IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

WILMA KNAPP	:	
v.	:	3:18-cv-01941-RDM
CONSULATE HEALTH CARE	:	

PLAINTIFF'S BRIEF IN OPPOSITION
TO DEFENDANT'S MOTION TO DISMISS

Wilma Knapp worked as a nurse at a nursing home owned by Consulate Health Care. Before selling the nursing home, Consulate unilaterally erased over 1,139 hours of leave time that Ms. Knapp had earned and accumulated over many years of dedicated service. Consulate did the same thing to Ms. Knapp's co-workers. So Ms. Knapp started this class action lawsuit, seeking to recover the erased leave time under the following theories: breach of contract; Pennsylvania Wage Payment and Collection Law ("WPCL"), 43 P.S. §§ 260.1, et seq.; promissory estoppel; and unjust enrichment. See generally Complaint (Doc. 1).

Consulate has moved to dismiss each of Ms. Knapp's four claims. See Docs. 6-7. As discussed below, the motion lacks merit and should fail. Moreover, even if the motion is meritorious, the proper remedy is an order permitting Ms. Knapp to re-plead, not outright dismissal. See Great Western Mining & Mineral Co. v. Fox Rothschild LLP, 615 F.3d 159, 174 (3d Cir. 2010); Phillips v. County of Allegheny, 515 F.3d 224, 236 (3d Cir. 2008).

I. FACTS

At the motion to dismiss stage, "a court 'take[s] as true all the factual allegations in the Complaint and the reasonable inferences that can be drawn from those facts.'" Lomma v. Ohio National Life Assurance Corp., 283 F. Supp. 3d 240, 247 (M.D. Pa. 2017) (Mariani, J.) (quoting Ethypharm S.A. France v. Abbott Laboratories, 707 F.3d 223, 231 n.14 (3d Cir. 2013)). Here, Ms. Knapp's complaint alleges the following pertinent facts:

> 6. During all relevant times, Defendant operated a nursing home located at 990 Medical Road, Millersburg, PA 17061, called "The Manor at Susquehanna Village," and referred to herein as "the Millersburg Facility."
>
> 8. Defendant issued to each Millersburg Facility employee the Employee Guidebook attached as Exhibit A. This Employee Guidebook provided employees "with a general overview of the policies of Consulate Health Care." Exhibit A at p. 1. Defendant "tried to make th[e] guidebook as complete as possible," id., and told employees to "familiarize [themselves] with its content without delay," id. Defendant instructed: "All employees are responsible for reading the material contained in this guidebook." Id.
>
> 9. Defendant's Employee Guidebook informed employees of Defendant's sick leave policies. See Exhibit A at p. 24. As stated in the Employee Guidebook: "Sick leave is accrued at a rate equal to 10 days per year, there is no maximum cap for the number of sick days employees may carry-over and earn." Id.
>
> 10. Defendant's Employee Guidebook also informed employees of Defendant's vacation leave policies. See Exhibit A at p. 23. As stated in the Employee Guidebook: "You may carry over unused vacation days up to a maximum of two times your annual accrual amount." Id.
>
> 11. Each pay period, Defendant issued to each Millersburg Facility employee a pay stub that listed, *inter alia*, the aggregate number of sick leave and vacation leave hours earned by and available to the employee.
>
> 12. Plaintiff was employed by Defendant as a nurse at the Millersburg Facility.
>
> 14. Plaintiff, like other employees at the Millersburg Facility, received the Employee Guidebook and earned, accumulated, and used sick and vacation

leave time according to the policies described in the Employee Guidebook.

15. As of mid-September 2017, Plaintiff had earned and accumulated 1,019 hours of sick leave and 120 hours of vacation leave. These leave hours, which were described on Plaintiff's pay stub, resulted from many years of dedicated service and sacrifice and carried a monetary value of approximately $30,365.74 ($26.66 X 1,139 hours).

