**[Cite as *Clayton v. Cleveland Clinic Found.*, 2015-Ohio-1547.]**

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION
**No. 101854**

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## JOANNE CLAYTON

PLAINTIFF-APPELLANT

vs.

## CLEVELAND CLINIC FOUNDATION

DEFENDANT-APPELLEE

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**JUDGMENT:**
AFFIRMED

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Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-13-813063

**BEFORE:** Blackmon, J., Jones, P.J., and Keough, J.

**RELEASED AND JOURNALIZED:** April 23, 2015

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PATRICIA ANN BLACKMON, J.:

**{¶1}** Appellant Joanne Clayton ("Clayton") appeals the trial court's granting of summary judgment in favor of the Cleveland Clinic Foundation (the "Clinic") and assigns the following error for our review:

> The trial court erred by granting defendant-appellee Cleveland Clinic Foundation's motion for summary judgment with respect to plaintiff-appellant Joanne Clayton's claims of promissory estoppel, breach of implied contract, and handicap discrimination.[1]

**{¶2}** Having reviewed the record and relevant law we affirm the trial court's decision. The apposite facts follow.

**{¶3}** The Clinic hired Clayton on August 4, 2003, as a housekeeper in the Environmental Service Department. Clayton was terminated on January 26, 2011, for making derogatory comments about her supervisor that were sexual in nature and for misusing the Family and Medical Leave Act ("FMLA"). She used FMLA leave to attend court appearances for pending criminal charges after claiming that the absences were related to a medical condition.

**{¶4}** Although Clayton had received positive performance evaluations while employed at the Clinic, her employment records also show that she was disciplined and reprimanded for conduct such as: leaving work early; leaving her closet unlocked; leaving her assigned work area; taking an extended break; taking pictures of biohazardous waste

[1] Clayton also filed claims for intentional infliction of emotional distress, hostile work environment, and race discrimination but has abandoned those claims.

in a patient room in violation of HIPAA; and, insubordination for failure to perform in a "courteous, conscientious, and caring manner" when asked by a nurse to reclean a room.

**{¶5}** On August 30, 2013, Clayton filed a complaint in the common pleas court alleging claims for intentional infliction of emotional distress, racial discrimination, hostile work environment, breach of implied contract, promissory estoppel, and handicap discrimination based on the fact she is HIV positive. The Clinic answered and filed a motion for summary judgment, which was opposed by Clayton. The trial court granted summary judgment in favor of the Clinic stating in its order:

> Cleveland Clinic Foundation's motion for summary judgment filed 05/16/2014, is granted. The court, having considered all the evidence and having construed the evidence most strongly in favor of the non-moving party, determines that reasonable minds can come to but one conclusion, that there are no genuine issues of material fact, and that Cleveland Clinic Foundation is entitled to judgment as a matter of law. Plaintiff is unable to establish the elements required for claims of intentional infliction of emotional distress, breach of an implied contract, promissory estoppel, and disability discrimination. For the claim of disability discrimination, even if plaintiff had established a prima facie [case] for disability discrimination, defendant articulates the specific non discriminatory reason plaintiff was discharged.
>
> Plaintiff failed to oppose defendant's motion for summary judgment on the claims for racial discrimination and hostile work environment. Therefore, defendant's motion for summary judgment is well taken and granted on all claims. It is so ordered.

Judgment Entry, July 16, 2014.

## Summary Judgment

**{¶6}** In her sole assigned error, Clayton argues the trial court erred in granting summary judgment on her claims for breach of implied contract, promissory estoppel, and handicap discrimination.

**{¶7}** We review an appeal from summary judgment under a de novo standard of review. *Baiko v. Mays*, 140 Ohio App.3d 1, 746 N.E.2d 618 (8th Dist.2000), citing *Smiddy v. The Wedding Party, Inc*., 30 Ohio St.3d 35, 506 N.E.2d 212 (1987); *N.E. Ohio Apt. Assn. v. Cuyahoga Cty. Bd. of Commrs*., 121 Ohio App.3d 188, 699 N.E.2d 534 (8th Dist.1997). Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate.

**{¶8}** Under Civ.R. 56, summary judgment is appropriate when: (1) no genuine issue as to any material fact exists, (2) the party moving for summary judgment is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can reach only one conclusion that is adverse to the nonmoving party.

