 NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-0

DAWN LEE,

Plaintiff-Appellant,

v.

SOUTH JERSEY HEALTHCARE,

Defendant-Respondent.

————————————————————————————————

March 13, 2015

Submitted February 3, 2015 – Decided

Before Judges Hoffman and Whipple.

On appeal from Superior Court of New Jersey, Law Division, Cumberland County, Docket No. L-0224-12.

Ned P. Rogovoy, attorney for appellant.

Schnader Harrison Segal & Lewis LLP, attorneys for respondent (Michael J. Wietrzychowski and Rebecca Lacher, on the brief).

PER CURIAM

Plaintiff employee Dawn Lee appeals from the October 15, 2013 Law Division order granting summary judgment to defendant South Jersey Healthcare[1] on plaintiff's claim of wrongful discharge. We affirm.

I.

Our review of the record reveals the following facts, viewed most favorably to plaintiff. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). Defendant hired plaintiff as a staff nurse in January 1998. Then, in 2008, defendant promoted plaintiff to assistant nurse manager. Defendant's employment was governed by a disciplinary policy, which stated, in pertinent part:

> South Jersey Healthcare believes in progressive corrective discipline. Therefore, in most cases of policy violation, the approach to improvement will be taken in two or more steps with discharge as the final step when corrective measures fail.
>
> Certain violations will result in discharge without prior warnings or corrective attempts. Even minor infractions, if repeated, may lead to discharge. The hospital reserves to its sole

discretion the use of progressive discipline.

The disciplinary steps are not rigid. An employee may be informally or formally counseled as often as believed necessary, may be put on disciplinary probation or may be suspended without pay more than once.

The disciplinary process **may** involve any or all of the following steps:

- Verbal counseling
- Written warning
- Probation
- Suspension
- Discharge

. . . .

Many infractions warrant immediate discharge without any prior progressive discipline.

. . . .

Discharge must be supported by a written summary of the facts that support the recommendation for termination of employment. **No employee will be discharged without approval**

of the Director of Human Resources.

(Emphasis in original).

Additionally, on March 27, 2001, plaintiff signed a "Pledge to Patient Satisfaction[,]" which stated, in pertinent part, that plaintiff agreed to "be professional and enthusiastic[,] . . . treat everyone with respect and dignity[,] . . . [and] promote a sense of unity and teamwork." Despite this pledge, plaintiff struggled with her communication skills, and was repeatedly instructed to improve her relationships with coworkers.

On May 29, 2006, plaintiff improperly failed to sign off on a medical chart. As a result, plaintiff "received verbal counseling[,]" and acknowledged that further errors would "result in the next step in the progressive discipline process up to and including termination[.]"

On or about June 10, 2011, plaintiff became aggravated with a coworker over shift scheduling. When questioned by her manager, plaintiff became more upset, and began to yell. Defendant suspended plaintiff for two days, and placed her on a probationary term under a "Performance Improvement Plan" that required "immediate and sustained improvement." Plaintiff successfully completed the plan on October 26, 2011, demonstrating "much improvement" in her "professional demeanor when interacting with staff . . . ." However, she acknowledged in writing that "any behaviors that do not conform with the standards of professional behavior may lead to further [probationary terms] or termination from [her] current position."

Shortly after completing the probationary term, on November 5, 2011, plaintiff became upset over some food and trash left at the nurse's station in violation of rules prohibiting "food or drink at the counters or work areas[.]" One of the nurses, T.S., inquired about a partially consumed bottle of soda that plaintiff had thrown out. In an email to management sent on November 11, 2011, T.S. described the incident as follows:

> I . . . walked back to . . . hear [plaintiff] talking loudly about "night shift's mess" while she was frantically cleaning the counter. I called her name to ask if she had seen my soda but she didn[']t answer me. I lightly tapped her on the shoulder to ask her if she had seen it. She continued to clean the counter and yelled[,] "I don't know[,] I threw away [six] of them." . . . . [Plaintiff] continued to yell for a moment about management, other employees, and needing to "keep her job[.]" . . . . I walked away as the yelling became louder. As I made it closer to the time clock [plaintiff] yelled at me from behind the nurse[']s desk for me to "clock out and go home[.]"
>
> . . . .
>
> The manner in which [plaintiff] expressed herself was unprofessional, demeaning and disrespectful . . . . She was easily heard yelling throughout [the area].

