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IN THE SUPREME COURT OF OHIO

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| THOMAS McMASTERS, | : | Supreme Court of Ohio |
| | : | Case Number 2015-1577 |
| Plantiff/Appellant, | : | |
| | : | On Appeal from the |
| V. | : | Montgomery County Court of Appeals |
| | : | Second Appellate District |
| ELIE GREEN, ET AL., | : | |
| | : | Court of Appeals |
| Defendent/Appellee | : | CASE NO. 26563 |

**Memorandum in Support of Jurisdiction Amended**


Thomas F. McMasters
6934 Sylmar Ct
Huber Heights, OH 45424
(937) 985-6275/ Fax by arrangement
tom@tommcmasters.us
pro se Appellant

Douglas M. Oldham
BARNES & THORNBURG LLP
41 South High Street, Suite 3300
Columbus, OH 43215
doldham@btlaw.com

John F. Meyers
BARNES & THORNBURG LLP
Prominence in Buckhead, Suite 1700
3475 Piedmont Road, N.E.
Atlanta, GA 30305
John.meyers@btlaw.com
Attorneys for the Appellees



FILED
SEP 28 2015
CLERK OF COURT
SUPREME COURT OF OHIO

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Proposition of Law No 1: The parties to an at will employment contract are equal parties to that contract with equal bargaining rights with both the obligation and right to good faith negotiations. For a court to invalidate the terms of a previously negotiated at-will contract and dictate that an employee must resign from employment or otherwise be deemed to have acquiescence to the imposition of a new contract, violates Article 1 Section 2, Section 16 and Section 1 of the of the Bill of Rights of the Ohio Constitution because the employee is being deprived of equal protection and due process rights and the ability to protect the value of his services.

Proposition of Law No. 2: At will is a statement of the termination clause of a contract that contains no established date of termination. At will relationships are perpetual contracts by nature ended by a triggering event instead of an established time. In and of itself at will has no intrinsic impact on other terms of a contract, such as salary and working conditions, that the employer and the employee have negotiated and agreed to separately.

Proposition of Law No. 3: Stating the employment relationship follows the at will concept is not equivalent to a disclaimer that company policies and practices are not binding.

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## EXPLANATION OF WHY THIS CASE IS A CASE OF A SUBSTANTIAL CONSTITUTIONAL QUESTION AND WHY THIS CASE IS A CASE OF PUBLIC OR GREAT INTEREST

When an employment relationship is established without a set end date it is generally understood that either party may end the employment relationship at any time for any reason not prohibited by law. This concept is sometimes referred to as employment at-will. The courts have long struggled to define this nebulous concept. Fundamentally though, whatever definition the Courts decide to use the definition and implementation must conform with Article 1 of the Ohio Constitution which in Section 2 tells us Government is instituted for the equal protection and benefit of the people and in Section 16 tells us we are all afforded the opportunity for Due Process. Adopting a definition that implies that employers can dictate at-will, whatever they want to an employee without giving that same authority to the employee significantly benefits the employers and, contrary to Section 1 of Ohio's Bill of Rights, obstructs the employee's ability to protect the value of his goods and services.

The Ohio Supreme Court in Lake Land Employment Group of Akron. LLC v. Columber, 101 Ohio St.3d 242, 2004-0hio-786, 804 N.E.2d settled a long running dispute concerning at-will employment when in Section II the Court recognized the relationship as a binding contract. Some Ohio Courts ignore the significance of this evaluation and instead focus only on a statement made in dicta found within the Opinion, "If, for instance, an employer notifies an employee that the employee's compensation will be reduced, the employee's remedy, if dissatisfied, is to quit." The simplistic application of this statement used by some lower courts denies an employee the equal course of action of notifying the employer of a salary increase. Giving both parties the right to notify and then impose a contract change is as illogical from a business sense as giving only one party that right. The more important Constitutional issues are it denies the employee the right to enforce obligations employers entered into freely and which were negotiated and established by mutual agreement. It denies the employee the right to good faith negotiations during subsequent contract re-

negotiations and denies the employee redress in the legal system. The simplistic application of this statement violates 3 of the fundamental rights found in the Ohio Bill of Rights.

When Mr. Green and I went into a conference room to negotiate a new salary, I believe that Serco and I went into those negotiations as equal parties with equal rights and privileges under the law. I believe we went into the negotiations with an ongoing contractual relationship and that the relationship could be change in one of two ways. 1. both parties come to an agreement on new terms or 2. either party could terminate employment. I also believed I had a superior negotiating position; I had successfully called attention to the Professional Services Clause, FAR 52.222-46, that tells us turnover associated with a contract change is detrimental to the public policy of the United States. I knew that if Serco reported to the government that they had to fire me because they did not bid high enough to retain me, this would have effected their performance rating. And if Serco chose to fire me instead of paying me a compensation near my previous salary then Serco was in danger of losing a wrongful termination suit. Serco was caught in a bad negotiating position and instead of progressing in good faith they bet on the courts interfering in the negotiating process, relieving them of their obligation under our ongoing contract and protecting them from the consequences of the FAR.

There is great public interest in knowing if the Ohio Supreme Court believes employment at-will means, "employment is voluntary and subject to termination by either party at any time and for any reason not prohibited by law" a definition that recognizes both parties have equal standing under the law, or if the Court believes it means, "employers can do whatever they want at-will".

## STATEMENT OF THE CASE AND FACTS

On February 3, 2011, SERCO offered Mr. McMasters full-time employment. The offer was made via a letter from Chris Sacksteder, SERCO HR Leader, to Mr. McMasters. (Summary of Docket No 28, Exhibit. 10) In relevant part, the letter states in the first paragraph;

> "Your duties will be those of an Acquisition Management Specialist IV/T10 (Sr. Acquisition Analyst, Labor Category) on the MC/HC 130 task located at Wright Patterson Air Force Base.

> Mr. John Hix will be your supervisor. Your bi-weekly pay rate will be $3,807.06, which would be $99,000.00 annually."

and in a subsequent paragraph;

> "Your hiring is subject to your review and understanding of, and agreement to adhere to, the policies and practices of SERCO, and the employment relationship is based on the mutual consent of the employee and SERCO. Accordingly, this relationship is at will, and either you or the company can terminate this relationship, with or without cause or advance notice, at any time. Neither this letter nor any other oral or written representations may be considered a contract for any specific period of time" (Summary of Docket No 28, Ex. 10)

An explicit definition of "at will" is found in Serco Policy HR-8 Employment at Will. (Exhibit 6).

Mr. McMasters and Serco entered into an at-will contractual relationship in Feb 2011 and continued that relationship making adjustments to the original at-will contract through mutual consent. When Serco began working on the follow on contract with the government, in anticipation of future salary negotiations Mr. McMasters sent a Nov 2012 email:

> "Elie, When constructing your bid for the follow-on contract to the position I currently hold, if you bid this position at a cost that would not support Serco paying at least 98% of my current salary and benefits, it would be dishonest of Serco and Sumaria to use my resume and experience to support the Sumaria / Serco bid." (Exhibit 12)

In Feb 2013, by mutual agreement, Serco and Mr. McMasters decided that in order to allow more time to negotiate new terms, they would continue their relationship under ACCESS with the same terms as the previous government contract. (Exhibit. No 93). On April 16, 2013 Mr. McMasters recorded a history of the contract negotiations;

> " ...the week of April 1st 2013, Elie came by the office and we had a conversation in a conference room about the proposed salary restructuring. When he mentioned the salary Serco proposed I immediately stopped the conversation about pay and benefits. I told him I would not be working (sic) for Serco at that salary. I redirected the conversation and asked how Serco would initiate termination procedures. He told me that Serco's position was that if I rejected the offer then Serco would consider it to be a voluntary separation. I told him that Serco was responsible for initiating the termination of our agreement. He asked me if I intended to keep working for Serco. I told him I would continue working as long as I was receiving my current pay[1]." (Exhibit 25 {P3})

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[1] Note: This statement infers nothing about what course of action I would take at the manifestation of the dispute. The next paragraphs which were written at the same time as this paragraph are clear about my intentions. As are the statements by Mr. Green who independently recorded the same incidents a month later.

" ...the week of April 1st or April 8th 2013, Elie came by my desk and told me HR had determined that the new pay structure would go into place April 13, 2013 and if I did not like it then I would have to resign. I told Elie I would not agree to the proposed pay structure and Serco would continue to pay my current salary until they terminated our agreement and initiated the out processing. I instructed him to make sure HR was aware they were not authorized to change my pay without my permission. He told me this was a HR decision and that he had no power to tell them (anything)." (Exhibit 25 {P2})

"On or about 12 April 2013 Elie came by my desk to discuss an upcoming business trip. During that conversation I initiated a discussion about the topic of my pay this week and beyond. I re-emphasized it was my expectation to be paid at the same rate in the upcoming weeks and beyond as I had been paid up until this conversation. I specifically asked him if he had conveyed my position to HR. He told me he had constructed and sent an email that stated that I rejected the compensation rate he proposed and that I expected to be paid at my current salary. I told him I was surprised neither he nor any other Serco representative initiated any further conversation about the subject since our last conversation. He shrugged his shoulders and stated he sent the email, everyone was aware of my position and it was up to "them" to do something. During that conversation I attempted to "partner" with Serco on this subject and inquired about the possible benefit Serco or I might gain if I were to resign instead of Serco terminating our arrangement. He had no response." (Exhibit 25 {P1})

Mr. Green memorialized this time period in Exhibit 105 Bullets 4 and 6;

No one readily accepted that action, but out of the 16 employees affected, all excepted (sic),with the exception of Mr. McMasters and Mr. Rovinsky and Mr. Wedel (both Mr. Rovinsky and Mr. Wedel elected to resign).

Mr. McMasters referred to his original offer letter where his salary was $90K and stated that Serco had no right to decrease his salary without his consent, and he did not agree to the change. He said that since he did not agree, Serco should Involuntarily terminate him.

On April 13, 2013 an impasse occurred during salary negotiations, prompting Serco to unilaterally change the salary term of the contract without Mr. McMasters' agreement. On or about May 6, 2013 Mr. McMasters received a deposit and pay statement that was not consistent with the contracted salary. Mr. McMasters informed Serco of the pay discrepancy in a May 6, 2013 email:

Elie Green et al,
The deposit received at my bank from Serco this past week does not fulfill SERCO's obligations as they relate to my salary. Looking at the pay statement on ADP, it looks like SERCO has implemented a salary at or near the one Elie relayed was proposed by Serco a few weeks ago and I rejected immediately.

