COURT OF APPEALS
DECISION
DATED AND FILED

July 2, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2615 **Cir. Ct. No. 00 CV 2192**

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

LORI L. TREMLETT,

PLAINTIFF-APPELLANT,

V.

AURORA HEALTH CARE, INC. AND CLAUDETTE HAMM,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Milwaukee County: MAXINE A. WHITE, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Lori L. Tremlett appeals from a judgment entered after the trial court granted summary judgment in favor of Aurora Health Care, Inc. and Claudette Hamm, dismissing her claims for breach of contract, bad faith, promissory estoppel, and intentional interference with her employment and prospective career opportunities. Tremlett claims the trial court erred when it

rejected her assertions that: (1) Aurora's employee handbook and employment policies constituted a legally enforceable employment contract; (2) Aurora made an enforceable promise to her, which she reasonably relied upon to her detriment; (3) Aurora breached the implied covenant of good faith and fair dealing; (4) Hamm improperly interfered with her employment relationship, and Aurora ratified such action; and (5) she was constructively discharged. For the reasons set forth below, we affirm.

I. BACKGROUND

¶2 In 1979, Tremlett began working at the Mount Sinai Medical Center as a staff nurse in the labor and delivery unit. Aurora manages Mount Sinai. After working for nineteen years at Mount Sinai, Tremlett became patient care manager of the Birth Center at Sinai Samaritan Medical Center. In July 1997, Claudette Hamm became Director of Women's Health for Aurora's Metro Region and consequently, Tremlett's supervisor. During this time, Aurora began to reorganize and consolidate its hospital services and facilities. Hamm frequently met with her subordinate managers, including Tremlett, to discuss administrative matters. At Hamm's initial meeting with Tremlett, she asked Tremlett to comment about combining management of the Birth Center with the Women's Care Center, which would require a combined managerial position. Tremlett remarked that the prospect would be good for the community, but the job would be "rather large" and that she could not handle it alone; she would need a coordinator to assist with the day-to-day operations. Hamm later told Tremlett that no coordinator would be assigned to the person picked to fulfill the combined managerial position.

¶3 At a staff meeting held in late 1997, Hamm stated that she did not anticipate that the new combined managerial position would be filled by anyone

other than Tremlett or Ms. Jackie Hipke, the current manager of the Women's Care Center. The next occasion that Hamm and Tremlett discussed the new position of combined manager was during Tremlett's performance review in February 1998. Out of ten categories used for evaluation purposes, Tremlett received a "meets expectations" rating in nine and an "exceeds expectation" rating in one. During this review, Tremlett received what Hamm characterized as "an average evaluation." Hamm advised Tremlett that she should stop making department decisions by herself; instead, she needed to develop the staff to make appropriate decisions themselves, i.e., employ the "shared governance" philosophy. Hamm also told her that the combined managerial position would be posted and would not be filled until all applicants had been interviewed. Tremlett indicated to Hamm that she was also interested in a position in the ambulatory services department and, in fact, had applied for the position.

¶4 In February or March 1998, as a result of patient complaints, Hamm told Tremlett that she might have to fill the combined managerial position with someone outside of the two departments. Tremlett, in turn, responded by claiming she could do what was needed. Hamm then told Tremlett if that was the case, she should continue in her efforts to obtain the newly planned position. The posting for the new position, however, was delayed due to existing, unsolved administrative matters. In the meantime, Tremlett felt "in limbo" and "uncertain" about whether she would receive the new manager's position.

¶5 On October 2, 1998, the combined managerial position was posted. As posted, in generic form, it described the position as "Patient Care Manager, Birth Center" and set forth in incomplete fashion the expanded duties of the position. Tremlett applied for the job. On November 16, 1998, she was separately interviewed by Diane Ekstrand, a recruiter for Aurora, and Hamm. Before the

interview, Hamm had reservations about Tremlett's qualifications for the new position, but decided to take a "fresh look" at Tremlett and allow her to demonstrate she was the right person for the new position.

