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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0826-11T2

ERLY H. HERNANDEZ,

Plaintiff-Appellant,

v.

TOYS "R" US, INC.,

Defendant-Respondent.

Argued May 30, 2012 - Decided August 9, 2012

Before Judges Payne and Simonelli.

On appeal from Superior Court of New Jersey,
Law Division, Morris County, Docket No. L-
1683-11.

Lewis Stein argued the cause for appellant
(Nusbaum, Stein, Goldstein, Bronstein &
Kron, P.A., attorneys; Mr. Stein, on the
brief).

Joseph C. Toris argued the cause for
respondent (Jackson Lewis L.L.P., attorneys;
Todd H. Girshon, of counsel and on the
brief; Mr. Toris, on the brief).

PER CURIAM

Plaintiff, Erly Hernandez, appeals from the dismissal,
pursuant to Rule 4:6-2(e), of her complaint against her former
employer, Toys "R" Us, Inc. In that complaint, plaintiff

claimed that Toys "R" Us had breached an implied contract arising from the company's Policy and Procedures Manual that she alleged guaranteed her a peer review process in connection with an appeal of her termination for cause. We affirm.

I.

In a complaint filed on June 13, 2011, plaintiff alleged that, commencing in 1999, she was employed by Toys "R" Us as a human resources associate at its warehouse, located in Mt. Olive Township. She alleged further that:

3. At the inception of her employment and during the course of her continued employment, Plaintiff Erly H. Hernandez was provided with a document setting forth the Policies and Procedures (a copy [of] which is annexed hereto as Exhibit A) stating how problems would be addressed that could result in a termination of an employee.

4. On or about February 28, 2008, the Plaintiff Erly H. Hernandez was wrongfully terminated from her employment at Toys "R" Us, Inc., without being afforded the procedures set forth in the paragraph above.

5. Plaintiff Erly H. Hernandez's termination is a breach of the implied contract of employment as aforesaid constituting wrongful termination.

Attached to the complaint as Exhibit A was page 9 from Toys "R" Us's Logistics Division Policies and Procedures Manual governing peer review. The page described peer review as "an internal problem-solving procedure that ensures that Associate concerns

are reviewed and are fairly and quickly resolved." In a section entitled "How does Peer Review Work," the manual stated:

Step 1:

Use the existing open door policy and discuss your concern with your Manager within 7 calendar days of the event: It is hoped that open communication will resolve your concern. If you are satisfied with the response . . . the process ends.

Step 2:

Complete an appeal form within 7 calendar days and forward to your DC Manager or DC General Manager. They will respond to you within 7 calendar days. If you accept their decision . . . the process ends. If you are not satisfied with their response; proceed to Step 3.

Step 3:

You will have 7 calendar days to continue your appeal and request a Peer Review Panel. You will select a Facilitator to coordinate the Panel and answer any questions you may have.

The manual then described the make-up of the panels, depending on the employment level of the employee, and continued:

The Panel will be scheduled within 14 days. They will listen to you, your Manager, and any appropriate witnesses. They can decide to:

- Grant your appeal
- Modify your appeal

- Deny your appeal

The decision of the Panel will be final and binding on the Company.¹

Upon service of plaintiff's complaint, Toys "R" Us moved for dismissal. In support of its motion, it supplied additional portions of the Policies and Procedures Manual to which plaintiff's complaint made reference, as well as an incomplete copy of plaintiff's employment application that was not considered by the court in reaching its decision.

The portions of the manual supplied by Toys "R" Us included examples of conduct that were subject to disciplinary action, along with the statement: "This list is not all-inclusive and the Company, with or without notice or cause, may take action up to and including termination whenever it believes it is appropriate." Among the examples of conduct cited were

4. Falsifying or omitting any material facts on any report or record, including but not limited to employment application, claims for benefits, etc.
5. Scanning/swiping the badge of another Associate or having another Associate scan/swipe your badge.
8. Unsatisfactory job performance.

¹ A second page of this section, supplied in the motion to dismiss filed by Toys "R" Us, provided "If you have been terminated, proceed directly to Step 3."

11. Theft of company time²

In a sign-off of information received, executed by plaintiff on February 6, 2007, plaintiff acknowledged:

I have read the Company Rules and Regulations. I fully understand them and agree to strictly abide by them. I further understand that behavior which contradicts these policies will result in immediate disciplinary action, up to and including termination.

With respect to the peer review policy, plaintiff also acknowledged:

I have received a copy of the peer review policy. I understand the program's internal problem-solving procedures, which ensures that Associate concerns are reviewed and are fairly and quickly resolved.

Additionally, Hernandez acknowledged that the manual was "not a contract for employment" – a restrictive statement that immediately preceded the signature block on the acknowledgment form.

In its motion to dismiss plaintiff's complaint, Toys "R" Us argued that, in light of the restrictive language of its Policy and Procedures Manual, together with language in plaintiff's employment application, she could not establish that the manual

² Plaintiff claimed that she had been terminated for punching in ten to fifteen employees who had not been able to enter the facility at the commencement of their work day because of a fire drill.

created an implied contract of employment, and thus plaintiff's employment was terminable at will.

Following argument, in an oral opinion, Judge Hansbury agreed with Toys "R" Us's position. He found that, in light of plaintiff's reference in her complaint to the Policies and Procedures Manual, it was proper for Toys "R" Us to submit additional relevant portions of the document, and by doing so, it did not convert its motion to dismiss into a motion for summary judgment pursuant to Rule 4:46-2. The judge held additionally that, as the result of disclaimers in the manual, it did not constitute a contract, and for that reason, a breach of contract could not be found. Further, the judge found that the plain language of the manual required that plaintiff initiate any peer review process, and that she had failed to do so.

Upon entry of an order of dismissal, plaintiff appealed.

II.

On appeal, plaintiff argues that her case "appears to be on all fours" with the law as set forth in Woolley v. Hoffman-LaRoche, Inc., 99 N.J. 284, modified, 101 N.J. 10 (1985), a decision in which the Court held that, absent a contractual disclaimer, an implied promise contained in the defendant's employment manual that an employee would be fired only for cause

created an enforceable contract. She also claims that the Policy and Procedures Manual did not "prominently and unmistakably" communicate that Toys "R" Us did not intend to be bound by the promises contained in the manual.

Additionally, plaintiff addresses the reliance by Toys "R" Us on plaintiff's employment application – a document that Judge Hansbury did not consider in reaching his decision. Plaintiff also claims that the judge went outside the record in holding that she had not initiated the peer review process, although there was no evidence that she had done so.

Finally, she concedes that Toys "R" Us properly appended additional pages of the Policies and Procedures Manual to its motion, citing New Jersey Sports Productions, Inc. v. Bobby Bostick Promotions, L.L.C., 405 N.J. Super. 173, 178 (Ch. Div. 2007). However, she claims that the reliance by Toys "R" Us on her employment application was improper, and it converted the motion to dismiss into one for summary judgment for which the proper twenty-eight-day notice was not provided. Nonetheless, she concedes that because oral argument did not take place for a number of weeks after the return date of the motion, she "may be hard put to establish prejudice."

Following our review of the record in this matter in light of the arguments of counsel, we are satisfied that plaintiff's

arguments are of insufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(A) and (E). We affirm substantially on the basis of Judge Hansbury's oral opinion.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION