

IN THE CIRCUIT COURT OF CLAY COUNTY, WEST VIRGINIA

WANDA KEENER and KATHERINE ASBURY,
Plaintiffs,

v.

**CLAY COUNTY DEVELOPMENT
CORPORATION,**
Defendant.

Case No. 18-C-6
Judge Richard A. Facemire

ORDER

This matter is before the Court upon the Defendant Clay County Development Corporation's Motion for Summary Judgment. The Court heard the arguments of counsel, and then ordered counsel to submit proposed findings of fact and conclusions of law for the Court's consideration, which counsel did file. The Court, after reviewing the pleadings and record in this case, shall GRANT the Defendant's Motion for Summary Judgment. The Court makes the following findings of fact and conclusions of law:

1. This matter arises out of claims of discrimination in violation of the West Virginia Human Rights Act and breach of an implied contract, resulting in the Plaintiffs' discharge from their employment with Defendant Clay County Development Corporation (CCDC).
2. The CCDC (n/k/a Clay Senior and Community Services), is a non-profit organization that provides relevant and appropriate services to Clay County, West Virginia's, senior citizen population. CCDC provides in-home and community-based services through federal and state monies, including Medicaid and various grants.
3. Plaintiff Wanda Keener, worked at Defendant, CCDC for thirty years in several different positions, ultimately working as a filing clerk for the past twenty years. Plaintiff Katherine Asbury worked at CCDC for forty-six years, also in several different

positions, but ultimately working as the 3B Project Director for the past forty years. Plaintiff Keener received no disciplinary action at any point during her employment with Defendant CCDC. Plaintiff Asbury received no disciplinary action at any point during her employment with Defendant CCDC.

4. On or about the 14th day of November 2016, Pamela Ramsey Taylor, then the CCDC Director, made a Facebook post stating as follows: “It will be refreshing to have a classy, beautiful, dignified First Lady in the White House [referring to former First Lady Melania Trump]. I’m tired of seeing an Ape in heels [referring to former First Lady Michelle Obama].” This Facebook post became notorious as it went viral and spread throughout American media, bringing negative attention to West Virginia as a whole and Clay County in particular. Plaintiffs are the sisters of Pamela Taylor.
5. As a result of the social media post made by Pamela Taylor, she was suspended and ultimately discharged as an employee of CCDC.
6. It is undisputed that Plaintiffs were born and raised in the United States, are Caucasian, complain of no disabilities, and were employed by the CCDC for several years in administrative roles.
7. Plaintiffs were involuntarily separated from employment and provided a letter dated December 22, 2016, notifying them about the CCDC Board of Directors’ decision to terminate their at-will employment with the CCDC, effective immediately. Further, the letter stated, “Your dismissal is in line with our at will termination policy.”
8. Plaintiffs assert that they were improperly discharged from employment premised on ancestry discrimination due to their familial status with the former CCDC Director

(Pamela Taylor), or alternatively, that the CCDC breached an implied contract for employment established by the CCDC's policy and procedure manual.

9. Defendant CCDC asserts that the Plaintiffs were not members of a protected class under the West Virginia Human Rights Act, Plaintiffs were at-will employees, and that the CCDC's policy and procedural manual does not create an implied contract for employment.
10. Plaintiffs acknowledged in their depositions that they were not discriminated against on the basis of their race, religion, color, sex, age, blindness, or disability.
11. The Court is presented with two separate policy and procedure guidelines or handbooks: (1) the handbook that was newly adopted on December 21, 2016; and (2) the policy that existed prior to the December 21, 2016, adoption of the newer policy, which is identified as the Clay County Development Corporation Guide ("Guide").
12. Plaintiffs argue that the newer adopted policy and procedures were not properly adopted pursuant to the CCDC's bylaws, and therefore, inapplicable to the issues raised in this matter.
13. While the Defendant argues that the newer adopted policy and procedures were properly adopted, it concedes that CCDC employees, and in particular the Plaintiffs, were not provided with the new policy and procedures sufficiently in advance of their termination from employment. So, the Court will assess the issues related to breach of implied contract under the older Clay County Development Corporation Guide.
14. Defendant CCDC presented the affidavit of Leslie McGlothlin, CCDC Interim Executive Director, who served in that capacity at all times material to this case.