¶6 The results of both interviews were similar. Both Ekstrand and Hamm concluded that Tremlett's management style was inconsistent with the shared governance style that was expected at Aurora. Hamm determined that Tremlett had not successfully implemented the shared governance model and continued to make most decisions on her own. In both interviews, Tremlett indicated that it was difficult to get her staff to the necessary level of independent decision-making and attributed this problem to the fact that most of the staff were women. Both Hamm and Ekstrand determined that Tremlett's performance in the interviews and her management plans were unsuited for the new position. On November 24, 1998, Hamm informed Tremlett that she would not be named to the new position.

¶7 In December 1998, Hamm refined the position description. It was denominated "Women's Health Care Manager" and set forth a complete list of specific duties, including the complete listing of the job responsibilities and requiring, rather than preferring, a master's degree. The position was posted on January 29, 1999. After interviews, the position was offered to an outside applicant, Margo Hall, on March 11, 1999.

¶8 After Tremlett learned that she would not be offered the new combined managerial position, she worked with Ekstrand to secure another position within the Aurora system. She was scheduled to interview for the position of Patient Care Manager at Aurora's OB/GYN clinic, an ambulatory

position, but withdrew her application to accept a position outside of the Aurora system before the interview took place.

¶9 Approximately one year after leaving Aurora for the new position, Tremlett filed a summons and complaint alleging claims based on breach of contract, promissory estoppel, intentional interference with employment relationship, and constructive discharge. Both sides filed motions seeking summary judgment. The trial court granted the summary judgment motion in favor of Aurora and Hamm. The bases for the trial court's summary judgment were: (1) the employee handbook used by Aurora did not create an employment contract between Tremlett and Aurora; (2) any promises made in the employee handbook are simply applications of Aurora's personnel policies; (3) any intentional interference with contract claim fails because no contract existed between Tremlett and Aurora; and (4) Tremlett's constructive discharge claim fails because she was an at-will employee and did not qualify for any public policy exception to the at-will doctrine. Tremlett appeals from the trial court's decision.

II. ANALYSIS

¶10 In reviewing motions for summary judgment, we apply the standards set forth in WIS. STAT. § 802.08(2) (1999-2000),[1] in the same manner as the trial court, although we often benefit from its analysis. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is properly granted when there is no genuine issue of material fact and only a question of law is at issue. ***Id.*** Here, the historical facts are not in dispute. The

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

pivotal issue on appeal is whether the various documents rise to the level of a contract. Whether facts fulfill a particular legal standard is a question of law, which we review independently. ***Bantz v. Montgomery Estates, Inc.***, 163 Wis. 2d 973, 978, 473 N.W.2d 506 (Ct. App. 1991).

A. Existence of a Contract.

¶11 Tremlett contends that she has an enforceable contract claim entitling her to a promotion for the newly created position of combined manager of Patient Care Center/Women's Health. The basis for this contention is three-fold: (1) the Aurora handbook, employment policies and procedures, when viewed together, constitute a contract; (2) the facts create an implied-in-fact employment contract; and (3) by the terms of the Aurora handbook and its policies, she was promised a particular kind of retention and promotional process, opportunity, and outcome in connection with the reorganization of the women's health services by Hamm. We shall examine each basis in turn.

¶12 Tremlett, citing ***Ferraro v. Koelsch***, 124 Wis. 2d 154, 368 N.W.2d 666 (1985), first asserts that Aurora's handbook, and the employment policies and procedures contained in the administrative manual, abrogate her at-will status, thereby creating an enforceable contractual relationship. For several reasons, this argument fails.