16. Throughout her employment, Plaintiff reasonably understood that her earned leave time would accumulate in the manner described in the Employee Guidebook. This reasonable understanding was corroborated by the tally of aggregate earned leave time appearing on her pay stubs and by Defendant's actual course of conduct in administering the leave time program. Year after year, Plaintiff worked in reliance of this reasonable understanding. For example, Plaintiff did not pursue other employment opportunities because changing employers would result in the loss of many years of earned leave time that she understood would be available to her in a time of need.

17. In 2017, Defendant informed Plaintiff and other Millersburg Facility employees that their earned and accumulated leave time was being eliminated in order to facilitate Defendant's sale of the Millersburg Facility to a nursing home company called Priority Healthcare Group. Just like that, Plaintiff's 1,139 hours of leave time was summarily and unilaterally wiped-out. The same thing happened to thousands more hours earned and accumulated by Plaintiff's co-workers. No consideration was offered or paid.

18. Upon information and belief, Defendant's unilateral elimination of employees' earned and accumulated leave time enabled Defendant to sell the Millersburg Facility for a purchase price that was hundreds of thousands of dollars greater than the price that would have been realized had Defendant's leave time liabilities been honored.

II. ARUMENT

The above factual allegations are sufficient to state a claim for breach of contract, violations of the PWPCL, promissory estoppel, and unjust enrichment.

A. The applicable standard of review is well-known.

In Lomma, supra, Your Honor cogently described the standard of review applicable to motions to dismiss. Ms. Knapp adopts this description as her own.

B. Ms. Knapp's "at-will" employment status is irrelevant.

Consulate's arguments against Ms. Knapp's breach of contract claim emphasizes that Ms. Knapp was an "at-will" employee, see generally Doc. 7 at 3-6, and its supporting authority consists exclusively of decisions in which "at-will" employees challenge the *termination* of their employment, see Carlson (cited at p. 3); McLaughlin (cited at p. 3); McNichols (cited at p. 3); Preobrazhenskaya (cited at p. 3); Scott (cited at p. 4); Mercante (cited at p. 4); Rossi (cited at p. 4); DiBonaventura (cited at p. 4); Lutheran (cited at p. 6).

Consulate's "at-will" argument misses the mark. "Employment at-will" is employment that "may be terminated at any time, by either the employer or the employee, without cause." Black's Law Dictionary, 9th Ed. (West 2009). But that does not mean an "at-will" employee cannot also enjoy contractual rights to wages and benefits accrued during the course of her employment.

The above principle is demonstrated by many decisions in which courts permit "at-will" employees to sue for wages and benefits under Pennsylvania contract law. Here are a few examples:

In Bertolino v. Controls Link, Inc., 2014 U.S. Dist. LEXIS 145983 (W.D. Pa. Oct 14, 2014), an employee, who was issued an Employee Handbook designating him as an "at-will" employee, asserted breach of contract and PWPCL claims when the employer failed to pay him for all of hours worked. See id. at *1-

6. Judge Lenihan explained that the employee's "at-will" status was irrelevant to the claim for unpaid wages: "while an employer may permissibly discharge an at-will employee at any time, the at-will doctrine does not relieve the employer of its contractual obligation to provide the compensation promised in return for the employee's services." Id. at *12 (citing Braun v. Wal-Mart Stores, Inc., 24 A.3d 875 (Pa. Super. 2011)).

In Kotlinski v. Mortgage America, Inc., 40 F. Supp. 2d 298 (W.D. Pa. 1998), an "at-will" employee alleged that she was owed certain commission payments pursuant to an "oral employment agreement" with her employer. Id. at 307. Judge Ambrose explained that the claim for unpaid commissions "is not inconsistent with" the employee's "at-will" status because the notion of "at-will" employment "does not address issues of compensation for work completed prior to an employee's termination." Id.

In Pilkington v. CGU Insurance Co., 2001 U.S. Dist. LEXIS 3668 (E.D. Pa. Feb. 12, 2001), an "at-will" employee asserted a contractual right to "accrued bonus monies." Id. at *20. The employer responded "that as an at-will employee who could be fired for any reason at any time, plaintiff cannot maintain a breach of contract claim." Id. Judge Waldman rejected this argument, explaining that nothing prevents "at-will" employees from accruing implied contractual rights that are "incidental or collateral to at-will employment." Id. at *22.

