

STATE OF MICHIGAN
COURT OF APPEALS

NANCY POSSELIUS,

Plaintiff-Counterdefendant-
Appellee-Cross-Appellant,

v

SPRINGER PUBLISHING COMPANY, INC.,

Defendant-Counterplaintiff-
Appellant-Cross-Appellee,

and

WILLIAM L. SPRINGER II,

Defendant-Appellant-Cross-
Appellee.

UNPUBLISHED

April 17, 2014

No. 306318

Macomb Circuit Court

LC No. 2009-003401-CD

Before: MURPHY, C.J., and M. J. KELLY and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant Springer Publishing Company, Inc. (“SPC”), and its owner, defendant William L. Springer II, appeal as of right a judgment for plaintiff, following a jury trial, in this retaliation and employment discrimination lawsuit. Plaintiff cross appeals, challenging the trial court’s ruling that any damages for lost wages were required to be reduced by the amount of unemployment benefits received by plaintiff. We conclude that plaintiff’s gender discrimination claim was barred by a contractual six-month limitations period and that the retaliation claim, which was predicated on the filing of a counterclaim by SPC, fails as a matter of law. Accordingly, we reverse and remand.

Plaintiff began working for SPC in 2000. In 2005, plaintiff received SPC’s revised policy book and signed a form acknowledging her receipt of the book. That form provided:

[1] I hereby acknowledge that this Policy Book has been received, read and understood. . . .

[2] I understand that this manual is not intended to be a contract, but is provided as a general explanation of policies which the Company uses as guidelines in its decision making process.

[3] I understand it is my responsibility to update this guide as soon as replacement pages are distributed.

[4] In the event that I am ever employed in a management capacity for the Company, I understand it is my responsibility to understand, execute and enforce the policies and procedures established in this Policy Book to the employees under my direction.

[5] I agree to conform to the rules and regulations of the Company and understand that my employment can be terminated at any time . . . at the option of either the Company or myself. This at will employment relationship can be modified only through a written modification approved by the Publisher.

[6] I agree that in consideration for my employment or continued employment that any claim or lawsuit arising out of my employment with, or my application for employment with, the Company or any of its principals or subsidiaries must be filed no more than six (6) months after the day of the employment action that is the subject of the claim or lawsuit. While I understand that the statute of limitations for claims arising out of an employment action may be longer than six (6) months, I agree to be bound by the six (6) month period of limitations set forth herein, and I WAIVE ANY STATUTE OF LIMITATIONS TO THE CONTRARY.

Plaintiff's employment ended in July 2008. Plaintiff filed suit a year later in July 2009. Defendants moved for summary disposition on the ground that plaintiff's action was barred by the six-month contractual limitations period. The trial court denied the motion, ruling that the acknowledgment form was ambiguous because: (1) it was unclear whether the "Revised Policy Book" plaintiff submitted was the "Policy Book" referenced in the acknowledgement form;¹ (2) it was unclear whether the phrase "this manual" as used in the second paragraph of the acknowledgment form referred to the policy book, to the acknowledgment form, or to both; and (3) it was unclear whether the acknowledgement form was part of the revised policy book or was a separate document. The trial court denied defendants' motion for a directed verdict at trial for the same reasons. We note that the jury was not even asked to resolve those alleged ambiguities, and instead was asked to determine in general whether plaintiff agreed to be bound by the six-month statute of limitations rather than the time limit set forth under Michigan law, with the jury answering in the negative.

¹ The evidence at trial indicated that the policy book referenced in the acknowledgement form was the policy book admitted into evidence.

The trial court's ruling on a motion for a directed verdict is reviewed de novo on appeal. *Taylor v Kent Radiology, PC*, 286 Mich App 490, 499; 780 NW2d 900 (2009). This Court must review the evidence and all legitimate inferences in the light most favorable to the nonmoving party. *Id.* The motion should be granted only if the evidence so viewed fails to establish a claim as a matter of law. *Id.* "The interpretation of a contract is also a question of law this Court reviews de novo on appeal, including whether the language of a contract is ambiguous and requires resolution by the trier of fact." *DaimlerChrysler Corp v G-Tech Prof Staffing, Inc*, 260 Mich App 183, 184-185; 678 NW2d 647 (2003).

