COURT OF APPEALS
DECISION
DATED AND FILED

February 6, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1797 **Cir. Ct. No. 00-CV-1575**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

FRANK MURPHY,

PLAINTIFF-APPELLANT,

V.

BRUNO INDEPENDENT LIVING AIDS AND JERRY GNABASIK,

DEFENDANTS-RESPONDENTS,

ABC INSURANCE COMPANY,

DEFENDANT.

APPEAL from a judgment of the circuit court for Waukesha County: J. MAC DAVIS, Judge. *Affirmed.*

Before Nettesheim, P.J., Brown and Snyder, JJ.

¶1 NETTESHEIM, P.J. Frank Murphy appeals from a summary judgment dismissing his action for breach of contract against his former employer, Bruno Independent Living Aids, and his action for tortious interference against his former Bruno supervisor, Jerry Gnabasik. We conclude that Murphy failed to raise a genuine issue of material fact as to both actions and that the defendants were entitled to judgment as a matter of law. We affirm the grant of summary judgment.

FACTS AND PROCEDURAL HISTORY

¶2 Bruno is a Wisconsin company that manufactures wheelchair lifts, motorized scooters and stair lifts for use by disabled persons. Bruno hired Murphy as a welder in its manufacturing operations on May 31, 1996. Bruno subsequently provided Murphy with the "Bruno Independent Living Aids Employee Handbook." On June 18, 1996, Murphy returned to Bruno's human resources department and signed a receipt included in the handbook providing, "I have received and reviewed a copy of the employee handbook listing company policies and procedures and agree to abide by them during the term of my employment with Bruno Independent Living Aids, Inc." At some point during his employment, Murphy was promoted to the position of welding team leader. Gnabasik, the plant operations manager for Bruno since 1990, supervised Murphy throughout his term of employment at Bruno. Without prior warning, Gnabasik discharged Murphy from his employment with Bruno on June 11, 1999.

¶3 According to Gnabasik's affidavit, Murphy's dismissal resulted from problems in his work performance, including an unwillingness or inability to work within the team structure utilized by Bruno, a resistance to certain changes in the manufacturing process, instances of a poor work attitude and inappropriate

conduct. Gnabasik's affidavit then provided the names of Bruno employees who had worked with Murphy, summaries of his discussions with them and the specifics of their complaints as to Murphy's work performance. Gnabasik communicated these complaints to Bruno's president who authorized Gnabasik to dismiss Murphy from employment with Bruno.

¶4 On November 7, 2000, Murphy commenced this action against Bruno alleging breach of an express employment contract based on the Bruno employee handbook and against Gnabasik alleging intentional interference with an employment contract. With respect to Bruno, Murphy claimed that the employee handbook created an express employee contract and that it established a "just cause" requirement for termination and a progressive disciplinary procedure. Murphy argued that he was wrongfully discharged because Bruno failed to follow its progressive disciplinary procedure and failed to establish cause for his termination. As to Gnabasik, Murphy alleged that his decision to terminate Murphy was based on his personal opinions and that he induced Bruno to end its employment relationship with Murphy.

¶5 On March 1, 2001, Bruno and Gnabasik filed a motion for summary judgment pursuant to WIS. STAT. § 802.08 (1999-2000),[1] arguing that the employee handbook had not abrogated Murphy's at-will employment relationship with Bruno and that Gnabasik had not improperly interfered with any contract between the parties. The trial court agreed and granted the motion for summary judgment as to both Bruno and Gnabasik. Murphy appeals.

[1] All references to the Wisconsin Statutes are to the 1999-2000 version.

DISCUSSION

Standard of Review

¶6 Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). A summary judgment motion presents a question of law that we review de novo. ***United Methodist Church v. Culver***, 2000 WI App 132, ¶25, 237 Wis. 2d 343, 614 N.W.2d 523. Despite our de novo standard of review, we value a trial court's ruling on the matter. ***Id***.

Contract Claims

1. Express Contract

¶7 Murphy claims that a genuine issue of material fact exists as to whether Bruno's employee handbook altered his employment-at-will relationship with Bruno to one of an express employment contract. Murphy contends that an express employment relationship existed and Bruno's discharge of him without adhering to its progressive disciplinary procedure constituted a breach of contract.

¶8 It is well established in Wisconsin that employment is terminable at the will of either an employer or an employee without cause. ***Wolf v. F&M Banks***, 193 Wis. 2d 439, 449, 534 N.W.2d 877 (Ct. App. 1995). Thus, a wrongful discharge of an employee-at-will occurs only when the discharge is contrary to a fundamental or well-defined public policy. ***Id***. at 449-50. Absent an abrogation of an at-will relationship, employees are "dischargeable at the whim of the employer, subject to the unusual public policy considerations that may occasionally arise." ***Id***. at 450. Such an abrogation may be evidenced by an express or implied contract. *See* ***Ferraro v. Koelsch***, 124 Wis. 2d 154, 157-58, 368 N.W.2d 666

(1995); ***Garvey v. Buhler***, 146 Wis. 2d 281, 287, 430 N.W.2d 616 (Ct. App. 1988).