¶13 ***Ferraro*** does not control this appeal, as it is distinguishable from Tremlett's case in five ways. First, in the second paragraph of the introductory language of the very first page of the Aurora employee handbook, it is expressly stated that the "information provided in the handbook is a guide. It is not a contract." The ***Ferraro*** handbook contained no such disclaimer. ***Id.*** at 159-60. Second, the handbook at issue here indicates that Aurora retains the unilateral

right to formulate policy and procedure changes. No such right was retained in ***Ferraro***. ***Id.*** Third, no express provisions exist in Aurora's handbook or manual requiring compliance with the provisions of these documents as a condition of continued employment. In contrast, Ferraro explicitly agreed that compliance with the handbook was a "condition of my continued employment." ***Id.*** at 158-59. Fourth, Aurora's disciplinary provisions do not require a "just cause" determination for dismissal. In ***Ferraro***, there was an express provision of this nature. ***Id.*** at 160.

¶14 Finally, in ***Ferraro***, the supreme court enunciated that it would not "by implication *alone* convert a handbook produced by an employer for the guidance and orientation of employees into an express contract." ***Id.*** at 166. "Rather, an employment manual may alter an at-will employment relationship only if the manual contains express provisions from which it reasonably could be inferred that the parties intended to bind each other to a different relationship." ***Bantz***, 163 Wis. 2d at 979 (citation omitted). Because we find no express provisions from which such an inference can be reasonably drawn in Tremlett's case, we reject this argument.

¶15 Tremlett's second premise offered to support her contract claim is the existence of an "implied-in-fact employment relationship" based upon the daily application of the provisions contained in the Aurora handbook and the employment policies and procedures contained in the administrative manual. In advancing this argument, Tremlett relies on her own deposition, the deposition of Amy Rislov, and affidavits of Carol Talatzko, Teresa Maier, and Nancy Wojciehowski. We reject this argument as well.

¶16 First, a party opposing summary judgment (here Tremlett) must set forth specific facts, evidentiary in nature and admissible in form, showing that a genuine issue exists for trial. *See* ***Fritz v. McGrath***, 146 Wis. 2d 681, 689, 431 N.W.2d 751 (Ct. App. 1988). "It is not enough to rely upon unsubstantiated conclusory remarks, speculation, or testimony which is not based upon personal knowledge." ***Helland v. Froedtert Mem'l Lutheran Hosp.***, 229 Wis. 2d 751, 756, 601 N.W.2d 318 (Ct. App. 1999). "An affidavit … stating a conclusion of law is not an evidentiary fact as required by the summary judgment statute." ***Ruchti v. Monroe***, 83 Wis. 2d 551, 558, 266 N.W.2d 309 (1978) (citation omitted).

¶17 The trial court examined the affidavits of Talatzko, Maier, and Wojciehowski in analyzing Tremlett's argument in opposition to the summary judgment motion. It assigned no credit to these affidavits because the legal effect attributed to the handbook and manual by the affiants were only general opinions. We have reviewed the depositions of Tremlett and Rislov and the affidavits of Talatzko, Maier, and Wojciehowski as relating to the legal effect of the handbook and manual. The specific averments and depositional testimony relied upon by Tremlett are only conclusory in nature, expressing ultimate facts or conclusions of law, not admissible for summary judgment purposes under WIS. STAT. § 802.08(3). From this review, we conclude the trial court reached the right result.

¶18 Second, Tremlett erroneously relies upon ***Clay v. Horton Mfg. Co.***, 172 Wis. 2d 349, 493 N.W.2d 379 (Ct. App. 1992) and ***Garvey v. Buhler***, 146 Wis. 2d 281, 430 N.W.2d 616 (Ct. App. 1988). In both decisions, we recognized that an employer, through its agents, may modify an employment relationship to include company policies, notwithstanding a disclaimer, if both parties intend to do so. Whether such a change takes place will depend upon the intent of the

employer and the employee regarding the employment relationship. Tremlett's reliance on these decisions is misplaced.

¶19 In ***Clay***, the employee asserted that the company's plant superintendent and his supervisor repeatedly assured him that the company was bound by the company's handbook provisions and procedures; more specifically, the company was bound by the seniority provisions relating to layoffs, despite a written disclaimer in its handbook that its policies were subject to change. ***Clay***, 172 Wis. 2d at 352-53. Clay sued in contract claiming that the company did not follow the policy before laying him off. ***Id.*** at 353.