Finally, in Miller v. Cerebian Biotech Corp., 2016 U.S. Dist. LEXIS 154597 (E.D. Pa. Nov. 8, 2016), an 'at-will" employee claimed she had an implied contractual right to be paid a specific salary for her work. See id. at *1-4. Judge O'Neill explained that the employee's "at-will" status did not prevent her from pursuing breach of contract and WPCL claims: "While a contract of employment is presumed to be terminable at will by either party absent a specification of definite duration, . . . the existence of an at-will contract does not negate a finding of an employment agreement for purposes of the WPCL." Id. at *18.

C. Consulate's view of Pennsylvania contract law is overly-restrictive and incorrect.

Consulate asserts that Ms. Knapp's breach of contract claim is doomed unless she demonstrates that the Employee Guidebook, standing alone, constitutes a formal written contract. As discussed below, this viewpoint is incorrect.

In the workplace setting, an employee's "contractual" right to particular pay or benefits can be established through a variety of express agreements, implied agreements, verbal agreements, and agreements arising from a course of conduct. "While a contractual obligation to compensation is needed, the need for an explicit formal written agreement has been chipped away, if it ever existed." Drummond v. Herr Foods Inc., 2014 U.S. Dist. LEXIS 2409, *10-11 (E.D. Pa. Jan. 9. 2014).[1]

[1] See Nagle v. Comprehensive Women's Health Services, P.C., 2018 U.S. Dist. LEXIS 9722, *48 (M.D. Pa. Jan. 19, 2018) (contractual right to fringe benefits "can reasonably be inferred from the facts and circumstances of the employment relationship"); Deron v.

Consistent with the above, Pennsylvania courts repeatedly observe that employees may accrue contractual rights through the *combination* of unsigned policy documents – such as employee manuals, handbooks, and guidelines – and other extrinsic evidence. In this regard, Judge Vanaskie's opinion in Masterson v. Federal Express Corp., 2008 U.S. Dist. LEXIS 76054 (M.D. Pa. Sept. 26, 2008), is instructive. There, a group of employees brought a breach of contract/WPCL claim asserting that their employer, FedEx Express, required them to perform unpaid work before and after their scheduled shifts. See id. at *1-6. In support of this claim, the employees referenced their Employee Handbook, which stated that "'[i]t is the policy of FedEx Express to compensate employees for all time worked.'" Id. at *6. FedEx responded that the Handbook wan not a contract. See id. at 2-13. Judge Vanaskie agreed that the Handbook, standing alone, did not form a contract. But he disagreed that dismissal was required:

> The Employee Handbook is not the sole basis for the alleged contract, but a factor contributing to the Plaintiffs' understanding of their employment agreement. In other words, the provision in the Employee Handbook stating FedEx Express' policy to compensate employees for all time worked provides a basis for Plaintiffs' expectation of the terms of employment. As such, the handbook is relevant, but not a *sine qua non* of the existence of the contractual obligation posited by Plaintiffs. . . . Plaintiffs have sufficiently alleged that they believed they would be paid for all hours worked, but that

SG Printing, Inc., 2012 U.S. Dist. LEXIS 125196 (M.D. Pa. Sept. 4. 2012) (employee pled breach of contract/PWPCL claim notwithstanding lack of any written documents); 18 KT.TV, LLC v. Entest Biomedical, Inc., 2011 U.S. Dist. LEXIS 128453, *12-13 (M.D. Pa. Nov. 7, 2011) (discussing "implied in fact contracts" in employment context).

> FedEx Express has failed to do so. There is at least an inference, which must be drawn in Plaintiffs' favor, that FedEx Express breached its contract with its employees.

Id. at *13-15.

