STATE OF MICHIGAN

COURT OF APPEALS

DIANE BETTS, SUSAN BRUNDAGE, NANCY COMAN, PATRICIA DAIMLER, CAROL A. DYKSTRA, ELLIE FERGUSON, LINDA FRITZLER, ELAINE HAAGSMAN, ERA ANN HARDY, JEANNE HEYS, DANA LEHMANN, LISA MINCH, PAUL MORSE, JULIE DEJONGE, a/k/a JULIE PRYSBY, LINDA RECKER, KATHARIN E. RICHARDS, PETRA J. ROTZELL, SHERYL ROWLAND, KATHY TEN HAAF, WILLIAM TERRY, KAREN WHEELER, and LINDA ZAHRN,

Plaintiffs-Appellees,

v

BUTTERWORTH HOSPITAL,

Defendant-Appellant.

UNPUBLISHED
December 17, 1999

No. 209497
Kent Circuit Court
LC No. 97-010026 CZ

Before: Hood, P.J., and Holbrook, Jr., and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals, by leave granted, from an opinion and order denying its motion for summary disposition. We reverse and remand.

In June 1987, defendant created the "Staff Relations Policy" in an attempt to increase weekend nurse staffing by offering a flexible compensation package to registered nurses. Specifically, the policy provided that nurses would work twenty-four hours, fifty weekends per year. Policy participants would be compensated with forty hours of pay in exchange for working twenty-four hours between 3:00 p.m. Friday to 7:00 a.m. Monday.[1] This policy was merely a six-month pilot program to evaluate the effectiveness of the program's recruitment and staffing efforts. The policy also provided, in relevant part:

9. If the plan is terminated by the hospital, current staff may remain on the plan.

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This policy is subject to change by hospital management without prior notification.

Defendant's policy was extended past the six-month pilot period and was revised on numerous occasions. On March 3, 1989, the policy was extended to staff members other than registered nurses. This revision also provided that participants were entitled to funeral leave pay, pension pay, and charge pay, benefits which were previously unavailable. This revision also omitted the language which allowed defendant to change the policy without prior notice, but continued to provide that current staff could remain on the plan if it was terminated by defendant. On February 1, 1990, the policy was revised to extend the job classifications which could be included in the weekend staffing policy. However, this policy removed the language which allowed current staff members to remain on the "plan" in the event it was terminated by defendant.

In July 1993, participants in the weekend staff policy were given notice that there would be modifications to the program in an attempt to reduce costs. Effective September 1, 1993, weekend staff were given the option of working twenty-four hours on the weekend while being paid for thirty-six hours or work twenty-eight hours, twenty-four on the weekend and four additional hours "as negotiated," and receive forty hours of pay. In July 1995, the program was revised again. This revision provided that staff would work forty-eight weekend hours in a two-week pay period and receive sixty-four hours of pay or work fifty-six weekend hours in a two-week pay period and receive seventy-two hours of pay. Further revisions occurred in July 1996, which provided that employees would be paid forty-eight hours of pay for working forty-eight hours per pay period. However, a twenty-one percent premium was placed on the hours worked, that is, an additional twenty-one percent of hourly wage was provided for each hour worked on the weekend.[2]

Despite the numerous revisions which had been made to defendant's weekend staffing policy, plaintiffs, members of the weekend staffing program, filed suit alleging breach of contract, improper unilateral modification, fraudulent and innocent misrepresentation, and promissory estoppel. Specifically, and importantly, plaintiffs acknowledged that they were at-will employees of defendant. However, they alleged that defendant's modifications to the original plan constituted a breach of contract where defendant had promised that plaintiffs would be able to remain on the original plan. Defendant moved for summary disposition of plaintiffs' complaint pursuant to MCR 2.116(C)(8). The trial court denied defendant's motion for summary disposition, holding that factual issues precluded summary disposition.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(8). However, defendant submitted documentary evidence in support of its motion. MCR 2.116(G)(5) provides that the trial court may not consider documentary evidence when considering summary disposition motions brought pursuant to MCR 2.116(C)(8). However, it is apparent from the opinion and order denying defendant's motion for summary disposition that the trial court examined the weekend staffing policies attached to defendant's motion. When a party brings a summary disposition motion under the wrong subrule, the trial court may proceed under the appropriate subrule as long as neither party is misled. *Blair v Checker Cab Co*, 219 Mich App 667, 670-671; 558 NW2d 439 (1996). Plaintiffs cannot

argue that defendant's motion, brought pursuant to MCR 2.116(C)(8), misled them because they also filed documentary evidence in opposition to defendant's motion for summary disposition. Furthermore, while the trial court did not specify the basis upon which summary disposition was denied, the trial court held that summary disposition was denied because of the numerous factual issues which were not yet resolved. Because all parties submitted documents in addition to their pleadings, we will discuss the trial court's opinion and order under MCR 2.116(C)(10). *Hughes v PMG Building, Inc,* 227 Mich App 1, 4 n 2; 574 NW2d 691 (1997). We review summary disposition decisions de novo to determine whether the prevailing party was entitled to judgment as a matter of law. *Id.*