¶20 In ***Garvey***, supervisors told the employee that a company policy existed whereby an employee would be terminated after the receipt of three pink disciplinary slips within a six-month period. ***Garvey***, 146 Wis. 2d at 285. Garvey stated that she had come to rely on this policy as a condition of her employment. ***Id.*** Two of her former supervisors provided affidavits supporting her claim; whereas, the vice-president of the company disputed the existence of such a policy. ***Id.***

¶21 The common element in both cases was communication by superior representatives of both companies to an employee of a possible intention to change the employment relationship. Also common to both cases was the existence of disputed issues of material fact relating to the intention of the parties. Thus, both summary judgments were reversed and remanded for a factual determination at trial.

¶22 Tremlett's claim is distinguishable from ***Clay*** and ***Garvey*** because of the absence of any communication between the agents of Aurora and Tremlett demonstrating an intention to alter the employment relationship, by making the

observance of the handbook and manual provisions a condition of employment, or guaranteeing her a promotion.

¶23 Lastly, as part of her contract claim, Tremlett contends that by terms of the Aurora handbook, manual, and policies, she was promised a particular kind of retention and promotion process in connection with the reorganization of the women's health services. She argues there is ample evidence that the Aurora handbook, manual, and policy operated to create promises to her, upon which she reasonably relied; that her qualifications would require her appointment as an inside applicant over an equally qualified external applicant. She contends these commitments were breached, notwithstanding her high qualifications.

¶24 The essence of this claim is that Aurora breached its "Promotion and/or Transfer" policy by not promoting her to the newly created managerial position. From a reading of this policy, it is obvious that the wording acknowledges the mutual advantages of internal transfers and promotion. Yet, the policy is couched in very precise terms. No language is contained in the policy guaranteeing an interview with the human resources department or a referral to the hiring department. Eligibility for transfer or promotion is dependent upon an individual's qualifications in terms of the skill requirements of the vacant position, past performance, and attendance record.

¶25 Tremlett casts Aurora's "Promotion and/or Transfer" policy as one of "Preference" for internal promotion. Our search has failed to discover any language providing the formation of such a policy mold. In support of this assertion, Tremlett again relies upon the same affiants she used to support her implied-contract claim. Again, we reject these bases because they are conclusory, contain ultimate facts, and are lacking in the appropriate evidentiary nature to be

admissible for summary judgment purposes. Regardless, even if an expression of preference can be inferred, we know of no authority that equates such expression to an enforceable obligation.[2]

B. Application of Promissory Estoppel.

¶26 As an alternative theory to support her claim, Tremlett contends that the doctrine of promissory estoppel applies because she relied, to her detriment, on Aurora's alleged promises of a merit evaluation, performance-based retention, and promotional system as described in Aurora's handbook and policy manuals. To successfully pursue a promissory estoppel claim, Tremlett must prove that: (1) Aurora made a promise, which it reasonably should have expected to induce action or forbearance of a definite and substantial character by Tremlett; (2) the promise induced such action or forbearance; and (3) injustice can be avoided only by enforcement of the promise. ***Clark Oil & Ref. Corp. v. Leistikow***, 69 Wis. 2d 226, 238, 230 N.W.2d 736 (1975).

¶27 In order for Tremlett's claim for promissory estoppel to succeed, she must demonstrate that a promise was made to her relating to the retention and promotion system. She fails to satisfy this fundamental element. The very first sentence in the "Promotion and/or Transfer" section of the employee handbook merely affirms the mutual "benefit to both the organization and its employees of

[2] Tremlett cites several other breaches of policy: i.e., (1) her denial of transfer violated Aurora's policy and handbook commitment to her for preferential appointment status based upon her long and distinguished record of meritorious service; and (2) denial of appointment without adequate or objective assessment of her performance record if an employee is said to have failed to perform. Because we have already concluded that the provisions of the Aurora handbook and manual were permissive in form, not creating contractual obligations binding in nature, we dismiss these additional claims of breach as meritless.

promoting and/or transferring qualified employees." The key phrase in this policy statement is "qualified employees." The section then describes the methodology applied for promotion or transfer and the broad criteria utilized to assess "qualification" for advancement or transfer.

