

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

Joanne R. Wissler,	:	
	:	
Plaintiff-Appellant,	:	
	:	
v.	:	No. 09AP-569
	:	(C.C. No. 2006-02218)
Ohio Department of Job and	:	
Family Services,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellee.	:	
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D E C I S I O N

Rendered on July 22, 2010

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*Joanne R. Wissler, pro se.*

*Richard Cordray, Attorney General, and Eric A. Walker, for appellee.*

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APPEAL from the Court of Claims of Ohio

CONNOR, J.

{¶1} Plaintiff-appellant, Joanne R. Wissler ("appellant"), appeals from a judgment of the Court of Claims of Ohio finding in favor of defendant-appellee, Ohio Department of Job and Family Services ("ODJFS"), on appellant's claims of wrongful discharge in violation of public policy and breach of implied contract.<sup>1</sup> For the following reasons, we affirm.

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<sup>1</sup> Pursuant to a trial held before the Court of Claims, appellant tried five causes of action: wrongful discharge in violation of public policy, defamation, intentional infliction of emotional distress, dereliction of duty, and breach of implied contract. The trial court determined appellant failed to prove all five claims. However, appellant has only appealed the claims alleging wrongful discharge and breach of implied contract. Therefore, we shall focus our analysis upon those two claims.

{¶2} Appellant began working for ODJFS on October 25, 2004, as a 180-day probationary employee. Appellant was employed in a customer service capacity at the help desk. Her duties included: providing information, referrals, and assistance regarding child welfare and child care development to constituents, legislators, and the general public; responding to callers seeking assistance regarding public children services programs administered by county agencies; and mediating disputes between county child service agencies and their clients.

{¶3} Dorothy Hughes worked for ODJFS as a program administrator and served as appellant's supervisor during the seven months that appellant was employed by ODJFS. Ms. Hughes assisted in providing hands-on training for appellant and was available for questions. In addition, appellant was also able to attend meetings and observe or "shadow" other staff members taking calls.

{¶4} On December 21, 2004, Ms. Hughes drafted a memorandum to appellant regarding appellant's handling of a child welfare case involving Lucas County Children Services. The memorandum was critical of appellant's handling of the matter and cited appellant's impatience and antagonistic manner as issues which appellant needed to address.

{¶5} Appellant received a mid-probationary evaluation on January 18, 2005. That evaluation resulted in an "unsatisfactory" rating. The evaluation reflected appellant's difficulty in meeting the expectations of her position and indicated appellant needed to be more receptive to learning new skills and accepting new information. During the trial, Ms. Hughes testified that appellant was often argumentative with her when she offered direction on how to handle a case.

{¶6} After the mid-probationary evaluation, a performance improvement plan was developed for appellant and addressed improvement opportunities such as developing customer service skills, responding to inquiries in a knowledgeable, courteous and efficient manner, presenting a professional image of the program, and providing complete, accurate, and appropriate information to callers. Although appellant requested that a special review be conducted at the midpoint between the mid-probationary review and the final performance review, Ms. Hughes declined to conduct such a review.

{¶7} On March 29, 2005, Ms. Hughes had a discussion with appellant addressing a complaint she had received from Sandusky County Children Services regarding appellant's handling of an inquiry involving the removal of children from a foster home. As a result of this complaint, Ms. Hughes expressed concern about appellant's judgmental manner and tone of voice and her general interaction with the complaint person. She also indicated appellant's analysis of the applicability of certain rules under the Ohio Adm.Code was incorrect. Ms. Hughes issued a memorandum to appellant on this date setting forth her concerns.

{¶8} On April 11, 2005, appellant and Ms. Hughes met to discuss appellant's final probationary evaluation. Again, appellant received an "unsatisfactory" performance rating. While appellant showed potential to be a valuable asset and worked hard, Ms. Hughes indicated appellant had been unable to consistently maintain an objective approach in her dealings with county agencies and failed to recognize and understand her role and the limits of her authority. As a result, Ms. Hughes recommended that appellant's probationary period be extended for 45 days in order to allow appellant to gain additional experience and receive additional instruction in the hopes of resolving these shortcomings.