Please correct the ADP pay statement to reflect the same salary as the pay period ending 2/15/2013 which shows the latest salary mutually agreed to by both Serco and me. Additionally, please ensure either immediate deposit of the remaining salary owed or provide the correction plan showing a reasonable schedule as to when this will occur.

and on May 10, 2013 a teleconference was held with representatives for Serco's Human Relations department. The best summation of our negotiating positions is capture within a May 10, 2013 email from Mr. McMasters.

> Sir,
>
> Thank you for taking the time to speak to me concerning the issue of my salary, If accurate, I appreciate your confirming this basic summary of our conversation.
>
> 1. Serco HR's position is that the company can unilaterally change my salary at any time.
>
> 2. My position is that the salary I work for was initially negotiated and determined by mutual agreement and any changes also require mutual agreement.
>
> Thank you for your confirmation of this summary or if necessary clarification of the Serco position (Exhibit 35)

May 16, 2013 Mr. Frank Lindell finally put in writing Serco's intention to reduce Mr. McMasters salary. Mr. McMasters responded with a letter rejecting that $57,000 a year salary and asserting his right to the $99,923 negotiated salary;

> Dear Mr. Lindell:
>
> Per the conversation I had with Elie Green on March 27, 2013, I reject the change in compensation Serco proposed and then unilaterally enacted April 13, 2013. I appreciate that you have put the proposed change in writing. Let this letter reflect that I also reject Serco's letter, dated 5-16-13 and signed by you, that seeks a unilaterally imposed salary change and that I expect Serco to pay back wages and future earnings so that they equal the earnings rate of the pay period ending 2/15/2013.
>
> I spoke to Mr. Gatanas personally on this issue and your subsequent letter has convinced me that it is unlikely I alone will be able to convince Serco to fulfill its obligations under the terms of our agreement, therefore, I have asked my attorney Mr. Frank Payson to engage Serco on my behalf. I appreciate your attention to ensuring his communications are directed to the appropriate Serco representative.
>
> Monday May 20, 2013 I will report to work at my normal work place at Wright Patterson. It is my expectation to be compensated at the last mutually agreed to salary. (Exhibit 42)

Serco continued to track Mr. McMasters as not agreeing to the salary change on internal documents at least through 3/28/2014 (McMasters Second Affidavit). Mr. McMasters worked in a deferred salary status until January 20, 2015[2].

## ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Section II of Lake Land Employment Group of Akron. LLC v. Columber, 101 Ohio St.3d 242, 2004-0hio-786, 804 N.E.2d is titled Formation of a Binding Contract and in {P14} and {P17} the Court settles the discussion on the contractual nature of at-will relationships. The McMasters / Serco employment relationship had all six elements of a contract listed in {P14} at least through April 13, 2013. As the evidence in the record shows in April 2013 Mr. McMasters and Serco came to an impasse on salary negotiations. Mr. McMasters was asking for something close to the current contracted salary of $99,923 and Serco was desiring to reduce this to $57,000. Eventually, this turned into a stand-off about which party would be required to end the employment relationship. Starting April 13, 2013 Serco began to pay the $57,000 rate despite all parties to this proposed contract modification acknowledging Mr. McMasters did not agree to the salary change.

Serco relies on {P18} of Lake Land v. Columber which gives two examples of an employer or an employee in an at-will relationship proposing a change to the terms of their employment relationship to justify their breach of contract actions;

> If, for instance, an employer notifies an employee that the employee's compensation will be reduced, the employee's remedy, if dissatisfied, is to quit.
>
> Similarly, if the employee proposes to the employer that he deserves a raise and will no longer work at his current rate, the employer may either negotiate an increase or accept the loss of his employee.

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[2] Within the statement of facts of both the Trial Court and the Appellate Court are references that make it appear as if I asserted I had a three year contract with Serco. I have never made that assertion nor have I made an assertion I had any kind of contract that specified a specific time period. At all times I recognized that at any time the contract could be terminated by either party for any reason not prohibited by law. The quotes used by the lower courts, especially in the trial court's discussion, are truncated and don't show I was referencing the contract between Serco and the Government in my evaluation of the likelihood of continued employment. The contention I asserted I had a 3 year contract is a red herring presented by Serco in their briefs that led the lower courts away from addressing the actual issues. I assert I had a negotiated binding contract that could have been terminated any time by either party but wasn't terminated by either.

These examples are decidedly not equal since in the first example the employer is not proposing, the employer is given the power to notify and then impose. In the second example the employee is only given the opportunity to propose.

A review of court rulings subsequent to Lake Land v Columber finds some courts have interpreted the first example given in {P18} as an inviolate rule without giving due regard to the contractual nature of the at-will relationship. Stated bluntly, the Ohio Supreme Court made a mistake when they wrote the example in such a way that lower courts would interpret it as giving one party to a contract the ability to notify the other of a change and by implication giving that party the power to unilaterally implement that change over the objections of the other. This is true even if the power to notify and impose were given equally to both parties of a contract.

In an attempt to make it seem as if the Bill of Rights is not violated we see in the arguments correct usage of the words "both" and "either" and then bad reasoning at the end that thwarts the correct usage. For instance, the Appellate Court Opinion {P38} cites *Whisman v. Ford Motor* Co., 157 Fed. Appx. 792 (6th Cir. 2005) "[i]t stands to reason that an employer who may legally terminate an employee on any given day without reason may also take the lesser step of altering the terms and conditions of the employee's employment prospectively without incurring liability for breach of contract or promissory estoppel." even though the Whisman quote is not compatible with the Opinion's {P37} quote from Smith v. St.Elizabeth Med. Ctr., 2d Dist. Montgomery No. 9676, 1986 WL 11811, *4 (Oct. 14, 1986) "Inherent in an employment-at-will agreement is the absolute right of **either** party *to change* or to terminate the relationship." unless both parties could take the lesser step of altering the terms and conditions of the employment relationship. Even Serco in its Brief of the Appellees (p13) realizes the Ohio Bill of Rights requires that we be treated as equal and makes this assertion to justify why they could impose a new salary, "salary is part of his "employment relationship," it therefore follows that "this relationship" can be terminated at any time by **either**

**party**." Staying consistent with the Bill of Rights it therefore follows that either party, including me, could establish the new salary. If given equally to both parties then this court must find in my favor because the record shows, I declared the salary I would be making on the ACCESS contract while Serco was still bidding on the contract, I declared my salary at the end of every conversation with Mr. Green, and I was the last to declare my salary when I announced I would be seeking legal intervention. The facts show that I never worked a minute when I was not the first and the last party to declare the salary term of our contract. However, a more logical course of reasoning that doesn't have as many negative business implications is to reject the contention that one party or the other can dictate the terms of a contract to another. Instead the Court should rely on the significant aspect of Lake Land v Columber and evaluate the relationship as a binding contract.

In the context of a binding contract there still might be a need to evaluate continued employment as it relates to the element of manifestation of assent. For an employment relationship that is defined by an explicit contract continued employment would have no effect. For employment relationships defined by implied contracts look to the discussion on unilateral contracts presented in Boiling v. Clevpak {P5} for a starting position; "the employees'[3] *implied* acceptance of offered benefits can be *presumed* from: (1) ..... (2) ..... and (3) the fact that the employees, after receiving the writing or learning of its contents, continue in their employment with the employer." but this would be a starting position that could be overcome by positive evidence that showed there was no agreement, for instance the kind of evidence I've presented in this case. Using this as a starting position to assess manifestation of assent makes sense in cases like Lake Land v Columber, where the employee agreed to the change in writing and then ten years later wanted to get out of it and in Whisman where the employees also agreed to the change in writing and then three years later decided they made the

[3] When the Court composes this it should be written so it is party neutral in order to also cover situations where continued employment shows the employer acquiesces to the employee. For instance if they know they can't timely hire a replacement or they realize their offered salary breaks the law but are not responsible enough to independently correct it.

wrong choice. It doesn't make sense to use continued employment as showing agreement when everyone involved in the situation acknowledges no agreement occurred.

When reviewing the literature to figure out why the Courts would deny an employee equal protection, rights and due process as required in the Ohio Bill of Rights and also deny employees the fundamental right to enforce the terms of contracts employers voluntarily enter into, there are very few reasons found as to why the Courts took this course of action. The best excuse I could see was because of a misunderstanding of what constitutes a good business environment.

Instead of trying to make sense of non-existent excuses, I'll concentrate on the case at bar to show a prime example of why the courts should not automatically side with the employer and prevent an employee from seeking justice through the courts. In this case a rogue management team, Bob Wood, Bill Hunt and Elie Green decided to ignore company policy (Exhibit 132 p1-6, 23) and make an inappropriate bid on a contract. Mr. Green did not undergo the required training for bidding on contracts (Green Deposition p13) and the mapping was performed and submitted to Serco Contracting by managers[4] and was not performed or approved by trained Human Relations personnel as required (Green Deposition p24 and Exhibit 91). The resulting contract resulted in Serco receiving reimbursement rates significantly below the previous contract rates received from the government. Serco Policy HR-27v4 (Exhibit 88 p4) committed Serco to follow the law and to provide written approval from the SVP HR for salary reductions greater than 10%. Even though the defense team presents an affidavit from Ms. Curtain claiming a 4 week after the fact email as her written approval of the salary reduction, this was not the kind of review that would protect the company from bad management decisions or provide assurances to employees of appropriate oversight in the face of Serco placing marginally qualified people in management positions. The salary proposed by Serco also failed to satisfy the requirements of FAR 52.222-46 as interpreted by the Courts in *CRAssociates*

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[4] managers = workforce supervisors

*v. United States,* 95 Fed. CL. 357 (2010). CRAssociates (p13) requires the government to make "a determination of whether each offeror's compensation package was generally consistent with the salaries being paid by the incumbent contractor;". It only follows that the offeror must pay that salary to the employee. In summary, the simplistic application of the example in {P18} of Lake Land that allows Serco to dictate new terms of a contract and tells the courts I have no opportunity to seek legal recourse results in the Courts instituting a legal preference for a company's poor business decisions and violations of the law over my right to protect the demonstrated value of my services.