**Breach of Implied Contract/Promissory Estoppel**

**{¶9}** Clayton's employment with the Clinic was as an at-will employee. Generally, when the plaintiff is an at-will employee, the employer may discharge the employee at any time, even without cause, so long as the reason for the discharge is not contrary to law. *Wright v. Honda of Am. Mfg., Inc*., 73 Ohio St.3d 571, 574, 1995-Ohio-114, 653 N.E.2d 381. *See also Mers v. Dispatch Printing Co.*, 19 Ohio St.3d 100, 483 N.E.2d 150 (1985), paragraph one of the syllabus. However, there are two

exceptions to the employment-at-will doctrine: (1) where the employer has made a promise from which the employee can prove promissory estoppel, and (2) where the facts and circumstances surrounding the employment demonstrate the existence of explicit or implicit contractual terms concerning discharge. *Wright* at 574; *Kelly v. Georgia-Pacific Corp*., 46 Ohio St.3d 134, 545 N.E.2d 1244 (1989), paragraphs two and three of the syllabus; *Mers*, paragraphs two and three of the syllabus

**{¶10}** We first address Clayton's breach of implied contract claim. Whether explicit or implicit contractual terms have altered an at-will-employment agreement depends upon the history of the relations between the employer and employee, as well as the facts and circumstances surrounding the employment relationship. *Wright* at 574. The relevant facts and circumstances include "the character of the employment, custom, the course of dealing between the parties, company policy, or any other fact which may illuminate the question * * *." *Mers*, paragraph two of the syllabus. *See also Kelly*, paragraph two of the syllabus.

**{¶11}** Clayton argues that the anti-discrimination and anti-harassment provisions in the employee handbook created an implied contract altering the terms of the at-will employment. The terms of employee handbooks, policy manuals, and the like may alter the initial at-will nature of the employment. *Uebelacker v. Cincom Systems, Inc.*, 48 Ohio App.3d 268, 272-273, 549 N.E.2d 1210 (1st Dist.1988). In order to have this effect, however, both parties must have intended for the language in handbooks or manuals to be legally binding. *Id.* In other words, the employee's belief that the handbook affords

him contractual rights does not mean that it does unless the employer intends it to do so. As in all contracts, express or implied, both parties must intend to be bound. "Absent mutual assent * * * a handbook becomes merely a unilateral statement of rules and policies which create no obligation and rights." *Tohline v. Cent. Trust Co., N.A.*, 48 Ohio App.3d 280, 282, 549 N.E.2d 1223 (1st Dist.1988). *Accord Wing v. Anchor Media, Ltd. of Texas*, 59 Ohio St.3d 108, 110, 570 N.E.2d 1095 (1991).

**{¶12}** Clayton only references two pages in the handbook regarding the Clinic's anti-discrimination and anti-harassment policies. These policies do not constitute a specific promise of employment that would modify an at-will employment relationship. Additionally, a complete reading of the manual shows

that at page 13 there is the following disclaimer:

> **Employment at Will**
>
> Unless a collective bargaining agreement applies, a caregiver's employment with [the] Cleveland Clinic is employment at will. This means that employment may be terminated for any or no reason, with or without cause or notice, at any time by the caregiver or by [the] Cleveland Clinic. Nothing in this Handbook or in any other document or oral statement or representation shall limit the right to terminate at will. *This Employment At Will policy is the sole agreement between the caregiver and [the] Cleveland Clinic as to the duration of employment and the circumstances under which the employment may be terminated.* (Emphasis added.)

**{¶13}** Disclaimers like the above preclude the use of a written employee handbook to demonstrate an implied contract of employment. *Wing* at 110; *Handler v. Merrill Lynch Life Agency, Inc.*, 92 Ohio App.3d 356, 635 N.E.2d 1271 (10th Dist.1993);

*Galgoczy v. Chagrin Falls Auto Parts, Inc.*, 8th Dist. Cuyahoga No. 94281, 2010-Ohio-4684.

**{¶14}** Clayton also claims that oral representations were made by supervisors telling her that her job was secure and long-term. According to Clayton, every morning the workers would have a group "huddle" with a supervisor who would say things such as, "as long as you do your job, you can retire from here" and that they "would love to see you retire from here."