If the parties to a contract dispute its terms, the "court must determine what the parties' agreement is and enforce it." *G & A, Inc v Nahra*, 204 Mich App 329, 330; 514 NW2d 255 (1994). If the language of a contract, when given its plain and ordinary meaning, "fairly admits of but one interpretation, it may not be said to be ambiguous or, indeed, fatally unclear." *Osman v Summer Green Lawn Care, Inc*, 209 Mich App 703, 706; 532 NW2d 186 (1995), overruled in part on other grounds by *Smith v Globe Life Ins Co*, 460 Mich 446, 455 n 2; 597 NW2d 28 (1999). "If the contract language is clear and unambiguous, then its meaning is a question of law for the court to decide." *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 132; 602 NW2d 390 (1999).

Language is not ambiguous simply because the parties dispute its meaning. *Gortney v Norfolk & W R Co*, 216 Mich App 535, 540; 549 NW2d 612 (1996). A contract is ambiguous if its language "is reasonably susceptible to more than one interpretation," *Rinke v Auto Moulding Co*, 226 Mich App 432, 435; 573 NW2d 344 (1997), or if two provisions irreconcilably conflict with each other, *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003). Parol evidence is admissible to explain an ambiguity. *Meagher v Wayne State Univ*, 222 Mich App 700, 722; 565 NW2d 401 (1997). If the contract language is ambiguous, "the ambiguous language presents a question of fact to be decided by a jury." *Cole v Auto-Owners Ins Co*, 272 Mich App 50, 53; 723 NW2d 922 (2006).

"[A]n unambiguous contractual provision providing for a shortened period of limitations is to be enforced as written unless the provision would violate law or public policy." *Rory v Continental Ins Co*, 473 Mich 457, 470; 703 NW2d 23 (2005). "Only recognized traditional contract defenses" such as duress, waiver, estoppel, fraud, or unconscionability "may be used to avoid the enforcement of the contract provision." *Id.* This Court has upheld a contractual six-month limitations period in employment discrimination cases, rejecting arguments that the shortened period violated public policy and was unconscionable. *Clark v DaimlerChrysler Corp*, 268 Mich App 138, 142-144; 706 NW2d 471 (2005). The acknowledgement form clearly and unambiguously required plaintiff to file suit within six months after the date of the employment action giving rise to the suit. Plaintiff does not deny this, but contends that the acknowledgement form did not create a valid and enforceable contract.

In *Heurtebise v Reliable Business Computers, Inc*, 452 Mich 405, 408; 550 NW2d 243 (1996), the plaintiff sued the defendant for gender discrimination following termination of her employment. The defendant's employee handbook provided in part that any dispute arising out of "employment related matters," including "any and all claims relating to termination of employment," were to be resolved by binding arbitration. *Id.* at 409 n 3. The plaintiff signed an acknowledgment form in which she "agreed to be bound by [the] terms and policies" of the

handbook. *Id.* at 409. The trial court denied the defendant's motion for summary disposition. Although this Court reversed, the Supreme Court upheld the trial court's ruling. *Id.* at 410. It held that the arbitration provision in the handbook did not create a valid or enforceable agreement to arbitrate because the handbook also stated that its policies did "not create any employment or personal contract, express or implied," and that the defendant reserved the right to modify any or all policies at its discretion, which indicated that "the defendant did not intend to be bound to any provision contained in the handbook." *Id.* at 413-414.

