Implied Contractual Obligations Under Employment Handbooks

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I. INTRODUCTION

In Massachusetts all employment is contractual. For example, when an employer promises to hire an employee at a certain hourly or annual rate of pay, and the employee relies upon that promise by performing work, the employer is contractually bound to pay the employee as promised for the work performed.[1] Although all employment is contractual in Massachusetts, an employee who is not otherwise protected is considered an employee-at-will. An employee-at-will can be terminated at any time for any reason, or for no reason, so long as the employer does not do so for an unlawful reason, e.g., an unlawfully discriminatory reason. *See Fortune v. Nat'l Cash Register Co.*, 373 Mass. 96, 100 (1977).

An employment handbook, however, can sometimes create an express or implied contract, thereby altering an employee's employment from being "at-will" into something more. For example, an express contract may exist when the parties expressly agree (either orally or in writing) that the terms of the employment handbook govern the rights and obligations of the employer and employee. In contrast, an implied contract may be inferred based upon the parties conduct and the attendant circumstances surrounding the handbook. *See Jackson v. Action For Boston Comm. Dev. Inc.*, 403 Mass. 8, 13 (1988).

This article focuses on the circumstances under which an employment handbook may create an implied contract of employment.

II. PROGRESSIVE DISCIPLINE POLICIES

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[1] Of course, under the Massachusetts Wage Act, the employer is also obligated to pay wages earned. *See* M.G.L. c. 149, § 148.

An employment handbook will usually contain numerous policies and procedures concerning employment. One policy typically relied upon by employees is the handbook's progressive discipline policy.[2] *See, e.g.*, *O'Brien v. New England Tel. & Tel. Co.*, 422 Mass. 686 (1996); *Clark v. South Middlesex Opportunity Council*, 2000 Mass. Super. LEXIS 191, at *10 (May 4, 2000). A progressive discipline policy usually provides that employees with performance and/or behavioral problems will be given warnings and an opportunity to cure prior to termination, unless there was gross misconduct requiring an immediate dismissal. The damages that flow from such claims are the employee's lost wages the argument being that had they been given a warning, they may have corrected the problem and prevented the termination.

Such policies establish a sense of fairness at the workplace, and can enhance employee morale. When employees are terminated without first receiving warnings and an opportunity to cure, they (especially long-term employees) may feel that their termination was unfair, and seek advice as to whether they have potential claims against the employer.

III. THE CENTRAL INQUIRY: REASONABLE BELIEF

When determining whether an employment handbook creates an implied contract, the central inquiry is whether the employee *reasonably believed* that the employer offered employment on the terms stated in the handbook. *See, e.g.*, *O'Brien*, 422 Mass. at 692; *Ferguson v. Host International, Inc.*, 53 Mass. App. Ct. 96, 102 (2001); *Derrig v. Wal-Mart Stores, Inc.*, 942 F. Supp. 49, 54-55 (D. Mass. 1996). As such, whether the employer intended to make such an offer, or whether a bargained-for exchange occurred is immaterial. *See O'Brien*, 422 Mass. at 693.

IV. DOES AN IMPLIED CONTRACT EXIST?

When determining whether an employee reasonably believed that an employment handbook created implied contractual rights under the *O'Brien* factors, the employee's counsel will (or should)

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[2] Employment handbook breach-of-contract claims have also been based upon policies concerning employee conduct and policies concerning the investigation of complaints of sexual harassment. *See Patriarca v. Center For Living and Working, Inc.*, 1999 Mass. Super. LEXIS 337 (Sept. 3, 1999) (employee conduct policy); *Vaughn v. XRE/ADC Corp.*, 1997 Mass. Super. LEXIS 61 (Oct. 9, 1997) (sexual harassment policy).

focus on the following inquiries.

A. Did The Employee Reasonably Believe (Both Subjectively And Objectively) That The Employer Agreed To Be Bound By The Handbook?

