

STATE OF MICHIGAN
COURT OF APPEALS

MARIAN E. GUELF, F,

Plaintiff-Appellant,

v

MERCY HEALTH SERVICES and DEBBIE
LARSON,

Defendants-Appellees.

UNPUBLISHED

May 25, 1999

No. 200040

Crawford Circuit Court

LC No. 95-003707-NO

Before: Hoekstra, P.J., and Jansen and Gage, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendants' motion for summary disposition on her age discrimination and retaliation claims pursuant to MCR 2.116(C)(7) and MCR 2.116(C)(10), based on a determination that the claims were subject to arbitration. We affirm in part but remand for further proceedings.

On appeal, a trial court's grant of summary disposition will be reviewed de novo. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). This Court must review the record in the same manner as must the trial court to determine whether the movant was entitled to judgment as a matter of law. *Phillips v Deihm*, 213 Mich App 389, 398; 541 NW2d 566 (1995). In reviewing a motion for summary disposition pursuant to MCR 2.116(C)(7) (claim is barred because of an agreement to arbitrate), this Court must accept the plaintiff's well-pleaded allegations as true, *Phinney v Perlmutter*, 222 Mich App 513, 543; 564 NW2d 532 (1997), and examine any pleadings, affidavits, depositions, admissions and documentary evidence submitted by the parties in a light most favorable to the nonmovant. MCR 2.116(G)(5); *Skotak v Vic Tanny International, Inc.*, 203 Mich App 616, 617; 513 NW2d 428 (1994). A motion under MCR 2.116(C)(7) should be granted only if no factual development could provide a basis for recovery. *Skotak, supra*. A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). Giving the benefit of reasonable doubt to the nonmovant, the court must determine whether a record might be

developed which will leave open an issue upon which reasonable minds could differ. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1995).

Plaintiff first argues that the trial court erred in holding that defendant Mercy Health Services' (Mercy's) human resources manual constituted an agreement to arbitrate. Plaintiff relies on *Heurtebise v Reliable Business Computers, Inc*, 452 Mich 405, 413; 550 NW2d 243 (1996), where the Court held that it is undisputed that an arbitration provision is unenforceable if it is not a binding contract. In *Heurtebise*, however, language in the employment handbook stated that the policies did "not create any employment or personal contract, express or implied." *Id.* at 413. Unlike *Heurtebise*, in *Rushton v Meijer, Inc (On Remand)*, 225 Mich App 156, 161; 570 NW2d 271 (1997), overruled in part on other grounds, *Rembert v Ryan's Family Steak Houses, Inc*, ___ Mich App ___; ___ NW2d ___ (Docket No. 196542, issued April 9, 1999), slip op, pp 1, 3, the handbook at issue contained no similar language stating that the employer did not intend to be bound by its provisions. Under these factual circumstances, the *Rushton* Court found that, even though there was reservation language in the Meijer handbook stating that the existing policies may be "modified or deleted" by the employer, both parties were bound to utilize the alternate dispute resolution procedure described in the handbook. *Id.* at 162.

Here, Mercy's human resource guidelines manual did not contain a specific disclaimer to the effect that the manual was not a contract of employment, or an explicit statement that Mercy did not intend to be bound by its provisions. To the contrary, the fair treatment policy's arbitration language indicates that its nonsupervisory employees may be discharged only on a showing of just cause, further distinguishing the instant policy from that at issue in *Heurtebise, supra*. *Rushton, supra* at 161-162. Although there was reservation language implying that Mercy could amend the policies, there was no evidence that the arbitration provision had been revoked or amended. Thus, *Rushton, supra* at 162, indicates that Mercy was retroactively bound by the arbitration provision. Accordingly, we conclude that the trial court did not err in finding that the parties were contractually bound.

Plaintiff also contends that the human resources manual did not constitute a binding agreement because she did not have knowledge of it and had never assented to it. Plaintiff denied that her supervisor had ever discussed the fair treatment procedure policy with her in a staff meeting or in a one-on-one conversation, and alleged that she had never been provided with a copy of the policy, nor had ever seen it posted on a bulletin board. Moreover, plaintiff represented that she was not aware of the policies in the large guidelines manual that was maintained by the hospital and not distributed to employees. Plaintiff additionally stated in an affidavit that at no time while she was complaining of discrimination nor at her exit interview was she ever advised of any internal grievance procedure or given the opportunity to pursue such a procedure. However, uncontradicted evidence showed that the fair treatment policy was inserted into the guidelines manual located in the medical social work department where plaintiff and one other employee worked. Moreover, an affidavit of Mercy's human resource director established that during the years of plaintiff's employment, she availed herself of many of the benefit provisions contained in the guidelines manual. Under these circumstances, plaintiff's conduct conveyed assent to the written policies, *Ehresman v Bultynck & Co, PC*, 203 Mich App 350, 354-355; 511 NW2d 724 (1994) (An employee who had otherwise operated under the terms of

employment agreements that also provided for arbitration was bound to arbitrate even though he failed to sign the documents.), and even though plaintiff claimed that she did not have actual knowledge of the manual, the distribution of the manual provided plaintiff with reasonable notification of the employment guidelines. *Grow v General Products*, 184 Mich App 379, 386-387; 457 NW2d 167 (1990).

Plaintiff next argues, relying on Justice Cavanagh's plurality opinion in *Heurtebise, supra* at 414-438, that parties cannot be compelled to arbitrate claims covered by the Michigan Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.* During the pendency of plaintiff's appeal, a conflict panel of this Court convened to address the validity of employee-employer agreements to arbitrate civil rights claims. *Rembert* contains an extensive review of state and federal law regarding arbitration, civil rights and contracts. The panel adopted new requirements to determine whether the parties intended to arbitrate statutory employment discrimination claims, and whether the arbitration procedures are fair and the agreement waives no substantive rights and remedies. The conflict panel concluded that so long as the arbitration agreement does not waive any statutory rights or remedies and so long as the agreement provides for a fair arbitration procedure, employers may contract with their employees to arbitrate statutory civil rights claims. *Rembert, supra* at 1, 16-20. Therefore, plaintiff's argument that the fair treatment policy violates public policy is without merit. Because the trial court was not afforded an opportunity to specifically address *Rembert's* concerns that the arbitration agreement not waive statutory rights and that it provide fair procedures, *id.* at 16-20, we must remand to the trial court solely for a determination whether the conditions were met for application and enforcement of the parties' agreement. In the event the arbitration agreement satisfies *Rembert's* concerns, defendants should be granted summary disposition.

Affirmed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra

/s/ Kathleen Jansen

/s/ Hilda R. Gage