Our case is easily distinguishable from *Heurtebise*. In that case, the arbitration agreement was part of the employee handbook and the handbook stated that it was not intended to create a contract. One element of a valid contract is mutuality of obligation. *Thomas v Leja*, 187 Mich App 418, 422; 468 NW2d 58 (1991). This means "that both parties are bound to an agreement or neither is bound." *Bancorp Group, Inc v Mich Conference of Teamsters Welfare Fund*, 231 Mich App 163, 171; 585 NW2d 777 (1998). By signing the acknowledgement form, the plaintiff in *Heurtebise* agreed to be bound by the terms of the handbook, but the handbook, in which the arbitration provision at issue was found, indicated that the defendant was not likewise bound by its terms and thus there was no mutuality of obligation. This case is different because the provision regarding a shortened limitations period was part of the acknowledgment form *itself* and there is nothing to indicate that SPC did not intend to be bound by that agreement. The revised policy book stated that SPC "reserve[d] the right to amend, alter or otherwise modify this Policy Book." However, the six-month limitations period was not contained in the policy book. Further, an employment contract is invalid only if the lack of mutuality amounts to a lack of consideration. *Toussaint v Blue Cross & Blue Shield of Mich*, 408 Mich 579, 600 n 7; 292 NW2d 880 (1980). And defendant provided valid consideration by agreeing to continue plaintiff's employment in exchange for plaintiff agreeing to the shortened limitations period. See *Id.* at 600 ("proper inquiry is whether the employee has given consideration for the employer's promise of employment").

This case is also distinguishable from *Stewart v Fairlane Community Mental Health Ctr (On Remand)*, 225 Mich App 410; 571 NW2d 542 (1997), and *Smith v Chrysler Fin Corp*, 101 F Supp 2d 534 (ED Mich, 2000), the other cases cited by plaintiff. In *Stewart*, the defendant's employee handbook contained an arbitration provision, but the acknowledgment form the plaintiff signed stated that the handbook was not an employment agreement or a contract of employment. *Stewart*, 225 Mich App at 411-413. Applying *Heurtebise*, the *Stewart* panel ruled that the handbook did not create an enforceable arbitration agreement, as the arbitration provision was found in the handbook, which handbook was not a contract. *Id.* at 419. In *Smith*, the defendant issued an Employee Dispute Resolution Process (EDRP) pamphlet to employees indicating that employment disputes were to be resolved by arbitration, but reserved the right to "amend, modify, suspend, or terminate all or part of th[e] EDRP at any time in its sole discretion." *Smith*, 101 F Supp 2d at 537-538. The federal court ruled that the provision giving the defendant the unilateral right to change or terminate the EDRP demonstrated the defendant's intent not to be contractually bound. *Id.* at 538-539.

Plaintiff argues that the acknowledgment form did not constitute a valid contract because of the language in the second paragraph stating that "this manual is not intended to be a contract." It is abundantly clear from paragraphs 1 - 4 that the terms "Policy Book," "manual," and "guide" were used interchangeably to refer to the same thing. The term "Policy Book"

undoubtedly referred to the revised policy book, receipt of which plaintiff acknowledged by signing the form. That book contained information about SPC's employment procedures and policies. The term "manual" is commonly defined in pertinent part as "a book easily held in the hand, esp. one giving information or instructions." *Random House Webster's College Dictionary* (1997). The term "guide" is similarly defined as "a book, pamphlet, or the like with information, instructions, or advice." *Id.* Thus, the term "manual" can only logically be interpreted as referring to the revised policy book, not to the acknowledgement form, a single sheet of paper which clearly was neither a booklet nor a pamphlet. Thus, there is no basis for concluding that the second paragraph is itself ambiguous or rendered the acknowledgment form ambiguous. Absent any ambiguity, plaintiff's subjective understanding of the meaning of the document is irrelevant. *Zurich Ins Co v CCR & Co (On Rehearing)*, 226 Mich App 599, 604-605; 576 NW2d 392 (1997). Although the revised policy book did not create contractual rights, the provision regarding a shortened limitations period is not part of the revised policy book. Thus, there is no basis for concluding, based on the second paragraph alone, that the acknowledgment form did not constitute a valid contract.

