IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
AIKEN DIVISION

Shadie Hall, Plaintiff, v. Family YMCA of Greater August *d/b/a YMCA Child Development Academy, LLC*, Defendant.	)	Civil Action No.: 1:17-cv-00337-JMC **ORDER AND OPINION**

Plaintiff Shadie Hall ("Plaintiff") filed an action alleging claims for breach of contract and breach of contract with fraudulent intent in the Court of Common Pleas for Aiken County against her former employer Defendant Family YMCA of Greater Augusta, doing business as YMCA Child Development Academy, LLC ("Defendant").[1] (ECF No. 1-1.) Asserting the court's diversity jurisdiction under 28 U.S.C. § 1332, Defendant removed the action to this court (ECF No. 1) and, thereafter, filed, pursuant to Fed. R. Civ. P. 12(b)(6), a motion to dismiss Plaintiff's complaint for failing to state a claim for which the court could grant relief (ECF No. 7). For the reasons that follow, the court **DENIES** Defendant's Rule 12(b)(6) motion to dismiss.

I. RELEVANT FACTUAL AND PROCEDURAL BACKGOUND

Plaintiff filed her complaint in state court on November 29, 2016, (ECF No. 1-1 at 16) and, in it, alleges the following facts. Plaintiff worked for Aiken-Barnwell Community Action Agency, Inc. ("ABCAA") from 2005 to August 16, 2015, as the director of ABCAA's early care and education program and its Head Start program. (*Id.* at 7.) On August 17, 2015, Plaintiff was

[1] Defendant asserts that it is correctly identified as YMCA Child Development Academy, LLC. (ECF No. 7-1 at 1 n.1.)

"transferred" to work for Defendant in the role of director of its Head Start program, after Defendant began receiving the grant that had previously funded ABCAA. (*Id.*) Under the transfer, "all policies that governed ABCAA would remain intact and would govern Defendant's workplace" and its employees, including Plaintiff. (*Id.*) As part of her duties, Plaintiff was to ensure compliance with all applicable federal and state regulations and guidelines in the implementation of the Head Start program. (*Id.* at 8.)

During the course of her roughly four-month employment with Defendant, Plaintiff observed Defendant failing to comply with applicable safety and other regulations and reported these failures to her supervisors. (*See id.* at 8-10). She continuously told her supervisors that playground and facility conditions were unsafe and violated regulations, that insecticides were required to be used on playgrounds and facilities, that Defendant's buses required registration cards, and that staff were required to undergo annual training from a state agency. (*Id.*) During the course of her employment, Defendant failed to provide Plaintiff with a professional development plan, even though Defendant is required to provide such a plan to all employees who are compensated through Head Start funding. (*Id.* at 10.) "Against company policy," Defendant also failed to provide Plaintiff a job description until November 6, 2015. (*Id.*)

Of particular note for this order, Defendant began to institute a policy of requesting and reviewing employees' driving records, and a poor driving record disclosed by the review would negatively affect an employee's employment with Defendant. (*Id.* at 8-9.) Plaintiff believed that Defendant's newly instituted policy was not permitted because, "under the transfer," "Defendant was to abide by the policies and procedures of ABCAA." (*Id.* at 9.) When Plaintiff requested information on this new policy in October 2015, Defendant, in retaliation, moved Plaintiff to its Augusta office, even though the employees she supervised were in Aiken. (*Id.* at 9-10.) After

reviewing the driving record of a certain employee, Nadia Jones, Defendant decided to terminate Jones because of her poor driving record. (*Id.* at 10.) When Defendant requested that Plaintiff sign Jones' termination letter, Plaintiff refused to do so "because Defendant failed to follow employment policies that required Defendant to seek approval of any termination from the Policy Council according to Head Start Personnel Policies & Procedures," which Plaintiff describes as the "governing termination policy." (*Id.*) In retaliation for her informing Defendant of the governing termination policy and for her refusal to sign Jones' termination letter, Defendant began to assign Plaintiff frivolous tasks or tasks that could not be completed in the time Defendant allotted. (*Id.*)

On November 6, 2015, Defendant "wrote Plaintiff up alleging that Plaintiff had failed to perform designated assignments." (*Id.*) Plaintiff alleges that the write-up was a pretext and was in retaliation for her "performing her job under the governance of the ABCAA policies," and, "knowing that she had performed . . . her job . . . under the governing policies," Plaintiff refused to sign the write-up when it was presented to her and, instead, "voiced her concerns about being written up." (*Id.*) On November 19, 2015, the Policy Council convened a meeting, to which Plaintiff was invited. (*Id.* at 11.) At the meeting, Defendant informed Plaintiff that her services were no longer needed and that she was being replaced because of alleged negligence, failure to follow instructions, and deliberate non-performance of work. (*Id.*) Defendant's chief executive officer told Plaintiff that she could choose to resign, in which case she would retain temporary benefits and receive a good reference, or to be terminated, in which case no benefits or good reference would be provided. (*Id.*) "Plaintiff did not feel as if she was given adequate opportunity to rebut the allegations" but "informed the Council that she had followed Defendant's policies and

procedures." (*Id.*) Plaintiff did not resign, and Defendant presented her a termination letter effective November 19, 2015. (*Id.*)

Based on the allegations in her complaint, Plaintiff asserts two claims against Defendant. In the first claim for breach of contract, Plaintiff alleges that she entered into an employment contract with Defendant, in which she agreed to perform her job duties in exchange for, among other things, "Defendant's guarantees that . . . she would be protected from discrimination." (*Id.* at 12.) Plaintiff alleges that "Defendant maintains an employment handbook and its own policies and procedures" and that Plaintiff relied on the promises contained in Defendant's handbook and Defendant's policies and procedures." (*Id.*) She further alleges that "Defendant breached its employment contract with Plaintiff . . . by failing to protect Plaintiff from the retaliatory acts of Defendant's managers after Plaintiff reported safety violations" and by "failing to follow the review plan it developed to improve Plaintiff's work performance." (*Id.* at 12-13.)