Another aspect of the reasoning concerning at-will relationships that is totally off the mark is the idea that since the contract can be broken at any time this means that the terms of the contract are in a constant state of fluctuation and uncertainty. This could be true but in most circumstances it is just the opposite. Most at-will relationships are entered into with the expectation that the terms will be perpetual because renegotiating terms every day / month / year is considered to be a hassle not worth the aggravation. Certainly, it was the practice that defined my relationship with Serco. We did not confirm with each other on Feb 11, 2011 that my salary was the same as it was Feb 10, 2011 nor did we confirm in advance that Serco would be paying the same salary on Feb 15, 2011 as they paid Feb 14, 2011. For the convenience of not having to negotiate terms on a daily, monthly, or yearly schedule, we agreed to an ongoing at-will contractual relationship that either party could terminate at any time.

The whole of any contract is made up of individual sections. The relationship between the terms and conditions of those sections are normally explicitly stated. Typical sections might include; Duties, Performance, Responsibilities, Compensation, Liabilities, Duration and Termination. At times a contract also includes non-disclosure agreements and non-compete agreements as individual sections. Sometimes handbooks or policies are considered as sections of a contract. Whether we call those sections, ancillary like *Harwood v. Avaya Corp.,* S.D. Ohio No. C2-05-828, 2007 WL 1574116 or we call them subsidiary like is done in Helle v. Landmark, Inc., 15 Ohio App.3d 1, 472 N.E.2d 765

(1984) or we call them sections, the premise is still the same, "The parties' freedom to contract as they see fit should not be circumscribed by an asphyxiative construction of the "at-will" doctrine." and "Thus viewed, the "at-will" concept is only a description of the parties' prima facie employment relationship. It intimates nothing about subsidiary contractual arrangements (express or implied) to which an employer may legally obligate himself by adding to that relationship new terms and conditions." Helle v Landmark (p11). The first paragraph of our agreement letter defines the Salary section, the Performance section and Duty section of our contract while later in the document it defines the Duration and Termination sections. The Duration is given by this sentence, "Neither this letter nor any other oral or written representations may be considered a contract for any specific period of time" meaning the contract is perpetual until the termination clause is activated. The Termination section is given by this sentence, "Accordingly, this relationship is at will, and either you or the company can terminate this relationship, with or without cause or advance notice, at any time.".

I anticipate Serco will attempt to claim only half of the sentence that defines the Duration, "Neither this letter nor any other oral or written representations may be considered a contract ..." but this doesn't make sense even in the context of the paragraph it is written where Serco uses contractual language in the first sentence, "and agreement to adhere to". It also doesn't make sense in the context of basic contracts. Even a handshake agreement is considered a contract if the agreement contains the six elements described in {P14} of Lake Land v Columber. The sentence from our agreement letter that defines the Duration only make sense in its entirety when it confirms the contract is of an indefinite period which is ended after certain criteria takes place, namely the Termination section (at will clause) is activated.

When the Appellate Court declare in {P44} of the opinion there is no basis to conclude that Thomas and Defendants entered into an ancillary agreement regarding his salary, the court ignored that it was common practice for Serco and Mr. McMasters to comingle the terms of an agreement and

the at-will clause. This is demonstrated by looking at the Employee Proprietary and Confidential Information Agreement (Exhibit 86).

Given the facts only one conclusion can be made, the Compensation section of our at-will contract was a separate/subsidiary/ancillary section to the Termination section. The fact that the Termination section could be used to terminate the entire contract immediately should have no affect on the negotiated terms of the rest of the sections of the contract.

This is best seen by examining a contract where the Court doesn't show a preference between the parties of a contract. If two parties had a contract with a $1,000 Payment, Duration of 5 years and a Termination section that included a 10 day termination, if one of the parties were to decide that since they could terminate the contract in 10 days they could write a letter that states, "10 days from now the Payment will be $1,500", the court would give no credence to that letter. Or if the other party having anticipated the letter hurried up and composed their own letter that stated, "10 days from now the Payment will be $500" and managed to deliver it at the same time, the court would give no credence to that letter either. What if instead of a 10 day termination period the 5 year contract contained a clause that allowed for immediate termination, which party would get to dictate terms? Or does one argue neither because the contract Duration is 5 years, that trumps the implied logic of the at-will concept? Using that logic, if an employee were to negotiate a one minutes notice before being terminated would that person avoid the implied employer privilege of unilaterally dictating the rest of the terms of the contract that some courts have bestowed employers?

The proposition that "an employer who may legally terminate an employee on any given day without reason may also take the lesser step of altering the terms and conditions of the employee's employment prospectively without incurring liability for breach of contract...." *Whisman v. Ford Motor* Co., 157 Fed. Appx. 792 (6th Cir. 2005) is reasoning that defies logic and the equality section of the Ohio Constitution unless that right is also given the employee. Giving both the employer and

the employee the right to dictate terms of a contract makes no sense in the terms of a good business environment or contract law.

Treating "If, for instance, an employer notifies an employee that the employee's compensation will be reduced, the employee's remedy, if dissatisfied, is to quit" Lake Land v Columber {P18} as a sacrosanct rule that prevents an employee from seeking redress in the courts violates the due process clause of the Ohio Constitution. In the case at bar it is even protecting Serco's illegal activities. In reply to my claim that Serco was barred by law to offer me $57,000 a year because of the requirements of FAR 52.222-46 the Appellate Court implied two reasons my argument failed. The first was because I chose to petition the courts for redress while I continued working, the act of continuing employment resulted in my giving up the legal right to argue for the salary prescribed by the law. This logic if validated has wide reaching implications on such statutes as minimum wage laws. I understand that, FAR 52.222-46, The Professional Services Clause, is not as widely known as the Service Contract Act of 1965 which is one reason why I point to the salary found in Administrative Assistant Melodie Lewis' offer letter, $12.50 per hour (Exhibit 126), and the salary required for an Administrative Assistant under the Service Contract Act, $21.19 (Exhibit 127), to show this rogue management team's law breaking ways are wide spread.

The second implied reason found in the Appellate Opinion was because I pointed out that Serco Policy committed Serco to following the law (Exhibits 88 (p4) and 132 (p1 & 23)), the Court determined that for at will relationships policies are not contractual therefore Serco wasn't required to follow the law (Appellate Opinion {P39} through {P49}). Because I want to talk about the contractual nature of company policies as they relate to at-will relationships, for arguments sake lets say, in terms of being contractual, there might be some requirement that Serco acknowledge they are required to follow the law. In the case at bar the Appellate Opinion (p29) equates the at-will statement to a disclaimer that company policies are not binding. This Court should disagree.

To justify equating the at-will statement with a disclaimer that company policies are not binding the Appellate Opinion (p24) cites Shepard v. Griffin Servs., Inc., 2d Dist. Montgomery No. 19032, 2002-0hio-2283. Ms. Shepard was an employee fired for cause when she falsified records. She happened to be an at-will employee. Ms. Shepard argued that Griffin Servs did not follow company policy when it fired her, therefore, her firing was not valid. However, Griffin Servs had specific disclaimers within their policies that stated they were not bound to follow those policies. Looking at Shepard v. Griffin Servs., Inc {P67-P69} you find the disclaimers, "I know that neither my employment, nor this manual, constitutes a contract for employment between me and the company." "Neither this Policy and Procedure Manual, nor any other document or publication made available by the Company establishes a contract of employment between an employee and the Company." The fact that Ms. Shepard was at-will is not relevant to whether she could force the company to follow the manual in order to protect her from being fired. These disclaimers would have had the same effect if Ms. Shepard had a 5 year contract that was terminable for cause.

In contrast the Policies in the binding at-will contract between Serco and me do not have a disclaimer that they are not binding. Just the opposite. Despite Serco's insistence otherwise these documents contain words and phrasing consistent with binding requirements: Serco Cost Estimating Policy (Exhibit 132 p 6, 23 ) "Mandatory training will be provided on Serco's cost estimating system at least annually to all staff involved in regularly preparing cost and price proposals.", "Where pricing methodologies are directed to Serco by a prime contractor, both Contracts and the Cost Analyst are responsible for verifying that these instructions: a.) .... b.) .... c.) Are in conformance with applicable laws and regulations."; HR-27v4 (Exhibit 88 p4) "Salary adjustments in excess of 10% require written approval from the SVP HR", "Serco provides wage and fringe benefits as required and in accordance with applicable laws, ". Even our original agreement insists on, "agreement to adhere to, the policies and practices of SERCO". In the case at bar, and in all cases, it is not

appropriate to equate an at-will statement to a disclaimer that policies are not contractual in nature. Instead the court should re-validate Helle v Landmark;

> "While an employer need not establish personnel policies or practices, where an employer chooses to establish such policies and practices and makes them known to its employees, the employment relationship is presumably enhanced. The employer secures an *8 orderly, cooperative and loyal work force, and the employee the peace of mind associated with job security and the conviction that he will be treated fairly. No pre-employment negotiations need take place and the parties' minds need not meet on the subject; nor does it matter that the employee knows nothing of the particulars of the employer's policies and practices or that the employer may change them unilaterally. It is enough that the employer chooses, presumably in its own interest, to create an environment in which the employee believes that, whatever the personnel policies and practices, they are established and official at any given time, purport to be fair and are applied consistently and uniformly**773 to each employee. The employer has then created a situation 'instinct with an obligation.' " (Emphasis added; footnotes omitted.) Toussaint v. Blue Cross & Blue Shield of Michigan (1980), 408 Mich. 579, 613, 292 N.W.2d 880, 892.

## CONCLUSION

This case is of great public interest because the vast majority of Ohio's employees are at-will. Lake Land v Columber is an important at-will decision because it verifies the contractual nature of the at will employment relationship. However, forcing an employee to quit in order to prove he does not agree to a contract change and preventing that employee from seeking legal enforcement of the contract as some Courts interpret {P18} significantly restricts that employees ability protect the demonstrated value of his services, and violates three basic rights found in the Ohio Constitution and the foundation of contract law. A ruling on this appeal will clarify the decision in Lake Land v Columber so that courts are not misapplying that decision to deny employees of their right to be equal parties to at-will employment contracts. The ruling will determine if employees have the right to both remain employed while challenging the unlawful actions of their employer and concurrently exercise their Constitutional rights to Due Process and to protect the value of their property.

