COURT OF APPEALS
DECISION
DATED AND RELEASED

December 11, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0202

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

JACQUELINE A. LANGENDORF,

Plaintiff-Appellant,

v.

T.D.H. MANUFACTURING, INC.,
a domestic corporation,

Defendant-Respondent.

APPEAL from an order of the circuit court for Racine County: DENNIS FLYNN, Judge. *Affirmed*.

Before Brown, Nettesheim and Snyder, JJ.

PER CURIAM. Jacqueline A. Langendorf appeals from an order granting summary judgment dismissing her wrongful termination of employment action against T.D.H. Manufacturing, Inc. We conclude that as a matter of law there was no modification of Langendorf's employment as an "at will" employee. We affirm the judgment.

Langendorf was hired by T.D.H. on November 28, 1990. It was an "at will" employment arrangement. In May 1992, T.D.H. circulated as a standard operating procedure a disciplinary policy. Under the policy, any employee who violated a work rule four times within twelve months would be terminated. On December 13, 1993, Langendorf was promoted to shop foreman. On July 5, 1994, she received a three-day disciplinary suspension for poor job performance. By a letter of July 9, 1994, Langendorf was informed that as part of a restructuring, her position was eliminated effective immediately.

Langendorf alleges that when she was promoted, T.D.H. agreed that rather than discharge her under the disciplinary policy she would be demoted to production worker status. She claims that T.D.H. breached this agreement by her discharge. T.D.H. argues that Langendorf remained an "at will" employee subject to discharge at any time for either poor job performance or as part of downsizing. The trial court found that there was no dispute of material fact that Langendorf was an "at will" employee subject to discharge at any time.

We review decisions on summary judgment de novo, applying the same methodology as the trial court. ***M & I First Nat'l Bank v. Episcopal Homes***, 195 Wis.2d 485, 496, 536 N.W.2d 175, 182 (Ct. App. 1995); § 802.08(2), STATS. That methodology has been recited often and we need not repeat it here except to observe that summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* ***M & I First Nat'l Bank***, 195 Wis.2d at 496-97, 536 N.W.2d at 182.

Langendorf argues that a dispute of fact exists as to whether an express oral modification of the terms of her employment occurred when she was promoted. The complaint alleges that Langendorf was promised reinstatement to her previous position in the event of poor job performance as a shop supervisor. T.D.H.'s answer admits "that there was discussion in which, under certain circumstances, [Langendorf] could change positions but den[ies] the remaining portion" of the allegation. Langendorf's affidavit in opposition to summary judgment sets forth that on December 13, 1993, T.D.H.'s president, Tom Hinkle, stated that if at any time in the future T.D.H. was dissatisfied with her job performance, she would be notified in accordance with the disciplinary policy and have the opportunity to return to a production worker position in

place of termination. Hinkle's affidavit explains that Langendorf was hired as an at will employee and states, "I have never said or signed anything which would in any way change this understanding."

While at first blush it would appear that there is a conflict about whether T.D.H. agreed to the modified disciplinary policy, summary judgment is not precluded. The alleged factual dispute which makes summary judgment inappropriate "must concern a fact that affects the resolution of the controversy ...." ***Clay v. Horton Mfg. Co.***, 172 Wis.2d 349, 353-54, 493 N.W.2d 379, 381 (Ct. App. 1992) (citations omitted).

The ultimate issue is whether the disciplinary policy, whether modified or not, creates an employment contract which altered Langendorf's "at will" status. This is a question of law. ***Bantz v. Montgomery Estates, Inc.***, 163 Wis.2d 973, 978, 473 N.W.2d 506, 508 (Ct. App. 1991).

In light of Wisconsin's policy favoring employment at will, the mere issuance of a progressive disciplinary policy is insufficient to alter an at will employment relationship. *See* ***Olson v. 3M Co.***, 188 Wis.2d 25, 54, 523 N.W.2d 578, 589 (Ct. App. 1994). The relationship is altered only if the employee handbook or policy contains express provisions from which it reasonably could be inferred that the parties intended to bind each other to a different relationship. ***Id.***

There is nothing in the language of the disciplinary policy to suggest that it was intended to alter the at will employment status. It does not provide that it is the sole method of discharge or that discharge may only be made for cause. *See* ***Bantz***, 163 Wis.2d at 983, 473 N.W.2d at 510 (handbook did not alter at will status where it only suggests, but does not mandate, a certain progression of disciplinary steps and does not state that discharge would be only for just cause). The policy states that it is used to ensure fair and equal treatment of all employees. It is a guideline and not a contract. ***Id.*** Without some expression that the policy was mandatory, it would be against public policy to construe it as creating a contract. Public policy seeks to encourage employers to implement disciplinary guidelines and they will not do so if they risk the loss of the power to discharge at will.

T.D.H. asserts that the oral agreement on which Langendorf seeks to rely is unenforceable as contrary to the statute of frauds which requires a writing for a contract that cannot be performed within one year, § 241.02(1)(a), STATS. Although the enforceability of the oral agreement to return Langendorf to her former position is questionable, the oral agreement does not guarantee Langendorf a job. *Cf.* ***Mursch v. Van Dorn Co.***, 851 F.2d 990, 996-97 (7th Cir. 1988) (statement by employer's vice president that "so long as you do your job you can be here until you're a hundred" did not create a contract guaranteeing employment). Langendorf remained an at will employee in any position. Even if T.D.H. returned Langendorf to a production worker under the modified disciplinary policy, it could have terminated her at will in that position. Therefore, summary judgment was appropriate.

We need not address T.D.H.'s claim that the disciplinary policy is not relevant because it dismissed Langendorf because of business reorganization and not for poor job performance. Langendorf's claim that the stated reason for termination was pretextual is not material in light of the at will employment relationship.

By the Court.—Order affirmed.

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