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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000811-MR

UNIVERSITY OF KENTUCKY AND
UNIVERSITY BOARD OF TRUSTEES APPELLANTS

APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 07-CI-04556

VERA FURTULA APPELLEE

AND

NO. 2009-CA-000852-MR

UNIVERSITY OF KENTUCKY AND
UNIVERSITY BOARD OF TRUSTEES APPELLANTS

APPEAL FROM FRANKLIN CIRCUIT COURT
v. HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 08-CI-02145

ANTHONY MILLER AND
NATIONAL CITY CORPORATION,
D/B/A NATIONAL CITY BANK APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE AND NICKELL, JUDGES; HARRIS,[1] SENIOR JUDGE.

HARRIS, SENIOR JUDGE: The University of Kentucky and the University Board of Trustees (collectively, the "University") appeal from the Fayette Circuit Court's order denying the University's motion for summary judgment in a suit filed against it by Vera Furtula. The University also appeals the Franklin Circuit Court's partial denial of the University's motion to dismiss in a suit filed against it by Anthony Miller.[2] For the reasons stated herein, we reverse and remand as to both appeals.

I. STATEMENT OF FACTS IN

[1] Senior Judge William R. Harris sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

[2] Appeal No. 2009-CA-000811-MR and Appeal No. 2009-CA-000852-MR have been consolidated pursuant to an order of this Court entered February 3, 2010. Therefore, we will dispose of them in one opinion.

VERA FURTULA CASE

Vera Furtula was employed at the University of Kentucky as a housekeeper. Furtula filed an application for long-term disability ("LTD") benefits pursuant to a plan offered by the University to its full-time employees.

The LTD program is structured to provide each eligible "totally disabled" employee a sum potentially worth as much as but not more than the salary the employee made when actively employed. This amount is reached by offsetting payable LTD benefits by amounts that program participants receive from other sources such as workers' compensation and social security benefits.

The program is provided at no cost to employees. Rather, the plan is funded either by an LTD Trust or by the University's current funds. Moreover, the program is not subject to the Employee Retirement Income Security Act ("ERISA"). The conditions of eligibility for the LTD program benefits are made known to University employees through the University's human resources policy and procedure manual and the University's staff handbook. The program is also described in a plan document and a trust agreement between the University and the trustee.

Furtula's initial application for LTD benefits was ultimately denied because her application failed to demonstrate that she was totally and permanently disabled. Thereafter, Furtula filed an appeal with the University's Office of

Institutional Equity and Equal Opportunity, which was also denied because the record did not establish that her condition met the definition of "total disability" under the plan.

Furtula subsequently filed a complaint and jury demand with the Fayette Circuit Court. In her complaint, Furtula alleged that the University "wrongfully and in contrast to the evidence contained within the administrative file, terminated the [LTD] benefits it owed to her pursuant to the terms of the applicable policy of insurance." Furtula also alleged that the University violated the Unfair Claims Settlement Practices Act ("UCSPA"), and breached its fiduciary duty to her. She made no allegation of breach of contract. In its answer, the University denied the allegations and asserted as a defense sovereign immunity, governmental immunity, and qualified immunity as a complete bar to the cause of action.

Thereafter, the University filed a motion for summary judgment asking the trial court to dismiss that portion of Furtula's complaint which alleged violations of the UCSPA. The trial court granted the motion and dismissed that portion of Furtula's complaint which alleged violation of KRS 304.12-230, finding that the statute did not apply as the University was not engaged in the business of entering into insurance contracts.

On March 10, 2009, the University filed another motion for summary judgment asking the trial court to dismiss the remaining allegations of Furtula's complaint on the basis of sovereign immunity. Furtula countered that her remaining claim was not barred because sovereign immunity had been waived by the legislature pursuant to KRS 45A.245, which provides in part that any person having a lawfully authorized written contract with the Commonwealth may bring an action against the Commonwealth on the contract, including, but not limited to, actions for breach of contract or for enforcement of a contract, or for both.

Thereafter, the Fayette Circuit Court denied the University's motion for summary judgment, stating that the allegations in Furtula's complaint were sufficient to raise a claim of breach of contract and that there were material issues of fact as to whether there was a waiver of immunity regarding her claim under KRS Chapter 45A. In the same order, the trial court transferred the case to the Franklin Circuit Court pursuant to KRS 452.105 and 45A.245.