Respectfully Submitted

Thomas F. McMasters
6934 Sylmar Ct
Huber Heights, OH 45424
(937) 985-6275

**Certificate of Service**: This will certify that a true copy of the foregoing was served by first class mail and email on Sept 28, 2015 upon:

John F. Meyers
BARNES & THORNBURG
Prominence in Buckhead, Suite 1700
3475 Piedmont Road, N.E.
Atlanta, GA 30305
John.meyers@btlaw.com

Douglas M. Oldham
BARNES & THORNBURG
41 South High Street, Suite 3300
Columbus, OH 43215
doldham@btlaw.com

Thomas F. McMasters

Case: CA 026563
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Ort: CAORFE

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2015 AUG 14 PM 12:00
GREGORY A. BRUSH
CLERK OF COURTS
MONTGOMERY CO. OHIO
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**IN THE COURT OF APPEALS OF OHIO**
**SECOND APPELLATE DISTRICT**
**MONTGOMERY COUNTY**

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|---|---|
| THOMAS McMASTERS, et al. | |
| Plaintiffs-Appellants | C.A. CASE NO. 26563 |
| v. | T.C. NO. 13CV5071 |
| ELIE GREEN, et al. | **FINAL ENTRY** |
| Defendants-Appellees | |

. . . . . .

Pursuant to the opinion of this court rendered on the 14th day of August, 2015, the judgment of the trial court is affirmed.

Costs to be paid as stated in App.R. 24.

Pursuant to Ohio App.R. 30(A), it is hereby ordered that the Clerk of the Montgomery County Court of Appeals shall immediately serve notice of this judgment upon all parties and make a note in the docket of the mailing.

Mary E. Donovan
MARY E. DONOVAN, Judge

Michael T. Hall
MICHAEL T. HALL, Judge

JEFFREY M. WELBAUM, Judge

Copies mailed to:

Thomas and Marilyn McMasters
6934 Sylmar Court
Huber Heights, OH 45424

Douglas M. Oldham
41 S. High Street
Suite 3300
Columbus, Ohio 43215

John Meyers
Prominence in Buckhead
3475 Piedmont Road N.E.
Suite 1700
Atlanta, GA 30305-3327

Hon. Mary Katherine Huffman
Common Pleas Court
41 N. Perry Street
Dayton, Ohio 45422

Case: CA 026563
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GREGORY A. BROUSH
CLERK OF COURTS
MONTGOMERY COUNTY

IN THE COURT OF APPELLATE DISTRICT
SECOND APPELLATE DISTRICT
39 MONTGOMERY COUNTY

| | |
|---|---|
| THOMAS McMASTERS, et al. | |
| Plaintiffs-Appellants | C.A. CASE NO. 26563 |
| v. | T.C. NO. 13CV5071 |
| ELIE GREEN, et al. | (Civil appeal from Common Pleas Court) |
| Defendants-Appellees | |

. . . . . .

**OPINION**

Rendered on the 14th day of August, 2015.

. . . . . .

THOMAS and MARILYN McMASTERS, 6934 Sylmar Court, Huber Heights, Ohio 45424
Plaintiffs-Appellants

DOUGLAS M. OLDHAM, Atty. Reg. No. 0088927, 41 S. High Street, Suite 3300, Columbus, Ohio 43215 and JOHN MEYERS, Prominence in Buckhead, 3475 Piedmont Rd. N.E., Suite 1700, Atlanta, Georgia 30305
Attorneys for Defendants-Appellees

. . . . . .

DONOVAN, J.

**{¶ 1}** This matter is before the Court on the Notice of Appeal of Thomas McMasters, filed January 3, 2015. Thomas appeals from the January 23, 2015 decision of the trial court that overruled his motion for summary judgment and sustained the motion for summary judgment of Serco, Inc. ("Serco") and Elie Green (together, "Defendants"). We hereby affirm the judgment of the trial court.

**{¶ 2}** Thomas and Marilyn McMasters (together, "the McMasters") filed a Complaint against Defendants on August 23, 2013. The Complaint alleges that Thomas was employed by Serco, in Fairborn, and that Green was an agent of Serco and Thomas' supervisor there. The Complaint alleges that Thomas previously was employed by URS Corporation ("URS"), a government contractor at Wright Patterson Air Force Base, working as a Senior Acquisitions Test Manager and earning $117,000.00 per year, "with significant additional benefits." According to the Complaint, on February 3, 2011, Serco offered Thomas "a comparable position, with similar duties and responsibilities, as he had with URS."

**{¶ 3}** The Complaint alleges that Thomas, "as part of salary negotiations, informed [Green], * * * of his URS compensation program. During these negotiations [Thomas] was not informed by [Serco] that it was receiving equal compensation from the government for the work to be provided by [Thomas]," despite Serco's knowledge of that fact. According to the complaint, URS offered Thomas a base salary of $99,000.00.

**{¶ 4}** The Complaint alleges as follows:

> The position with [Serco] consisted of [Thomas] working as an Acquisition Management Specialist-Senior Acquisition Analyst on the MC/HC 130 task located at Wright Patterson Air Force Base. This was specified to be a full time exempt position with the further indication that the position would be for minimally one year. [Thomas'] duties consisted of the duties required for a Senior Test and Evaluation Manager for the MCTF program in the AFLCMC/WIS Division at Wright Patterson Air Force Base.

**{¶ 5}** The Complaint alleges that "the offer letter specified that the hiring of

[Thomas] was subject to the policies and practices of [Serco]." According to the Complaint, the "offer letter further specified that the employment relationship, defined to consist minimally of salary and benefits, position duties and responsibilities, location of the job, etc., was based on the 'mutual consent' of the employee and [Serco]." The Complaint alleged that "[t]his meant that before any change to the employment relationship could occur that both parties, i.e., [Thomas] and [Serco] would have to agree to such change."

**{¶ 6}** The Complaint alleges as follows:

> One of the [Serco] material policies and practices applying to this employment relationship was policy (HR-27 Version 4), which clearly provides that in determining wages and salaries that [Serco] would use a compensation system based on the current market value of a position, based on the skills, knowledge and behaviors required of a fully competent incumbent. The policy further stated its purpose was to attract and retain high quality employees and to fairly compensate the workforce for the value of the work provided. This policy was the custom and practice of the company.

**{¶ 7}** Thomas asserts in the Complaint that in the course of negotiations, he was told that "the period of performance of the contract was for 3 years. [Thomas] later learned that the actual period of performance was for one year with two one year options. [Thomas] was also told at the time that [Serco] would require his services for the entire term of the 3 year contract with the Air Force." According to the Complaint, Thomas was "also told that [Serco] did not expect to lose anyone or alter the terms and conditions of

their employment during the 3 year contract." The Complaint alleges that Thomas "relied on the promise of continued employment" for a three year period.

**{¶ 8}** According to the Complaint, Thomas accepted the offer of employment from [Serco] on February 5, 2011, and his employment commenced on February 7, 2011. Thomas asserts that he "achieved all good to excellent performance evaluations during his course of employment with [Serco]." The complaint further alleges that on "April 15, 2013 [Serco] and [Green] unilaterally changed the employment relationship by reducing [Thomas'] base pay 43% from $99,900.00 to $57,000.00 annually," despite the fact that "his job title, position description and duties and responsibilities did not change."

**{¶ 9}** Thomas asserts in the Complaint that he complained via correspondence to Green and the "[Serco] Human Relations Director" about the change in compensation, and that to "date, [Serco] has refused to restore [Thomas'] base pay and benefits * * *." According to the Complaint, "the surrounding circumstances of [Thomas'] hiring by [Serco] indicate that [Serco] and [Thomas] did not intend for their contractual relationship (either express or implied) to be at-will."

**{¶ 10}** The Complaint alleges against Defendants breach of contract, quantum meruit, unjust enrichment, loss of consortium, promissory estoppel, civil fraud, breach of implied contract, equitable estoppel, reckless conduct, malice, and punitive damages. Against Serco, the complaint alleges respondeat superior/ratification. The Complaint sought a permanent injunction against Defendants, and an order that Thomas be "reinstated to his position at full pay and benefits * * *." The Complaint sought an award for McMasters "in compensatory damages in excess of $25,000.00 for each of their common law and statutory claims * * * ," and "compensatory damages in excess of

$25,000.00 for each of their Tort and Contract claims* * * ," and "punitive and/or liquidated damages in an amount in excess of $25,000.00 on their Tort claims," as well as "their costs and attorney fees, and pre and post judgment interest." Finally, the McMasters sought equitable relief, "including but not limited to as appropriate, back pay, front pay, pain and suffering, special damages, past and future lost benefits and wages if [Thomas] is not reinstated to his position at full pay with back pay since April 15, 2013."

**{¶ 11}** On November 3, 2014, McMasters filed, under seal, pursuant to a June 27, 2014 Stipulated Protective Order, his Motion for Summary Judgment. Also on November 3, 2014, Thomas separately filed an Affidavit. The Affidavit provides in relevant part as follows:

> * * *
>
> 4. I did not draft and had no role in drafting the offer letters dated January 26, 2011 and February 3, 2011 that I received from [Serco]. The letters are Exhibits 9 and 10 to the Deposition of Elie Green.
>
> 5. The statements in the offer letters * * * that my salary would be $99,000.00 per year and the employment relationship would be subject to the mutual consent of the parties, induced me to accept employment with [Serco].
>
> 6. I accepted employment with [Serco] by signing the offer letters * * * on January 26, 2011 and February 5, 2011.
>
> 7. I received merit salary increases through [Serco's] performance evaluation process. I consented to the salary increases that I received.
>
> 8. At some point between April 29, 2013 and May 6, 2013, I

received the first payroll check reflecting the reduction in my salary.

9. On May 10, 2013, in a telephone conference with representatives from [Serco's] human resources department I rejected the reduced salary of $57,000.00 per year. I sent an email to Francisco Magana with a copy to Deborah Campbell following the conference call which is attached hereto as Exhibit A.