¶28 It is uncontroverted in the record that Aurora provided Tremlett with a merit evaluation process prior to considering her qualifications for the new position. Furthermore, Aurora offered her the same process when she expressed a desire for retention in a different capacity.

¶29 From a reasonable reading of this section, we can find no language to substantiate a claim that Aurora made an enforceable promise to promote her to the newly created managerial position. Absent the showing of a promise, a claim of promissory estoppel fails.

C. Bad Faith.

¶30 Tremlett claims Aurora and Hamm engaged in bad faith obstruction of the merit performance, internal promotion, and retention provisions of her employment contract. In support of this claim, Tremlett asserts that:

> [I]n addition to its duty to provide [her] fair promotional or transfer opportunity, Aurora and Ms. Hamm could not, as they did, impede the fair assessment of her qualifications, eliminate the open position of Patient Care Manager-Birth Center for which she was the only qualified candidate, deny her the opportunity to compete for the refashioned Manager-Women's Health position, and frustrate her efforts to secure comparable alternative employment positions with Aurora.

In support of this lack of good faith claim, Tremlett cites ***Mackenzie v. Miller Brewing Co.***, 2000 WI App 48, ¶42 n.9, 234 Wis. 2d 1, 608 N.W.2d 331, and Chief Justice Abrahamson's concurrence in the supreme court's decision affirming

the court of appeals, 2001 WI 23, ¶34 n.3, 241 Wis. 2d 700, 623 N.W.2d 739, to substantiate the existence of an over-arching obligation of good faith between an employer toward an employee in a continuing at-will employment relationship. The recognition of this doctrine of implied good faith as an exception to the "at-will relationship," however, is induced from a narrow group of decisions demonstrating misrepresentation on the part of the employer "to ensnare a specific employee and alter in some way his [or her] status as an at-will employee." ***Brodsky v. Hercules, Inc.***, 966 F. Supp. 1337, 1351 (D. Del. 1997) (citing ***E.I. DuPont de Nemours and Co. v. Pressman***, 679 A.2d 436 (Del. 1996)).

¶31 The explication of this claim as set forth above, assumes much that we are not willing to accept. First, as the trial court astutely pointed out in its written decision, although Tremlett asserted that Hamm promised her the newly combined managership in the reorganized hospital, no deposition testimony—even under "a generous interpretation"—rises to the level of an enforceable promise. Tremlett has not reasserted this particular claim on appeal. Moreover, unlike ***Brodsky*** and ***Pressman***, there is no issue of misrepresentation before us. In the absence of a demonstrated promise or action to induce the altering of the at-will status, Tremlett's claim for breach of the duty of good faith and fair dealing must fail.

D. Intentional Interference/Ratification Claims.

¶32 Tremlett next argues that Hamm intentionally interfered with her job and career and that Aurora ratified Hamm's improper actions. The trial court granted Aurora's motion seeking summary judgment on this claim because Tremlett failed to make any specific factual assertions showing the existence of an

element essential to her case; namely, that Hamm had an improper motive. We conclude that the trial court properly dismissed this claim.

¶33 The elements of tortious interference with a contractual relationship are: (1) the plaintiff had a contract or prospective contractual relationship with a third party; (2) the defendant interfered with the relationship; (3) the interference was intentional; (4) a causal connection exists between the interference and the damages; and (5) the defendant was not justified or privileged to interfere. ***Dorr v. Sacred Heart Hosp.***, 228 Wis. 2d 425, 456, 597 N.W.2d 462 (Ct. App. 1999). Here, we have concluded that no contract existed between Aurora and Tremlett. Accordingly, any claim for tortious interference with a contract must fail.