15. Mrs. McGlothlin averred that, at year end of 2016 and beginning of 2017, the CCDC suffered from a large financial debt as a result of unpaid payroll taxes with associated penalties and interest, Medicaid reimbursements due to overpayment, and various outstanding bank loans. Further, the CCDC debt amount exceeded Two Hundred Fifty Thousand Dollars (\$250,000.00), and at year end of 2016, did not have sufficient funding to cover its ongoing payroll obligations.
16. Mrs. McGlothlin's affidavit further stated that Plaintiffs were the highest paid non-professional employees at CCDC with a combined total salary in excess of One Hundred Fifteen Thousand Dollars (\$115,000.00) per year.
17. It is also set forth in the McGlothlin affidavit that neither of Plaintiffs' employment positions were replaced, and their job duties were absorbed by other employees.
18. The information provided in the McGlothlin affidavit was confirmed by the CCDC's corporate representative (current Executive Director, Stephanie Duffield) in a 30(b)-deposition taken by Plaintiffs.
19. Plaintiffs presented no evidence or countervailing affidavit to contradict the sworn statements of the CCDC Interim Executive Director or the CCDC's corporate representative related to the financial condition of the CCDC or replacement hires for Plaintiffs' former positions.
20. With respect to the Plaintiffs' breach of implied contract claim, the Court has been presented with a copy of the Guide that was produced by the Plaintiffs in discovery.
21. While the parties disagree on its significance to the ultimate resolution related to the formation of an implied contract of employment, it is undisputed that printed on the bottom of page three of the Guide is the following disclaimer: "*Note-Receipt of this

Employment Manual does not constitute an employment contract with this agency.” It is further undisputed that this disclaimer is contained nowhere else within the Guide.

22. The Guide includes a disciplinary procedure process that is used when incidents of employee performance or behavior show failure to comply with rules and regulations for agency operation, failure to meet job description or assigned duties, and failure to comply with orders of a superior.
23. Plaintiffs contend that this disciplinary procedure prohibits the CCDC or its Board of Directors from discharging employees unless it strictly adheres to the progressive discipline procedures contained within it. In other words, Plaintiffs assert that no CCDC employee could be discharged from employment without first subjecting the employee to the progressive discipline process.
24. According to Plaintiffs, because the Guide created a progressive disciplinary procedure, an implied contract for employment was formed with each employee, altering their presumed at-will employment status.
25. However, Defendant correctly points out that the Guide provides multiple instances that authorize the CCDC to discharge an employee for reasons other than those that would trigger the use of the disciplinary procedures:
 - (a) New employees are subject to a probationary period at the conclusion of which the employee can be discharged;
 - (b) There is specific language in the Guide which states that there is “no guarantee of employment beyond a grant period;” and

- (c) There are express terms that authorize CCDC to involuntarily discharge an employee when there is insufficient funding, a reorganization occurs, or discontinuation of a particular position or area of service.
26. The Guide contains no terms that reasonably can be construed to promise job security to the Plaintiffs.
27. Further, the Guide provides for two classifications of involuntary termination. The first is Positive Dismissal, defined as termination “based on circumstances beyond the employee’s control.” The second is Negative Dismissal which is based upon behavior that is controlled by the employee.
28. The Defendant CCDC admits that the Plaintiffs were not discharged based upon their failure to comply with rules and regulations for agency operation, failure to meet job description or assigned duties, or failure to comply with orders of a superior. In other words, Plaintiffs’ discharge was unrelated to any conduct that would trigger the disciplinary process, or a Positive Dismissal.
29. The affidavit of Leslie McGlothlin and deposition testimony of Stephanie Duffield, CCDC’s corporate representative indicate that the CCDC was insufficiently funded at the time of the Plaintiffs’ discharge.
30. It is unrefuted that the Plaintiffs’ positions were discontinued, and their job duties and responsibilities were absorbed by remaining CCDC employees.
31. With respect to the Plaintiffs’ claim of discrimination in violation of the West Virginia Human Rights Act. In their Complaint they allege that their termination, “violates the prohibition against discrimination based upon ancestry set forth in W.Va. Code § 5-11-9(2) and a violation of the public policy of the state of West Virginia to provide its

citizens equal opportunity for employment without regard to ancestry or familial status. W.Va. Code § 5-11-2.” Plaintiffs argue that employees cannot be discharged from employment based on their familial status, or in this case, being the sisters of the former CCDC Director Pamela Taylor.

32. In support of their claims, Plaintiffs assert that leading up to their discharge, they were interviewed and questioned about their relationship with their sister. Plaintiffs believe that this questioning is evidence of the CCDC’s intent to discharge them because of their familial relationship.
33. The interviews of the Plaintiffs were conducted by Robert Roswall, Commissioner of the West Virginia Bureau of Senior Services, who was appointed by the Governor and is the chief administrative officer and oversees all program and fiscal operations of that state agency. Mr. Roswall and his staff are not employees of the CCDC, and were conducting interviews in December of 2016 as part of the West Virginia Bureau of Senior Services’ monitoring and investigation of the CCDC.
34. W.Va. Code § 5-11-2 states: “It is the public policy of the state of West Virginia to provide all of its citizens equal opportunity for employment...Equal opportunity in the areas of employment and public accommodations is hereby declared to be a human right or civil right of all persons without regard to race, religion, color, national origin, ancestry, sex, age, blindness or disability.”
35. The statute further states: “Equal opportunity in *housing accommodations* or *real property* is hereby declared to be a human right or civil right of all persons without regard to race, religion, color, national origin, ancestry, sex, blindness, disability, or familial status (emphasis added).”

