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**IN THE
COURT OF APPEALS OF INDIANA**

DEPAUW UNIVERSITY,)
)
Appellant-Defendant/Cross-Appellee,)
)
vs.) No. 11A04-0312-CV-611
)
JANIS K. PRICE,)
)
Appellee-Plaintiff/Cross-Appellant.)

APPEAL FROM THE CLAY CIRCUIT COURT
The Honorable Diana LaViolette, Special Judge
Cause No. 11C01-0301-PL-30

December 14, 2004

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

DePauw University and Janis K. Price appeal various trial court rulings with respect to Price's claims for breach of procedure and religious harassment. We affirm in part and reverse in part.

Issues

With respect to DePauw's appeal, we find the following issue dispositive:

- I. Whether the trial court erred in denying DePauw's motion for summary judgment on Price's breach of procedure claim.

With respect to Price's cross-appeal, we address the following issue:

- II. Whether the trial court erred in granting DePauw's motion for summary judgment on Price's religious harassment claim.

Facts and Procedural History

In the fall of 1988, DePauw hired Price as the director of field experience and the director of the AV laboratory. Beginning in the spring of 1989, DePauw also employed Price on a year-to-year basis as a non-tenured part-time instructor for the field experience course, a half-credit course designed to prepare students for student teaching. Each year, Price received an appointment letter specifying her position, including her salary and benefits, for the upcoming academic year. For the 2000-2001 academic year, Price's salary was \$40,025.00. Appellant's App. at 727.

Enrollment in the field experience course declined over the years, from approximately twenty students to only four students for the 2001 spring semester. In May 2001, a student in the course complained to DePauw's Vice President for Academic Affairs Neal Abraham that Price had provided to her students a magazine described by Price as written "from a Christian

perspective” that Abraham viewed as “anti-gay literature[.]” *Id.* at 753, 755. Based on these and on additional concerns, Abraham decided to modify Price’s duties for the upcoming academic year.¹

On July 17, 2001, Abraham sent Price an appointment letter that reads in relevant part as follows:

In light of staffing needs and the most recent assessment of your performance, I offer you a three-quarter time, 10-month appointment as Education Program Coordinator, at a salary of \$31,225 for 2001-2001 [sic]...

....

You are expected to provide a quarterly activity report and performance self-assessment and Dr. Lee and I will provide formal responses to those reports.

Please indicate your acceptance of this position by signing and returning one copy of this letter.

Id. at 272. On that date, Price sent Abraham an e-mail acknowledging her receipt of the letter and seeking clarification of certain matters regarding the offer. Abraham responded via e-mail the following day. On July 18, 2001, Price signed the appointment letter. Price performed her duties and received her salary under the terms of the appointment letter for the entire academic year.

On April 17, 2002, Price filed suit against DePauw, Abraham, and DePauw’s trustees in Putnam Circuit Court. DePauw removed the case to federal court. On October 15, 2002, District Judge Richard L. Young granted the defendants’ motion to dismiss the first three

¹ In a letter to Price dated July 17, 2001, Abraham expressed his “serious” concerns regarding Price’s failure to read the aforementioned magazines “in detail” before providing them to her students and her solicitation of comments from students and “from teachers and administrators in the school districts” that “were critical of [her] faculty colleagues.” Appellant’s App. at 259, 260. This letter is not the appointment letter mentioned elsewhere in this opinion.

counts of Price's complaint and remanded the remaining counts to the Putnam Circuit Court.²

The case was subsequently venued to Clay Circuit Court.

On remand, Price added several counts to her complaint. On March 7, 2003, the trial court dismissed all counts except Count II, which alleged that the defendants had failed to follow university procedure as outlined in the DePauw University Academic Handbook ("the Handbook"). The trial court dismissed the trustees and Abraham as defendants. On April 23, 2003, Price filed a second amended complaint. In Count I, Price alleged that DePauw had failed to follow university procedure as outlined in the Handbook in removing her from her "previous titles, positions and duties" and reducing her salary. *Id.* at 97. In Count II, Price alleged that DePauw had failed to follow university procedure as outlined in the Handbook with respect to harassment, specifically by "failing to protect [her] 'religious and moral convictions' [.]" *Id.* at 99 (emphasis removed).