Defendant first argues that the trial court erred in denying summary disposition of plaintiff's breach of contract claim. We agree. Defendant argues that its weekend staffing "policy" could be modified without plaintiffs' consent and did not create contract rights, while plaintiffs argue that the modifications were not permissible without the assent of plaintiffs who did not agree to the modifications in compensation. In *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579, 614-615; 292 NW2d 880 (1980), the Supreme Court held that "employer statements of policy . . . can give rise to contractual rights in employees without evidence that the parties mutually agreed that the policy statements would create contractual rights in the employee . . . ."

However, in *In re Certified Question*, 432 Mich 438, 441; 443 NW2d 112 (1989), the plaintiff was discharged after thirteen years of employment with the defendant due to poor job performance. The plaintiff filed suit alleging that company policy provided that employment would not be terminated without just cause. However, prior to the plaintiff's discharge, the defendant modified its personnel policy to provide that employment was at-will. *Id.* at 442. The Supreme Court held that where "contractual rights" arise outside of normal contract principles, it is inappropriate to apply strict rules of contractual modification. *Id.* at 447-448. Furthermore, the Supreme Court rejected the contention that personnel policies could not be revoked absent an express reservation:

> It is one thing to expect that a discharge-for-cause policy will be uniformly applied while it is in effect; it is quite a different proposition to expect that such a personnel policy, having no fixed duration, will be immutable unless the right to revoke the policy was expressly reserved. The very definition of "policy" negates a legitimate expectation of permanence. "Policy" is defined as "a definite course or method of action selected (as by a government, institution, group, or individual) from among alternatives and in the light of given conditions to guide and usu(ally) determine present and future decisions; . . . a projected program consisting of desired objectives and the means to achieve them . . . ." *Webster's Third New International Dictionary, Unabridged Edition* (1964). In other words, a "policy" is commonly understood to be a flexible framework for operational guidance, not a perpetually binding contractual obligation. In the modern economic climate, the operating policies of a business enterprise must be adaptable and responsive to change. [*Id.* at 455-456.]

The Supreme Court held that employers may unilaterally change written policies, even though the right to make such a change was not expressly reserved from the outset, provided that affected employees

were given reasonable notice of the policy change. *Id.* at 457. The Court noted that a contrary holding would tie employers to "anachronistic policies in perpetuity." *Id.* at 456.

In the present case, defendant created the staffing program in an attempt to remedy inadequate weekend staffing of nurses by creating a flexible compensation choice. In April 1993, defendant invited plaintiffs to attend various meetings concerning the status of the weekend staffing program. In June 1993, defendant advised plaintiffs that it remained committed to the weekend staffing program, however, the program had to be reviewed to justify the costs/benefits. On July 2, 1993, defendant advised plaintiffs that the program would be modified effective September 1, 1993. The modifications afforded individual participants in the plan the option of working twenty-four hours with payment for thirty-six hours or working twenty-eight hours with payment of forty hours. Defendant's unilateral modification of the weekend staffing program with reasonable notice to the participants was proper. *In re Certified Questions, supra*. Reasonable notice of subsequent modifications was also given. Any holding to the contrary would interfere with defendant's management decisions and its need to modify policies in response to changing economic circumstances. *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 532; 473 NW2d 652 (1991).[3]

Plaintiffs argue that the policy created a contract and any subsequent modifications were ineffective without their consent. We disagree. Contract construction is a question of law, *Meagher v Wayne State University*, 222 Mich App 700, 721; 565 NW2d 401 (1997), which we review de novo. *State Farm Fire & Casualty Co v Couvier*, 227 Mich App 271, 273; 575 NW2d 331 (1998). The essential elements of a contract are: parties competent to contract, a proper subject matter, legal consideration, mutuality of agreement, and mutuality of obligation. *Mallory v City of Detroit*, 181 Mich App 121, 127; 449 NW2d 115 (1989). Specifically, plaintiffs contend that there was an "agreement" that defendant would not modify the "plan," and plaintiffs did not consent to any modification. However, enforceability of personnel policies is not contingent upon negotiations or a meeting of the minds. *Bullock v Automobile Club of Michigan*, 432 Mich 472, 480; 444 NW2d 114 (1989). Rather, enforcement of a policy manual is recognized as an obligation distinct from and independent of contract analysis. *Id.* Defendant's revisions to the original policy constitute unilateral modifications, not an offer to modify compensation. *Id.* at 483. Accordingly, the trial court erred in denying plaintiff's motion for summary disposition of the breach of contract claim.