10. I did not receive a letter from Frank Lindell dated May 16, 2013 containing the following provision: "I, Thomas McMasters accept this change in compensation and will continue to work as an Acquisition Management Specialist IV, reporting to Elie Green" with a line for my signature.

11. Since April 13, 2013, I have been paid a salary of $57,000.00 per year, which is $2,192.31, bi-weekly.

**{¶ 12}** Defendants filed their Motion for Summary Judgment on all claims raised by the McMasters on November 4, 2014. Therein they asserted in part as follows:

In his attempt to create an employment contract and avoid the at-will language in his offer letters, his confidentiality agreement and Serco policies, [Thomas] points to five items as creating a contract: (1) his offer letters; (2) Serco policy HR-27; (3) Serco's salary matrix; (4) policies such as Serco's Journey to Excellence program referring to how Serco will treat employees; and (5) Serco's guidelines for the contracting process and how it will bid on contracts. However, as a matter of law and undisputed facts, these items in no way create an express or implied contractual relationship

requiring Serco to pay [Thomas] a particular salary for a particular period of time.

**{¶ 13}** According to Defendants, Thomas "agreed to the at-will nature of the employment relationship in ***three signed documents.***" Defendants asserted that "Ohio case law permits an employer to change the salary of an at-will employee." Further, they argued, "as to his implied contract claim, [Thomas] cannot satisfy his heavy burden of proving a breach of implied contract." Defendants asserted that "the undisputed fact that [Thomas] was an at-will employee precludes his breach of contract claims. Either party – Serco or [Thomas] – could terminate their relationship. In the event [Thomas] disagreed with his salary reduction, case law is clear that his remedy was to resign. By continuing to work, [Thomas] accepted his salary decrease."

**{¶ 14}** Regarding the fraud claim, Defendants asserted that Thomas "cannot prove his fraud claim because he did not rely on any alleged material misrepresentation, and the alleged misrepresentations were for future conduct." Defendants further asserted that Thomas "cannot show the detrimental reliance, as a matter of law, necessary for his fraud claim."

**{¶ 15}** Attached to the Motion for Summary Judgment is the Affidavit of Elie Green, which provides that he is the former Interim Program Director for Serco, and that in the course of his employment there, he supervised Thomas. The affidavit provides that when Thomas was hired, Serco had a contract with "the Army to supply services to Wright Patterson Air Force Base," and that Serco entered into the contract on March 19, 2008, for one year, "with the option for renewal in one-year increments for four years." According to Green, the contract was a "Best Value" contact, which means that "the

government, in awarding the contract, focused on obtaining the best value for the quality of services it received," and that the government retained "the flexibility and discretion to award the contract to a competitor who is not the lowest bidder."

**{¶ 16}** In December, 2012, according to Green, "the government sought to discontinue the services being done on the [contract of March, 2008] through a different contractual arrangement. Specifically, the Department of the Air Force issued a request for proposals for an Acquisition of Consolidated Enterprise Support Service contract ('the ACCESS contract')." Pursuant to the ACCESS contract, "Serco could not serve as a prime or direct contractor with the government. Instead, a small business had to serve as the prime contractor and Serco had to become a subcontractor to the prime's relationship with the government." Green averred that Serco "partnered with Sumaria Systems, Inc. to bid for the ACCESS work." According to the affidavit, the ACCESS contract is a " 'Lowest Price Technically Acceptable' contract," which means the "government was required to award the contract to the lowest price offeror whose proposal met the technical acceptability standards." Green averred that Serco and Sumaria "entered into a subcontract agreement" when the bid was accepted, and that all "of the positions Serco bid for the ACCESS work experienced a significant decrease in billing rates." Due to the decreased rates, "Serco was forced to adjust employee salaries in early 2013. I was responsible for analyzing the salaries and providing recommendations to Frank Lindell, Robert Wood, and Human Resources," Green averred. Green's affidavit provides that he "first calculated the amount each employee could be paid if the company earned no profit," by using "the bill rate and information supplied by Serco's accounting department as to overhead costs." Finally, Green

averred, "although the company typically aims for 8-10% profit, I built in a 3.98% profit and submitted my recommendations for approval."

**{¶ 17}** Also attached to the motion is the Affidavit of Candy Curtain, the Senior Vice President of Human Resources for Serco. According to Curtain, she is "responsible for overseeing a human resources team dedicated to employee issues including but not limited to job performance, hiring, terminations, compensation, benefits, and enforcement of Serco's human resources policies." She averred that at the time of Thomas' reduction in pay, Frank Lindell was the Vice President for Logistics, Robert Wood was the Vice President for Logistics, Personnel and Readiness, and Deborah Campbell was a Human Resources Generalist III, and Wood was "the senior executive of the business unit [Thomas] worked in."

**{¶ 18}** According to Curtain, "Serco has developed a salary matrix guideline, an internal human resources and compensation document outlining the appropriate minimum, average, and maximum salary for each employment position and pay grade. These guidelines are not distributed to employees and are not strictly mandatory," meaning that "employee salaries are, under special circumstances, set outside the matrix depending on business and job needs."

**{¶ 19}** Curtain averred as follows:

* * *

5. My team is responsible for ensuring compliance with Human Resources Policy HR-27; a true and accurate copy of same is attached as Exhibit A. With respect to [Thomas], Serco followed the policy in effect at the time. Serco did not consider [Thomas'] pay decrease a demotion

because his pay grade did not change. * * * Because [Thomas] did not experience a demotion, HR-27 Section III.C. did not apply.

6. Further, in the event that HR-27 Section III.E. even applies to [Thomas'] salary reduction, Serco complied with that policy. Robert Wood and Deborah Campbell approved [Thomas'] pay decrease. Attached as Exhibit C is a true and accurate copy of the Employee Pay/Hours Change form showing these approvals. Serco's compensation team reports directly to me, and in email correspondence, I provided written approval of the pay change. Attached as Exhibit D is a true and accurate copy of my May 17, 2013 email noting my approval.

7. Attached as Exhibit E is a true and accurate copy from Serco's Cost Estimating Policies and Procedures Manual. These guidelines for the contracting process and how Serco will bid on contracts do not make any promises to employees that they will receive a particular salary or will be employed for a certain length of time; they simply provide an appropriate set of guidelines for preparing contract proposals.

**{¶ 20}** We note that Exhibit C to the Curtain affidavit reflects Thomas' change in pay, and it indicates that the minimum salary for his level of employment is "78170.6700", and the maximum salary for his level is "125073.0600." Exhibit D contains email correspondence from Curtain to Lindell, directing him to send an email and the attached correspondence to Thomas regarding his decrease in pay.

**{¶ 21}** On November 17, 2014, "Defendant Serco Inc.'s Memorandum in Opposition to Plaintiff's Motion for Summary Judgment" was filed, in which Serco noted

that Thomas' "Motion for Summary Judgment appears to seek judgment against only Defendant Serco. In the event [Thomas] is seeking judgment against Defendant Elie Green or this Court views [Thomas'] Motion for Summary Judgment as same, Mr. Green joins in this brief." Defendants asserted that Thomas is an at-will employee, and that Serco complied with its policies.

**{¶ 22}** On November 18, 2014, Thomas filed, under seal, a memorandum contra Serco's Motion for Summary Judgment. On November 24, 2014, Thomas filed a reply brief in support of his motion for summary judgment, also under seal.

**{¶ 23}** In its decision on the motions for summary judgment, the trial court determined as follows regarding the breach of express and implied contract claims:

> In this case, [Thomas] claimed that Serco hired him for a minimum of three years and cited the offer letter as support for his breach of contract claim, arguing that the letter provided an annual rate of compensation and stated that "the employment relationship is based upon the mutual consent of the employee and Serco." [Thomas] specifically claimed that he was assured by Green that his employment offer was for a three-year term. However, the offer letter signed by [Thomas] did not state a duration of employment, but, rather, stated "*Neither this letter nor any other oral or written representations made may be considered a contract for any specific period of time.*" Additionally, the offer letter and Serco's Employee Proprietary and Confidential Information Agreement, also signed by [Thomas], failed to include durational terms, but specifically stated that the employment arrangement was "at-will." Even assuming the offer letter

created an employment agreement outside of the Ohio common law employment at-will contractual relationship, the court must presume that a contract without a durational term is terminable at will. Here, the subject agreements even explicitly stated that the employment arrangement was "at-will," and, thus, the court finds that the terms of the agreements clearly manifested the parties' intent to have an at-will employment arrangement and there was no intent to bind each other to a specific term.

Additionally, because [Thomas] and Serco's employment arrangement was at-will, and since an employer in an at-will relationship may legally terminate the relationship for any reason, it follows that Serco was able to propose to change the terms of the employment relationship between it and [Thomas] at any time. In other words, the terms of [Thomas'] employment agreement, cautioning him that "*this relationship is at will, and either you or the company can terminate this relationship, with or without cause or advance notice, at any time. Neither this letter nor any other oral or written representations may be considered a contract for any specific period of time . . . ,*" correspond with Serco's authority under common law to initiate a modification to the terms of [Thomas'] at-will employment agreement. Additionally, even if Serco initiated a modification of the agreement, [Thomas] had to assent to the modification in salary for it to become a term of the parties' contractual relationship, which [Thomas] did by remaining employed and failing to quit, thereby acquiescing to the salary change imposed by Serco. Here, it is undisputed that Serco notified

[Thomas] concerning the modification of [Thomas'] salary; that [Thomas] advised Serco that he did not accept the salary modification; and that [Thomas] continued to work for Serco even after he was informed of his salary decrease. Under Ohio law, [Thomas'] continued employment after the modification constituted acceptance of it. As a result, [Thomas] cannot recover for breach of contract because the modification nullified Serco's obligation to pay [Thomas] at his previous rate of pay.