**{¶15}** Oral representations will alter the at-will employment agreement only if the parties have a "meeting of the minds" that such representations are considered "valid contracts altering the terms of discharge." *Rayel v. Wackenhut Corp.*, 8th Dist. Cuyahoga No. 67459, 1995 Ohio App. LEXIS 2389 (June 8, 1995); *Turner v. SPS Technologies, Inc.*, 8th Dist. Cuyahoga No. 51945, 1987 Ohio App. LEXIS 7318 (June 4, 1987). Statements regarding career development or future opportunities are insufficient to establish an express or implied contract that varies the employment-at-will agreement. *Daup v. Tower Cellular, Inc.*, 136 Ohio App.3d 555, 562-563, 737 N.E.2d 128 (10th Dist.2000). The above statements were mere words of encouragement and cannot reasonably be relied upon to expand the normal expectation of an at-will employment relationship. Accordingly, the trial court did not err by granting summary judgment on Clayton's claim for a breach of implied contract.

**{¶16}** Clayton also argues that the trial court erred in granting summary judgment on her promissory estoppel claim. An employee may recover under the theory of

promissory estoppel if she proves that the employer made a promise that it should have reasonably expected the employee to rely upon, the employee relied upon the promise, and the employee suffered injury as a result of this reliance. *Kelly*, 46 Ohio St.3d 134, 545 N.E.2d 1244, paragraph three of the syllabus.

**{¶17}** The promise at the heart of a promissory estoppel claim must consist of more than a commitment to the employee's future career development or a vague assurance of job security. *Hoyt v. Nationwide Mut. Ins. Co.*, 10th Dist. Franklin No. 04AP-941, 2005-Ohio-6367, ¶ 45; *Buren v. Karrington Health, Inc.*, 10th Dist. Franklin No. 00AP-1414, 2002-Ohio-206. Rather, in order to prove promissory estoppel, a promise of future benefits or opportunities must include a specific promise of continued employment. *Wing*, 59 Ohio St.3d 108, 570 N.E.2d 1095, paragraph two of the syllabus.

**{¶18}** In support of her promissory estoppel claim, Clayton argues that she relied on her positive performance evaluations, the Clinic's promise in its employee handbook to protect her from discrimination and harassment, and promises made by supervisors in their morning huddle. She claims she relied on these representations to her detriment by not seeking employment elsewhere.

**{¶19}** Detrimental reliance does not exist where the promisee merely refrains from seeking other employment; she must reject a specific offer of employment to show detrimental reliance. *Stickler v. Keycorp*, 8th Dist. Cuyahoga No. 80727, 2003-Ohio-283, ¶ 27*; Onysko v. Cleveland Pub. Radio*, 8th Dist. Cuyahoga No. 76484, 2000 Ohio App. LEXIS 3368 (July 27, 2000), citing *Nilavar v. Osborn*, 127 Ohio

App.3d 1, 17-18, 711 N.E.2d 726 (2d Dist.1998). Here, there is no evidence that Clayton rejected an offer of employment based on any alleged promise by the Clinic. She admitted that she never applied for any other jobs while working at the Clinic because "she was happy" and "loved" working at the Clinic. (Depo. 165.)

**{¶20}** Moreover, as we stated above, the handbook's anti-discrimination and anti-harassment provisions and the statements made by supervisors in the morning group huddles were not specific promises of job security thus they could not be reasonably relied upon.

**{¶21}** Clayton also argues that she relied upon her positive performance evaluations. Although she did receive positive performance reviews, she also received numerous reprimands and warnings. Also, "standing alone, praise with respect to job performance and discussion of future career development will not modify the employment-at-will relationship." *Helmick v. Cincinnati Word Processing, Inc*., 45 Ohio St.3d 131, 543 N.E.2d 1212 (1989), paragraph three of the syllabus. Accordingly, the trial court did not err by granting summary judgment on Clayton's claim based on promissory estoppel.

