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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002197-MR

JAMES A. NEWTON, JR. APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU A. STEVENS, JUDGE
ACTION NO. 07-CI-000796

THE UNIVERSITY OF LOUISVILLE APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, JUDGE; HENRY AND ISAAC,[1] SENIOR JUDGES.

HENRY, SENIOR JUDGE: James Newton appeals from a Jefferson Circuit Court opinion and order which granted summary judgment to Newton's former employer, the University of Louisville. The sole question on appeal is whether the University of Louisville's employment handbook, the "Redbook," and the personnel policies promulgated on the University's website constitute a written

[1] Senior Judges Sheila R. Isaac and Michael L. Henry sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

contract for purposes of waiving governmental immunity pursuant to Kentucky Revised Statutes (KRS) 45A.245. We agree with the Jefferson Circuit Court that the "Redbook" does not constitute such a contract, and accordingly affirm the judgment of that court.

James Newton began working for the University as a groundskeeper on May 10, 2004. On January 19, 2005, he sustained a work-related injury and was unable to return to work from February 15, 2005 until June 10, 2005. During that period he exhausted all of his leave time and used additional time from the University's shared leave pool. He returned to light-duty work from June 10, 2005 until July 10, 2005 and resumed his regular duties from July 10, 2005, until September 13, 2005, when he was granted workers' compensation benefits. Newton underwent cervical decompression surgery in January 2006, but the surgery failed to alleviate his severe pain and disability. He returned to work with restrictions on May 4, 2006, but six days later he left work indefinitely on his physician's order. Newton claims that on June 14, 2006, he submitted an application for long-term disability benefits to his direct supervisor, Greg Gittings. The University's Human Resources Department claims that it received only Greg Gittings' statement on behalf of the employer in support of Newton's disability application in June 2006. In a letter dated June 15, 2006, Newton's employment with the University was terminated retroactively from May 10, 2006. In February 2007 Newton completed two additional long-term disability benefits applications which the University submitted to the insurance carrier.

Newton claims that the University failed to process his applications and therefore breached the contract inherent in the University's disability insurance policy as it is described in the Redbook. He further argues that he was wrongfully dismissed because the University's personnel policy provides that a regular status employee may be dismissed only for cause, and that he had not committed any of the offenses which are listed as warranting dismissal.

Newton filed suit against the University on January 23, 2007, alleging breach of contract and violation of the disability provisions of the Kentucky Civil Rights Act. *See* KRS 344. Ultimately, the Jefferson Circuit Court granted summary judgment to the University on the breach of contract claim[2] on the grounds that the University's personnel policies do not bear the hallmarks of a written contract, and that consequently Newton's breach of contract claims were barred by the doctrine of sovereign immunity. This appeal followed.

In reviewing a grant of summary judgment, our inquiry focuses on "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996); Kentucky Rules of Civil Procedure (CR) 56.03. "[T]he proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his

[2] The circuit court also granted summary judgment to the University on Newton's claim of disability discrimination. Newton has not raised this issue in his appeal.

favor." *Steelvest v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

In 1970, the University of Louisville "became a state institution of higher education . . . with all the attendant powers and protections, including immunity from suit except where the Kentucky General Assembly specifically waives it. . . . The doctrine extends to both actions in tort and contract." *University of Louisville v. Martin*, 574 S.W.2d 676, 677 (Ky. App. 1978). In KRS Chapter 45A, the Kentucky Model Procurement Code, the General Assembly waived sovereign immunity on written contracts made with the Commonwealth. The pertinent provision of the Code states as follows:

> Any person, firm or corporation, having a lawfully authorized written contract with the Commonwealth at the time of or after June 21, 1974, may bring an action against the Commonwealth on the contract, including but not limited to actions either for breach of contracts or for enforcement of contracts or for both. Any such action shall be brought in the Franklin Circuit Court[3] and shall be tried by the court sitting without a jury. All defenses in law or equity, except the defense of governmental immunity, shall be preserved to the Commonwealth.

KRS 45A.245(1).

Chapter 45A also provides the following definitions of "contract" and "writing" or "written":

> "Contract" means all types of state agreements, including grants and orders, for the purchase or disposal of

[3] Although the statutory provision specifies that actions on contracts must be brought in Franklin Circuit Court, the Jefferson Circuit Court ruled that Newton's breach of contract claim could be joined with his claim of wrongful termination under KRS 344.040, which requires filing in the county of residence. The University has not appealed this ruling.

> supplies, services, construction, or any other item. It includes awards; contracts of a fixed-price, cost, cost-plus-a-fixed-fee, or incentive type; contracts providing for the issuance of job or task orders; leases; letter contracts; purchase orders; and insurance contracts except as provided in KRS 45A.022. It includes supplemental agreements with respect to any of the foregoing[.]

KRS 45A.030(7).