. . . .

> The incident has had a negative impact on the department and myself. . . . . [Plaintiff] is unapproachable as evidenced by her tirade that morning.

. . . .

> Not only did I feel disrespected, humiliated and unappreciated, I felt threatened.

Plaintiff admitted that T.S. "became upset with [her] actions[,] and as a result, a certain verbal give and take occurred[,]" and agreed with the facts of the incident. However, plaintiff differed over the tone of the altercation: "I wouldn't say it was heated. I'd say I was firm because she was . . . in my face about it." Plaintiff also denied screaming. A third nurse, M.S., witnessed the event. She certified that the altercation "was louder than normal[,]" and "seemed to be a rather up and down conversation" that lasted fifteen to thirty seconds.

As a result of the November 5, 2011 incident, defendant discharged plaintiff on November 18, 2011. Plaintiff's termination form stated that, since completion of her probationary period, "multiple staff members began to complain again about [plaintiff's] behavior[,]" and repeatedly described her as "unapproachable, spiteful, demeaning and disrespectful." The form described the November 5, 2011 incident, stating that plaintiff "scream[ed] at the staff" and "had inappropriate conversations . . .

that morning concerning" other coworkers. The form concluded that plaintiff's "fail[ure] to consistently sustain professional behavior and conduct despite multiple warnings . . . [would] no longer be tolerated[,]" and therefore her employment was "terminated, effective immediately."

Plaintiff filed a one-count complaint on March 5, 2012, alleging that defendant wrongfully terminated her employment in violation of its "discipline policy and procedure[,]" described as "a term and condition of employment." Defendant filed a motion for summary judgment on May 11, 2013, and the trial court heard oral argument on October 11, 2013. On that date, the court issued an oral opinion granting defendant's motion and dismissing plaintiff's complaint.

The court found that plaintiff was an at-will employee, and that the disciplinary policy did not create "an implied covenant protecting her from termination without cause . . . ." Alternatively, the court found that defendant "sufficiently complied" with the principles of progressive discipline, "even if the policy did create some sort of enforceable implied contract provision[.]" Relying on West New York v. Bock, 38 N.J. 500 (1962), and its progeny, the court stated:

> I find that clearly the hospital engaged in progressive discipline in the time period leading up to this termination. There [were] two prior steps. A two-day suspension and a . . . probationary period performance plan and then the termination. This all occurs in a short period of time and it involves similar conduct.

This appeal followed. On appeal, plaintiff argues that summary judgment was improper due to existing issues of disputed material fact.

II.

We review motions for summary judgment de novo under the same legal standard applied by the trial court. Spinks v. Twp. of Clinton, 402 N.J. Super. 465, 473 (App. Div. 2008), certif. denied, 197 N.J. 476 (2009). The trial court may grant summary judgment if

> the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.
>
> [R. 4:46-2(c).]

If "the evidence 'is so one-sided that one party must prevail as a matter of law,' the trial court should not hesitate to grant summary judgment." Brill, supra, 142 N.J. at 540 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 2512, 91 L. Ed.2d 202, 214 (1986)).

Absent a contract, private employment is presumed to be at-will, and generally an employee may be discharged with or without cause. Bernard v. IMI Sys., Inc., 131 N.J. 91, 106 (1993). However, an employee manual "may give rise to an implied contract of employment if its provisions 'contain an express or implied promise concerning the terms and conditions of employment.'" Witkowski v. Thomas J. Lipton, Inc., 136 N.J. 385, 393 (1994) (quoting Gilbert v. Durand Glass Mfg. Co., Inc., 258 N.J. Super. 320, 330 (App. Div. 1992)). In determining whether an employee manual creates an implied contract, the "key consideration . . . is the reasonable expectations of the employees." Id. at 392. The existence of an implied contract is an issue of fact, ordinarily left to the jury. See Giudice v. Drew Chem. Corp., 210 N.J. Super. 32, 36 (App. Div. 1986).