On July 28, 2003, DePauw filed a motion for summary judgment. On October 6, 2003, the trial court denied DePauw's motion with respect to Count I and granted the motion with respect to Count II. The trial court denied DePauw's motion to certify its order for interlocutory appeal. On October 31, 2003, a jury returned a verdict of \$10,401.00 for Price. This appeal ensued.

² Counts I and III alleged violations of 42 U.S.C. § 1983. Count II alleged that the defendants had created a hostile work environment in violation of 42 U.S.C. § 2000, also known as Title VII of the Civil Rights Act of 1964.

Discussion and Decision

In this appeal, we review the trial court's ruling on DePauw's motion for summary judgment.

When reviewing a grant or denial of a motion for summary judgment, we stand in the shoes of the trial court. Summary judgment is appropriate "if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ind. Trial Rule 56(C). A genuine issue of material fact exists when there is a dispute, or when undisputed facts are capable of supporting conflicting inferences, about an issue which would dispose of the litigation. Once the moving party demonstrates, prima facie, that there is no genuine issue of material fact as to any determinative issue, the non-moving party must come forward with contrary evidence. Upon appeal, we do not weigh the evidence, but rather we consider the facts in the light most favorable to the non-moving party. We may sustain the judgment upon any theory supported by the designated evidence.

Cox v. Town of Rome City, 764 N.E.2d 242, 245-46 (Ind. Ct. App. 2002) (some citations omitted).

I. Breach of Procedure Claim

By way of introduction, we note that

Indiana follows the doctrine of employment at will, under which employment may be terminated by either party at will, with or without reason. However, the at-will employment relationship may be converted to a relationship in which the employer may terminate the employee only for good cause. In order to achieve the termination-for-good-cause status, the employee must provide adequate independent consideration.

Wior v. Anchor Indus., Inc., 669 N.E.2d 172, 175 (Ind. 1996) (citation omitted).

In *Orr v. Westminster Village North, Inc.*, 689 N.E.2d 712 (Ind. 1997), our supreme court "re-affirm[ed] the validity of the employment-at-will doctrine in Indiana and the general rule that adequate independent compensation is necessary to convert an at-will

relationship into an employment relationship requiring an employer to discharge an employee for good cause.” *Id.* at 722. The *Orr* court also “decline[d] plaintiffs’ invitation to construe employee handbooks as unilateral contracts and to adopt a broad new exception to the at-will doctrine for such handbooks.” *Id.* In so doing, the court specifically reserved the question of “whether unilateral contracts in the employment context always require adequate independent consideration and whether an employee handbook can ever constitute a unilateral contract serving to modify the otherwise at-will employment relationship.” *Id.* at 719-20 (footnotes omitted).

Here, Price characterizes her breach of procedure claim as a “breach of contract claim based on the terms of [the Handbook].” Appellee’s Br. at 7. According to Price, her claim is premised on the notion that the Handbook “could create contractual rights” despite the fact that it is not mentioned in the appointment letter and is not an executed document. *Id.* at 18; *cf. Salcedo v. Toepp*, 696 N.E.2d 426, 435 (Ind. Ct. App. 1998) (“In the absence of anything to indicate a contrary intention, writings executed at the same time and relating to the same transaction will be construed together in determining the contract.”); *I.C.C. Protective Coatings, Inc. v. A.E. Staley Mfg. Co.*, 695 N.E.2d 1030, 1036 (Ind. Ct. App. 1998) (“Where a written contract refers to another instrument and makes the terms and conditions of such other instrument a part of it, the two will be construed together as the agreement of the parties.”), *trans. denied*. Even assuming, *arguendo*, that the Handbook was part of Price’s employment contract with DePauw, Price’s claim fails.

“Generally, equitable estoppel precludes a person from maintaining a position inconsistent with another position asserted at a previous time.” *Mason Metals Co. v. Ind.*

Dep't of State Rev., 590 N.E.2d 672, 676 (Ind. Tax 1992). More specifically, “[a] person cannot claim both under and against the same instrument[.]” 12 I.L.E. *Estoppel and Waiver* § 20 (2001) (citing *Keister v. Myers*, 115 Ind. 312, 17 N.E. 161 (1888), and *Bryant v. Barger*, 112 Ind. App. 17, 42 N.E.2d 429 (1942)). It is undisputed that Price accepted the terms of her appointment letter, performed her duties, and collected her salary and benefits; she cannot now be heard to complain that DePauw breached the terms of the Handbook.³ Accordingly, we reverse the trial court’s denial of DePauw’s motion for summary judgment on Price’s breach of procedure claim and enter judgment in DePauw’s favor.⁴