¶9 Here, Murphy's express contract claim is premised upon Bruno's employee handbook. Our supreme court held in ***Ferraro*** that the employee's acceptance of the terms set forth in that particular handbook created an employment contract and that employee handbooks may convert an employment relationship into one that can only be terminated by adherence to the contractual terms of the handbook. ***Ferraro***, 124 Wis. 2d at 157-58. In evaluating whether an employee handbook reflects an intent by the parties to alter the at-will employment relationship, the courts, commencing with ***Ferraro***, have examined whether the handbook contains (1) an employee acceptance of those regulations as a condition of continued employment; (2) a layoff procedure based on seniority; (3) distinctions between probationary and nonprobationary employees, including disciplinary procedures; (4) a progressive procedure for discipline based on the number and seriousness of rule violations; (5) discharge only for "just cause"; and (6) a promise from the employee that he or she would provide notice prior to leaving employment. ***Wolf***, 193 Wis. 2d at 451 (citing ***Ferraro***, 124 Wis. 2d at 159-60).[2]

¶10 We look first to whether Murphy accepted the provisions of the employee handbook as a condition of his continued employment. We conclude that he did. Upon hiring, Murphy received an employee handbook and provided

[2] We note that Murphy argues at several points in his brief that the trial court considered only the progressive disciplinary procedure at Bruno in arriving at its decision. Although our review of the record does not support Murphy's argument, we need not address it. Our review on summary judgment is de novo. ***United Methodist Church v. Culver***, 2000 WI App 132, ¶25, 237 Wis. 2d 343, 614 N.W.2d 523.

Bruno's human resources department with a signed acknowledgment of its receipt and his agreement to "abide by [company policies and procedures] during the term of [his] employment with Bruno." Bruno required the receipt to be signed within one week of receiving the handbook. Although stated differently, we are satisfied that the language of Bruno's handbook conditioned Murphy's continued employment upon his acceptance of the provisions of its employee handbook.

¶11 Next, we observe that Bruno's employee handbook did not provide a layoff procedure based on seniority. Nor did it make any distinction between the discharge procedures for probationary or nonprobationary employment. Although Bruno categorized its workers as probationary until the ninetieth day of employment, unlike the handbook in ***Ferraro***, the Bruno employee handbook makes no distinction in disciplinary procedure or process for discharge of employees in these two groups. *See* ***Ferraro***, 124 Wis. 2d at 165.

¶12 Another indication of an express contract between an employee and employer is the existence of a mandatory progressive disciplinary procedure. ***Wolf***, 193 Wis. 2d at 451-52. While Bruno's handbook provides for progressive disciplinary measures, it clearly states that the procedure is "typical."[3] Implicit in

[3] The section of the Bruno handbook entitled "Discipline" is prefaced with this statement:

> It is hoped that the use of discipline will not be necessary at Bruno. We have, however, established a progressive discipline procedure for dealing with work performance problems or misconduct, if it occurs. The system is designed to treat all employees fairly and to motivate them to improve performance or conduct in the future. The following steps ar[e] typical of the procedure that we follow to help the employee ….

The section then provides for the following steps: oral reprimand, written reprimand, final written warning and suspension, and finally, dismissal.

the use of the word "typical" is the existence of atypical situations in which the procedure will not be followed. That the Bruno handbook reserves the right to deviate from typical procedure detracts from Murphy's contention that the employee handbook created an express employment contract.

¶13 Also weighing against Murphy is the lack of any provision in the Bruno employee handbook indicating that an employee may be terminated only for "just cause." Important to the ***Ferraro*** court's decision was the employer's promise in the handbook that "an employee would be *entitled* to different treatment depending upon the type of alleged misconduct and, most importantly, that a discharge would only be for 'just cause.'" ***Ferraro***, 124 Wis. 2d at 165. Here, Bruno made no such promises in the handbook as to the discharge of its employees. The handbook did, however, contain a provision requesting that employees provide two weeks' written notice prior to terminating employment with Bruno and advising that a failure to do so would result in the loss of any accumulated vacation pay.

¶14 In sum, the Bruno employee handbook fails to meet four of the six ***Ferraro*** factors. We acknowledge that an absolute alignment with all of the ***Ferraro*** factors is not required in order for an employment relationship to rise to the level of an express contract. ***Wolf***, 193 Wis. 2d at 453. However, based on the facts of this case, we conclude that the provisions lacking in the Bruno handbook remove any genuine dispute as to whether it abrogated the at-will relationship by creating an express employment contract. In summary, the handbook did not create an express contract of employment between Bruno and Murphy. Murphy remained an employee-at-will.