**Handicap Discrimination**

**{¶22}** Clayton also claims that the Clinic engaged in discriminatory actions because she was HIV positive.

**{¶23}** In order to establish a prima facie case of disability discrimination, the person seeking relief must demonstrate that (1) she was disabled, (2) an adverse

employment action was taken by an employer, at least in part, because the individual was disabled, and (3) the person, though disabled, can safely and substantially perform the essential functions of the job in question. *DeBolt v. Eastman Kodak Co.*, 146 Ohio App.3d 474, 766 N.E.2d 1040, ¶ 39 (10th Dist.2001), citing *Columbus Civ. Serv. Comm. v. McGlone*, 82 Ohio St.3d 569, 571, 697 N.E.2d 204 (1998). After the plaintiff demonstrates a prima facie case, her employer must produce evidence of a legitimate, nondiscriminatory reason for its action. *Hood v. Diamond Prods., Inc*., 74 Ohio St.3d 298, 658 N.E.2d 738 (1996). The plaintiff must then show that the given reason is mere pretext. *Id*.

**{¶24}** R.C. 4112.01(A)(13) defines "disability" as:

> [1] a physical or mental impairment that substantially limits one or more major life activities, including the functions of caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working; [2] a record of a physical or mental impairment; or [3] being regarded as having a physical or mental impairment.

**{¶25}** Clayton denied that she was handicapped in her deposition. She stated as follows:

> Q. How does your HIV status impair you?
>
> A. It doesn't.
>
> Q. All right. So you would say that it doesn't substantially limit any of your activities of daily life?
>
> A. No. Thank God. Praise him.

Q. When you were at the Cleveland Clinic Foundation, would you agree with me that you could perform all of your essential functions of being a housekeeper without any accommodations?

A. I was able to perform any duty without any accommodations.

Depo. at 75-76.

**{¶26}** Clayton did file an affidavit several months after her deposition, in which she stated that she was handicapped as a result of her HIV status and that she was denied reasonable accommodation. This was in direct contradiction to her deposition testimony. The Ohio Supreme Court in *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, 850 N.E.2d 47, ¶ 28, held as follows:

> We agree with the sentiment in *Lemaster v. Circleville Long Term Care, Inc*. (Feb. 22, 1988), Pickaway App. No. 87 CA 2, 1988 Ohio App. LEXIS 566, 1988 WL 17187. "Ordinarily, under [Civ.R.] 56(C), when an affidavit is inconsistent with affiant's prior deposition testimony as to material facts and the affidavit neither suggests affiant was confused at the deposition nor offers a reason for the contradictions in her prior testimony, the affidavit does not create a genuine issue of fact which would preclude summary judgment." We hold that an affidavit of a party opposing summary judgment that contradicts former deposition testimony of that party may not, without sufficient explanation, create a genuine issue of material fact to defeat a motion for summary judgment.

**{¶27}** In the instant case, there was no explanation provided for the inconsistencies. Therefore, the affidavit cannot be used to create a material issue of fact.

**{¶28}** Clayton's doctor also did not believe that Clayton's HIV status physically impaired her. In her letter requesting that Clayton be reinstated to housekeeping duties in patient rooms the doctor stated, "Ms. Clayton has no medical conditions that should offer limitation in the performance of her responsibilities." There was also no evidence that the Clinic regarded her as being disabled.

**{¶29}** Even if Clayton did prove she was handicapped, she has failed to show an adverse employment action was taken against her based on her handicap. She stated in her affidavit that because of her handicap, she was re-assigned from cleaning patient rooms to cleaning the stairwell, forced to work without assistance, denied overtime, and terminated. However, in her deposition, her testimony was contradictory to the affidavit. As we stated above, the affidavit cannot be used to create an issue of fact.

**{¶30}** Clayton claimed in her affidavit that in June 2007 she was reassigned from cleaning patient rooms, a job she loved, to cleaning the stairwell. In her interrogatory, she explained that she had complained to her supervisor, Twana Johnson, that the housekeeper on the previous shift was not "doing a good job" cleaning the rooms. She then revealed to the supervisor that she was HIV positive and "the specific accommodation requested was only that my comprised immune system be taken into consideration in regard to my safety * * *."

**{¶31}** In response, she was switched from cleaning patient rooms to cleaning the stairwell, which paid the same, but was less desirable to Clayton because it was hard on her knees. She admitted she did not inform supervisors regarding the knee pain. Depo. 88. We do not see how reassigning an employee with an alleged compromised immune system to a more healthy environment constitutes discrimination, especially when the patient requested an accommodation because of her compromised immune system. Changing her duties so that she was not exposed to the patients' maladies was based on a valid concern for Clayton's health. In fact, once her physician cleared her to work in patient rooms, she was reassigned back to her original position.