In her second claim for breach of contract with fraudulent intent, Plaintiff re-alleges the same grounds for breach that she alleged in her first claim. (*See id.* at 13-14.) In addition, Plaintiff alleges that Defendant breached the terms of the employment contract "by reason of an intentional design on its part to defraud Plaintiff of her employment." (*Id.* at 14.) She further alleges that she has been maligned and that "Defendant acted in a malicious, deliberate, intentional way, and with a deliberate indifference to the rights of Plaintiff." (*Id.*) Plaintiff asserts that "Defendant's continuance of harassment and retaliatory acts towards Plaintiff did not comply with the terms of the employment contract" and that "Defendant sought out and fraudulently breached the agreement . . . by deliberately refusing to follow its own anti-discrimination and anti-harassment policies." (*Id.*)

Defendant removed the action to this court on February 3, 2017, (ECF No. 1) and filed the instant Rule 12(b)(6) motion to dismiss on February 24, 2017 (ECF No. 7). In its motion and subsequent briefing, Defendant argues that Plaintiff's complaint fails to sufficiently allege the existence of a contract that altered her at-will employment status, that the handbook to which Plaintiff refers in her complaint, as a matter of law, does not amount to a contract that altered her at-will employment status, and that Plaintiff's complaint fails to sufficiently allege that Defendant engaged in fraudulent activity in the alleged breach. (*See* ECF Nos. 7, 7-1, 12.) Plaintiff responds that she has alleged sufficient factual matter to establish the existence of an employment contract and Defendant's fraudulent activity in breaching it, and Plaintiff challenges Defendant's attempt to have the court consider an employee handbook that it attaches to its motion to dismiss. (*See* ECF No. 11.) Having received the parties' briefing and oral argument (*see* ECF Nos. 7-1, 11, 12, 15), Defendant's motion to dismiss is ripe for disposition.

II. LEGAL STANDARD

A Rule 12(b)(6) motion for failure to state a claim upon which relief can be granted "challenges the legal sufficiency of a complaint." *Francis v. Giacomelli*, 588 F.3d 186, 192 (4th Cir. 2009) (citations omitted); *see also Republican Party of N.C. v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992) ("A motion to dismiss under Rule 12(b)(6) . . . does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses."). To be legally sufficient a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A Rule 12(b)(6) motion "should not be granted unless it appears certain that the plaintiff can prove no set of facts which would support its claim and would entitle it to relief." *Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993). When considering a Rule 12(b)(6) motion, the court should accept as true all well-pleaded allegations and should view

the complaint in a light most favorable to the plaintiff. *Ostrzenski v. Seigel*, 177 F.3d 245, 251 (4th Cir. 1999); *Mylan Labs.*, 7 F.3d at 1134. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556).

III. ANALYSIS

Defendant's arguments for dismissal are (A) that the complaint fails to sufficiently allege the existence of a contract that altered Plaintiff's at-will employment status; (B) that the employee handbook on which Plaintiff's complaint relies, as a matter of law, does not create a contract that altered Plaintiff's at-will employment status; and (C) that the complaint fails to sufficiently allege that Defendant engaged in fraudulent activity in breaching the contract. The court addresses each of these arguments in turn.

A. Existence of a contract altering at-will employment status

"South Carolina[2] has long recognized the doctrine of employment at-will." *Brailsford v. Fresenius Med. Ctr. CAN Kidney Ctrs., LLC*, No. 2:15-cv-00239-DCN, 2015 WL 4459032, at *3

[2] As this court's diversity jurisdiction is implicated, South Carolina choice of law rules apply. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496-97 (1941); *see also CACI Int'l, Inc. v. St. Paul Fire & Marine Ins. Co.*, 566 F.3d 150, 154 (4th Cir. 2009). Although neither party directly addresses which jurisdiction's substantive law should govern the complaint's allegations regarding the existence of a contract or Defendant's fraudulent intent according to South Carolina choice of law rules, the court notes that, in their briefing and at the motion hearing, both parties have cited to South Carolina law with respect to both issues. Accordingly, the court applies South Carolina substantive law. *See Cosey v. Prudential Life Ins. Co.*, 735 F.3d 161, 169 n.7 (4th Cir. 2013) (citing *Am. Fuel Corp. v. Utah Energy Dev. Co.*, 122 F.3d. 130, 134 (2d Cir. 1997)); *Tehram-Berkeley v. Tippetts-Abbett*, 888 F.2d 239, 242 (2d Cir. 1989); *Schiavone Constr. Co. v. Time, Inc.*, 735 F.2d 94, 96 (3d Cir. 1984).

(D.S.C. July 21, 2015) (citing *Mathis v. Brown & Brown of S.C., Inc.*, 698 S.E.2d 773, 778 (S.C. 2010)); *accord Weaver v. John Lucas Tree Expert Co.*, No. 2:13-cv-01698-PMD, 2013 WL 5587854, at *4 (D.S.C. Oct. 10, 2013). "Under the doctrine of at-will employment, an 'at-will employee may be terminated at any time for any reason or for no reason, with or without cause.'" *Weaver*, 2013 WL 5587854, at *4 (quoting *Legette v. Nucor Corp.*, 2:12-cv-1020-PMD, 2012 WL 3029650, at *3 (D.S.C. July 25, 2012)) (citing *King v. Marriott Int'l, Inc.*, 520 F. Supp. 2d 748, 755 (D.S.C. 2007); *Barron v. Labor Finders of S.C.*, 713 S.E.2d 634, 636 (S.C. 2011)). "'Of course, an employer and employee may choose to contractually alter the general rule of employment at-will and restrict their freedom to discharge without cause or to resign with impunity.'" *Brailsford*, 2015 WL 4459032, at *3 (quoting *Prescott v. Farmers Tel. Co-op., Inc.*, 516 S.E.2d 923, 925 (S.C. 1999)). "Because employment is presumed to be at-will, in order to survive a motion to dismiss on a claim for breach of contract of employment, a plaintiff must plead sufficient factual allegations to establish the existence of an employment contract beyond the at-will relationship." *Id.* (citing *Weaver*, 2013 WL 5587854, at *4). Thus, to assess a claim for breach of contract, "it is first necessary to determine whether a contract was formed," as "[i]t is axiomatic that to recover under a theory of breach of contract, a valid contract must have existed between the parties." *Weaver*, 2013 WL 5587854, at *5 (citing, *inter alia*, *Fung Lin Wah Enters. Ltd. v. E. Bay Imp. Co.*, 465 F. Supp. 2d 536, 542-43 (D.S.C. 2006); *Tidewater Supply Co. v. Indus. Elec. Co.*, 171 S.E.2d 607, 608 (S.C. 1969)); *accord Brailsford*, 2015 WL 4459032, at *3.