A disclaimer in an employment manual is only effective if, by its language and prominent placement, "no one could reasonably [think the manual] was intended to create legally binding obligations." Nicosia v. Wakefern Food Corp., 136 N.J. 401, 412 (1994) (quoting Woolley v. Hoffmann-La Roche, Inc., 99 N.J. 284, 299, modified, 101 N.J. 10 (1985)). Such a disclaimer must "be both clear and prominent so that the employee unmistakably understands that the manual provisions will not bind the company." Jackson v. Georgia-Pacific Corp., 296 N.J. Super. 1, 16 (App. Div. 1996) (internal quotation marks omitted), certif. denied, 149 N.J. 141 (1997).

Further, a clearly-worded disclaimer serves "to provide adequate notice to an employee that she or he is employed only at will and is subject to termination without cause." Nicosia, supra, 136 N.J. at 412. The "effectiveness of a disclaimer clause can be resolved by the court as a question of law." Id. at 416.

We need not decide whether the disciplinary policy created an implied contract, but we nevertheless note that it sets forth a loose structure for employee discipline, and thus presents a weak but cognizable basis for finding that the policy created an implied contract. Although the policy "reserves to [defendant's] sole discretion the use of progressive discipline[,]" and only roughly outlines the disciplinary procedures that defendant "may" apply, it lacks clear and prominent disclaimer language, and never confirms at-will employment.

Progressive discipline generally provides that punishments must be proportional to the employee's disciplinary record. In re Stallworth, 208 N.J. 182, 198-99 (2011).[2] Accordingly, "one act of misconduct may result in 'minor discipline' merely because it was a first offense, whereas the same misconduct, if repeated, could equate justify the imposition of 'major discipline,' including termination." Id. at 198.

To the extent that the disciplinary policy here sets forth progressive discipline procedures, it is clear that defendant complied with those procedures. Plaintiff was first disciplined in 2006, received a written warning, and acknowledged that future mistakes would "result in the next step in the progressive discipline process up to and including termination." Then, on June 22, 2011, plaintiff was again disciplined, and moved up the progressive discipline scale to a two-day suspension and a probationary period. Again, plaintiff acknowledged that a failure to "show immediate and sustained improvement" would result in "further discipline, up to and including termination." Fewer than five months later, the final incident occurred, and plaintiff was discharged.

Even accepting plaintiff's account of the events of November 5, 2011, it was within defendant's discretion to conclude that plaintiff's conduct was inconsistent with

defendant's required social norms. Plaintiff's "firm" comments were "louder than normal[,]" and caused T.S. to report that she felt "disrespected, humiliated[,] . . . unappreciated[,]" and "threatened." Defendant need not prove that plaintiff screamed at T.S., or that T.S.'s conduct was proper, to conclude that plaintiff's response failed to "be professional and enthusiastic[,] . . . treat everyone with respect and dignity[,] . . . [and] promote a sense of unity and teamwork."

Viewing the record in the light most favorable to plaintiff, defendant complied with the discretionary progressive discipline procedures set forth in its disciplinary policy. Therefore, the trial court properly concluded that defendant was entitled to judgment as a matter of law.

In light of our conclusion that defendant complied with the progressive discipline procedures set forth in its disciplinary policy, we need not determine whether "reasonable jurors could find" that plaintiff screamed at T.S. or that the disciplinary policy created an implied contract. Brill, supra, 142 N.J. at 532 (quoting Anderson, supra, 477 U.S. at 252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214). Defendant was entitled to judgment as a matter of law regardless of those claimed factual issues, and so they are not "genuine issue[s] of material fact." R. 4:46-2. Accordingly, plaintiff's factual arguments fail. We therefore affirm the trial court's October 15, 2013 order granting summary judgment in favor of defendant and dismissing plaintiff's complaint with prejudice.

Affirmed.

[1] According to defendant's brief, its correct name is South Jersey Hospital, Inc.

2 In contrast to the disciplinary policy at issue here, the existing case law on progressive discipline primarily addresses public employment, where statutes set forth an explicit, structured, and mandatory disciplinary procedure. See, e.g., N.J.S.A. 52:14B-9 to -10; Bock, supra, 38 N.J. at 514-19 (1962). Accordingly, those cases provide limited guidance here, where the policy only loosely outlines the disciplinary procedure.
