COURT OF APPEALS
DECISION
DATED AND FILED

March 25, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1837 **Cir. Ct. No. 01-CV-54**

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

FAITH TASKER,

PLAINTIFF-APPELLANT,

V.

CHIEFTAIN WILDRICE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Washburn County: EUGENE D. HARRINGTON, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Faith Tasker appeals a summary judgment dismissing her claims against Chieftain Wildrice Company. Tasker argues that Chieftain's employee handbook altered her at-will employment status, thus creating an express employment contract. Alternatively, Tasker argues that because an issue of material fact remains regarding whether the parties intended to

abrogate Tasker's at-will employment status, summary judgment was inappropriate. We reject these arguments and affirm the judgment.

BACKGROUND

¶2 In December 1994, Tasker began her employment with Chieftain as a sales representative. On March 27, 2001, Tasker overheard a comment from a co-worker who was writing a school paper on "deviant behavior." Tasker replied "if you want to do a paper on deviant behavior, all you have to do is work at Chieftain." Tasker's comment was overheard by Keith Kappel, Chieftain's sales manager. Kappel and Joan Gerland, Chieftain's general manager, subsequently fired Tasker for her "deviant behavior" comment, believing Tasker's comment to be part of a continuing pattern of negativity at work. Tasker filed suit against Chieftain alleging breach of contract, misrepresentation and promissory estoppel. The circuit court granted summary judgment in favor of Chieftain and this appeal follows.[1]

ANALYSIS

¶3 This court reviews summary judgment decisions independently, applying the same standards as the circuit court. ***Smith v. Dodgeville Mut. Ins. Co.***, 212 Wis. 2d 226, 232, 568 N.W.2d 31 (Ct. App. 1997). Summary judgment is granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987).

[1] On appeal, Tasker challenges only the dismissal of her breach of contract claim.

¶4 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, 532 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. Unless the parties expressly abrogate the employee's at-will status, an employee is "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).

A. Express Contract

¶5 Here, Tasker contends that Chieftain's employee handbook altered her at-will employment status and created an express employment contract. In ***Ferraro***, our supreme court concluded that representations in an employee handbook may, as a matter of law, limit the power of an employer to terminate an employment relationship that would otherwise be terminable at will. ***Id.*** at 157. An employment manual may alter an at-will employment relationship, however, "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 v. Montgomery Estates, Inc.***, 163 Wis. 2d 973, 979, 473 N.W.2d 506 (Ct. App. 1991).

¶6 In ***Ferraro***, our supreme court held that an employee handbook abrogated the at-will employment relationship where the handbook included: (1) an employee acknowledgment and acceptance of the handbook's policies and rules as a condition of continued employment; (2) discharge only for just cause;

(3) a mandatory progressive disciplinary procedure based on the number and seriousness of rule violations; (4) a layoff procedure based on seniority; (5) distinctions between probationary and non-probationary employees; and (6) an expectation that employees would provide a two-week notice before leaving their employment. ***Ferraro***, 124 Wis. 2d at 159-161. 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. Rather, each case must be examined in light of its particular facts. ***Id.***

¶7 Here, Tasker claims that Chieftain's employee handbook satisfies the ***Ferraro*** factors. First, Tasker claims she accepted the handbook's regulations as a condition of her employment. We are not persuaded. The employee handbook in place at the time Tasker's employment was terminated consistently stated that it did not imply a contract between Chieftain and its employees and further specified that employment with the company was at-will.[2] In fact, Tasker's handbook receipt and acknowledgment form stated that she understood: (1) the contents of the handbook could be changed at any time with or without notice by Chieftain; (2) the handbook provided guidelines and information; (3) the handbook did not constitute an employment contract of any kind; (4) her employment and compensation could be terminated at any time for any reason; and (5) nothing in the handbook varied or modified her at-will employment relationship with the company. Tasker's signature on the acknowledgment form evinces her acceptance of ongoing at-will employment at Chieftain.

[2] Subsequent to receipt of Tasker's first employee handbook in December 1994, Chieftain periodically issued written revisions to the handbook. For each revision, Tasker signed a receipt with an acknowledgment that she had read and understood the company's employee handbook. Tasker signed her final acknowledgment form on January 3, 2000.