{¶9} According to the testimony of Ms. Hughes, when she discussed the final probationary evaluation with appellant, appellant became very angry, aggressive, and loud, to the point that others in nearby offices could hear appellant and were concerned about Ms. Hughes' safety. Appellant herself admitted during her testimony that she did become angry and as a result may have spoken more loudly, but disputed that her actions were disrespectful.

{¶10} Ultimately, appellant agreed to the 45-day extension of her probation period and signed a document to that effect on April 11, 2005. As a result of that extension, Ms. Hughes developed a performance management plan ("PMP") for appellant. The primary purpose of the PMP was to ensure that appellant understood the standard of performance expected of her and the means to be used to achieve that standard. The PMP set forth requirements such as: maintaining an objective and impartial attitude when dealing with county staff; delivering friendly, courteous, and polite communication; tactfully assisting and directing customers; identifying, analyzing, and interpreting issues and problems; and validating facts prior to presenting a response to issues.

{¶11} The PMP also established a weekly monitoring process by which appellant was to meet with her supervisor to monitor her compliance with the plan. Among other things, the PMP required appellant to communicate with her supervisor regarding her complaint calls and to complete several self-assessments of her calls. In turn, Ms. Hughes was to observe appellant's calls and provide feedback, as well as complete a customer satisfaction survey by contacting appellant's customers on a weekly basis.

{¶12} Although Ms. Hughes signed the PMP on May 6, 2005, appellant did not sign the PMP, claiming she wished to speak with the union steward before she signed it. Despite a conference held on May 10, 2005, during which Ms. Hughes and her supervisor

provided appellant with additional clarification about the PMP, appellant still did not sign the document and in fact never signed the document prior to her termination.

{¶13} During the trial, Ms. Hughes testified the PMP was a management tool used to outline the expectations for appellant and the objectives she needed to accomplish in order to achieve a successful performance during the extension period. According to Ms. Hughes, the PMP set forth areas in which appellant was deficient and in which she was expected to show improvement in order to be maintained as a permanent employee. Appellant, however, argued that the PMP was essentially a contract giving her an additional 45 days to improve her performance and to work towards permanent employee status.

{¶14} On May 11, 2005, Ms. Hughes provided appellant with her first weekly performance summary regarding her progress. On May 18, 2005, a second summary was provided. At trial, Ms. Hughes testified that appellant's efforts to comply with the PMP were not very successful, as she failed to complete assigned work and failed to meet expectations. On May 18, 2005, Ms. Hughes sent a memorandum to the chief of labor relations recommending that appellant be removed from probationary employment and terminated, due to the ongoing problems. Appellant was subsequently notified that she was terminated from her probationary position on May 20, 2005.

{¶15} Following a trial before the Court of Claims on the issue of liability only, the trial court found in favor of ODJFS as to all claims. Appellant now asserts the following two assignments of error for our review:

#### **FIRST ASSIGNMENT OF ERROR**

THE TRIAL COURT ERRED IN FAILING TO APPLY THE RELEVANT FACTS OF THIS CASE TO THE FOUR ELEMENTS STANDARD IN *PAINTER V. GRALEY* FOR A FINDING OF WRONGFUL DISCHARGE BECAUSE OF THE

PUBLIC POLICY EXCEPTION IN FAVOR OF THE APPELLANT-PLAINTIFF WISSLER.

**SECOND ASSIGNMENT OF ERROR**

THE TRIAL COURT ERRED IN APPLYING THE STANDARDS OF IMPLIED-IN-FACT CONTRACT TO THE PERFORMANCE MANAGEMENT PLAN AND EXTENSION OF PROBATION THAT WAS BREACHED BY THE DEFENDANT/APPELLEE, THE OHIO DEPARTMENT OF JOB AND FAMILY SERVICES.

{¶16} In her first assignment of error, appellant argues the trial court erred in finding that appellant failed to prove a wrongful discharge case on the grounds that her termination was in contravention of a clear public policy. Appellant claims the trial court failed to apply the relevant facts to her wrongful discharge claim and further contends the trial court's findings are against the manifest weight of the evidence. We disagree.