36. The Plaintiffs argue that they were discharged based on their familial status. The Court is called upon to determine if the Plaintiffs' familial status (sisterhood with Pamela Taylor) falls under the auspices of ancestry as a protected class under the Human Rights Act.
37. The term "ancestry" is not defined by either the West Virginia Human Rights Act or Title VII of the Civil Rights Act of 1964.
38. This issue was partially addressed by Judge Chambers in *Billiter v. Jones*, 2020 WL 118595 (S.D. W.Va. Jan. 9, 2020). In this case the plaintiff was an employee of the Mason County Circuit Clerk's office, she was terminated by the newly elected circuit clerk, because the new circuit clerk was a political rival of the plaintiff's mother. The plaintiff alleged she was discriminated against due to her "familial status." In the *Billiter* case, Judge Chambers found that familial status under the West Virginia Human Rights Act is applicable only to equal opportunity in housing accommodations, and not applicable to employment cases. However, Judge Chambers did at the time of that ruling leave open the issue of whether ancestry includes lineage or familial status.
39. In a subsequent ruling in the *Billiter* litigation, 2020 WL 564901 (S.D. W.Va. Sept. 22, 2020), Judge Chambers granted the Defendants' motion for summary judgment as it related to the Plaintiff's claim of employment discrimination based upon ancestry. The Court noted that, "West Virginia's Human Rights Act does not define the word 'ancestry,' nor does any decision of the West Virginia Supreme Court of Appeals."
40. "The Court does not believe that the including of 'ancestry' in the Human Rights Act is merely redundant or meaningless. *Barefoot v. Sundale Nursing Home*, 457 S.E.2d 152 (W.Va. 1995) and *Fairmont Specialty Services v. West Virginia Human Rights*

Commission, 522 S.E.2d 180 (W.Va. 1990) suggest that ancestry is a meaningful part of the act. Discrimination based on ancestry means discrimination based on some type of characteristic like race, ethnicity, or national origin that is passed down by lineal ascendants.”

41. In the *Barefoot* case, ancestry was used to describe the plaintiff’s Native American heritage. In the *Fairmont Specialty Services* case, it was used in relation to the party’s Mexican ancestry.
42. Judge Chambers in the second *Billiter* ruling found that the discrimination that the plaintiff was alleging because of her relationship to her mother was not actionable.
43. “The crux of Billiter’s claim is that Jones terminated her because of her and her mother’s political affiliation. This is simply not the kind of innate characteristic that anti-discrimination laws like the West Virginia Human Rights Act were enacted to protect. To whatever extent it has been argued, and even conceded that terminating an employee because the employer does not like her mother or father—or because the employer does not like her mother’s political actions—may be improper or wrong, it is improper because civilized society looks down upon it, not because the law forbids it.”
Billiter v. Jones, 2020 WL 564901 (S.D. W.Va. Sept. 22, 2020)
44. In 1987, the United States Supreme Court reviewed the legislative history involving civil rights employment discrimination in the context of ancestry and concluded that Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics. “Such discrimination is racial discrimination that Congress intended to

forbid, whether or not it could be classified as racial in terms of modern scientific theory.” *Saint Frances College v. Al-Khazraji*, 481 U.S. 604, 613 (1987).

45. Other jurisdictions have found that ancestry discrimination is identical as a factual matter to discrimination based on ethnicity or national origin. *Nnadozie v. Genesis HealthCare Corp.*, 730 F. Appx. 151, 157 (4th Cir. 2018).
46. The Second Circuit Court of Appeals, similarly, ruled that racial discrimination includes discrimination based on ancestry or ethnic characteristics. *Vill. of Freeport v. Barrella*, 814 F.3d 594 (2d Cir. 2016).
47. The Court finds that ancestry discrimination does not include discrimination based upon a family relationship. Ancestry has a broader meaning than just a relationship to one specific other person. The Plaintiffs’ claim that they were terminated because of their family relationship with their sister is not an actionable claim under the W.Va. Human Rights Act, and the Court GRANTS the Defendant summary judgment on this issue.
48. Plaintiffs allege that the handbook (Clay County Development Corporation Guide) they worked under for the entirety of their employment with the CCDC constitutes an implied contract which was breached when they were terminated by the Defendant without the Defendant following the progressive discipline policies set forth therein.
49. “In the absence of other evidence, West Virginia law presumes that employment is at-will.” *Eaton v. City of Parkersburg*, 198 W.Va. 615, 619 (1996). “As a general rule, West Virginia law provide that the doctrine of employment-at-will allows an employer to discharge an employee for good reason, no reason, or bad reason without incurring

liability unless the firing is otherwise illegal under state or federal law.” *Williams v. Precision Coil, Inc.*, 459 S.E.2d 329, 340 (W.Va. 1995).