¶8 Next, Tasker claims Chieftain's employee handbook made distinctions between temporary and "regular" employees.[3] In ***Ferraro***, the employer applied a different process for discharging employees depending on whether they were still within a probationary period. ***Ferraro***, 124 Wis. 2d at 160. Our supreme court noted that if all employees were at-will, the handbook's differing provisions would not have been necessary as "all employees could have been dischargeable at the whim of the employer." ***Ferraro***, 124 Wis. 2d at 165. Unlike the handbook in ***Ferraro***, Chieftain's employee handbook did not distinguish temporary employees from regular employees when stating the company's disciplinary and termination procedures. The same procedures apply to both types of employees.

¶9 Tasker also argues Chieftain's handbook provided a progressive procedure for discipline based on the number and seriousness of rule violations. Although Tasker claims Chieftain was bound to follow its own progressive disciplinary procedures, the handbook discusses disciplinary procedures using permissive language. Specifically, the handbook provided that Chieftain would "attempt" to administer discipline on a fair and equal basis to all employees. The handbook noted: "Because it is impossible to list every conceivable infraction, the Company within its total discretion, can amend these guidelines." Further, the

[3] The employee handbook provides:

> The first ninety days of employment are considered a temporary employment/training period. It offers Management an opportunity to review your skills, ability and attitude. It is your opportunity to evaluate us as well. Personal and vacation time are accumulating during the Temporary Employment period though the employee is not eligible to receive them until after the first ninety days has been completed. Holiday pay will not be given during the Temporary Employment Period.

handbook emphasized that oral and/or written warnings could be bypassed based on the severity of an incident and Chieftain reserved the right "to add to, modify or eliminate any rule when circumstances require a change." The handbook mentions no "just cause" standard for discharge nor did the handbook establish a mandatory hierarchy of rules for disciplinary action. Rather, Chieftain reserved the right to determine what employee discipline would be appropriate in any particular situation, up to and including termination.

¶10 Finally, Tasker emphasizes that although the employee handbook stated employees could terminate their employment at any time, employees who failed to give two weeks' notice would forfeit any earned vacation pay.[4] Although Chieftain concedes that this ***Ferraro*** factor could arguably favor Tasker's position, it maintains that this lone factor does not abrogate Tasker's at-will employment. We agree.

¶11 The handbook repeatedly emphasized that employment at Chieftain was at-will. Tasker's handbook receipt and acknowledgment form evinces her recognition that the handbook merely provided guidelines and information and did not constitute an employment contract of any kind. "That an employer conveys to an employee what is expected of him or her and that the employee complies does

[4] The handbook's relevant provision provided:

> If you decide to leave our employment, we would appreciate a two-week notice, however, employees are employed at will and can terminate their employment at any time for any reason. Notifications should be given to your supervisor. This notice must be in writing. Non-exempt employee's vacation time earned and unused will be paid if the employee gives two weeks notice. Any employee who fails to give two weeks notice will forfeit any earned vacation pay.

not alone produce a contract." ***Bantz***, 163 Wis. 2d at 981. Although the handbook laid out rules, regulations and policies, we conclude they were guidelines rather than contractual demands, especially in light of the handbook's use of permissive language to underscore the at-will nature of the employment relationship. We therefore conclude that Chieftain's employee handbook did not abrogate Tasker's at-will employment.

B. Issue of Material Fact Regarding Existence of an Employment Contract

¶12 Citing ***Garvey v. Buhler***, 146 Wis. 2d 281, 430 N.W.2d 616 (Ct. App. 1988), and ***Clay v. Horton Mfg. Co.***, 172 Wis. 2d 349, 493 N.W.2d 379 (Ct. App. 1992), Tasker argues that because an issue of material fact remains regarding whether the parties intended to abrogate Tasker's at-will employment status, summary judgment was inappropriate. Because ***Garvey*** and ***Clay*** are distinguishable from the present case, we are not persuaded.