Further, there is no basis for concluding that the acknowledgment form itself was part of the revised policy book. And this is the key distinguishing feature between this case and *Heurtebise, Stewart, and Smith*, where in all of those cases the provision sought to be enforced was part of the handbook, yet there was language indicating that the handbook provisions were not contractual. The policy book here consisted of 12 pages addressing 17 policies and ended on the 12th page. The page numbering was identified at the bottom of each page as follows: "Page 1 of 12" through "Page 12 of 12." On page 12 of the policy book after the conclusion of policy number 17, it was stated, "[END OF POLICY BOOK]." Neither the table of contents nor the policies referenced the acknowledgment form or the shortened limitations period, and the acknowledgement form did not contain any notation to indicate that it was part of the policy book. Plaintiff testified only that she received the policy book and acknowledgement form at the same time. The only indication that the two formed a single document was implied by the fact that they were presented as a single exhibit at trial and, because the acknowledgement form was the last page of the exhibit, plaintiff and her attorney both referred to it as "the last page" as if it were the last page of the policy book. However, none of the witnesses testified that the acknowledgement form was part of the policy book.

Because the acknowledgement form created an enforceable agreement and was not ambiguous, plaintiff was bound by the provision requiring claims to be brought within six months. Application of the six-month limitations period barred plaintiff's gender discrimination claim, which arose out of Springer's conduct during plaintiff's employment. And we conclude that the failure of the discrimination claim necessarily results in a failure of the retaliation claim as a matter of law. Because of the six-month limitations period, plaintiff's discrimination claim should not have been filed in the first place, and it was the filing of the discrimination claim that formed the underlying basis of plaintiff's retaliation theory, i.e., SPC filed the counterclaim in retaliation for plaintiff filing the discrimination claim. The time-barred filing of the discrimination claim set in motion the events that led to the counterclaim and then the retaliation claim, which claims never would have been pursued but for plaintiff's improperly filed lawsuit.

Finally, we find it necessary to respond to the dissenting opinion. We respectfully disagree with the dissent's reasoning, given that Michigan law does not currently support the

proffered analysis. The dissent essentially indicates that “continued employment” cannot constitute “consideration” for purposes of establishing a binding contract by way of the acknowledgment form itself, where employees are at-will employees, as the employer’s promise of continued employment is illusory, e.g., the employer could terminate an employee the day after an agreement is executed. In *Timko v Oakwood Custom Coating, Inc.*, 244 Mich App 234; 625 NW2d 101 (2001), the plaintiff employee had signed an employment application that contained language acknowledging an at-will employment relationship and agreeing to a 180-day statute of limitations. This Court addressed the issue of consideration, stating:

Plaintiff next argues that the 180-day period of limitation cannot be enforced because defendant is "attempting to enforce the provisions contained in the employment application as if it is a contract, a contract where the Defendants have *absolutely no obligation*." "The enforceability of a contract depends, however, on consideration and not mutuality of obligation." *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579, 600; 292 NW2d 880 (1980); 1 Restatement Contracts, 2d, § 79, p 200. This Court previously has recognized that the terms of an employment application constituted part of an employee's and employer's contract of employment. *Butzer v Camelot Hall Convalescent Centre, Inc.*, 183 Mich App 194, 200; 454 NW2d 122 (1989); *Eliel v Sears, Roebuck & Co.*, 150 Mich App 137, 140; 387 NW2d 842 (1985). Here, defendant clearly provided plaintiff consideration to support enforcement of the terms of the application, *specifically employment and wages*. 1 Restatement Contracts, 2d, § 71, p 172 (consideration may constitute a return promise or a performance, including an act, a forbearance, or "the creation, modification, or destruction of a legal relation"); Black's Law Dictionary (7th ed), p 300 (defining consideration as "[s]omething of value [such as an act, a forbearance, or a return promise] received by a promisor from a promisee"). [*Timko*, 244 Mich App at 244 (emphasis added).]

Accordingly, the *Timko* panel rejected the plaintiff’s argument that the defendant employer’s act of employing the plaintiff as an at-will employee did not constitute consideration sufficient to create a contract. For purposes of identifying legally-adequate consideration, we can discern no relevant difference between a promise of at-will employment at the commencement of employment, which could be terminated on a whim the next day, and a promise of continued at-will employment. We do not see a sound basis for distinguishing *Timko*.