Contracts will be either bilateral or unilateral in nature, and, in the employment context where no formal written agreement between the employer and employee appears to exist,[3] the contract, if any, is likely unilateral, meaning that, in response to the employer's offered promises,

[3] Plaintiff does not argue that she had a formal written employment agreement with Defendant.

the employer accepts, not by making a reciprocal promise, but by commencing performance. *See Weaver*, 2013 WL 5587854, at *5 (citing *Sauner v. Pub. Serv. Auth. of S.C.*, 581 S.E.2d 161, 165-66 (S.C. 2003). *Prescott*, 516 S.E.2d at 926; *Small v. Springs Indus., Inc.*, 357 S.E.2d 452, 454 (S.C. 1987); *Int'l Shoe Co. v. Herndon*, 133 S.E. 202, 203 (S.C. 1926)). Under South Carolina law, a unilateral employment contract exists when the employer makes a specific offer, the offer is communicated to the employee, and the employee commences performance of employment-related duties in reliance on the offer. *Id.* at *5-6 (citing *Sauner*, 581 S.E.2d at 165-66; *Prescott*, 516 S.E.2d at 926; 82 Am. Jur. 2d *Wrongful Discharge* § 84 (1992)). In addition, "[t]o alter an employee's at-will status under South Carolina law, a contract . . . must limit either the duration of the employment or the employer's right to terminate the employee." *Id.* at *6 (citing *Wadford v. Hartford Fire Ins. Co.*, No. 3:87-2872-15, 1988 WL 492127, at *4 (D.S.C. Aug. 11, 1988); *Lord v. Kimberly-Clark Corp.*, 827 F. Supp. 2d 598, 602-05 (D.S.C. 2011)). "In sum, to survive [a motion to dismiss] with respect to [a] breach of contract claim, [a plaintiff-employee] needs to have set forth sufficient factual allegations in [her c]omplaint to state a facially plausible claim that the [p]arties entered into a contract with terms of employment that limited the duration of the relationship or the right of termination or both." *Id.* (citing *Battle v. Nikanth, LLC*, No. 2:13-543-PMD, 2013 WL 4874976, at *5 (D.S.C. Sept. 11, 2013)); *accord Brailsford*, 2015 WL 4459032, at *4.

"'An employee handbook *may* create a contract altering an at-will arrangement.'" *Brailsford*, 2015 WL 4459032, at *3 (brackets omitted) (emphasis added in *Brailsford*) (quoting *Nelson v. Charleston Cnty. Parks & Recreation Comm'n*, 605 S.E.2d 744, 747 (S.C. Ct. App. 2004)). "A handbook forms an employment contract when: '(1) the handbook provision(s) and procedure(s) in question apply to the employee, (2) the handbook sets out procedures binding on

the employer, and (3) the handbook does not contain a conspicuous and appropriate disclaimer.'" *Id.* (quoting *Grant v. Mount Vernon Mills, Inc.*, 634 S.E.2d 15, 20 (S.C. Ct. App. 2006)). "In order for a handbook to alter an employee's at-will status and create an employment contract, the employer must 'phrase the document's language in mandatory terms giving rise to a promise, an expectation and a benefit to an employee,'" *id.* at *4 (brackets omitted) (quoting *Nelson*, 605 S.E.2d at 747) (citing *Hessenthaler v. Tri-Cnty. Sister Help, Inc.*, 616 S.E.2d 694, 698 (S.C. 2005); *Grant*, 634 S.E.2d at 20), because "'[w]hen definite and mandatory, such [language] impose[s] a limitation on the employer's right to terminate an employee at any time, for any reason.'" *id.* (citing *Grant*, 634 S.E.2d at 20). "'When the evidence conflicts or is capable of more than one inference, the issue of whether an employee handbook constitutes a contract should be submitted to the jury; however, a court should intervene to resolve the handbook issue as a matter of law if the handbook statements and the disclaimer, taken together, establish beyond any doubt that an enforceable promise either does or does not exist.'" *Id.* (brackets and ellipsis omitted) (quoting *Grant*, 634 S.E.2d at 20).