> "Writing" or "written" means letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

KRS 45A.030(29). Newton argues that the Redbook, and the personnel policies which the University posts online, constitute a written employment contract and that consequently the circuit court erred in ruling that the University is protected from his breach of contract claims by the doctrine of sovereign immunity. The sections of the personnel policies which are directly relevant to his claims relate to termination and the provision of disability benefits. The policy relating to termination provides in part as follows: "A regular status employee may be dismissed only for cause and normally, though not necessarily, only after at least one written warning pointing out areas of deficiency and establishing a reasonable time limit for improvement." The policy lists twenty offenses for which employees may be subjected to disciplinary action in the form of oral warning, written reprimand, suspension without pay, demotion, or termination.

The section of policy regarding the long term disability insurance provides as follows:

> The University provides Long Term Disability Insurance at no cost to you when you participate in the University of Louisville Retirement Plan. Long Term Disability (LTD) is designed to provide long term compensation to employees who, due to disability, are prevented from being actively employed.
>
> Under LTD, if you become totally disabled while insured and remain disabled beyond a six-month qualifying period, the university's LTD plan will pay the greater of 60 percent of your monthly base salary or 60 percent of your monthly average earnings from the past two calendar years just before the start of the period of disability. The maximum benefit available is $5,000 per month. Any disability benefits you receive from Social Security, Veteran's Benefits or other governmental disability benefits are offset and are subtracted from your Long Term Disability monthly benefit amount. In addition to the income benefit, the university's LTD plan also provides a pension accrual benefit. Fifteen percent of the first $833.33 of your monthly salary, up to $125 per month, is contributed to a retirement account with TIAA-CREF.

The policy provides a link to the complete certificate of coverage for the benefit, and provides contact information for the insurance carrier and the benefits office for employees seeking more information.

In arguing that these provisions constitute a written contract, Newton relies primarily on *Parts Depot, Inc. v. Beiswenger*, 170 S.W.3d 354 (Ky. 2005), in which the Kentucky Supreme Court held that an express personnel policy can become an implied contract under certain circumstances. In order to qualify as an implied contract, the language in the policy must not be precatory, or merely an

expression of policies that the employer will strive to follow. *Beiswenger*, 170 S.W.3d at 363. Moreover, an employer may avoid having a personnel policy treated as an employment contract by including an express disclaimer to that effect. *Id.* Once an employer establishes an express policy that is not precatory and contains no disclaimer, however,

> and the employee continues to work while the policy remains in effect, the policy is deemed an implied contract for so long as it remains in effect. If the employer unilaterally changes the policy, the terms of the implied contract are also thereby changed.

Id.

Thus, an employer's statement of policy can create contractual rights in an employee even if the statement was not signed by either party, makes no reference to the specific employee, and can be amended unilaterally by the employer. *Id*., *citing Toussaint v. Blue Cross & Blue Shield of Mich*., 408 Mich. 579, 292 N.W.2d 880, 885 (1980).

The University argues that the Redbook and the personnel policies do not display the hallmarks of a contract, and that the policy which explains the availability of long-term disability benefits is precatory, and neither promises nor guarantee such benefits to employees.

We disagree. The portions of the Redbook and the personnel policies which have been provided in the record and set forth above contain sufficiently specific and contractual language to create an implied contractual obligation under *Beiswenger*. The passage relating to dismissal plainly states that a regular status

employee may be dismissed only for cause. The portion relating to long term disability insurance plainly states that the University provides long term disability (LTD) insurance at no cost to participants in the University's retirement plan. It outlines in detail the amounts the University's LTD plan will pay, it specifies that these amounts will be reduced by the amount of other benefits received, and that a pension accrual benefit is available. Moreover, the University has not drawn our attention to any disclaimer of contractual status contained in the Redbook or elsewhere in the personnel policies.

The University further contends, however, that even if the Redbook and the personnel policies meet the criteria of an "implied contract" under *Beiswenger*, an "implied contract" is not a "written contract" for purposes of waiving sovereign immunity under KRS 45A.245(1). An implied contract is by definition unwritten in whole or in part. "An implied contract is one neither oral nor written - but rather, implied in fact, based on the parties' actions." *Hammond v. Heritage Communications, Inc.*, 756 S.W.2d 152, 154 (Ky. App. 1988).

> A contract implied in fact . . . differs from an "express contract" only in the mode of proof required; and it is implied only in that it is to be inferred from the circumstances, the conduct, and the acts or relations of the parties, rather than from their spoken words. In short, from the evidence disclosed the court may conclude the parties entered into an agreement, although there is no proof of an express offer and a definite acceptance.

Victor's Executor v. Monson, 283 S.W.2d 175, 176 -177 (Ky. 1955).

To establish an implied contract,

> the evidence must disclose an actual agreement or meeting of the minds although not expressed and such is implied or presumed from the acts or circumstances which according to the ordinary course of dealing and the common understanding of men shows a mutual intent to contract.

Rider v. Combs, 256 S.W.2d 749, 749 (Ky. 1953). Under *Beiswenger*, Newton's continuing to work was the additional act or conduct from which the existence of an implied contract could be inferred. The existence of the contract, therefore, depended on something beyond the written terms of the Redbook and personnel policies.