{¶17} Under Ohio law, either party to an at-will employment relationship may legally terminate the relationship at any time and for any reason, so long as it is not contrary to law. *Leininger v. Pioneer Natl. Latex*, 115 Ohio St.3d 311, 2007-Ohio-4921, ¶6 citing *Mers v. Dispatch Printing Co.* (1985), 19 Ohio St.3d 100. However, Ohio law does recognize a cause of action for an at-will employee who has been terminated in violation of a clear public policy. *Hoyt v. Nationwide Mut. Ins. Co.*, 10th Dist. No. 04AP-941, 2005-Ohio-6367, ¶53, citing *Greeley v. Miami Valley Maintenance Contractors, Inc.* (1990), 49 Ohio St.3d 228, 233-34. This is a recognized exception to the traditional employment at-will doctrine under Ohio common law. *Painter v. Graley*, 70 Ohio St.3d 377, 382-84, 1994-Ohio-334. An exception is justified where an employer discharged her employee in contravention of a "sufficiently clear public policy," which is discernable by the judiciary based upon sources such as the United States and Ohio Constitutions, legislation, administrative rules and regulations, and common law. *Id.* at 384.

{¶18} To establish a *Greeley* claim for wrongful termination in violation of public policy, plaintiffs must prove each of the following elements: (1) a clear public policy existed and was manifested in the federal or state constitution, statute, administrative regulation, or common law (the clarity element); (2) terminating employees under circumstances like those involved in the plaintiff's termination would jeopardize that public policy (the jeopardy element); (3) plaintiff's dismissal was motivated by conduct related to the public policy (the causation element); and (4) the employer lacked an overriding legitimate business justification for the dismissal (the overriding justification element). *Collins v. Rizkana*, 73 Ohio St.3d 65, 69-70, 1995-Ohio-135; *Kulch v. Structural Fibers, Inc.*, 78 Ohio St.3d 134, 151, 1997-Ohio-219. The first two elements are questions of law to be determined by the court, while the third and fourth elements are questions for the trier of fact. *Collins* at 70.

{¶19} Judgments which are supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence. *C. E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, syllabus. Additionally, when reviewing a judgment under a manifest weight of the evidence standard, a reviewing court must presume that the findings of the trier of fact are correct. *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80-81.

{¶20} Appellant relies upon Ohio Adm.Code 5101:2-5-11 as the basis for establishing the clarity element of her claim for wrongful discharge in violation of public policy. Ohio Adm.Code 5101:2-5-11 sets forth rules for handling complaints alleging violations by public children services agencies or violations by persons or organizations required to be certified under Ohio Adm.Code Chapter 5101. Appellant argues she was

discharged as a result of performing her duties, pursuant to Ohio Adm.Code 5101:2-5-11, because she referred certain complaints she received in the course of her employment to her supervisor, Ms. Hughes.

{¶21} Appellant argues a clear public policy exists in that ODJFS is responsible for supervising public child welfare services in Ohio pursuant to R.C. 5101.22 and 5101.24. Additionally, appellant argues Ohio Adm.Code 5101:2-5-11 obligates ODJFS to promptly investigate complaints about possible rule violations involving child welfare and child care licensing agencies. She further argues her employment at ODJFS obligated her to identify situations where rules may have been violated and to refer those possible violations to a supervisor.

{¶22} In finding in favor of ODJFS on appellant's claim for wrongful discharge in violation of public policy, the trial court considered the elements required for establishing a *Greeley* claim. The trial court concluded appellant failed to establish ODJFS violated a clear public policy regarding the rules and regulations set forth in Ohio Adm.Code Chapter 5101 and also determined appellant's termination did not somehow jeopardize a clear public policy. In addition, the trial court found the termination was not motivated by any complaint appellant may have made as to compliance with the rules and regulations under Ohio Adm.Code Chapter 5101. Finally, the trial court found ODJFS had a legitimate business justification for its decision to terminate appellant's probationary employment, due to concerns about her unprofessional demeanor, her inadequate customer service skills, and her failure to respond to supervisory instruction.