Here, Defendant argues that, under *Twombly* and *Iqbal*, the complaint contains insufficient factual allegations establishing the existence of an employment contract between Defendant and Plaintiff that altered the default at-will employment status. (*See* ECF No. 7-1 at 3-5; ECF No. 12 at 1-2.) However, Defendant does not appear to argue that Plaintiff has failed to sufficiently plead the existence of a unilateral employment contract. More specifically, Defendant does not appear to argue that Plaintiff's complaint fails to plead that Defendant made a specific offer of employment to Plaintiff, that the offer was communicated to Plaintiff, or that Plaintiff began to perform job-related duties for Defendant in reliance on the offer. In fact, Defendant's summary of the complaint's allegations seems to confirm that it sufficiently pled the existence of a unilateral

contract. (*See* ECF No. 7-1 at 2 ("Defendant took over [ABCAA] and inherited Plaintiff as an employee. Plaintiff was hired by and began working for Defendant as the Head Start Director that same day." (internal citations omitted)).) In any event, the court concludes that Plaintiff's complaint sufficiently pleads the elements of a unilateral employment contract. The complaint states that Plaintiff was "transferred" from ABCAA to Defendant as a result of Defendant winning the grant that had previously been awarded to ABCAA and that as part of the transfer, polices that had governed ABCAA would continue to govern the former employees of ABCAA. (ECF No. 1-1 at 7.) Plaintiff further alleges that she began working for Defendant after the transfer occurred. (*Id.* at 8.) Viewing these factual allegations in the light most favorable to Plaintiff, the court has no trouble determining that the "transfer" constituted an offer by Defendant for Plaintiff to continue to perform duties similar to (if not the same as) those that she previously been assigned when she was employed by ABCAA, that this offer was communicated to Plaintiff, and that Plaintiff accepted the offer by commencing performance of those duties in reliance on Defendant's offer, including its promise to continue the policies that had governed ABCAA.

The real thrust of Defendant's argument is not that Plaintiff has failed to allege the existence of a unilateral contract but, instead, that Plaintiff has failed to sufficiently allege that the contract altered the default at-will employment status under South Carolina law. (*See* ECF No. 7-1 at 4 ("What Plaintiff does not allege . . . is that the handbook or the[] 'unidentified' policies and procedures upon which she relies altered her status as an at-will employee."); *id.* ("Plaintiff has not . . . allege[d] the existence of any contract of employment that altered her at-will employee status or limited Defendant's ability to terminate her for any reason, at any time.").) The court disagrees. The complaint alleges that, after ABCAA's employees were "transferred" to Defendant, "all policies that governed ABCAA would remain intact and would govern Defendant's

workplace," "Defendant's employees," and "Plaintiff's employment." (ECF No. 1-1 at 7.) Plaintiff further alleges that some (though perhaps not all) of these policies were contained in an employee handbook. (*Id.* at 12.) In describing Plaintiff's co-worker Jones' termination, the complaint alleges that, under these policies, Jones could not be terminated without first seeking the approval of the Policy Council. (*Id.* at 10.) Furthermore, reading the entire complaint in the light most favorable to Plaintiff, the court may draw the reasonable inference that it alleges that, under the policies on which Plaintiff relied, employees such as her could not be terminated in retaliation for reporting to their superiors non-compliance with federal and state regulations applicable to the Head Start program.

In the court's view, these allegations sufficiently plead the existence of an employment contract that altered Plaintiff's at-will status. First, the complaint alleges the existence of an employee handbook that was applicable to ABCAA employees and later applicable to Defendant's employees, and the complaint details some of the handbook's provisions. At this stage, the court is obligated to accept these well-pled factual allegations as true, *Ostrzenski*, 177 F.3d at 251; *Mylan Labs.*, 7 F.3d at 1134, meaning the court accepts, for purposes of deciding Defendant's Rule 12(b)(6) motion, that ABCAA issued an employee handbook that contained provisions preventing it from terminating employees in retaliation for reporting non-compliance with applicable regulations or without seeking the Policy Council's approval.[4] *See Conner v. City of Forest Acres*,

[4] Defendant appears to argue that the court cannot accept an allegation of the existence of a handbook or allegations as to the details of provisions within it if the complaint fails to identify the handbook or fails to cite to specific provisions of the handbook or if the plaintiff fails to attach the handbook to the complaint. (*See* ECF No. 7-1 at 4-5; ECF No. 12 at 2). This argument was more clearly asserted at the motion hearing. Defendant has cited no legal authority supporting this view, aside from *Iqbal*'s general proclamation that conclusory legal assertions should not be accorded the presumption of truth that is accorded well-pled factual allegations. In deciding Rule 12(b)(6) motions, courts accept as true a complaint's allegations as to the terms of a purported contract when the allegations are factually sufficient (not mere conclusory legal assertions) and

560 S.E.2d 606, 610 (S.C. 2002) ("Because an employee handbook may create a contract, the issue of the existence of an employment contract is proper for a jury when its existence is questioned and the evidence is either conflicting or admits of more than one inference.")

Second, the complaint sufficiently alleges that the handbook amounted to an employment contract. As explained above, the mere existence of an employee handbook, alone, does not create a contract altering the at-will arrangement. *Brailsford*, 2015 WL 4459032, at *3. To form an employment contract, the ABCAA handbook must have applied to Plaintiff, must set out procedures that are binding on Defendant, must not contain a conspicuous and appropriate disclaimer, and must be phrased in mandatory language that gives rise to a promise to Defendant. *Id.* at *3-4. Read in the light most favorable to Plaintiff, the complaint sufficiently alleges that the ABCAA handbook applied to Plaintiff and contained, in mandatory language, termination procedures that were binding on Defendant. The complaint contains no allegations regarding a disclaimer in the handbook. Nevertheless, even if the complaint had alleged the existence of a conspicuous and appropriate disclaimer, the procedural posture of this case combined with the other allegations regarding the ABCAA handbook would prevent the court from concluding that the handbook, as pled, does not amount to an enforceable contract. As explained above, a court may determine, as a matter of law, that an employee handbook does not amount to an enforceable contract, but only when the statements in the handbook and any disclaimer, taken together, establish beyond doubt that the handbook does not create contractual obligations. *See id.* at *4.

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are not contradicted by a properly considered contract attached to the pleadings or to the Rule 12(b)(6) motion. *See Lindquist v. Tanner*, No. 2:11-3181, 2012 WL 3839235, at *3 (D.S.C. Sept. 4, 2012); *Kaiser-Flores v. Lowe's Home Ctrs., Inc.*, No. 5:08-cv-45-V, 2009 WL 762198, at *4 (W.D.N.C. March 19, 2009). In the court's view, Plaintiff's allegations as to the existence of a handbook and the provisions within it are more than mere empty legal conclusions; they are well-pled factual assertions that the court must accept as true under Rule 12(b)(6) analysis.