The University filed this appeal, arguing that the trial court erred in denying its motion for summary judgment on the basis of sovereign immunity. This Court entered a show cause order as to why the appeal should not be dismissed as interlocutory. In response, the University cited the recent Kentucky Supreme Court case of *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883 (Ky. 2009), in which the Court held that the jurisdiction of the Court of Appeals is

properly invoked to address a trial court's interlocutory order on the issue of immunity from damages claims. This Court entered an order determining that there was sufficient cause to allow the appeal to continue.

II. STATEMENT OF FACTS IN ANTHONY MILLER CASE

Anthony Miller was also a University employee who applied for LTD benefits from the University's LTD program. Miller filed his original lawsuit in Fayette Circuit Court, alleging that the University's denial of benefits was a violation of the UCSPA and a breach of fiduciary duty. The University moved to dismiss Miller's case pursuant to Kentucky Civil Rule (CR) 12.02, 19.01, and 21 for lack of jurisdiction, improper venue, failure to state a claim on which relief may be granted, misjoinder of a party, and failure to name an indispensable party.

In support of its motion the University argued, among other things, that Miller's claims were barred by sovereign immunity. In his response to the University's motion, Miller argued that the governing documents were a contract for which sovereign immunity had been waived pursuant to KRS 45A.245.

The Fayette Circuit Court denied the University's motion in order to give Miller an opportunity to establish that he had the kind of contract with the University required to invoke the waiver of immunity set out in KRS 45A.245. Additionally, the court transferred the case to the Franklin Circuit Court.

Following transfer to the Franklin Circuit Court, the University moved to dismiss Miller's claims on the grounds unaddressed in Fayette Circuit Court. Without reaching the question of immunity from KRS Chapter 304 claims, the Franklin Circuit Court agreed that Miller had failed to state a claim for violation of the UCSPA and thus it dismissed Miller's claims under KRS Chapter 304 and the UCSPA. However, the court denied the University's motion to dismiss based on sovereign immunity because of its concern that there are no provisions that enable a participant or beneficiary aggrieved by a decision of the plan fiduciaries to obtain any judicial review. On appeal, this Court again entered a show cause order, and thereafter found that cause was shown pursuant to *Prater*.

III. ANALYSIS

Summary judgment is appropriate when the material facts are not in dispute and the non-movant would be unable to produce evidence at trial warranting judgment in his or her favor.[3] *Steelvest v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 483 (Ky. 1991). In order to defeat a properly-supported

[3] Although in Miller's case the University is appealing from the trial court's denial of a motion to dismiss, when a trial court considers matters outside of the pleadings, it must treat the motion as one for summary judgment. *Waddle v. Galen of Kentucky, Inc.*, 131 S.W.3d 361, 364 (Ky. App. 2004). The University argues that, because Miller specifically referenced the LTD program's governing documents in his complaint, the University's submission of and citation to those documents did not convert its motion to dismiss into a motion for summary judgment. *See Commercial Money Center, Inc. v. Illinois Union Ins. Co.*, 508 F.3d 327, 335-336 (6th Cir. 2007). However, this argument does not take into account the affidavit of Bart Miller, the University's disability benefits manager, which was also attached to the motion to dismiss. Because the University attached documentation outside of the pleadings in its motion to dismiss, the motion will be treated as one for summary judgment.

summary judgment motion, a non-movant must present as least some affirmative evidence showing that there is a genuine issue of material fact for trial. *Id.* at 482. The facts must be viewed in the light most favorable to the party that is in opposition to the motion for summary judgment. *Id.* On appeal, the standard of review of a trial court's denial of a motion for summary judgment is *de novo*. *Scrifes v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996).

The University's primary argument is that the University has sovereign immunity under the facts of both of these cases, and therefore that both cases should have been summarily dismissed.[4] Furtula and Miller argue that the LTD plan documents were a binding contract, and that the General Assembly has waived sovereign immunity in cases of suits on contracts entered into with the state.

The University is a state agency entitled to sovereign immunity. *See Withers v. University of Kentucky*, 939 S.W.2d 340, 342-43 (Ky. 1997). The University's immunity can be waived only with a specific and express waiver from the General Assembly. *University of Louisville v. Martin*, 574 S.W.2d 676, 677 (Ky. App. 1978).