Even if we could conclude that the policy revisions constituted a contract, plaintiffs are not entitled to their requested relief. Where parties adopt a mode of performing their contract different from its strict terms or mutually relax its terms by adopting a loose mode of executing it, neither party can return to the past and insist upon a breach because the agreement was not fulfilled according to its letter. *Goldblum v United Automobile, Aircraft & Agricultural Implement Workers*, 319 Mich 30, 37; 29 NW2d 310 (1947). In the present case, plaintiffs did not object to numerous revisions to the weekend program.[4] Accordingly, plaintiffs are precluded from insisting upon a return to the original terms of the program. *Id.*

Defendant next argues that the trial court erred in denying its motion for summary disposition of the fraudulent and innocent misrepresentation claim. We agree. To establish a cause of action for fraud or misrepresentation, a plaintiff must demonstrate: (1) that the defendant made a material representation,

(2) that the representation was false, (3) that when the defendant made the representation its falsity was known to the defendant or made recklessly without knowledge of its truth or falsity, (4) that the defendant made it with the intent that the plaintiff would act on it, (5) that the plaintiff acted in reliance on it, and (6) that the plaintiff was injured. *Eerdmans v Maki*, 226 Mich App 360, 366; 573 NW2d 329 (1997). This action must be premised upon a statement relating to a past or an existing fact. *Id.* Future promises cannot constitute actionable fraud. *Id.* Defendant's alleged promise, that the program would not change to original plan participants, refers to future events and is not actionable. The trial court erred in denying summary disposition of this claim.

Defendant next argues that the trial court erred in denying summary disposition of the claim of promissory estoppel. We agree. Plaintiffs' resignation from their prior positions to enter the weekend staffing program is insufficient consideration to support a promissory estoppel claim. *Meerman v Murco, Inc*, 205 Mich App 610, 616; 517 NW2d 832 (1994); *Marrero v McDonnell Douglas Capital Corp*, 200 Mich App 438, 442-443; 505 NW2d 275 (1993). Hence, we reverse the trial court's denial of summary disposition and remand for entry of judgment in favor of defendant.

Reversed and remanded for entry of judgment in favor of defendant. We do not retain jurisdiction.[5]

/s/ Harold Hood
/s/ Donald E. Holbrook, Jr.
/s/ E. Thomas Fitzgerald

[1] The policy also provided that staff would not be eligible for earned time off, holiday and shift differential, personal illness bank, pension plan, and life insurance. However, the following benefits were included: tuition assistance, health and dental insurance, social security, workers' compensation, parking, meal subsidy, breaks, merit increases, seniority bonus, and eighty hours paid vacation.

[2] The revisions also modified the benefit availability given to staff members. For example, the February 1, 1996 revision provided that staff would be given pension pay, holiday pay, shift differential, compassionate pay, and short term disability. However, the parties have not challenged the sufficiency and the adequacy of the consideration for any alleged contract, accordingly, we will not address it.

[3] We acknowledge that there was no majority with respect to the reasoning for the holding in *Dumas, supra*. However, our citation to dicta which we find persuasive is not prohibited. *Dykstra v Dep't of Transportation*, 208 Mich App 390, 391; 528 NW2d 754 (1995).

[4] For example, in March 1989, the program was revised to provide an additional benefit of pension pay to nurses, although it was a benefit which was expressly excluded from prior versions. Plaintiffs did not object to the inclusion of additional benefits or the reduction in compensation in 1993, 1995, and 1996. Only after these numerous revisions did plaintiffs insist upon a return to the original term of *compensation* be reinstated. Plaintiffs have not requested that additional benefits received in subsequent revisions be returned to defendant.

[5] The trial court also held that plaintiffs' claim for "improper unilateral modification" was duplicative of the claim for breach of contract and ordered the claim stricken. Plaintiffs have not filed a cross-appeal challenging this ruling, therefore, we need not address it on appeal.