Here, the allegations of the complaint are the only indications of the handbook's contents that the court may consider,[5] and the allegations describe a handbook that applied to Plaintiff and contained mandatory, binding termination procedures. Thus, regardless of the presence of a disclaimer, the court could not determine at this stage, as a matter of law, that the handbook does not constitute an employment contract. *See Lord*, 827 F. Supp. 2d at 602 ("'An employee manual that contains promissory language and a disclaimer is inherently ambiguous, and a jury should interpret whether the manual creates or alters an existing contractual relationship.'" (internal quotation marks omitted) (quoting *Horton v. Darby Elec. Co., Inc.*, 599 S.E.2d 456, 460 (2004))).

Third, the complaint sufficiently alleges that the contract embodied by the provisions of the handbook altered the at-will employment arrangement. The complaint alleges that policies in the ABCAA handbook applied to all employees who had been transferred to Defendant's employment, including Plaintiff. In discussing Jones' termination, the complaint further alleges that the policies in the ABCAA handbook prevented Defendant from terminating employees without first seeking approval of the Policy Council. In the court's view, these allegations sufficiently plead that the terms of the employment contract limited Defendant's right to terminate Plaintiff. *See Weaver*, 2013 WL 5587854, at *5. Furthermore, as the court explained above, when read in the light most favorable to Plaintiff, the complaint as a whole alleges that the policies contained in the handbook prevented Defendant from terminating employees in retaliation for

[5] *See* Part III.B, *infra*.

reporting non-compliance with applicable regulations.[6] This too, in the court's view sufficiently alleges that the terms of the employment contract limited Defendant's right to terminate Plaintiff.[7]

In sum, the court concludes that the complaint sufficiently alleges that Defendant and Plaintiff entered into a unilateral contract with terms embodied in the ABCAA handbook that limited Defendant's right to terminate Plaintiff, thereby altering the default at-will arrangement. Thus, the court rejects Defendant's assertion that dismissal is appropriate on the ground that the

[6] Citing *Brailsford*, *King*, and *Frasier v. Verizon Wireless*, No. 8:08-cv-356, 2008 WL 724037 (D.S.C. Mar. 17, 2008), Defendant argues that anti-retaliation policies embodied in a handbook are insufficient to form an employment contract that displaces at-will status. (ECF No. 7-1 at 6.) In the court's view, the cases cited by Defendant are distinguishable because, in each of them, the handbook language presented only a generalized policy statement that could not create the expectation of guaranteed employment if the policy was not followed because it did not promise specific treatment in specific situations. *See Brailsford*, 2015 WL 4459032, at *4; *Frazier*, 2008 WL 724037, at *2; *King*, 520 F. Supp. 2d at 756-57. However, the language of an anti-retaliation policy can create an enforceable employment contract if it is not generalized but, instead, promises specific treatment in specific situations, such as expressly stating that the employee will not be terminated for filing internal complaints. *See Lord*, 827 F. Supp. 2d at 604. Here, the court must accept the well-pled allegations of Plaintiff's complaint that the applicable handbook prevented Defendant from terminating her employment in retaliation for reporting Defendant's non-compliance with regulations. Thus, the handbook, as pled, contains a non-generalized policy, promising that Plaintiff would not have her employment terminated in retaliation for the specific actions she took. Accordingly, the rule stated in *Brailsford*, *King*, and *Frazier* is inapplicable.

[7] At the motion hearing, Defendant seemed to argue that, when an employee alleges a breach of an employment contract by pointing to an employer's failure to abide by a handbook's provision, the court, in determining whether the handbook limits the employer's right to terminate the employee and thereby constitutes an enforceable contract, may look only to the provision that the employee claims the employer breached. Thus, Defendant seemed to argue that the court may only consider whether the handbook's anti-retaliation provision limited Defendant's right to terminate Plaintiff. To the extent Defendant makes this argument, it appears to have raised it for the first time at the motion hearing, and, for this reason, the court is disinclined to consider it. *See Mulvey Constr., Inc. v. BITCO Gen. Life Ins. Corp.*, No. 1:07-0634, 2015 WL 6394521, at *7 (S.D.W. Va. Oct. 1, 2015); *N.C. All. for Transp. Reform v. U.S. Dep't of Transp.*, 713 F. Supp. 2d 491, 510 (M.D.N.C. 2010). In any event, Defendant cites no authority (and the court has unearthed no authority) for the proposition that a court assessing the existence of an employment contract alleged to arise from an employee handbook may only look to the provision of the handbook alleged to have been breached in determining whether the handbook contains mandatory, promissory language that limits the employer's right to terminate the employee. Accordingly, the court rejects Defendant's argument in this vein.

complaint failed to sufficiently allege the existence of an employment contract that altered Plaintiff's at-will status.

B. Employee handbook creating contract altering at-will employment status

Defendant next argues that, assuming Plaintiff sufficiently pled in her complaint the existence of a contract that altered the at-will arrangement, the complaint is nonetheless subject to dismissal because the very handbook to which Defendant points as the source of her contractual rights demonstrates without a doubt that it is not an enforceable employment contract. (*See* ECF No. 7-1 at 5-7; ECF No. 12 at 2-3.) Accordingly, for the court's consideration, Defendant attaches as an exhibit to its motion to dismiss a handbook titled "YMCA Child Development Academy, LLC[] Personnel Handbook" issued in October 2015 (the "YMCA handbook"). (*See* ECF No. 7-2.) Defendant argues that the court's review of the YMCA handbook would demonstrate that it contains no mandatory promises regarding termination or procedures. (ECF No. 7-1 at 5-7.) Thus, Defendant appears to be advancing a form of the "exhibit-prevails rule, which provides that 'in the event of conflict between the bare allegations of the complaint and any exhibit attached, the exhibit prevails.'" *Goines v. Valley Comty. Servs. Bd.*, 822 F.3d 159, 166 (4th Cir. 2016) (quoting *Fayetteville Inv'rs v. Commercial Builders, Inc.*, 936 F.2d 1462, 1465 (4th Cir. 1991)).