[4] The trial court in Miller's case did not specifically discuss whether Miller's complaint was sufficient to raise a claim of breach of contract. However, because the court found that sovereign immunity did not apply to Miller's claim of breach of fiduciary duties, and this claim was part of the overall question regarding whether there was a valid contract, we find that the issue was preserved for our review.

As already mentioned, KRS 45A.245 waives immunity for persons who hold an authorized written contract with the Commonwealth. *See* KRS 45A.245(1). Specifically, the statute provides, in pertinent part, that:

> 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.

KRS 45A.245(1).

In both Furtula's and Miller's cases, the trial court made findings that insurance contracts were not involved when examining the parties' UCSPA claims. When the trial court granted a partial summary judgment in the University's favor concerning the UCSPA claims in Furtula's case, it made the following statements:

> -[The LTD program] is a benefit of employment rather than an insurance policy.
>
> -In this case, there is no material issue of fact with regard to whether the University of Kentucky or the UK Board of Trustees is engaged in the business of entering into contracts of insurance; they are not.

Similarly, the Franklin Circuit Court noted the following in Miller's case:

> -UK is not in the business of contracting for a consideration to pay a sum of money upon the happening of a certain contingency.
>
> -Benefits like the LTD program "have been considered as constituting neither an insurance company nor a contract of insurance."

-The "self-administration and self-funding of the LTD Plan by UK did not render UK to be an insurance company or constitute an insurance contract with the participants and beneficiaries."

What the University established through the LTD benefits program was not an insurance business, but an employee benefit plan, specifically a "welfare benefit plan." In the context of private employee welfare benefit plans, such plans have been considered as constituting neither an insurance company nor a contract of insurance. *Dillard v. Teamsters Joint Council No. 83 of Virginia Health and Welfare Fund*, 1985 WL 17724 *5 (W.D. Va. Oct. 31, 1985).

Additionally, Furtula and Miller have failed to demonstrate that they held any other type of written contract with the University for LTD benefits via the LTD governing documents. The essential elements of a valid contract include an offer and acceptance, full and complete terms, and bargained for consideration. *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 384 (Ky. App. 2002).

In this case, none of the plan documents provided to this Court evidence intent to create a contract on the part of the University.[5] For example, under Section 8.01 of the LTD trust agreement, 9.01 of the LTD plan document, and 8.01 of the salary continuation plan, the LTD program is not to be construed as

[5] *See Dearman v. Dial Corp.*, 2010 WL 254928 (E.D. Mo., Jan. 19, 2010). The Court notes that, as an unpublished Eastern District of Missouri case, the case holds no precedential value. We do, however, find the analysis utilized by the district court to be persuasive.

a contract of employment or a guarantee of continued employment. Additionally, Section 8.01 of the LTD trust agreement states that:

> [N]either the establishment of the Trust hereby created, nor any modification thereof, nor the creation of any fund or account, nor the payment of any benefits shall be construed as giving to any Participant or other person any legal or equitable right against the Employer, or any officer or employee thereof, or the Trustee, except as herein provided. Under no circumstances shall the terms of employment of any Participant be modified or in any way affected hereby.

Additionally, pursuant to Sections 8.01 and 8.02 of the LTD plan document, the plan may be unilaterally modified, amended, or terminated at any time with no notice. Moreover, the staff handbook through which the policy was disseminated stated that it was not a contract. As a result, a reasonable employee could not interpret the University's plan language as an offer to enter into a contractual relationship. *See Johnson v. McDonnell Douglas Corp.*, 745 S.W.2d 661, 662-63 (Mo. 1988) (where employee handbook contained general language and the employer reserved the power to alter it, a reasonable at-will employee could not interpret its distribution as an offer to modify his at-will status).

The University's unilateral act of publishing its LTD benefits policy in its human resources or staff handbook was not a contractual offer to its employees, but merely disseminated informational statements on the University's self-imposed policies. Because the University made no offer to its employees, no

power of acceptance was created in Furtula or Miller. Without an offer there can be no contract, and without a contract there can be no cause of action for breach of contract.

Moreover, the University maintains the program at no cost to employees, and thus it does not require or even involve the kind of legal consideration necessary to create a contract between Furtula and the University or Miller and the University. Furthermore, the LTD program does not require or encourage employees to give up or forego other potential sources of coverage, but provides that the LTD benefits must be reduced by amounts from other sources so that participants ultimately receive as much as they would have received if they were actually working for the University.