II. Religious Harassment Claim

For similar reasons, we affirm the trial court’s grant of summary judgment in favor of DePauw on Price’s religious harassment claim. In her second amended complaint, Price alleged that DePauw failed to comply with the harassment policy outlined in Section X of the Handbook’s personnel policies, i.e., DePauw “breached its agreement to keep her free from

³ Price contends that she “is not asserting against the letters of appointment. Instead, she is claiming that the decision to offer a reduced role was made based upon an improper reason and that she was denied procedural safeguards provided by the handbook during the decision making process.” Appellee’s Br. at 26. Price’s contention misses the mark in two important respects. We first observe that “[a] promisor’s motive for breaching [her] contract is generally regarded as irrelevant, as the promisee will be compensated for all damages proximately resulting from the breach.” *Epperly v. Johnson*, 734 N.E.2d 1066, 1073 (Ind. Ct. App. 2000). We further observe that Price’s claim is premised on her argument that the Handbook is part and parcel of her employment contract. See Appellee’s Br. at 20 (“Since the appointment letter and the [H]andbook deal with the same subject matter, employment, they should be construed together despite the appointment letter not referencing the [H]andbook.”). As such, Price cannot benefit under the terms of the appointment letter and then sue DePauw for breaching the terms of the Handbook. In other words, Price cannot have it both ways.

⁴ Our reversal of the trial court’s judgment on this issue necessitates the reversal of its award of costs to Price. Consequently, we need not address DePauw’s argument that the trial court abused its discretion in awarding postage and deposition transcript costs to Price.

religious harassment.” Appellee’s Br. at 44.⁵ Stated differently, Price “was demoted simply because of her religious beliefs.” Appellee’s Reply Br. at 14.

The fact remains, however, that Price chose to accept the purported demotion when she signed the appointment letter for the 2001-2002 academic year. In other words, the alleged breach of the Handbook was apparent *before* the contract was executed.⁶ To the extent that the breach may have continued thereafter, Price – having expressly ratified it – may not now complain of it. *Cf. Garard v. Yeager*, 154 Ind. 253, 259, 56 N.E. 237, 238 (1900) (“A person does not waive any right given by contract unless, with a full knowledge of all the material facts, he does, or forbears the doing of, something inconsistent with the right, or his intention to rely upon it.”). It is therefore unnecessary for us to determine

⁵ Section X reads in pertinent part:

DePauw University reaffirms the right of its students, faculty and all other employees to learn, teach, live and work in an environment free from harassment by any member of the DePauw community. Harassment includes conduct which denigrates or demeans an individual because of his or her race, gender, age, ethnic or religious origin or association, sexual orientation, or physical appearance or handicap. The form of such harassment may include verbal and physical conduct which involves an expressed or implied threat to personal safety, or has the purpose of reasonably foreseeable effect of interfering with an individual’s full and free participation in the educational or extracurricular life of the University. Such acts can create a hostile or intimidating working or educational environment that is damaging to individual dignity and sense of self-worth. Such conduct interferes with the process of teaching and learning, and violates the integrity of the University.

Appellant’s App. at 425.

⁶ Price does not specifically contend that the 2001-2002 appointment letter was a novation, i.e., “a new contract made with the intent to extinguish one already in existence.” *Columbia Club, Inc. v. Am. Fletcher Realty Corp.*, 720 N.E.2d 411, 423 (Ind. Ct. App. 1999), *trans. denied* (2000). In fact, Price acknowledged in her deposition that her appointments were “good for an academic year[.]” Appellant’s App. at 207. Even assuming, *arguendo*, that the appointment letter was a novation, our court “has held that, when an employer unilaterally changes agreed-upon employment terms, the employee may either (1) accept the changes and continue employment under the new terms or (2) reject the changes and quit work.” *Wheeler v. Balemaster, Div. of E. Chicago Mach. Tool Corp.*, 601 N.E.2d 447, 448 (Ind. Ct. App. 1992).

whether the Handbook could be used to create unilateral contractual rights separate and distinct from the employment contract itself.

Affirmed in part and reversed in part.

RILEY, J., and VAIDIK, J., concur.