Plaintiff argues that Defendant is putting the shoes on before the socks. In Plaintiff's view, the court may not consider the YMCA handbook in deciding Defendant's Rule 12(b)(6) motion to dismiss because Plaintiff contests the authenticity of the YMCA handbook and because Plaintiff has not relied on the YMCA handbook in her complaint. (*See* ECF No. 11 at 8-9.)

This court recently addressed the circumstances in which it may consider documents attached to a Rule 12(b)(6) motion to dismiss:

> Although courts "generally do not consider extrinsic evidence when evaluating the sufficiency of a complaint," in a motion under Rule 12(b)(6),

> there are exceptions: for example, courts "may properly consider documents attached to a . . . motion to dismiss 'so long as they are integral to the complaint and authentic.'" *Anand v. Ocwen Loan Servicing, LLC*, 754 F.3d 195, 198 (4th Cir. 2014) (quoting *Philips v. Pitt Cty. Mem. Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009)). Thus the court may consider documents that are "integral to and explicitly relied on in the complaint" when the [plaintiff] "do[es] not challenge [their] authenticity." *Phillips v. LCI Int'l, Inc.*, 190 F.3d 609, 618 (4th Cir. 1999); *accord Zak v. Chelsea Therapeutics Int'l, Inc.*, 780 F.3d 597, 606-07 (4th Cir. 2015)[.] The Fourth Circuit has explained that
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> > "[t]he rationale underlying this exception is that the primary problem raised by looking to documents outside the complaint—lack of notice to the plaintiff—is dissipated where plaintiff has actual notice and has relied upon these documents in framing the complaint. What the rule seeks to prevent is the situation in which a plaintiff is able to maintain a claim of fraud by extracting an isolated statement from a document and placing it in the complaint, even though if the statement were examined in the full context of the document, it would be clear that the statement was not fraudulent."
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> *Am. Chiropractic Ass'n v. Trigon Healthcare, Inc.*, 367 F.3d 212, 234 (4th Cir. 2004) (internal quotation marks, brackets, and ellipsis omitted) (quoting *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997)); *see also Pension Benefits Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3rd Cir. 1993) ("[A] court may properly consider a concededly authentic document upon which the complaint is based when the defendant attaches such a document to its motion to dismiss . . . . Otherwise, a plaintiff with a legally deficient claim could survive a motion to dismiss simply by failing to attach a dispositive document.").

United States v. Savannah River Nuclear Solutions, LLC, No. 1:16-cv-00825-JMC, 2016 WL 7104823, at *6 (D.S.C. Dec. 6, 2016).

Here, the court agrees with Plaintiff that it may not consider the YMCA handbook that Defendant attached to its motion to dismiss. First, Plaintiff contests the attachment's authenticity, and, therefore, the court will not consider it. *See Turnage v. JPMorgan Chase Bank*, No. 2:11-2916-RMG, 2012 WL 12354226, at *4 (D.S.C. Apr. 13, 2012) (declining to consider document

because plaintiff challenged its authenticity).[8] Second, and more importantly, Plaintiff is correct that the document is not referenced in her complaint and does not appear to be integral to it. Throughout her complaint, Plaintiff explicitly alleges that the policies contained in the handbook issued by her former employer, ABCAA, remained applicable to her "transfer" to employment with Defendant and that a handbook issued by ABCAA prior to her employment with Defendant, not the YMCA handbook (which on its face was not issued until well after Plaintiff's employment with Defendant commenced), is the source of her contractual rights. Because the YMCA handbook is not integral to Plaintiff's complaint, because the complaint does not explicitly rely on the YMCA handbook, and because Plaintiff challenges the YMCA handbook's authenticity, the court will not consider it in deciding Defendant's motion.

In the course of responding to Defendant's arguments regarding the YMCA handbook, Plaintiff asserted that "it is [her] contention that Defendant was controlled by policies and procedures of ABCAA." (ECF No. 11 at 9.) Focusing on this aspect of Plaintiff's response, Defendant attaches to its reply a document titled "[ABCAA] . . . Personnel Policies and Procedures" issued in December 2013 (the "ABCAA handbook"). (ECF Nos. 12-1, 12-2.) Defendant asserts that this document is the handbook on which Plaintiff's complaint explicitly relies, that it is integral to the complaint, and that therefore the court may consider it in deciding

[8] It is not entirely clear whether a court may consider a document attached to a defendant's motion to dismiss over the plaintiff's challenge to the document's authenticity if the court finds that the document is in fact authentic. *Compare Zak v. Chelsea Therapeutics Int'l, Ltd.*, 780 F.3d 597, 606-07 (4th Cir. 2015) ("Consideration of a document attached to a motion to dismiss ordinarily is permitted *only* when the document is integral to and explicitly relied on in the complaint and when the plaintiffs do not challenge the document's authenticity." (emphasis added) (internal quotation marks and brackets omitted)), *with Tessler v. Nat'l Broad. Co., Inc.*, 364 F. App'x 5, 7 (4th Cir. 2010) (explaining that district court did not abuse its discretion by rejecting plaintiff's challenge to the authenticity of materials attached to motion to dismiss). To the extent the court has the authority to consider such a document upon a finding that it is authentic, the court declines to make such a finding with respect to the YMCA handbook in this order.

the instant motion. (ECF No. 12 at 3-4.) Relying nearly exclusively on the disclaimer contained on the first page of the ABCAA handbook, Defendant argues that the handbook to which Plaintiff points in her complaint, under South Carolina law, cannot amount to an employment contract altering the at-will arrangement. (*See id.*) At the motion hearing—the first opportunity Plaintiff had to address the ABCAA handbook attached to Defendant's reply—Plaintiff challenged the authenticity of the ABCAA handbook and, because, she argued, it was not clear whether the document attached to the reply is the same as the handbook to which she points in her complaint, Plaintiff also suggested that her complaint does not rely on the ABCAA handbook.