Additionally, while we have not been cited to, nor have we uncovered, any Kentucky cases on point concerning government LTD benefit plan documents, we find the cases dealing with employer policies contained in employee handbooks to be illustrative. What we have found to be true in almost every case is that employer policies or benefit statements that are unilaterally imposed on at-will employees are not contracts enforceable at law. *See Oakwood Mobile Homes, Inc. v. Sprowls*, 82 S.W.3d 193, 194 (Ky. 2002); *Noel v. Elk Brand Mfg. Co.*, 53 S.W.3d 95, 98-99 (Ky. App. 2000) (upholding summary judgment for employer on breach of contract claim where employee handbook stated that it "was not a

contract"); *Nork v. Fetter Printing Co.*, 738 S.W.2d 824, 827 (Ky. App. 1987) (employee handbook containing disclaimer cannot be the basis for a breach of contract claim).

The only thing the LTD program establishes for University employees is a mere expectancy of the opportunity to apply for LTD benefits. University employees remain at will and the University is under no contractual obligation to pay LTD benefits or even to continue the LTD program in the future.

Our Supreme Court has held that "[a]n express personnel policy can become a binding contract 'once it is accepted by the employee through his continuing to work when he is not required to do so.'" *Parts Depot, Inc. v. Beiswenger*, 170 S.W.3d 354, 362 (Ky. 2005). However, in so holding, the Court made clear that the personnel policies at issue did not contain any language disclaiming a contractual relationship. As the Sixth Circuit later observed in examining the decision:

> The court held that Parts Depot's manual constituted an implied contract because the language used in the manual was specific and contractual, rather than precatory, and because the manual contained no disclaimer stating, for example, that it was not a contract of employment.

Oaks v. 3M Co., 453 F.3d 781, 786 (6th Cir. 2006).

Moreover, even if a contract was formed, it would be an implied contract. *See Beiswenger*, 170 S.W.3d at 363. As stated in *Beiswenger*:

> [E]mployer 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, and, hence, although the statement of policy is signed by neither party, can be unilaterally amended by the employer without notice to the employee, and contains no reference to a specific employee, his job description or compensation, and although no reference was made to the policy statement in preemployment interviews and the employee does not learn of its existence until after his hiring.

Id. (citing *Toussaint v. Blue Cross & Blue Shield of Mich.*, 292 N.W.2d 880, 892 (Mich. 1980)). The Court went on to note that "[t]he principle is akin to estoppel. Once an employer establishes an express personnel policy 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." *Id.* However, as already stated, KRS 45A.245 applies only to written contracts. *Commonwealth v. Whitworth*, 74 S.W.3d 695, 700 (Ky. 2002). Therefore, even if Furtula and Miller had implied contracts with the University, this would not be sufficient to overcome the University's sovereign immunity.

Furtula and Miller cite the Court to *Marcus v. Miller*, 2007 WL 1519349 (Ky. App. May 25, 2007) to support the proposition that the LTD programs are a contract that University employees can enforce. Their reliance is misplaced. *Marcus* concerned a plaintiff-employee who was mistakenly overpaid almost $30,000 in LTD benefits. The University's right of recovery in *Marcus* –

recognized by the trial court and affirmed by the Court of Appeals – was based, not on contract, but on the equitable doctrine of monies had and received. Under that doctrine, the plaintiff-employee's receipt of overpaid LTD funds created an independent, implied contract, independent of the LTD program documents, that required him to repay those funds to the University. Regardless, nothing said in *Marcus* could create a contract where one does not exist, and it certainly could not waive the University's immunity in this case.

Appellants also argue that *Whittenburg Construction Co. v. University of Kentucky*, 2007 WL 3037721 (Ky. App. 2007) establishes that the University is not immune from contract claims. *Whittenberg*, however, is inapposite in this case because the plaintiff in *Whittenberg* had an actual, direct written contract with the University.

Additionally, Furtula and Miller raise concerns about an application of immunity that would exempt the University's LTD benefits decisions from judicial review. However, the sovereign immunity defense is a constitutional protection that can be waived only by the General Assembly. *Wells v. Commonwealth, Dep't of Highways*, 384 S.W.2d 308 (Ky. 1964).

For the foregoing reasons, the judgments of the Fayette Circuit Court and the Franklin Circuit Court are reversed and remanded with directions to the Franklin Circuit Court to enter orders dismissing both cases.

ALL CONCUR.

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