In *Garcia v. Middle Rio Grande Conservancy District*, 918 P.2d 7 (N.M. 1996), the Supreme Court of New Mexico addressed whether an implied employment contract is a written contract for purposes of waiving sovereign immunity. In that case, the employer, Middle Rio Grande Conservancy District, contended that because the employment contract could only be implied, it could not be said to be written as required under the pertinent section of the statute (N.M.S.A. § 37-1-23(A)) waiving sovereign immunity. *Garcia*, 918 P.2d at 11. The state Supreme Court ultimately ruled that the implied contract constituted a valid written contract as required to waive sovereign immunity, but did so based on public policy concerns relating specifically to the welfare of public employees. As the state's intermediate appellate court later explained, in refusing to extend the *Garcia* ruling to other types of implied contracts,

> [a]s a practical matter, most employment agreements in the public sector are implied-in-fact, rooted in the

> conduct of the parties and in a maze of personnel rules and regulations, as well as employee manuals that apply generically to all employees. Because such employee manuals are issued to government employees in a unilateral manner and must be accepted by an employee as a condition of employment, they become the binding surrogates for an express employment contract in public sector employment situations.
>
> The existence of the personnel manual became the driving force behind the result reached in Garcia. If not for the vision of the *Garcia* opinion, few public employees could ever sue for breach of contract, no matter how egregious the breach and no matter how well-documented the implied-in-fact relationship with the employer. The legislative drafters of Section 37-1-23(A) could not have intended such an injustice. Given the particular nature of employment law, we decline to expand the Supreme Court's holding in *Garcia*, beyond the employment arena.

Campos de Suenos, Ltd. v. County of Bernalillo, 28 P.3d 1104, 1112 (N.M.Ct.App. 2001).

Although we are sympathetic to the public policy concerns which motivated the holding in *Garcia*, we decline to extend the definition of written contract in our Model Procurement Code to include the implied contract which may have been created between Newton and the University.

When interpreting a statute, "[o]ur main objective is to construe the statute in accordance with its plain language and in order to effectuate the legislative intent." *Cabinet for Families and Children v. Cummings*, 163 S.W.3d 425, 430 (Ky. 2005). Our General Assembly did not include the term "implied contract" in the waiver provision although it was free to do so; under the Tucker

Act, for example, Congress has waived sovereign immunity with respect to "any claim against the United States founded . . . upon any express or implied contract with the United States[.]" 28 U.S.C. § 1491(a)(1). Similarly, in New Hampshire, "[j]urisdiction has been conferred upon the superior court 'to enter judgment against the state of New Hampshire founded upon any express or implied contract with the state.' RSA 491:8." *Lorenz v. New Hampshire Administrative Office of the Courts*, 883 A.2d 265, 267 (N.H. 2005).

Furthermore, the inclusion of implied employment contracts does not appear to further the underlying purposes and policies of the Model Procurement Code, which appear to be limited "to the procurement of items of hardware and services subject to bidding procedures[.]" *Ashley v. University of Louisville*, 723 S.W.2d 866, 867 (Ky. App. 1986). Those purposes and policies are as follows:

> (a) To simplify, clarify, and modernize the law governing purchasing by the Commonwealth;
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> (b) To permit the continued development of purchasing policies and practices;
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> (c) To make as consistent as possible the purchasing laws among the various states;
>
> (d) To provide for increased public confidence in the procedures followed in public procurement;
>
> (e) To insure the fair and equitable treatment of all persons who deal with the procurement system of the Commonwealth;
>
> (f) To provide increased economy in state procurement activities by fostering effective competition; and

> (g) To provide safeguards for the maintenance of a procurement system of quality and integrity.

KRS 45A.010(2).

Other jurisdictions have been reluctant to extend the waiver of sovereign immunity to implied contracts.[4] "The State is only subject to a lawsuit for breach of contract if the contract is in writing. . . . An 'implied' contract does not satisfy this requirement." *Fedorov v. Board of Regents for University of Georgia*, 194 F.Supp.2d 1378, 1394 (S.D.Ga. 2002). In Florida, the state Supreme Court held that the legislature's grant of authority to the state to enter into contracts implicitly waived the immunity bar, but "qualified the newly-minted rule, 'emphasiz[ing] that [its] holding here is applicable only to suits on express, written contracts into which the state agency has statutory authority to enter.'" *Financial Healthcare Associates, Inc. v. Public Health Trust of Miami-Dade County*, 488 F.Supp.2d 1231, 1236 (S.D.Fla. 2007), *quoting Pan-Am Tobacco v. Department of Corrections*, 471 So.2d 4, 7 (Fla. 1984).

For the foregoing reasons, the summary judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

[4] The waiver of sovereign immunity on contract claims varies widely from state to state. *See Windsor Ave, LLC v. State*, 875 A.2d 506-509 (Conn. 2005), for a detailed survey.

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