The court would reject Defendant's argument regarding the ABCAA handbook for reasons similar to those for which it rejects Defendant's argument regarding the YMCA handbook: Plaintiff challenges its authenticity, and it is not clear that the complaint relies on the YMCA handbook that Defendant attached to its reply. However, assuming without deciding that the court could consider the ABCAA handbook in deciding the instant motion, the court nonetheless concludes that it does not establish without a doubt and as a matter of law the non-existence of an employment contract.

Three portions of the document are relevant here. First, the disclaimer on the first page of the handbook, which is bolded and capitalized, reads:

> **PURSUANT TO SECTION 41-1-110 OF THE 1976 SOUTH CAROLINA CODE OF LAWS, AS AMENDED, NOTHING IN THESE PERSONNEL POLICIES & PROCEDURES OR IN ANY OF THE AGENGY'S OTHER PUBLICATIONS IS INTENDED TO CREATE, NOR SHALL IT BE INTERPRETED TO CREATE, A CONTRACT OR AGREEMENT OF EMPLOYMENT, OR ANY PART OF A CONTRACT OR AGREEMENT OF EMPLOYMENT, EITHER EXPRESS OR IMPLIED. THE RELATIONSHIP BETWEEN [ABCAA] AND ITS EMPLOYEES IS STRICTLY THAT OF EMPLOYMENT AT WILL.**

(ECF No. 12-1 at 3.)

Second, in a separate addendum applicable to Head Start employees, under the heading titled "Separations," the ABCAA handbook provides, in relevant part, the following:

> The Head Start Director shall inform a Head Start employee in writing that dismissal will be recommended to the Policy Council. This written notice shall contain, at a minimum:
>
> The charges on which the dismissal is based.
>
> The employee's right to access all documentation to be used by [ABCAA] in substantiating the charges against the employee.
>
> A statement that no new or additional charges not previously communicated to the employee in writing may be brought out against the employee.
>
> A statement advising the employee of their right to be represented by a person of their choosing, at their own expense.
>
> The date, time, and location of the Policy Council meeting at which the dismissal will be considered.
>
> A statement advising the employee that he/she will have a minimum of five (5) working days from the date of the notification letter to prepare for the dismissal hearing.
>
> The Policy Council shall hold a meeting to hear both sides of the case no more than ten (10) working days from the date of the letter recommending dismissal. The Policy Council shall notify the Executive Director and/or the Head Start Director, in writing, of the decision no more than twelve (12) working days from the date of the letter recommending dismissal.
>
> If the Policy Council approves the dismissal, the employee will be given two (2) weeks written notice prior to the separation, This notice shall specify the reason for the termination and the last date of employment,
>
> If the Policy Council disapproves the recommendation for dismissal, all termination proceedings will cease and all adverse documents pertaining to the dismissal shall be removed from the employee's permanent record.
>
> The decision of the Policy Council is final.

(*Id.* at 14-15.)

Third, the Head Start addendum contains an extremely detailed process for aggrieved Head Start employees to appeal adverse actions under a section titled "Appeal Procedures." (*See* ECF No. 12-2 at 28-30.) Features of the appeal process include the filing of a written appeal to the Executive Director; the Policy Council's written acknowledgement of the appeal; the Policy Council's responsibility to arrange for witnesses, a hearing room, recording devices, and presentation of records and evidence; timely completion of the appeal hearing; provisions for producing a transcript of the hearing; the rights of an aggrieved employee to counsel, cross-examination, and the presentation of her own evidence; a final decision on the appeal by the Policy Council; and the right to appeal the decision to the Executive Director on procedural but not substantive matters. (*See id.*) It is not clear to the court whether or how the appeal process applies to terminations of Head Start employees.

Having reviewed these provisions of the ABCAA handbook, the court is unable to determine at this time, as a matter of law, that it undoubtedly does not create an enforceable employment contract that displaces the default at-will arrangement. First, to the extent that Defendant relies on the handbook's disclaimer invoking S.C. Code. Ann. § 41-1-110 (2016),[9] the court concludes that Defendant's reliance is misplaced. Section 41-1-110 only precludes the

[9] The statute, in full, provides:

> It is the public policy of this State that a handbook, personnel manual, policy, procedure, or other document issued by an employer or its agent after June 30, 2004, shall not create an express or implied contract of employment if it is conspicuously disclaimed. For purposes of this section, a disclaimer in a handbook or personnel manual must be in underlined capital letters on the first page of the document and signed by the employee. For all other documents referenced in this section, the disclaimer must be in underlined capital letters on the first page of the document. Whether or not a disclaimer is conspicuous is a question of law.

S.C. Code Ann. § 41-1-110 (2016).

existence of an employment contract based on an employee handbook or personnel manual when the disclaimer is on the first page of the document, underlined, capitalized, and signed by the employee. S.C. Code. Ann. § 41-1-110; *see Hessenthaler*, 616 S.E.2d at 697 n.5. Here, the disclaimer in the ABCAA handbook attached to Defendant's reply is not underlined and, although the page on which it appears contains a signature line, it is not signed by Plaintiff. (*See* ECF No. 12-1 at 3.) Therefore, the court cannot find that the disclaimer is conspicuous as a matter of law under § 41-1-110. *See McClurkin v. Champion Labs., Inc.*, No. 0:11-cv-02401-CMC, 2011 WL 5402970, at *3 (D.S.C. Nov. 8, 2011).