This should be the first inquiry. If the employee did not reasonably believe that the employer had agreed to follow the policies within the handbook, then the employee's claim will falter. *See Derrig v. Wal-Mart Stores*, 942 F. Supp. 49, 55 (D. Mass. 1996). In *Derrig*, the court set forth the following test: "First, did the employee believe that the employment manuals he or she was given constituted the terms or conditions of employment, equally binding on employee and employer? Second, was this belief reasonable under the circumstances?" *Id.*

B. Did The Employee Sign The Handbook, Acknowledge The Handbook's Existence, Or Did The Employer Call Special Attention To It?

It would be quite difficult to argue that an employee reasonably believed that the handbook was binding if he or she never knew it existed. Therefore, an employee's signature or acknowledgment of a handbook is evidence that the employee knew of and assented to the policies within the handbook, and continued working in belief that such policies governed his or her employment. Even if the employee did not sign the handbook, or acknowledge it in some way, the employer still may have called special attention to it by, for example, giving it to employee upon hire, or placing it on the employer's web page.

C. Does The Handbook Provide For A Term Of Employment?

If the handbook provides for a term of employment (i.e., that employment exists for a certain number of years, until terminated for just cause, or is permanent), then the employee is not an employee-at-will. Rather, when an employee has a contract for a term, he or she can only be terminated for cause. *See O'Brien*, 422 Mass. at 692.

D. Does The Handbook Contain Disclaimers?

Disclaimers will usually provide that the handbook is not a contract, that the policies found within it are established merely to provide guidance, and that the employer reserves the right to unilaterally change the handbook's policies. However, the Massachusetts Supreme Judicial Court, in *O'Brien*, stated that such disclaimers are not dispositive on the issue of whether an employee reasonably believed that a handbook or manual was binding. *See O'Brien*, 422 Mass. at 693. Despite this, several Massachusetts trial courts have allowed motions for summary judgment on handbook claims relying, at least in part, on the handbook disclaimer language, determining that the employee could not have reasonably believed that the handbook was binding in light of the circumstances, including such language. *See, e.g.*, *Aisagbonhi v. Osmonics, Inc.*, 2000 Mass. Super. LEXIS 492, at *6-*7 (Aug. 30, 2000); *Clark v. South Middlesex Opportunity Council, Inc.*, 2000 Mass. Super. LEXIS 191, *10-*11 (May 4, 2000).

E. Are The Disclaimers Obvious?

Much wind was taken out of the sails of the "disclaimer defense" in the Appeals Court decision of *Ferguson v. Host Int'l Inc.*, 53 Mass. App. Ct. 96 (2001). In *Ferguson*, the plaintiff sued his former employer for breach of contract, alleging that the employer failed to follow its progressive discipline policy contained in a personnel manual prior to his termination. *See Ferguson*, 53 Mass. App. Ct. at 98. The employer filed a motion for summary judgment, arguing that the employee manual did not establish contractual rights because it contained a disclaimer that it did not create a contract, and a reservation to unilaterally disregard the manual. *See id.* at 101. Based on this argument, the Massachusetts Superior Court granted the employer's motion for summary judgment. *See id.* at 97.

The Appeals Court disagreed, reversing summary judgment because "[t]he two clauses in the . . . employee manual properly could be viewed by the fact finder as the functional equivalent of fine print." *Id.* at 103. The two clauses were not predominantly placed in the manual; rather, they were "buried" in the "general, introductory" part of the manual□a place not as likely to attract employees' attention as the specific obligations and benefits set forth throughout most of the manual. *See id.* Accordingly, the court determined that "[i]t cannot be said as a matter of law that the plaintiff could not reasonably believe that the company would adhere to the portions of the manual

establishing the system of progressive discipline . . . ." *Id*

In light of *Ferguson*, employee's counsel will (or should) determine if the handbook's disclaimers are obvious. For example, is the handbook 50-100 pages long with disclaimers only appearing on the first page in the introductory paragraph? As another example, is the disclaimer language in bold print, such that the employee is likely to see it? If the disclaimers are buried in the handbook, employee's counsel will argue that *Ferguson* is controlling, and that the employee reasonably believed that the handbook was binding, despite the disclaimer language.