2. Implied Contract

¶15 Next, Murphy contends that his at-will employment relationship with Bruno was altered by implied contract. Relying on ***Garvey v. Buhler***, 146 Wis. 2d 281, 287, 430 N.W.2d 616 (Ct. App. 1988), Murphy contends that Bruno's actions and policies with respect to the progressive disciplinary procedure and the termination of regular and probationary employees created an implied contract.

¶16 As a threshold issue, we reject Bruno's contention that an employee should not be permitted to argue that an implied contract exists even when an employee handbook or manual does not create an express contract. In ***Garvey***, we considered whether the holding of ***Ferraro*** encompassed implied as well as express contracts. ***Garvey***, 146 Wis. 2d at 287. Considering the supreme court's ruling in ***Ferraro***, the ***Garvey*** court specifically held that it did, noting that "[t]he ultimate rule of ***Ferraro*** … is that contracts—regardless of their ilk—will be enforced in Wisconsin." ***Garvey***, 146 Wis. 2d at 287. Unlike Bruno, we do not find it significant that the employee in ***Garvey***, arguing for the existence of an implied contract, had not been provided with an employee handbook. We see no reason why the parties to an employment relationship could not create an implied contract separate and apart from an employee handbook. If such a contract is deemed to exist, it will be enforced. ***Id***.

¶17 We therefore turn to the merits of Murphy's implied contract argument. In support of his contention that Bruno's actions and policies with respect to progressive discipline and discharge created an implied contract, Murphy submitted his own affidavit and that of a former Bruno employee, Scott Czaplewski. Both Murphy and Czaplewski attested to the fact that, despite the

lack of distinction between probationary and nonprobationary employees in the handbook, Bruno's practice was to discipline and discharge these employees differently. Bruno contends that these affidavits were conclusory and lacked evidentiary foundation. We agree.

¶18 A party opposing a summary judgment motion must set forth "specific facts," evidentiary in nature and admissible in form, showing that a genuine issue exists for trial. ***Helland v. Kurtis A. Froedtert Mem'l Lutheran Hosp.***, 229 Wis. 2d 751, 756, 601 N.W.2d 318 (Ct. App. 1999). "It is not enough to rely upon unsubstantiated conclusory remarks, speculation, or testimony which is not based upon personal knowledge." ***Id***.

¶19 Here, Murphy's affidavit contained statements indicating his understanding of Bruno's disciplinary and discharge procedures. With respect to probationary employees, Murphy's affidavit stated in part, "During my tenure at Bruno, all employees, including myself, upon their hiring, knew that they could be terminated anytime before completing the 90-day probationary period." And, "The probationary employees were not subject to the progressive disciplinary procedure, as explained in Bruno's Handbook." Although Murphy states that he is aware of employees who were terminated during their probationary period, he provides no specific instances of probationary employee discipline or discharge.

¶20 Murphy makes similar conclusory statements regarding nonprobationary employee discipline and discharge. He states, "During my tenure at Bruno, all regular employees were subject [to] the progressive disciplinary procedure, as explained in Bruno's Handbook," and "[t]he progressive disciplinary procedure ... was a mandatory procedure that was required to be followed." While Murphy states that he, as a team leader, employed the progressive disciplinary

procedure for nonprobationary employees, he again fails to cite to any instance in which this procedure was utilized. Murphy also states that "other Bruno employees strictly followed this procedure," but he does not provide any basis for his knowledge or any instance in which other employees utilized this supposed procedure. Again, the statements provided in Murphy's affidavit are conclusory on this point. We reach the same conclusion as to Czaplewski's affidavit, which was nearly identical to Murphy's.[4]

¶21 Based on our conclusion that the affidavits submitted by Murphy in support of his implied contract claim were conclusory and lacked evidentiary foundation, we reject his contention that the trial court improperly granted summary judgment on this claim. We conclude that Murphy failed to raise a genuine issue of material fact as to the existence of an implied contract between him and Bruno.

Tortious Interference with Contract

¶22 Murphy's final claim is against Gnabasik, his supervisor at Bruno. Murphy contends that Gnabasik tortiously interfered with his employment relationship with Bruno by relying on untruthful information in making the decision to terminate him and by not following the progressive disciplinary procedure prior to terminating him.

[4] Both sides raise arguments as to the trial court's treatment of Czaplewski's affidavit. Murphy argues that the trial court erred in failing to consider his statements. Again, our review of the record does not support Murphy's argument. The record reflects that the trial court considered but gave little weight to Czaplewski's statement. Bruno argues that the trial court should not have considered Czaplewski's affidavit at all because it was provided to Bruno the morning of the summary judgment hearing. Given our conclusion as to the value of Czaplewski's affidavit, we do not further address Bruno's argument.