50. A “party asserting that an employment was other than at-will bears the burden of rebutting the at-will presumption.” *Yunker v. E. Associated Coal Corp.*, 591 S.E.2d 254 (W.Va. 2003). Such claims must be established by clear and convincing evidence.

Id.

51. The only evidence offered by the Plaintiffs to refute the presumption of their at-will status is the Guide and its progressive disciplinary procedure.

52. Although the Guide contains a disclaimer that it does not create an employment contract, the Plaintiffs argue that the disclaimer is not sufficiently conspicuous.

53. West Virginia law holds that an employer may include a disclaimer that prevents a handbook from contractually limiting an employer’s discretion to discharge an employee, but it must do so in language that is clear, conspicuous, and likely to be understood by employees. *Williams v. Precision Coil, Inc.* The disclaimer in the Guide is in clear and easy to understand language. While it is only contained on one page of the Guide, it is on page 3 which is the first page of the Guide with any significant text (the first 2 pages are essentially title pages), and it is under the heading “To the Employee.” If the Guide were read in chronological order, it would be one of the very first sentences the employee would read.

54. In order to form the basis of a unilateral employment contract, a handbook must contain a promise of job security. *Edmonds v. Altice Tech. Servs. US LLC*, 413 F. Supp. 3d 488 (S.D. W.Va. 2019) and *Mace v. Charleston Area Med. Ctr. Found., Inc.*, 422 S.E.2d 624 (W.Va. 1992).

55. An employee handbook may form the basis of a unilateral contract if there is a definite promise by the employer not to discharge covered employees except for specific reasons. *Williams v. Precision Coil, Inc.*
56. It is this point of law Plaintiffs mostly rely upon in their breach of implied contract claim.
57. However, such a unilateral contract does not arise merely by the fact that the employer has altered its employees that certain conduct may form the basis of a discharge. *Edmonds v. Altice Tech. Servs. US LLC.*
58. Employment that is not for a fixed term is presumed to be employment that is terminable at will by either party. Under West Virginia law for an employee handbook to form the basis of a unilateral employment contract that would rebut the at-will presumption, it must contain a promise of job security. *Id.*
59. Because of the at-will presumption, any promises alleged to alter the presumptive employment relationship must be very definite to be enforceable. *Yunker v. E. Associated Coal Corp.*
60. It is the province of the court, and not of the jury, to interpret a contract. *iPacesetters, LLC v. Douglas*, 806 S.E.2d 476, 487-88 (W.Va. 2017), *Stephens v. Bartlett*, 191 S.E. 550 (W.Va. 1937).
61. The Court finds that the Guide does not form a contract for employment, and GRANTS the Defendant's Motion for Summary Judgment with respect to the breach of contract issue. The Guide does not contain a promise of job security. In fact, the Guide specifically identifies that involuntary termination may occur for several different reasons, although it does not state the termination could only be for those reasons.

Furthermore, the Guide contains a clear disclaimer that receipt of the Guide does not constitute an employment contract with the Defendant, and further it states that, "this manual should be used as a guide in dealing with agency personnel matters."

62. The Court finds that the Plaintiffs were at-will employees, and as such could be terminated for any non-discriminatory reason.

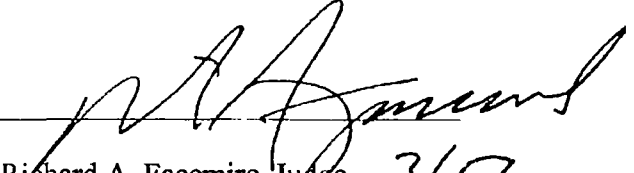
Therefore, it is hereby ORDERED, ADJUDGED, and DECREED:

1. The Defendant, Clay County Development Corporation's Motion for Summary Judgment shall be GRANTED, and Case No. 18-C-6 shall be DISMISSED and stricken from the Court's docket.
2. The Court shall note and preserve all parties' objections and exceptions to the Court's rulings.
3. This is a FINAL ORDER, and any party aggrieved by this Order may file a Petition for Appeal with the West Virginia Supreme Court of Appeals.
4. The Clerk of this Court shall provide a copy of this Order to all counsel of record.

It is accordingly so ORDERED.

ENTERED this the 5th day of March 2021.

Entered: 5 March 2021


Richard A. Facemire, Judge 3/5/2021