F. Was The Handbook Negotiated, Or Did The Employee Continue To Work After Learning Of It?

If the employee negotiated the terms of an employment handbook, that fact alone would make the handbook's terms enforceable. *See O'Brien*, 422 Mass. at 692. Conversely, the absence of such negotiations is of little import since it is not surprising that an employer's handbook would not be subject to negotiation. *See id.* The fact that the handbook was not bargained for is without consequence so long as the employee continued to work after learning of it. The employee's continued employment provides sufficient consideration to support the promises stated within the handbook. *See id.* at 691-692.

G. Does The Handbook Contain Language That Is Promissory?

Another important inquiry is whether the handbook's language contains mandatory versus discretionary language. For example, does the progressive discipline policy state that warnings "will" be given for substandard performance, or does it state that warnings "may" be given? Mandatory language evidences that the handbook is a binding employment contract. *See O'Brien*, 422 Mass. at 693. Mandatory language in handbooks could reasonably lead employees to believe that the policies within it would be followed. *See Derrig*, 942 F. Supp. at 55 (finding that an employment manual formed the basis of an implied-in-fact contract, in part, because the manual's mandatory language and detail "reasonably suggest their binding nature").

H. Did the Employer Rely Upon The Handbook And/Or Consistently Follow It?

If the employer consistently relies upon the handbook, whether through grievance procedures or by consistently using progressive discipline before terminating employees, such reliance and/or practices will be used by plaintiff's counsel to show that the employee reasonably believed that the handbook was binding. As expressed by the Massachusetts Supreme Judicial Court in the *O'Brien* case, "[i]f an employer adheres to the procedures set forth in its manual, that would be some evidence that the terms of the manual were part of the employment contract." *O'Brien*, 422 Mass. at 691-692; *see also Derrig*, 942 F. Supp. at 54 (explaining that where an employer's conduct "is in conformity with procedures set forth in its own manual, an implied-in-fact contract may exist.")

I. Does The Manual Contain Grievance Procedures, And Did The Employee Follow The Policies?

If a handbook contains grievance procedures, and the employee failed to follow them (e.g., failed to file a grievance that a policy or procedure was not followed), such an omission may be fatal to the employee's breach-of-contract claim. In the *O'Brien* case, the Massachusetts Supreme Judicial Court determined that an implied contract existed based upon an employment manual, but ruled against the employee because she failed to follow the grievance procedures in the manual before bringing a breach-of-contract claim in court. *See O'Brien*, 422 Mass. at 695-696. The court relied upon the general rule that remedies specified in an agreement must be exhausted before running off to court. *See id.*

V. THE COVENANT OF GOOD FAITH AND FAIR DEALING

Every contract is subject to an implied covenant of good faith and fair dealing. *See Anthony's Pier Four, Inc. v. HBC Associates*, 411 Mass. 451, 473 (1991). Therefore, even when an employer followed the handbook's policies and procedures (assuming that an employer's handbook is enforceable), but there is evidence that it was followed in bad faith, the employee may still have an actionable breach-of-contract claim. *See Williams v. B & K Medical Systems, Inc.*, 49 Mass. App. Ct. 563 (2000).

For example, if a manager follows the progressive discipline policy, but has manufactured or grossly exaggerated the performance problem, then the warnings were not given in good faith. As another example, if a manager follows the progressive discipline policy, but in his or her warning sets forth progressive requirements that are impossible to meet (i.e., sets the employee up for failure), then the policy was followed in bad faith. In such circumstances, employee's counsel is likely to argue that the employer breached the covenant of good faith and fair dealing.

VI. CONCLUSION

Given that the test in Massachusetts regarding the enforceability of employment handbooks is whether the employee "reasonably believed" that the handbook was binding, ascertaining whether an implied contract exists will be fact intensive and determined on a case-by-case basis. Furthermore, given that disclaimers are not dispositive of the issue, the safest bet for an employer is to ensure that its policies and procedures are consistently followed, and are followed in good faith.