Similarly, in Caucci v. Prison Health Services, Inc., 153 F. Supp. 2d 605 (E.D. Pa. 2001), Judge Padova observed that, standing alone, an Employee Handbook did not create a contract. See id. at 611. Yet, the Handbook could manifest a contractual agreement when combined with other evidence:

> Notwithstanding this, provisions in a handbook or manual can constitute a unilateral offer of employment which the employee accepts by the continuing performance of his or her duties. A unilateral contract is a contract wherein one party makes a promissory offer which calls for the other party to accept by rendering a performance. In the employment context, the communication to employees of certain rights, policies and procedures may constitute an offer of an employment contract with those terms. The employee signifies acceptance of the terms and conditions by continuing to perform the duties of his or her job; no additional or special consideration is required. Thus, the provisions comprising the unilateral contract may be viewed as "a contract incidental or collateral to at-will employment." An employer who offers various rewards to employees who achieve a particular result or work a certain amount of overtime, for example, may be obligated to provide those awards to qualifying employees, although retaining the right to terminate them for any or no reason.

Id. (internal citations omitted).

Masterson and Caucci are just two examples of the many employment rights cases in which Pennsylvania judges find contractual obligations based on the *combination* of corporate policy documents plus other extrinsic evidence. Other

cases include: Kemmerer v. ICI Americas, Inc., 70 F.3d 281, 284-88 (3d Cir. 1995) (contractual right to deferred compensation based on "executive deferred compensation plan" combined with course of conduct evidence); Bertolino, 2014 U.S. Dist. LEXIS 145983, at *9-12 (contractual right based on representations in Employee Handbook combined with employee's performance in reliance on Handbook provisions); Euceda v. Millwood, Inc., 2013 U.S. Dist. LEXIS 120515, *13 (M.D. Pa. Aug. 26, 2013) (employee sufficiently pled a wage agreement even though, standing alone, wage "notice" document attached to his complaint was "insufficient to create a binding contract"); Pilkington, 2001 U.S. Dist. LEXIS 3668, at *1-3, 20-25 (contractual right to bonus payments based on representations in "Information Systems Staff Retention Program" document combined with employee's performance of work in reliance on such representations); Braun, 24 A.3d at 939-44 (contractual right to be paid during breaks based on representations in employee handbook combined with verbal remarks and course of conduct evidence); Bauer v. Pottsville Area Emerency Medical Services, Inc., 758 A.2d 1265, 1267-69 (Pa. Super. 2000) (contractual right to "full-time" wages and benefits after probationary period based on representations in employee handbook and employee's continued performance in reliance on such representations).

In sum, Ms. Knapp can assert a breach of contract/PWPCL claim even if her Employee Guidebook, standing alone, is not a contract.

D. Ms. Knapp adequately pleads breach of contract.

Under the above principles, Ms. Knapp easily states a claim for breach of contract. First, as in Masterson, Consulate's Guidebook is "a factor contributing to the Plaintiffs' understanding of their employment agreement." Masterson, 2008 U.S. Dist. LEXIS 76054, at *13. In particular, the Guidebook was presented to Ms. Knapp as "a general overview of the policies of Consulate" that was "as complete as possible." Complaint at ¶ 8. Consulate instructed Ms. Knapp to "familiarize [herself] with [the Guidebook's] content without delay." Id. Consulate further instructed: "All employees are responsible for reading the material contained in this guidebook." Id.

Second, the Guidebook specifically described Consulate's leave time policies. Regarding sick leave, the Guidebook stated: "Sick leave is accrued at a rate equal to 10 days per year, *there is no maximum cap for the number of sick days employees may carry-over and earn*." Complaint at ¶ 9 (emphasis supplied). Regarding vacation leave, the Guidebook stated: "*You may carry over* unused vacation days up to a maximum of two times your annual accrual amount." Id. at ¶ 10 (emphasis supplied) [2]

[2] Consulate asserts that this language does not apply because Ms. Knapp's employment was "terminated." See Doc. 7 at 5-6. This is wrong. Ms. Knapp's employment was never "terminated." On the contrary, Consulate erased Ms. Knapp's leave time before selling the nursing home and while Ms. Knapp was still employed by Consulate. See Complaint at ¶ 17. Moreover, even if Ms. Knapp's leave time was erased after the sale, Defendant fails to explain why Ms. Knapp's transition from Consulate to the successor employer should constitute a "termination" under the Guideline's policy language.

