald Burchfield, Paul Johnson, Beth Hildreth, and Bruce Engle all believed that the way MedCentral's policies worked was that sleeping even during your break was a violation of the policies that would warrant a suspension. Whether you agreed with that or not, that's what happened then, isn't it?

{¶44} "A. Okay.

{¶45} "Q. Do you agree with that?

{¶46} "A. Yeah, I agree.

{¶47} "Q. All right."

{¶48} Tr. at 83-84.

{¶49} Based upon the express disclaimer contained in the MedCentral Policy and Procedure Manual set forth in the Statement of the Facts and Case, supra, and the deposition testimony of Appellant demonstrating his understanding he was not to sleep during his break period, we find no implied contract of employment existed between the parties herein.

Promissory Estoppel

{¶50} Appellant further asserts MedCentral's Policy Manual states the meal period is not included in an employees work hours; therefore, he was not sleeping during work hours. Further, MedCentral did not pay Appellant for the meal period, only for hours actually worked. Appellant argues he relied upon this material representation to his detriment pursuant to the doctrine of promissory estoppel. Appellant asserts he

relied to his detriment on MedCentral's material misrepresentation the lunch period was not included in his work hours in exercising "his fundamental and substantive rights during his unpaid lunch period."

{¶51} The elements necessary to establish a claim for promissory estoppel are: (1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) the reliance must be reasonable and foreseeable; and (4) the party claiming estoppel must be injured by the reliance. *Schepflin v. Sprint-United Telephone of Ohio* (April 29, 1997), Richland App.No. 96-CA-62-2, citing *Stull v. Combustion Engineering, Inc.* (1991), 72 Ohio App.3d 553, 557.

{¶52} Again, based upon the deposition testimony set forth above and the terms and conditions of MedCentral's Policy Manual, Appellant was aware sleeping during his meal period and breaks was not permitted and would result in disciplinary proceedings. According, Appellant has not demonstrated a promise, which he reasonably relied upon to his detriment following the Feburary 19, 2002 incident. Therefore, his claim for promissory estoppel necessarily fails as a matter of law.

Injury not arising out of a contract

{¶53} Appellant further argues he sustained injuries not arising out of contract under common and statutory law for exercising his fundamental and substantive rights.

{¶54} Appellant's brief fails to cite either common or statutory law creating "fundamental and substantive" rights alleged to have been violated. The brief alludes to a claim for tortuous interference with an employment contract. However, as a party to the contract, MedCentral could not have tortuously interfered with its own contract, as

an element of the claim is interference with the contract of a third party. *Bridge v. Park National Bank*, 2008-Ohio-6607.

{¶55} The Ohio Supreme Court has held:

{¶56} "...an exception to the employment-at-will doctrine is not limited to public policy expressed by the General Assembly in the form of statutory enactments. As this court recently noted, '[w]hen the common law has been out of step with the times, and the legislature, for whatever reason, has not acted, we have undertaken to change the law, and rightfully so. After all, who presides over the common law but the courts?' *Gallimore v. Children's Hosp. Med. Ctr.* (1993), 67 Ohio St.3d 244, 253, 617 N.E.2d 1052, 1059. Today we reaffirm *Greeley* and hold that an exception to the employment-at-will doctrine is justified where an employer has discharged his employee in contravention of a 'sufficiently clear public policy.'"

{¶57} There is no sufficiently clear public policy as manifested in law precluding an employer from prohibiting an employee from sleeping while on an unpaid break. Accordingly, Appellant has not demonstrated a compensable injury not arising out of a contract.

{¶58} In conclusion, the trial court did not err in granting summary judgment in favor of MedCentral on Appellant's claims as there are no genuine issues of material fact remaining, and reasonable minds could come to but one conclusion.

{¶59} The September 24, 2008 Judgment Entry of the Richland County Court of Common Pleas is affirmed.

By: Hoffman, J.

Gwin, P.J. and

Wise, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin
HON. W. SCOTT GWIN

s/ John W. Wise
HON. JOHN W. WISE

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

EASTHER MCNEIL	:	
	:	
Plaintiff-Appellant	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
MEDCENTRAL HEALTH SYSTEM	:	
	:	
Defendant-Appellee	:	Case No. 2008CA0104

For the reasons stated in our accompanying Memorandum-Opinion, the September 24, 2008 Judgment Entry of the Richland County Court of Common Pleas is affirmed. Costs to Appellant.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin
HON. W. SCOTT GWIN

s/ John W. Wise
HON. JOHN W. WISE