Second, assessing the handbook outside the context of § 41-1-110, the court concludes that it does not undoubtedly demonstrate that it does not create contractual obligations. When the disclaimer in a handbook fails to comply with the requirements of § 41-1-110, a reviewing court proceeds to the determination of whether the disclaimer may otherwise be found to be conspicuous and whether, taken together, the disclaimer and the provisions in the handbook undoubtedly demonstrate that the handbook does or does not create a contract displacing at-will employment. *See Brailsford*, 2015 WL 4459032, at *4; *Hessenthaler*, 616 S.E.2d at 697-98.

Here, even if the court concluded that the disclaimer in the ABCAA handbook is conspicuous as a matter of law, it would nonetheless conclude that the handbook does not undoubtedly demonstrate that it does not create contractual obligations. In the court's view, the provisions in the Head Start addendum to the handbook regarding separation constitute mandatory language limiting the right of Defendant to terminate Head Start employees. Specifically, the provisions expressly prohibit Defendant from terminating Head Start employees unless the Policy Council approves the termination after the hearing described in the provision occurs. It further expressly states that "all termination proceedings will cease," meaning, in the court's view, that

Defendant may not terminate a Head Start employee if the Policy Council rejects the dismissal recommendation. Furthermore, to the extent the appeal procedure outlined in the Head Start addendum applies to employee terminations, these procedures also limit Defendant's right to terminate Head Start employees if aggrieved employees are deprived of the rights afforded them under the appeal procedure provisions. *See Hessenthaler*, 616 S.E2d at 698 ("Mandatory, progressive discipline procedures may constitute enforceable promises. Such procedures typically provide that an employee may be fired only after certain steps are taken. When definite and mandatory, these procedures impose a limitation on the employer's right to terminate an employee at any time, for any reason." (internal citations omitted)). Because the ABCAA handbook contains binding, mandatory language limiting Defendant's right to terminate, the presence of a conspicuous disclaimer that does not comply with § 41-1-110 would not permit the court to conclude, as a matter law, that the handbook does not create enforceable contractual obligations. *See Brailsford*, 2015 WL 4459032, at *4; *Lord*, 827 F. Supp. 2d at 602.

In sum, the court rejects Defendant's arguments that Plaintiff's claims should be dismissed because one of the handbooks it attached to its briefing on the instant motion demonstrate that it does not create an employment contract. The court cannot consider the YMCA handbook at this stage, and the court concludes that the ABCAA handbook, even if appropriately considered, does not undoubtedly demonstrate that it does not create enforceable contractual obligations.

C. Allegations of fraudulent activity

Lastly, Defendant argues that Plaintiff's complaint fails to sufficiently allege that Defendant, in breaching the employment contract, engaged in fraudulent activity. (ECF No. 7-1 at 8.) In Defendant's view, the complaint merely asserts the allegation that Defendant breached the

contract by engaging in fraudulent activity, a conclusory legal allegation that should not be accorded the presumption of truth under Rule 12(b)(6) analysis. (*Id.*)

The court disagrees with Defendant. In doing so, the court relies primarily on the South Carolina Supreme Court's treatment of a breach-with-fraudulent-intent claim in *Conner v. City of Forest Acres*, 560 S.E.2d 606 (2002). In *Conner*, the Supreme Court explained:

> In order to have a claim for breach of contract accompanied by a fraudulent act, the plaintiff must establish three elements: (1) a breach of contract; (2) fraudulent intent relating to the breaching of the contract and not merely to its making; and (3) a fraudulent act accompanying the breach. *Harper v. Ethridge*, 348 S.E.2d 374 (Ct.App.1986). The fraudulent act is any act characterized by dishonesty in fact or unfair dealing. *Id.* "Fraud," in this sense, "assumes so many hues and forms, that courts are compelled to content themselves with comparatively few general rules for its discovery and defeat, and allow the facts and circumstances peculiar to each case to bear heavily upon the conscience and judgment of the court or jury in determining its presence or absence." *Sullivan v. Calhoun*, 108 S.E. 189, 189 (1921) (citation omitted).
>
> . . . . [The employee]'s claim is that the [employer] fabricated pretextual reasons for [the employee]'s termination knowing the reasons were false and did not justify termination for cause. Viewing the evidence in the light most favorable to [the employee], as we must, we find there is a genuine issue of material fact as to whether the [employee] fraudulently breached its contract.

Conner, 560 S.E.2d at 612 (parallel citations omitted). Although *Conner* was decided in the summary judgment context, it instructs that an employee adequately pleads fraudulent activity in a breach-with-fraudulent-intent claim by sufficiently alleging that the employer terminated the employment on pretextual grounds knowing that the grounds for termination were false. *See McClurkin*, 2011 WL 5402970, at *5 ("Fabricating pretextual reasons for an employee's termination may constitute the fraudulent act that must accompany the breach of contract.").

Here, viewed in the light most favorable to Plaintiff, the complaint alleges that certain of Defendant's managers (who are specifically identified in the complaint) sought to terminate her employment because she continually reported to them instances of non-compliance with

regulations applicable to the Head Start program Defendant administered and because she attempted to vindicate contractual rights afforded her and other employees under the handbook and other policies and procedures that governed Defendant. The complaint further alleges that these managers contrived reasons to terminate Plaintiff's employment—by assigning her frivolous tasks or tasks that could not be completed, by transferring her to Defendant's Augusta office when her work was more easily accomplished in Aiken, by failing to provide her a professional development plan, and by failing to provide her a job description until just prior to her termination—that were a pretext for their real reasons for terminating her. These allegations sufficiently plead that Defendant fabricated pretextual reasons to terminate Plaintiff's employment and, therefore, sufficiently plead that Defendant, in breaching the employment contract, engaged in fraudulent activity. Accordingly, the court rejects Defendant's final ground for dismissal.

IV. CONCLUSION

For the foregoing reasons, Defendants' Rule 12(b)(6) motion to dismiss the complaint (ECF No. 7) is **DENIED**.

IT IS SO ORDERED.

United States District Court Judge

July 25, 2017
Columbia, South Carolina