¶13 In ***Garvey***, the plaintiff was hired as a store clerk by Open Pantry and was ultimately promoted to store manager. ***Garvey***, 146 Wis. 2d at 285. Although there was no employee handbook, Christine Garvey had signed a company policy on alcohol sales that specified she would be fired if convicted for violating any alcohol sale law. The company also maintained a polygraph policy, a standard of conduct form and two company manuals. ***Id.*** Garvey claimed that her supervisors informed her there was a company policy or practice whereby an employee would be terminated only after getting three disciplinary slips within a six-month period. ***Id.*** Although she did not appear to have a record of poor job performance, Garvey's employment was ultimately terminated because of the conduct of one of her subordinates. Because Open Pantry disputed Garvey's contention that she could not be fired without first receiving three disciplinary

slips, the ***Garvey*** court concluded that a factual issue was left unresolved and therefore reversed the circuit court's grant of summary judgment. ***Id.*** at 289-90.

¶14 In ***Clay***, the employee handbook in use at the beginning of Curtis Clay's employment provided that "length of service is used as a basis for … layoff," but also noted that the handbook's policies were subject to change by management. ***Clay***, 172 Wis. 2d at 351. The employer later posted a policy statement regarding layoffs on a bulletin board. The policy statement reiterated that employees would be laid off based on their length of service within their work group. Likewise, Clay's superiors made repeated oral assurances that the handbook's policies were binding on both Horton and its employees—specifically, that employees with less seniority would be laid off first. ***Id.*** at 353. A subsequently revised handbook again provided that length of service would be used as a baseline for layoffs; however, the handbook also contained a disclaimer stating that neither its policies and provisions nor any other communications were part of an employment contract. ***Id.*** at 351-52. When Clay was subsequently laid off, he had seniority over two-thirds of the other employees. Clay thus argued that the employee handbook, his employer's oral representations and posted company policy regarding layoffs altered his at-will employee status. ***Id.*** at 353.

¶15 The ***Clay*** court concluded that it is possible for a company through its agents to modify an employment contract to include company policies notwithstanding a handbook's disclaimer, if both parties intend to do so. ***Id.*** at 355. The ***Clay*** court further concluded: "Because whether the parties intended to alter their employment relationship is a question of disputed fact, the granting of summary judgment is inappropriate." ***Id.*** at 356.

¶16 Here, Tasker claims that Gerland emphasized the corrective discipline procedure set forth in the employee handbook. Tasker understood that procedure to include the progressive steps of: (1) oral warning; (2) written warning; (3) three-day suspension; and/or (4) termination. Emphasizing that she had, on two occasions, been disciplined consistent with her understanding of the progressive steps, Tasker argues that an issue of material fact remains regarding whether the employee handbook, in conjunction with her employer's oral representations and the parties' past course of conduct evinced an intent to abrogate Tasker's at-will employment.[5]

¶17 Unlike the employer in ***Garvey***, Chieftain does not deny it had a policy regarding discipline and termination of its employees. Thus there is no issue of fact as described in that case. In ***Clay***, an issue of fact remained regarding whether the employer intended to abrogate Clay's at-will employment by oral representations regarding the company's layoff policy. Here, to the extent Tasker argues she was led to believe that Chieftain would follow the employee handbook, it did. Although Chieftain's employee handbook outlined progressive disciplinary steps, the handbook discussed Chieftain's disciplinary procedures using permissive language. As noted above, although the handbook described a progressive disciplinary procedure, Chieftain ultimately retained the right to determine what employee discipline would be appropriate in any particular situation, up to and including termination. Because Tasker's past discipline and

[5] In July 1995, Gerland issued Tasker an oral warning for tardiness, noting that "in the event of another occurrence, you would proceed through the disciplinary action as outlined in your employee manual." Then, in March 1998, Tasker received a written warning regarding her mandatory phone call average. The warning stated: "The next phase if you do not provide an 80 call average in the week of March 27, is a three day suspension."

present termination are consistent with the permissive terms of the handbook, there is no issue of fact regarding whether the parties intended to abrogate Tasker's at-will employment.[6]

By the Court.—Judgment affirmed.

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

[6] Tasker also claims Gerland made oral representations regarding the length of Tasker's employment—specifically, that Chieftain looked forward to having Tasker work there for a long time. Gerland's deposition revealed that Chieftain was committed to the ongoing development of their employees, believing that it was beneficial to have sales representatives with longevity. Gerland confirmed that during the time she was involved in hiring at Chieftain, she would question applicants regarding their long-term goals. Gerland's expressing an interest in Tasker's long-term employment, however, is not sufficient to abrogate Tasker's at-will employment.