¶34 Tremlett's attempt to broaden her claim to suggest that Hamm improperly interfered with her "employment" and "prospective career" also fails. In ***Mackenzie***, 2000 WI App 48 at ¶63, we recognized the cause of action for intentional interference with a *prospective* contractual relationship. ***Id.*** In order to succeed, however, the claimant must show that the action on the part of the defendant was *improper*, and set forth seven factors to consider in addressing this issue. ***Id.*** at ¶64. These included: (1) the nature of the actor's conduct; (2) the actor's motive; (3) the interests of the other with which the actor's conduct interferes; (4) the interest sought to be advanced by the actor; (5) the social interests in protecting the freedom of action of the actor and the contractual interest of the other; (6) the proximity or remoteness of the actor's conduct to the interference; and (7) the relations between the parties. ***Id.***

¶35 Tremlett asserts that Hamm failed to promote her to the combined managerial position because of "personal hostility" Hamm had toward Tremlett. When asked at her deposition if she had any factual knowledge of improper

motive held by Hamm, Tremlett replied that she had only suspicions. This is insufficient to raise an issue of fact regarding whether Hamm acted improperly. Hamm asserted that Tremlett was not hired as the newly combined manager for legitimate business reasons. Tremlett proffers nothing to rebut the legitimate reasons except her suspicions that Hamm had personal hostility toward her. "Courts will not second guess employment or business decisions, even when those decisions appear ill-advised or unfortunate." ***Strozinsky v. School Dist. of Brown Deer***, 2000 WI 97, ¶33, 237 Wis. 2d 19, 614 N.W.2d 443. Absent some factual basis for Tremlett's suspicions, we cannot second guess her supervisor's employment decision. Tremlett has failed to satisfy her burden because she does not provide any factual basis to support her claim of improper motive.

¶36 As a result, we conclude that the trial court did not err when it dismissed this claim. Because we have so concluded, it is not necessary to address the second part of this issue regarding whether Aurora ratified Hamm's conduct. If there was no improper conduct demonstrated, then there was nothing for Aurora to ratify.

E. Constructive Discharge.

¶37 Tremlett's last claim is that the trial court should not have dismissed her claim alleging she was constructively discharged. Tremlett contends that her discharge was unlawful because the managerial position she held was eliminated and replaced by the expanded combined position. She argues that she was effectively terminated when Aurora failed to offer her the combined position. The trial court ruled that the undisputed facts demonstrated that Tremlett was not discharged, but in fact resigned from her Aurora position to take a position with

another health care provider. We conclude that the trial court's decision on this issue was correct.

¶38 In asserting a constructive discharge claim, the claimant must satisfy a two-part test: (1) the claimant must identify a fundamental and well-defined public policy sufficient to meet the narrow cause of action for wrongful discharge under the public policy exception to the employment at will doctrine; and (2) the claimant must demonstrate that the discharge violates that fundamental and well-defined public policy. ***Strozinsky***, 2000 WI 97 at ¶37. A claimant using the doctrine of constructive discharge to refute an employer's contention that the claimant voluntarily resigned is bound by the same two-factor test. ***Id.*** at ¶69.

¶39 Tremlett fails to satisfy either element of the test. In fact, she does not even allege any public policy argument to except her from the at-will doctrine. Rather, she relies on contractual and estoppel claims. We have already concluded that no contractual or estoppel claims exist. Because Tremlett has failed to support her constructive discharge claim by alleging either that she fits into a public policy exception to the at-will doctrine, or by demonstrating that she was not an at-will employee, this claim was properly dismissed. Moreover, we agree with the trial court's ruling that even if Tremlett was able to successfully tie "her constructive discharge claims to her underlying claims, she has failed to raise any factual allegations on summary judgment that approach the 'intolerable conditions' described in constructive discharge caselaw."

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.