Moreover, in *QIS, Inc v Indus Quality Control, Inc.*, 262 Mich App 592, 594; 686 NW2d 788 (2004), this Court, citing *Robert Half Int’l, Inc v Van Steenis*, 784 F Supp 1263, 1273 (ED Mich, 1991), stated, “Mere continuation of employment is sufficient consideration to support a noncompete agreement in an at-will employment setting.” This is controlling precedent and undermines entirely the dissent’s position. We do not read anything in *Heurtebise*, 452 Mich 405, as indicating that the promise of continued at-will employment does not constitute adequate consideration for purposes of forming a binding contract; the handbook in *Heurtebise* stated that the policies therein did not create a contract, express or implied. *Id.* at 413. The acknowledgment form here contains no such language as applicable to the form itself. We note that “[c]ourts will not ordinarily inquire into the adequacy of consideration[.]” *Moffit v*

Sederlund, 145 Mich App 1, 11; 378 NW2d 491 (1985). And, in our view, there is a difference between not having a job period and having a job, albeit at-will employment.

Further, in *In re Certified Question*, 432 Mich 438, 441; 443 NW2d 112 (1989), our Supreme Court answered the following certified question in the affirmative:

“Once a provision that an employee shall not be discharged except for cause becomes legally enforceable under *Toussaint* . . ., as a result of an employee's legitimate expectations grounded in the employer's written policy statements, may the employer thereafter unilaterally change those written policy statements by adopting a generally applicable policy and alter the employment relationship of existing employees to one at the will of the employer in the absence of an express notification to the employees from the outset that the employer reserves the right to make such a change?”

In answering the certified question in the affirmative and allowing a change in the policy to an at-will employment arrangement, the Court stated:

It has been suggested that if such a policy is revocable, it is of no value, and thus is the equivalent of an illusory promise. Of course, a permanent job commitment would be highly prized in the modern work force. However, it does not follow that anything less than a permanent job commitment is without meaning or value. Indeed, the prevalence of job security provisions in collective bargaining agreements that typically expire after only a few years attests to the fact that such commitments need not be permanent to have value. [*In re Certified Question*, 432 Mich at 455.]

We recognize that this language from *In re Certified Question* addresses a different factual and legal context, but it does lend some support for the idea that a promise of continued employment, even if the continued employment is merely at-will employment, constitutes consideration adequate to form a contract and is not illusory.

In glancing at caselaw in foreign jurisdictions, the states differ on whether continued at-will employment can constitute sufficient consideration. See *Fifield v Premier Dealer Services, Inc*, 373 Ill Dec 379, 383; 993 NE2d 938 (2013) (“Illinois courts analyze the adequacy of consideration in the context of postemployment restrictive covenants because it has been recognized that a promise of continued employment may be an illusory benefit where the employment is at-will.”); *Sniezek v Kansas City Chiefs Football Club*, 402 SW3d 580, 586 n 2 (Mo App, 2013) (“Additionally, one of the cases cited . . . indicates that, unlike in Missouri, continued employment, even if it is only at-will, fulfills the consideration requirement under Pennsylvania law.”); *Wright & Seaton, Inc v Prescott*, 420 So2d 623, 628 (Fla App, 1982) (“[W]here employment was a continuing contract terminable at the will of either the employer or employee, the Florida Courts have held continued employment constitutes adequate consideration to support a contract.”). Thus, there is some legal merit, generally speaking, in the analysis suggested by the dissent, but it simply does not find any support in Michigan law.

In light of our rulings, it is unnecessary to consider the parties' remaining claims on appeal.

Reversed and remanded for entry of judgment in favor of defendants. We do not retain jurisdiction. We decline to award taxable costs pursuant to our discretion under MCR 7.219(A).

/s/ William B. Murphy

/s/ Michael J. Kelly