{¶23} Even if we were to assume that a clear public policy does exist here, and we further assumed that appellant has met the jeopardy and causation elements,

appellant's claim still fails, as she cannot demonstrate that ODJFS lacked an overriding legitimate business justification for her dismissal.

{¶24} The record supports a finding that appellant displayed a judgmental and antagonistic attitude and had difficulty remaining unbiased and taking instruction from others, including her supervisor. More than one county agency complained about their interactions with her. Despite appellant's claims to the contrary, these allegations are supported with sufficient specificity in that her supervisor provided examples of such conduct.

{¶25} In addition, Ms. Hughes testified that appellant became very angry and very loud during her April 2005 final evaluation, because appellant was upset with her evaluation, and that others in the office were concerned about Ms. Hughes' safety. In fact, appellant admitted during the trial that she was angry and unfriendly, and that her voice may have gotten a little louder as a result. Appellant also admitted that she signed a counseling memo with respect to that incident. This conduct, coupled with the conduct set forth above, could be cause for concern regarding appellant's ability to get along with others and to do her job, and thus could constitute reasonable grounds for her termination.

{¶26} The record also supports the trial court's finding that ODJFS was dissatisfied with appellant's work, as the weekly performance summaries and Ms. Hughes' testimony support the assertion that appellant failed to exhibit progress regarding the goals set forth in the PMP. The trial court found Ms. Hughes' testimony regarding appellant's performance to be credible, and such testimony indicated appellant's efforts to comply with the PMP were not very successful, as she failed to complete assigned work and failed to meet expectations. Again, such a determination supports termination.

{¶27} Furthermore, as a general rule, a court will not substitute its judgment for that of an employer and will not second-guess the business judgments of employers regarding personnel decisions. See, e.g., *Dodson v. Wright State Univ.* (1997), 91 Ohio Misc.2d 57; *Washington v. Cent. State Univ.* (1998), 92 Ohio Misc.2d 26; *Kundtz v. AT&T Solutions, Inc.*, 10th Dist. No. 05AP-1045, 2007-Ohio-1462; and *Lynch v. EG&G Mound Applied Technologies, Inc.* (Jan. 29, 1999), 2d Dist. No. 17333.

{¶28} Therefore, we find the trial court's determination is supported by competent, credible evidence, and as a result, its determination is not against the manifest weight of the evidence. Accordingly, we overrule appellant's first assignment of error.

{¶29} In her second assignment of error, appellant contends the trial court erred in its determination that appellant failed to prove her breach of contract claim.

{¶30} Appellant argues that the PMP and the probation extension plan constituted a contract which provided her with 45 days to improve her performance in order to be maintained as a permanent employee. Instead of continued employment, she argues she was terminated early, without justification. While she admits signing the 45-day probation extension, appellant acknowledges that she never signed the PMP, but claims it was because she was not given a second opportunity to do so. However, she submits that she immediately attempted to comply with the requirements of the PMP and that her actions created an implied-in-fact contract and thereby modified her at-will employment. ODJFS disputes this assertion.

{¶31} Under Ohio law, there are three recognized types of contracts: express, implied-in-fact, and implied in law. An implied in fact contract arises based upon the conduct of the parties or the circumstances surrounding the transaction, either of which make it clear the parties have entered into a contractual agreement, despite the lack of a

formal agreement. *Fouty v. Ohio Dept. of Youth Servs.*, 167 Ohio App.3d 508, 2006-Ohio-2957, ¶56. In order to determine whether an implied-in-fact contract exists, "[t]he conduct and declarations of the party must be examined to determine the existence of an intent to be bound." *Id.* at ¶57, quoting *Reali, Giampetro & Scott v. Soc. Natl. Bank* (1999), 133 Ohio App.3d 844, 850.