Thus, when Serco changed the compensation terms of [Thomas'] at-will employment, [Thomas'] proper remedy was not to sue for breach of contract, but, rather, it was to attempt to negotiate a more favorable compensation package, or quit. * * * Consequently, even construing the evidence in favor of [Thomas], the court finds that no genuine issue of material fact remains as to [Thomas'] breach of contract claim, and Defendants are entitled to judgment as a matter of law. * * * Likewise, for the foregoing reasons, and because the court finds that Serco's offer letter memorialized the at-will employment relationship between the parties, [Thomas'] alternative claim for breach of implied contract also fails as a matter of law. * * *

**{¶ 24}** Regarding Thomas' claim for civil fraud, the trial court determined as follows:

Here, [Thomas] has failed to submit evidence demonstrating that the alleged representations of future compensation by Serco and Green were false when the statements were made and were made with no intention to

honor them. Additionally, it is undisputed that [Thomas] was paid as originally agreed for more than two years from 2011 before he was notified of the modification to his salary in 2013. Thus, even construing the evidence in favor of [Thomas], the court finds that no genuine issues of material fact remain, and Defendants are entitled to judgment as a matter of law. * * *

**{¶ 25}** We note that on May 14, 2015, McMasters filed a "Citation of Addition (sic) Authorities – Definition of Terms," in which he submitted definitions of the terms "Voluntary Terminations," and "Involuntary Termination," taken from Serco Policy No. HR-32 Version 2. On May 18, 2015, McMasters filed a "Provision of readable copies of Exhibit 90."

**{¶ 26}** Thomas asserts two assignments of error herein. His first assigned error is as follows:

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF SERCO ON MR. MCMASTERS' BREACH OF EXPRESS AND IMPLIED CONTRACT CLAIMS BECAUSE EVIDENCE IN THE RECORD DEMONSTRATES THAT MR. MCMASTERS DID NOT ACCEPT SERCO'S REDUCTION OF HIS SALARY AND HIS SALARY WAS REDUCED ABSENT A MEETING OF THE MINDS.

**{¶ 27}** According to Thomas, his "offer letter create[d] an express or implied contract which precluded [Serco] from unilaterally reducing his salary absent his consent." He asserts that Serco "breached its express or implied contract with [him] by reducing his salary without his consent." According to Thomas, his "continued employment * * * did

not constitute assent to the reduction of his salary because his compensation agreement was ancillary to his at-will employment relationship[.]" He asserts that Serco's "assent to [his] continued employment obligated [Serco] to continue to pay [his] agreed upon salary." Thomas asserts that he "acted reasonably in not resigning from his employment and relying upon [Serco's] policies as providing assurance that his salary could not legally be reduced to $57,000.00."

**{¶ 28}** Thomas directs our attention to Serco Policy Number HR-8, which governs "Employment at Will," and he asserts that absent "from HR-8 is any mention that [Serco] may unilaterally reduce an employee's compensation or a disclaimer stating that [Serco] is not bound by its own employment policies. Mr. Green testified at his deposition that he did not see anything in the policy which would permit [Serco] to unilaterally reduce [Thomas'] salary." Thomas further directs our attention to Serco Policy No. HR-27, and he asserts that since Serco "did not comply with HR-27, [he] had no reason to anticipate that the company had the right to legally reduce his salary without his consent. Even on January 20, 2015, when the employment relationship ended, HR-27 falsely promised that [Thomas'] salary would be set within the market established salary range of $79,343 and $126,949, as established by Serco's salary matrix." Thomas asserts that "Serco's policy statements also claim that the company adheres to the law." Thomas directs our attention to *CRAssociates, Inc. v. United States*, 102 Fed. Cl. 698 (2011), and he asserts that "FAR 52.222-46 requires that employees commencing work under new contracts to be paid comparable labor rates to those paid under the previous contract," and that Serco "did not honor its obligations under FAR 52.222-46," contrary to Serco policy.

**{¶ 29}** Defendants respond that the trial court correctly determined that Thomas'

claims for breach of express and implied contract fail because it is undisputed that he is an at-will employee. Defendants assert that Thomas accepted the decrease in pay by remaining employed by Serco. Defendants assert that Thomas' reliance upon the "mutual consent" language in his offer letters is "specious at best," and that the offer letters should be read as a whole. According to Defendants, "[b]ecause both offer letters must be read as a whole and all provisions given effect, it follows that Serco did not breach any express or implied agreement to pay [Thomas] [$99,000.00] indefinitely." Defendants assert that Thomas "fails in his attempt to establish that his salary is somehow a separate agreement ancillary to the at-will nature of his employment." Defendants assert that Serco's policies did not create an express or implied contract, and that Serco "complied with its policies and guidelines."

**{¶ 30}** Defendants assert, "[specifically], nothing in Policy HR-27, Compensation and Salary Administration, binds the company to paying an employee a particular salary or to even paying an employee a market rate – the policy speaks in terms of what Serco 'endeavors' to do and outlines Serco's general process for determining a salary." According to Defendants, "HR-27 stops short of requiring Serco to pay employees according to a particular salary range. Further, Serco's salary matrix is an internal human resources/compensation document that is not distributed to employees, and is not intended to be construed as a contractual offer that employees can accept."

**{¶ 31}** Finally, Defendants assert that Serco "did comply with its policy statement that it would adhere to the applicable law – [Thomas] is simply incorrect in claiming that the Professional Services Clause, FAR § 52.222-46 was applicable to his salary adjustment." Defendants assert that *CRAssociates v. United States*, 95 Fed. Cl. 357,

369 (2010) does not apply.

**{¶ 32}** In Reply, Thomas asserts as follows:

> [Thomas] acknowledges that pursuant to [Serco] HR-8 Employment at Will policy, either party could terminate his employment at any time for any reason not prohibited by law; however, contrary to [Serco's] contention, that policy and the common law of the State of Ohio, did not permit [Serco] to reduce [Thomas'] salary absent his consent. [Serco's] arguments ignore the plain language set forth in [Thomas'] offer letter stating that the employment relationship, including salary, would be governed by mutual consent. Additionally, [Serco] made representations in company policies pertaining to salary upon which [Thomas] reasonably relied.

**{¶ 33}** Thomas further asserts as follows:

> In *CRAssociates, Inc. v. United States*, 102 Fed. Cl. 698, the court determined that any follow on (sic) compensation package to the employee must be comparable to the employee's previous compensation package. Through FAR, Congress established an obligation for the winning contractor to pay [Thomas] a salary comparable to the $99,923.00 per year he was earning under the previous contract. * * *
>
> A decision was made to mitigate company losses by inappropriately reducing the employee salaries covered by FAR 52.222-46 instead of reducing management salaries which are paid threw (sic) overhead and not protected by FAR 52.222-46.

**{¶ 34}** As this Court has previously noted:

When reviewing a summary judgment, an appellate court conducts a de novo review. *Village of Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). "De Novo review means that this court uses the same standard that the trial court should have used, and we examine the evidence to determine whether as a matter of law no genuine issues exist for trial." *Harris v. Dayton Power & Light Co.*, 2d Dist. Montgomery No. 25636, 2013-Ohio-5234, ¶ 11 (quoting *Brewer v. Cleveland City Schools Bd.* [o]f *Edn.*, 122 Ohio App.3d 378, 383, 701 N.E.2d 1023 (8th Dist.1997) (citing *Dupler v. Mansfield Journal Co* ., 64 Ohio St.2d 116, 413 N.E.2d 1187 (1980)). Therefore, the trial court's decision is not granted any deference by the reviewing appellate court. *Brown v. Scioto Cty. Bd. Of Commrs.*, 87 Ohio App.3d 704, 711, 622 N.E.2d 1153 (4th Dist.1993).

Civ. R. 56 defines the standard to be applied when determining whether a summary judgment should be granted. *Todd Dev. Co., Inc. v. Morgan*, 116 Ohio St.3d 461, 463, 880 N.E.2d 88 (2008). Summary judgment is proper when the trial court finds: "(1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the Motion for Summary Judgment is made, who is entitled to have the evidence construed most strongly in his favor." *Fortune v. Fortune*, 2d Dist. Greene No. 90-CA-96, 1991 WL 70721, *1 (May 3, 1991) (quoting *Harless v. Willis Day Warehous[ing] Co.*, 54 Ohio St.2d 64, 67, 375 N.E.2d 45

(1978)). The initial burden is on the moving party to show that there is no genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 292–93, 662 N.E.2d 264 (1996). Once a moving party satisfies its burden, the nonmoving party may not rest upon the mere allegations or denials of the party's pleadings. *Dotson v. Freight Rite, Inc.*, 2d Dist. Montgomery No. 25495, 2013-Ohio-3272, ¶ 41 (citation omitted).

*Cincinnati Ins. Co. v. Greenmont Mut. Hous. Corp.*, 2d Dist. Montgomery No. 25830, 2014-Ohio-1973, ¶17-18.

**{¶ 35}** As this Court has also previously noted:

"A contract is generally defined as a promise, or a set of promises, actionable upon breach. Essential elements of a contract include an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment), a manifestation of mutual assent and legality of object and of consideration." *Minster Farmers Coop. Exchange Co., Inc. v. Meyer,* 117 Ohio St.3d 459, 2008-Ohio-1259, 884 N.E.2d 1056, ¶ 28, quoting *Perlmuter Printing Co. v. Strome, Inc.*, 436 F.Supp. 409, 414 (N.D.Ohio 1976); *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, 770 N.E.2d 58,¶ 16. The parties must have a "meeting of the minds" as to the essential terms of the contract in order to enforce the contract. *Episcopal Retirement Homes, Inc. v. Ohio Dept. of Indus. Relations*, 61 Ohio St.3d 366, 369, 575 N.E.2d 134 (1991).

*Mishler v. Hale*, 2014-Ohio-5805, 26 N.E.3d 1260, ¶ 24 (2d Dist.).

**{¶ 36}** " 'Generally, a plaintiff must present evidence on several elements to

successfully prosecute a breach of contract claim. Those elements include the existence of a contract, performance by the plaintiff, breach by the defendant, and damage or loss to the plaintiff.' (Citations omitted.) *Doner v. Snapp*, 98 Ohio App.3d 597, 600–601, 649 N.E.2d 42 (2d Dist.1994)." *Folck v. Barnhart*, 2d Dist. Clark No. 2014-Ohio-CA-2, 2014-Ohio-1657, ¶ 15. "When reviewing a contract, the court's primary role is to ascertain and give effect to the intent of the parties. *Hamilton Ins. Serv., Inc. v. Nationwide Ins. Cos.*, 86 Ohio St.3d 270, 273, 714 N.E.2d 898 (1999)." *Westerfield v. Three Rivers Nursing & Rehab. Ctr., L.L.C.*, 2d Dist. Montgomery No. 25347, 2013-Ohio-512, ¶ 21. The Supreme Court of Ohio has "long held that a contract is to be read as a whole and the intent of each part gathered from a consideration of the whole. * * * If it is reasonable to do so, we must give effect to each provision of the contract. * * * ." *Saunders v. Mortensen*, 101 Ohio St. 3d 86, 2004-Ohio-24, 801 N.E.2d 452, ¶ 16.