¶23 Having determined that Murphy was an at-will employee, the contract in question is the employment-at-will contract. Gnabasik does not dispute that there can be tort liability for interference with a contract terminable at will. ***Mackenzie v. Miller Brewering Co.***, 2000 WI App 48, ¶63, 234 Wis. 2d 1, 608 N.W.2d 331, *aff'd*, 2001 WI 23, 241 Wis. 2d 700, 623 N.W.2d 739. However, Gnabasik contends that "[i]nterference alone … does not establish the tort; the interference must be 'improper.'" ***Id***. Gnabasik argues that, without more, his actions in relaying the concerns of Murphy's colleagues to his supervisors did not constitute tortious conduct as a matter of law. Gnabasik contends that as Murphy's supervisor he was in a "legitimate position" to take these actions pursuant to ***Mackenzie*** and thus, Murphy has failed to raise a material dispute of fact as to whether his actions were improper. We agree.

¶24 Gnabasik's affidavit presented at summary judgment identifies the specific supervisors and employees at Bruno who voiced concerns about Murphy's work and sets forth their specific concerns.[5] Murphy contends that the incidents

[5] For example, Gnabasik's affidavit stated:

> As Plant Operations Manager, I was informed of problems with Murphy's work performance and conduct by a number of other supervisors and employees at Bruno in the period leading up to his dismissal. For instance, I spoke with Bruno's Night Shift Manager, John Wasielewski, on several occasions during the week prior to Murphy's dismissal. During these conversations, I learned that Wasielewski felt that Murphy was not cooperating with respect to the coordination of work between the day and night shift welders by criticizing the quality of the night shift's work and reserving easier or less time-consuming work for his own day shift welder. The substance of my conversations with Wasielewski about the conflicts between the day and night shift welders was confirmed by further conversations I had with the Manufacturing Team Leader, Tracey Milbrath, the Quality Assurance Manager, Mike Tessman, and the Manufacturing Plant Manager, Tom Habeck.

(continued)

cited to by the supervisors and employees never occurred or that their characterization of his actions is untruthful. Murphy argues that Gnabasik should not have relied on those statements or reported them to his superiors without first giving Murphy the opportunity to respond. Murphy additionally argues that Gnabasik's actions were motivated by an alleged dispute between Murphy and Gnabasik's girlfriend who was also employed at Bruno.

¶25 Murphy's arguments fall short. Even assuming that the information provided by the Bruno employees and conveyed by Gnabasik was inaccurate or false, Murphy fails to demonstrate how Gnabasik acted *improperly* by relaying such information to his supervisors. While Murphy's affidavit and deposition testimony refuted much of the criticism provided by other Bruno employees, he failed to present any evidence that Gnabasik was duty bound to investigate those complaints himself or that Gnabasik knew or should have known that the information was false or fabricated. The authority to terminate Murphy did not lie with Gnabasik. Rather, that authority rested with higher-ups at Bruno. If anyone had the obligation to investigate the accuracy and truthfulness of the allegations against Murphy, it presumably would be those persons.[6]

We note that Murphy argues in his reply brief that the statements contained in Gnabasik's affidavit are inadmissible hearsay and should not be considered by the court. We disagree. The statements are not offered for the truth of their content. *See* WIS. STAT. § 908.01(3) ("Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.). Rather, the statements contained in Gnabasik's affidavit are offered to explain Gnabasik's reliance on them in reporting to Bruno's president and in making a decision as to Murphy's termination.

[6] Nor does Murphy provide evidence as to improper motive. While Murphy's affidavit alleges that Gnabasik was involved with an employee at Bruno, it does not provide any evidence as to how that relationship colored the information conveyed by Gnabasik.

¶26 In sum, Murphy failed to raise any material issue of fact on the question of Gnabasik improperly relaying the negative information to the Bruno superiors. Without more, Gnabasik's transmission of information did not constitute improper interference with a contract.[7] *See* ***Mackenzie***, 2000 WI App 48 at ¶70. We therefore conclude that the trial court's grant of summary judgment was proper.

CONCLUSION

¶27 We conclude that Murphy failed to raise any genuine and material issues as to each of his claims against Bruno and Gnabasik. As such, Bruno and Gnabasik were entitled to a summary judgment of dismissal as a matter of law.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[7] Based on our conclusion that the progressive disciplinary procedure set forth in Bruno's handbook was not mandatory, we need not address Murphy's additional argument that the degree of discipline—discharge—was not reasonably related to the seriousness of the misconduct reported by Gnabasik. ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983).