Third, the Guidebook's representations about the earning and accumulation of leave time were consistently and repeatedly reinforced throughout the course of Ms. Knapp's employment. In particular, over the years, Ms. Knapp and her co-workers "earned, accumulated, and used sick and vacation leave time according to the policies described in the Employee Guidebook." Complaint at ¶ 14.

Fourth, Consulate repeatedly presented Ms. Knapp and her co-workers with paystubs that documented the accumulation of leave time without limitation. See Complaint at ¶¶ 11, 15.

Fifth, Ms. Knapp continued to work for Consulate in reliance on Consulate's representation that leave time would be earned and accumulated in the manner described in the Guidebook and reflected on the paystubs. In particular:

> Throughout her employment, Plaintiff reasonably understood that her earned leave time would accumulate in the manner described in the Employee Guidebook. This reasonable understanding was corroborated by the tally of aggregate earned leave time appearing on her pay stubs and by Defendant's actual course of conduct in administering the leave time program. Year after year, Plaintiff worked in reliance of this reasonable understanding. For example, Plaintiff did not pursue other employment opportunities because changing employers would result in the loss of many years of earned leave time that she understood would be available to her in a time of need.

Complaint at ¶ 16.

Viewed in combination, the above allegations plead an enforceable agreement under the "implied" or "unilateral" contract principles described in Section II.C above. Indeed, Pennsylvania judges have denied motions to dismiss

in other cases in which the plaintiffs asserted far less than Ms. Knapp.[3]

E. Ms. Knapp adequately pleads a WPCL claim.

Consulate correctly observes that Ms. Knapp's WPCL claim must be based on a contractual right to her accumulated leave time. See Doc. 7 at 6 (citing Weldon v. Kraft, Inc., 896 F.2d 793, 801 (3d Cir. 1990)). Consulate then argues that dismissal of the contract claim is fatal to the WPCL claim. See id. at 6-7.

Of course, the inverse is equally true: the survival of Ms. Knapp's contract claim ensures the survival of her WPCL claim. Thus, since Ms. Knapp has adequately pled a contractual right to her accumulated leave time, see Section II.D supra, dismissal of her WPCL claim is not warranted.[4]

F. Ms. Knapp adequately pleads promissory estoppel.

The promissory estoppel doctrine "allows the court to enforce a party's

[3] See, e.g., Pleickhardt v. Major Motors of Pennsylvania, Inc., 2017 U.S. Dist. LEXIS 153963, *12-14 (M.D. Pa. Sept. 21, 2017) (employee pled contractual right to full weekly salary during final week of employment by alleging that she had been paid full salary during all previous weeks. See id. at *12-14 Schupack v. Marketvision Research, Inc., 2017 U.S. Dist. LEXIS 100886, *4-8 (E.D. Pa. June 29, 2017) (employee pled contractual right to wages by alleging that she performed work in expectation of payment and notified employer that she sought such payment); Rapczynski v. DIRECTV, LLC, 2016 U.S. Dist. LEXIS 34833, *27-28 (M.D. Pa. Mar. 17, 2016) (Mariani, J.) (purported employees pled a contractual entitlement to wages by merely alleging that they "fulfilled DIRECTTV work orders," which was "sufficient to imply 'a promise to pay the reasonable value of the service' performed"); Oxner v. Cliveden Nursing & Rehabilitation Center PA, L.P., 2015 U.S. Dist. LEXIS 124470, *5-11 (E.D. Pa. Sept. 17, 2015) (employee pled contractual right to wages by asserting that she performed unscheduled work per supervisor's instruction and her expectation of payment).

[4] Consulate's WPCL argument references Giuliani v. Polysciences, Inc., 275 F. Supp. 3d 564 (E.D. Pa. 2017). This case is distinguishable because (i) the corporate policy document relied on by Mr. Giuliani was ambiguous regarding the bonus pay and leave time that he sought and (ii) Ms. Giuliani failed to assert any facts outside of the corporate policy document. See id. at 577-79. Ms. Knapp's complaint does not suffer from either deficiency.

promise that is unsupported by consideration where (1) the promisor makes a promise that he reasonably expects to induce action or forbearance by the promisee, (2) the promise does induce action or forbearance by the promisee, (3) and injustice can only be avoided by enforcing the promise." Carlson v. Arnot-Ogden Memorial Hospital, 918 F.2d 411, 416 (3d Cir. 1990).