**{¶32}** Interestingly, in her deposition, Clayton denied telling supervisors that her immune system was compromised. Clayton explained that the June 2007 reassignment was based on Clayton's frustration that "C-diff" biohazardous waste not being disposed of in a timely manner. She, therefore, took pictures of the waste in a patient's room and showed it to her supervisor. She was reprimanded for taking the pictures because it violated the Clinic's HIPAA policy prohibiting photographing patient rooms. A week later, she was reassigned to housekeeping duties in the stairwell. In her deposition, she stated that she did not believe she was switched to cleaning the stairwell because she was HIV positive. Depo. 198. She thought her HIV positive status was used as a pretext by her supervisor to punish her for the unauthorized pictures. Therefore, either the switch in duties was a reasonable accommodation in response to Clayton's concern regarding her compromised immunity, or as she said, was not based on her HIV status at all, but to

punish her for violating HIPAA. Neither of these reasons was discriminatory based on her HIV status.

**{¶33}** Clayton also alleged in her affidavit that she was denied overtime. In her deposition, however, she admitted she was given overtime, just not on the days she wanted. "Not every action that makes an employee unhappy or resentful is an adverse employment action." *Crable v. Nestle USA, Inc.*, 8th Dist. Cuyahoga No. 86746, 2006-Ohio-2887, citing *Palmer v. Reno*, 190 F.3d 765, 767 (6th Cir., 1991). She also admitted that she thought she was not given the overtime on the days she wanted based on "personality issues."

**{¶34}** Clayton also stated in her affidavit that she was forced to work without assistance. According to supervisor Mark Hutchinson's affidavit, Clayton only requested assistance one time, and he informed her that another worker was already on the floor working with her. He claimed Clayton did not respond when he told her this. According to Hutchinson, it would be very rare for one person to have to clean an entire floor. Without documentation or an exact recall of how many times she was denied help, we cannot say there was evidence of a discriminatory motive.

**{¶35}** There is also no evidence her termination was motivated by the fact that Clayton is HIV positive. She claimed her termination was without cause; therefore, it must have been based on her HIV positive status. However, her termination occurred eight years after she informed the Clinic that she was HIV positive. The Clinic also gave legitimate reasons for terminating Clayton's employment. She was fired for misusing

FMLA leave by attending court proceedings when she said she was off for medical reasons. In her deposition, Clayton does not dispute that she was in court on those days, but stated that coincidentally, she was also sick on those days. She was also terminated for making sexually suggestive and derogatory comments regarding a supervisor. She claims that the coworker who reported her was lying. However, she had no explanation as to why two other coworkers confirmed she made the statements.

**{¶36}** Clayton argues that the reasons for termination were pretextual because the Ohio Department of Job and Family Services found she was terminated without cause when it awarded her unemployment compensation. However, "'just cause' for purposes of the agency's determination regarding a discharged employee's eligibility to receive unemployment compensation benefits is distinct from, and has no collateral-estoppel effect upon, a subsequent civil suit concerning the employee's discharge. *See* R.C. 4141.281(D)(8)." *Sexton v. Oak Ridge Treatment Ctr. Acquisition Corp.*, 167 Ohio App.3d 593, 2006-Ohio-3852, 856 N.E.2d 280, ¶ 11 (4th Dist.).

**{¶37}** There was no evidence that any of the actions that Clayton complained of were motivated by a discriminatory intent. In fact, in her deposition Clayton admitted as follows:

> Q. Can you, Ms. Clayton, give me an example of different treatment that was given to any white or non-handicapped employee at the same time you feel that you were discriminated against?
>
> A. No.

Depo. 187.

**{¶38}** Accordingly, the trial court did not err in granting summary judgment in favor of the Clinic on Clayton's claims because there were no material facts in issue and the Clinic was entitled to judgment as a matter of law. Clayton's sole assigned error is overruled.

**{¶39}** Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA ANN BLACKMON, JUDGE

LARRY A. JONES, SR., P.J., and
KATHLEEN ANN KEOUGH, J., CONCUR