{¶32} In *Mers*, supra, the Supreme Court of Ohio recognized that the terms of an at-will employment relationship could be transformed into an implied contract for a definite term. Examples of evidence of an employment contract include employee handbooks, company policies, and some oral representations. See *Kelly v. Georgia-Pacific Corp.* (1989), 46 Ohio St.3d 134, 139. Furthermore, the facts and circumstances surrounding an employment-at-will relationship, such as the character of the employment, customs, the course of dealings between the parties, or company policy, may be considered by the trier of fact. *Id.* However, a plaintiff asserting the existence of an implied employment contract has a "heavy burden." *Walton v. Greater Cleveland Regional Transit Auth.* (June 29, 2000), 8th Dist. No. 76274, quoting *Srail v. RJF Internatl. Corp.* (1998), 126 Ohio App.3d 689 (discretionary appeal not allowed, 82 Ohio St.3d 1473).

{¶33} Additionally, "[b]ecause the question of the existence of an implied-in-fact contract requires crucial factual determinations regarding the intent and thought processes of the parties, deference must be paid by a reviewing court to the trial court's determinations." *Fouty* at ¶57, quoting *B & J Jacobs Co. v. Ohio Air, Inc.*, 1st Dist. No. C-020264, 2003-Ohio-4835, ¶10.

{¶34} Here, appellant's status was that of a probationary employee whose probation had been extended in order to give her a chance to improve and, if she was successful, to become a permanent employee. Ms. Hughes indicated in appellant's April

2005 performance summary that if appellant refused to agree to the 45-day probationary extension, she could not recommend appellant for permanent hire. Thus, it is evident that appellant's continued employment status was clearly less than certain, and we disagree with appellant's argument that the probationary extension and the PMP required ODJFS to give appellant the full 45 days to improve her performance.

{¶35} The trial court found that the provisions of the PMP amounted to only managerial guidance to be used to help appellant achieve a successful performance. The trial court determined the PMP set forth various job-related goals and a process for monitoring appellant's progress, but was not a contract for continued employment. The trial court also noted that appellant did not sign the PMP and thus could not claim to be bound by it. We find no error in the trial court's determination that appellant failed to support her allegation of an implied-in-fact contract, as appellant failed to produce evidence of conduct or declarations of both parties demonstrating the existence of an intent to be bound.

{¶36} This determination is supported not only by the testimony of appellant's supervisor, Ms. Hughes, but also by the testimony of Teresa Toronto, a labor relations employee for ODJFS. Both witnesses testified that the PMP was simply a management tool. Ms. Toronto further testified that a document which extended an employee's initial probationary period did not constitute a contract requiring ODJFS to retain that probationary employee for the specific period set forth in the extension, since the employee could be terminated at any time, as long as it was not the result of discriminatory practices.

{¶37} While appellant claims that her conduct in attempting to comply with the PMP evinces her own intent to be bound by it, we find this to be not only questionable,

but also insufficient, as there is no evidence that such an intent to be bound can be attributed to ODJFS. We also point out that appellant had the PMP for two weeks prior to her termination and never signed the document. Furthermore, we note that pursuant to R.C. 124.27(C), appellant's at-will employment could be terminated at any point during her period of probationary employment.

{¶38} R.C. 124.27(C) provides, in relevant part, as follows:

All original and promotional appointments \* \* \* shall be for a probationary period, not less than sixty days nor more than one year, to be fixed by the rules of the director \* \* \*. No appointment or promotion is final until the appointee has satisfactorily served the probationary period. If the service of the probationary employee is unsatisfactory, the employee may be removed or reduced at any time during the probationary period. \* \* \*

{¶39} Thus, this statute provides ODJFS with authority to terminate a probationary employee at any time during the probationary period if her service is unsatisfactory.

{¶40} Based upon our analysis as set forth above, we find no error in the trial court's determination that appellant failed to establish a claim for breach of implied contract. Accordingly, we overrule appellant's second assignment of error.

{¶41} In conclusion, we overrule appellant's first and second assignments of error and affirm the judgment of the Court of Claims of Ohio.

*Judgment affirmed.*

KLATT and McGRATH, JJ., concur.

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