Consulate argues that Ms. Knapp's promissory estoppel claim must fail because she was an "at-will" employee. See Doc. 7 at 8-9. This is the same approach that Consulate took in arguing against Ms. Knapp's breach of contract claim. See Section II.B supra. Once again, Consulate's brief relies on cases in which "at-will" employees challenge the *termination* of their employment. See Doc. 7 at 9 (citing Dyche, Bair, Denillo, and Geiger. As with the breach of contract claim, these wrongful termination cases are inapplicable because, although "at-will" employees may be terminated without cause, they still may enjoy ancillary rights to wages and benefits accrued during the court of their employment. See Section II.B supra (citing cases).

Consulate also argues that its promises to Ms. Knapp regarding leave time were not sufficiently "clear and unambiguous" to support a promissory estoppel claim. See Doc. 7 at 9-10. This argument should fail. The promissory estoppel doctrine merely requires "a promise that [the promisor] reasonably expects to induce action or forbearance by the promisee," Carlson, 918 F.2d at 416, and such

a promise can be created by "[m]isleading words, conduct, or silence," Thomas v. E.B. Jermyn Lodge No. 2, 693 A.2d 974, 977 (Pa. Super. 1997). Thus, in Arasi v. Neema Medical Services, Inc., 595 A.2d 1205 (Pa. Super. 1991), the Superior Court found that, although the employee's written contract did not give her the right to wages earned during certain weeks, she could assert a promissory estoppel claim based on an "oral understanding" that she would be paid and the employer's "silence" during the weeks in which she performed work. Likewise, in Bootel v. Verizon Directories Corp., 2004 U.S. Dist. LEXIS 12240 (E.D. Pa. June 25, 2004), an employee adequately pled promissory estoppel based on management's "oral representations" that encouraged her to "keep selling" and management's "silence" in the wake of her continued work. See id. at *32-33.

Here, Ms. Knapp has alleged that Consulate's promise that she could "carry over" her leave time without any "maximum cap" was clearly set forth in the Guidebook and then reinforced throughout her actual employment. See Section II.D supra (summarizing allegations). Under Arasi, Bootel, and the above legal principals, these allegations are sufficient to establish a promise.

Finally, Consulate argues that Ms. Knapp fails to allege that she relied on Consulate's leave time promises. See Doc. 7 at 10-11. This argument ignores the straightforward allegations of reliance in paragraph 16 of Ms. Knapp's complaint. Consulate is not allowed to ignore such allegations at the pleadings stage.

G. Ms. Knapp adequately pleads unjust enrichment.

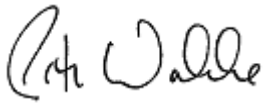
In opposing the unjust enrichment claim, Consulate argues that Ms. Knapp has not alleged that she "conferred a benefit" on Consulate. See Doc. 7 at 11-14. This argument cannot be squared with Ms. Knapp's allegation that Consulate erased ***over 1,139 hours*** of leave time (carrying a monetary value of $30,365.74) that Ms. Knapp earned and accumulated over many years of dedicated service. See Sections I and II.B supra. Assuming an 8-hour workday, these 1,139 hours represent over 20 weeks of labor by Ms. Knapp and over 20 weeks of leave time liability for Consulate. Courts routinely find that the benefits of an employee's labor can support an unjust enrichment claim. See, e.g., Dean v. CVS Pharmacy, Inc., 2017 U.S. Dist. LEXIS 143506, *16-18 (E.D. Pa. Sept. 6, 2017); 18 KT.TV, LLC, 2011 U.S. Dist. LEXIS 128435, at *15-18.

III. CONCLUSION

For all the above reasons, Consulate's motion to dismiss should be denied.

Dated: December 7, 2018

Respectfully,



Peter Winebrake
R. Andrew Santillo
Mark J. Gottesfeld
Winebrake & Santillo, LLC
715 Twining Road, Suite 211
Dresher, PA 19025
(215) 884-2491