**{¶ 37}** " 'In Ohio, the common-law doctrine of employment at will governs employment relationships. * * * .' (Citations omitted) *Dohme v. Eurand Am., Inc.*, 130 Ohio St.3d 168, 2011-Ohio-4609, 956 N.E.2d 825, ¶ 11." *Coles v. I-Force*, 2d Dist. Montgomery No. 26385, 2015-Ohio-1040, ¶ 14. "At-will employment is contractual in nature. * * * In such a relationship, the employee agrees to perform work under the direction and control of the employer, and the employer agrees to pay the employee at an agreed rate." *Lake Land Emp. Group of Akron LLC v. Columber*, 101 Ohio St.3d 242, 2004-Ohio-786, 804 N.E.2d 27, ¶ 17. "Inherent in an employment-at-will agreement is the absolute right of either party *to change* or to terminate the relationship." *Smith v. St. Elizabeth Med. Ctr.*, 2d Dist. Montgomery No. 9676, 1986 WL 11811, *4 (Oct. 14, 1986) (emphasis added).

**{¶ 38}** The Sixth Circuit considered the Ohio Supreme Court's decision in *Lake Land* in *Whisman v. Ford Motor Co.*, 157 Fed. Appx. 792 (6th Cir. 2005). Therein, the employer, ZFB, altered the employees' overtime bonuses and annual incentive bonuses, and the Sixth Circuit noted that "*significantly*, the plaintiffs continued to work for ZFB despite the changes * * *." *Id.*, 795 (emphasis added). The employees alleged, inter alia, that the defendants "breached their employment agreements by prospectively altering the terms of their employment. * * * Alternatively, the plaintiffs contend that the defendants are liable under a theory of promissory estoppel for failing to adhere to their pre-hire promises." *Id.*, 800. The Sixth Circuit determined in part as follows:

> The plaintiffs do not dispute that their employment relationship with ZFB is governed by Ohio's employment at-will doctrine. Under that doctrine, "[u]nless otherwise agreed, either party to an oral employment-at-will agreement may terminate the employment relationship for any reason which is not contrary to law." *Mers v. Dispatch Printing Co.*, 19 Ohio St.3d 100, 483 N.E.2d 150, 153 (1985). The district court concluded that, given the plaintiffs at-will status, ZFB retained the right to change the prospective terms of their employment, stating, "[i]t stands to reason that an employer who may legally terminate an employee on any given day without reason may also take the lesser step of altering the terms and conditions of the employee's employment prospectively without incurring liability for breach of contract or promissory estoppel."
>
> The plaintiffs' contention that altering the terms of their employment was tantamount to a breach of their employment agreements is at odds with

the Supreme Court of Ohio's recent decision in *Lake Land* * * *. In *Lake Land*, the defendant, a former employee of the plaintiff, argued that the non-compete agreement he had signed during the course of his employment was unenforceable because it was not supported by consideration. In evaluating the plaintiff's claim, the court noted that, in general, "an employer or an employee in an at-will relationship may propose to change the terms of their employment relationship at any time." *Id.* at 32. The court reasoned that if an employer changes the terms of the employee's work agreement, "the employee's remedy, if dissatisfied, is to quit." *Id.* Conversely, "if the employee proposes to the employer that he deserves a raise and will no longer work at his current rate, the employer may either negotiate an increase or accept the loss of his employee." *Id.* From these observations, the court reasoned that "mutual promises to employ and to be employed on an ongoing basis, according to agreed terms, are supported by consideration: the promise of one serves as consideration for the promise of the other." *Id.* Applying these principles, the *Lake Land* court held that an employer's offer of continued employment, given in exchange for an employee's assent to a non-compete agreement, constitutes consideration to support the agreement. *Id.*

The plaintiffs argue that *Lake Land* is limited to those situations in which an employee is asked to alter the terms of his at-will employment agreement by signing a non-compete agreement. We are not persuaded that the general principle invoked in *Lake Land* – that continued

employment constitutes consideration for a change in the terms of the employee's employment agreement - should not be applicable here. The articulation of this principle in *Lake Land* was not a novel development in Ohio law. In *Nichols v. Waterfield Fin. Corp.*, 62 Ohio App.3d 717, 577 N.E.2d 422, 423 (1989), a case which did not involve a non-compete agreement, the court reasoned that "if consideration were required to modify an at-will contract, . . . continued employment [would be] sufficient consideration to modify the contract."

When ZFB changed the compensation terms of the plaintiffs' at-will employment, the plaintiffs' proper remedy was not to sue for breach of contract; it was to attempt to negotiate a more favorable benefits and compensation package, or quit. Because the plaintiffs did not quit, but continued to work for ZFB, even after ZFB altered its overtime and annual incentive policies, the modification to the plaintiffs' employment was supported by consideration. Consequently, the plaintiffs have no basis on which to sue for breach of contract.

*Id.*, 800-801.

**{¶ 39}** As the trial court herein noted, however, "exceptions to the terminable at will rule exist * * *." As this Court has previously noted:

* * * Under the first exception, the existence of an express or implied contract can overcome the employment-at-will presumption. *Reasoner v. Bill Woeste Chevrolet, Inc.* (1999), 134 Ohio App.3d 196, 200, 730 N.E.2d 992. In order to imply a contract, "[t]here must be specific evidence to show

that the parties mutually assented to something other than at-will employment." *Id.* Specifically, employee handbooks, company policy, and oral representations under some circumstances may contain such evidence. *Kelly v. Georgia-Pacific Corp.* (1989), 46 Ohio St.3d 134, 139, 545 N.E.2d 1244.

We note, however, that many of these documents may contain disclaimers, which require the employee to acknowledge that the document does not create an employment contract. These disclaimers negate any inference of contractual obligations between the parties. *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, 570 N.E.2d 1095, paragraph one of the syllabus. Instead, the handbook then becomes "merely a unilateral statement of rules and policy which creates no obligations and rights." *Tohline v. Central Trust Co., N.A.* (1988), 48 Ohio App.3d 280, 282, 549 N.E.2d 1223.

*Shepard v. Griffin Servs.*, Inc., 2d Dist. Montgomery No. 19032, 2002-Ohio-2283, ¶s 61-62.

**{¶ 40}** Regarding Thomas' offer letters, we initially note, as the trial court correctly determined, the letters do not specify a duration of employment. The letter of January 26, 2011, provides in relevant part as follows:

Dear Thomas,

It is with pleasure that we offer you a full time exempt position. Your duties will be those of an Acquisition Management Specialist IV/T10 (Sr. Acquisition Analyst, Labor Category) on the Special Operations Forces

Group (SOF) Consolidation task located at Wright Patterson Air Force Base. Your bi-weekly pay rate will be $3,807.69, which would be $99,000.00 annually. * * *

* * *

Your hiring is subject to your review and understanding of, and agreement to adhere to, the policies and practices of Serco, and the employment relationship is based upon the mutual consent of the employee and Serco. Accordingly, this relationship is at will, and either you or the company can terminate this relationship, with or without cause or advance notice, at any time. Neither this letter nor any other oral or written representations may be considered a contract for any specific period of time.

Please acknowledge your understanding of the terms described above by signing and returning a copy of this letter to Catherine Springer via fax or email by January 27, 2011. * * *

**{¶ 41}** Thomas placed a check mark next to a line that provides, "I accept this offer," and his signature appears at the bottom of the page. The letter of February 3, 2011, contains identical language regarding the at-will nature of Thomas' employment.

**{¶ 42}** The "Employee Proprietary and Confidential Information Agreement," dated February 8, 2011, and signed by Thomas, further provides in relevant part:

* * *

WHEREAS, as a condition precedent to the Employee's hiring and/or continued employment, Serco requires the Employee to execute this

Agreement:

* * *

8. Employee understands and acknowledges that employment with Serco is on an "at will" basis, meaning that either Employee or Serco may terminate the employment relationship at any time, with or without cause or notice. Employee understands and acknowledges that nothing in this Agreement is intended to create a guarantee of employment or continued employment and should not be construed as such under any conditions.

9. This Agreement constitutes the entire agreement between the parties hereto with respect to the subject matter hereof, and there are no representations, understandings, or agreements relative hereto that are not fully expressed herein. Any other terms or conditions included in any proposals, acknowledgements, or other documents or forms utilized or exchanged by the parties or pursuant hereto shall not be incorporated herein, or binding unless expressly agreed to in writing by both parties hereto.

**{¶ 43}** We note that in excerpts of Thomas' deposition, attached to Defendants' Motion for Summary Judgment, Thomas admits to signing the above documents and to entering into an employment at-will relationship with Serco. Construing the evidence most strongly in favor of Thomas, we agree with the trial court's conclusion that, since the above agreements each explicitly state that the nature of the relationship between Serco and McMasters is at-will, "the terms of the agreements clearly manifested the parties' intent to have an at-will employment arrangement," such that his breach of express

contract argument fails.

**{¶ 44}** Regarding his breach of implied contract claim, construing the evidence most strongly in favor of Thomas, we conclude that Thomas has not established that the parties mutually assented to something other than at-will employment. Further, there is no basis to conclude that Thomas and Defendants entered into an ancillary agreement regarding his salary. We note that in his Complaint, Thomas asserted that Version 4 of HR-27, effective November 4, 2011, applied to his employment relationship, but in his Reply brief, he directs our attention to Version 5 of HR-27, effective July 23, 2013. Version 4 of HR-27 provides in relevant part at Section III:

> E. Salary adjustments – Salary adjustments as a result of market changes or internal equity must be reviewed by the compensation team. Salary adjustments in excess of 10% require written approval from the SVP HR.
>
> F. Salary limitations – Base pay may not exceed the maximum of the salary range. This applies to the initial establishment of base wages at the time of hire, salary adjustments, promotions, demotions, or merit increases. Any exception requires written justification and written approval from the SVP HR.

**{¶ 45}** Section III E of Version 5 of HR-27 is identical to that of Version 4. Section III F of Version 5 provides in relevant part:

> F. Salary limitations – Base pay must be set within the salary range. This applies to the initial establishment of the base wage at the time of hire, salary adjustments, promotions, demotions, or merit increases. Any

exception requires a justification memo and written approval from the SVP HR.

**{¶ 46}** Both versions provide at Section IV A: "Serco provides wage and fringe benefits as required and in accordance with applicable laws * * *."

**{¶ 47}** Thomas asserts that Serco Policy No. HR-27 creates an implied contract and prohibits Serco from adjusting his salary. Thomas further asserts that since Serco Policy No. HR-27 states that Serco provides wages in accordance with applicable laws, and since Serco allegedly illegally reduced "employee salaries covered by FAR 52.222-46"[1], Thomas is entitled to prevail on his breach of implied contract claim. We note that before the trial court, Thomas directed the court's attention to *CRAssociates v. United States,* 103 Fed.Cl. 23 (2012). In his brief and reply, he directs our attention to *CRAssociates v. United States*, 102 Fed. Cl. 698 (2011). In Defendants' brief, they assert that *CRAssociates v. United States*, 95 Fed. CL. 357 (2010) does not apply herein.[2]

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[1] 48 C.F.R. 22.1103 provides in part that "All professional employees shall be compensated fairly and properly. Accordingly, the contracting officer shall insert the provision at 52.222-46, Evaluation of Compensation for Professional Employees, in solicitations for negotiated contracts * * *." 48 C.F.R. 52.222-46(a) provides " * * * offeror will submit a total compensation plan setting forth salaries and fringe benefits proposed for the professional employees who will work under the contract." 48 C.F.R. 52.222-46(d) provides that "[f]ailure to comply with these provisions may constitute sufficient cause to justify rejection of a proposal."

[2] As summarized in *CRAssociates*, 103 Fed. Cl. 23, 24 (2012): "On September 7, 2011, CRAssociates, Inc. (CRA) filed a complaint in this court seeking to enjoin Spectrum Healthcare Resources, Inc. (Spectrum) from performing on a health care contract that it had received from the U.S. Army (the Army). This court had enjoined a prior award of this contract. *See CRAssociates, Inc. v. United States*, 95 Fed.Cl. 357 (2010). After that decision, the Army conducted further rounds of discussions with the parties and, after evaluating revised proposals, awarded the contract again to Spectrum. CRA again protested this decision by filing a complaint with this court. On December 23, 2011, this court denied plaintiff's motion for judgment on the administrative record. Based on this

**{¶ 48}** Thomas cannot establish a breach of an implied employment contract based upon Defendants' failure to comply with Serco Policy No. HR-27, given the above documents Thomas signed as well as the disclaimer found in Serco Policy Number HR-8, which governs "Employment at Will" and provides:

> This policy states that employment with Serco is at will, meaning employment is voluntary and subject to termination by the employee or Serco at any time and for any reason not prohibited by law. *Nothing in these policies shall be interpreted to be in conflict with or to eliminate or modify in any way the employment at-will status of Serco employees.* This policy may not be fully applicable in all states in which Serco does business. This policy may not be modified by any officer or employee and shall not be modified in any publication or document. The only exception to this policy is a valid, written employment agreement approved by the CEO, Chief of Staff and/or Senior Vice President of HR. (Emphasis added).

**{¶ 49}** Thomas has not provided evidence that his employment relationship with Serco was other than at-will, and we agree with Defendants that the fact "that [Thomas] was an at-will employee precludes his breach of contract claims." Thomas' reliance upon the policy provisions cited above to alter the nature of his at-will employment is misplaced, since those policies are unilateral statements of rules which create no obligations and

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decision, the court declined to enjoin performance of the contract. *CRAssociates, Inc. v. United States*, 102 Fed.Cl. 698 (2011). On January 3, 2012, plaintiff appealed that decision to the Federal Circuit. That same day, it filed a motion to stay this court's judgment pending appeal, seeking to bar further performance of the contract by Spectrum." The court denied the motion for stay pending appeal. *Id.*, 28. In *CRAssociates*, 95 Fed. Cl. 357 (2010), the federal court determined that the Army failed to conduct the analysis required by 48 C.F.R. 52.222-46.

rights. Since Thomas' employment was at-will, Serco was free under common law principles to modify the terms of his employment, including his salary, and Thomas was free to assent to the modification and remain in Serco's employ at a reduced salary, or to quit. By continuing to work, he provided consideration for and accepted his salary decrease. Construing the evidence most strongly in favor of Thomas, we conclude that the trial court correctly determined that no genuine issue of material fact remained on Thomas' claims for breach of express and/or implied contract. Accordingly, his first assigned error is overruled.

**{¶ 50}** Thomas' second assigned error is as follows:

> SERCO COMMITTED FRAUD BY MISREPRESENTING TO [THOMAS] THAT HIS EMPLOYMENT RELATIONSHIP WAS GOVERNED BY MUTUAL AGREEMENT AND SERCO'S POLICIES.

**{¶ 51}** In his Complaint, Thomas alleged that Serco represented to him that Serco "had engaged in a 3 year government contract that would require his services for the entire term. Further, [Serco] and or its agent or employees represented that Serco did not expect to lose anyone or alter the terms and conditions of employment during the 3 year contract." Thomas alleged that these representations were material and false, and that he relied upon them to his detriment.

**{¶ 52}** Thomas asserts in his brief that the evidence herein "demonstrates that [Serco] represented in [his] offer letter that his salary would be established by mutual consent as a means of inducing him to accept and continue his employment, but had no intention of fulfilling that representation." Thomas further asserts that Serco's "employment policies falsely represented to [Thomas] that he would be compensated in

accordance with HR-27, if he continued his employment, but once again [Serco] had no intention of living up to that representation. Questions of fact exist which precluded summary judgment on [Thomas'] fraud claim."

**{¶ 53}** Defendants respond that Thomas "cannot show the detrimental reliance, as a matter of law, necessary for his fraud claim," since he "did not forego any other job offer." Defendants further assert that the allegations that Thomas "could expect to be paid a particular amount into the future and could expect that his salary would not change in the future without his consent," are "allegations about future conduct." According to Defendants, promises "as to a certain outcome or future action are not actionable fraud claims." Finally, Defendants assert that there "is nothing in the record showing that Serco did not intend to honor the offer letters when it provided same to [Thomas]. Indeed, Serco did pay [Thomas] $99,000 to $99,923.20 for the first two years of his employment. When Serco withdrew its consent to paying such a salary to [Thomas], it did so properly as [Thomas] was an at-will employee."

**{¶ 54}** As the Supreme Court of Ohio noted in *Burr v. Board of County Com'rs of Stark County*, 23 Ohio St.3d 69, 73, 491 N.E.2d 1101 (1986):

> In *Cohen v. Lamko, Inc.* (1984), 10 Ohio St.3d 167, 169, 462 N.E.2d 407, we set forth the elements of fraud as:
>
> " '(a) a representation or, where there is a duty to disclose, concealment of a fact,
>
> " '(b) which is material to the transaction at hand,
>
> " '(c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be

inferred,

" '(d) with the intent of misleading another into relying upon it,

" '(e) justifiable reliance upon the representation or concealment, and

" '(f) a resulting injury proximately caused by the reliance.' * * * " *Id.* at 169, 462 N.E.2d 407, quoting *Friedland v. Lipman* (1980), 68 Ohio App.2d 255, 429 N.E.2d 456 [22 O.O.3d 422], paragraph one of the syllabus.

**{¶ 55}** As this Court noted in *Langford v. Sloan*, 162 Ohio App.3d 263, 2005-Ohio-3735, 833 N.E.2d 331, ¶ 13-14 (2d Dist.):

"As a general rule, fraud cannot be predicated upon statements which are promissory in their nature when made, and which relate to future actions or conduct, since a representation that something will be done in the future, or a promise to do it, from its nature cannot be true or false at the time when it is made, and thus cannot generally be fairly viewed as a representation of fact. *Nilavar v. Osborn* (1998), 127 Ohio App.3d 1, 711 N.E.2d 726, modified on reconsideration (May 12, 1998).

"However, an exception to the general rule barring fraud on the basis of promises about future performance exists where an individual makes a promise concerning future action, occurrence, or conduct and, at the time she makes it, has no intention of keeping the promise, since in such a case the individual possesses individual [sic] actual fraudulent intent, and his or her misrepresentation is thus of an existing fact—the speaker's present state of mind. *Snell v. Salem Ave. Assoc.* (1996), 111 Ohio App.3d 23, 675 N.E.2d 555."

**{¶ 56}** As the trial court noted, Thomas has not presented any evidence showing that the alleged representations regarding his future compensation for a three-year period by Green and Serco were false when the statements were made. As Defendants noted, Thomas was paid as set forth in his offer letters for more than two years. Accordingly, we cannot conclude that the exception to the general rule barring fraud on the basis of promises concerning future action applies. In other words, construing the evidence most strongly in favor of Thomas, since the alleged statements that are the subject of his fraud claim are promissory in nature, Thomas' fraud claim fails.

**{¶ 57}** We further note that Thomas testified at deposition that he began to look for employment when he learned that his position at URS would be eliminated, around January, 28, 2011. He stated that he received an offer for a position of "safety officer" through MacCauley Brown, and an offer for a short term assignment in Oklahoma. He stated that he accepted the MacCauley Brown offer, but that it was withdrawn before his interview with Serco. Thomas stated that he did not want to accept short-term employment in Oklahoma and declined the offer. He stated that he interviewed for another position while he was employed at Serco. As Defendants assert, there is no basis to conclude that Thomas relied to his detriment on the language in his offer letters in accepting employment at Serco. Finally, Serco was entitled to alter Thomas' salary, given the at-will nature of his employment. Construing the evidence most strongly in favor of Thomas, we agree with the trial court's determination that no genuine issue of material fact remains on Thomas' civil fraud claim. Thomas' second assigned error is overruled.

**{¶ 58}** The judgment of the trial court is affirmed.

. . . . . .

HALL, J. and WELBAUM, J., concur.

Copies mailed to:

Thomas and Marilyn McMasters
Douglas M. Oldham
John Meyers
Hon. Mary Katherine Huffman