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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

KEVIN M. NOSS,)	Appeal from the Circuit Court
)	of Kendall County.
Plaintiff-Appellant,)	
)	
v.)	No. 12-L-62
)	
FOX RIVER FOODS, INC.,)	Honorable
)	Marcy L. Buick,
Defendant-Appellee.)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Presiding Justice Burke and Justice McLaren concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly dismissed plaintiff's complaint for breach of an employment contract and intentional interference with his expectation of new employment: despite plaintiff's arguments to the contrary, his employment with defendant was at will, and defendant's subsequent report as to the reason for plaintiff's termination was true and thus was not actionable.

¶ 2 Plaintiff, Kevin M. Noss, appeals from an order of the circuit court of Kendall County dismissing with prejudice his two-count amended complaint against his former employer, defendant, Fox River Foods, Inc. Because plaintiff failed to allege a claim in either count, we affirm.

¶ 3

I. BACKGROUND

¶ 4 Plaintiff started working as a truck driver for defendant in June 2007. Before being hired, he completed an employment application. The application contained a section on the last page, just above plaintiff's signature, entitled "Applicant Statement." The applicant statement provided, in relevant part, that, if hired, plaintiff understood that he was "free to resign at any time, with or without cause and with or without prior notice, and [defendant] reserve[d] the same right to terminate [his] employment at any time, with or without cause and with or without prior notice, except as may be required by law." The statement further provided that plaintiff understood that "no supervisor or representative of [defendant] [was] authorized to make any assurances to the contrary and that no implied oral or written agreements contrary to the foregoing express language [were] valid unless they [were] in writing and signed by [defendant's] president."

¶ 5 Immediately below the applicant statement was a line in large, bold print that stated "**Do Not Sign Until You Have Read The Above Applicant Statement.**" Below that was a line that certified that plaintiff had read, understood, and accepted the terms of the applicant statement. Plaintiff signed directly under that line.

¶ 6 On November 8, 2011, plaintiff reported for work at defendant's Montgomery, Illinois, facility. At approximately 7:30 a.m., while unloading cargo, his truck became stuck in the mud. Plaintiff had to have the truck towed out of the mud, and then he was instructed to complete his route.

¶ 7 Plaintiff's complaint alleged as follows. At around 5 p.m. on that date, plaintiff returned to defendant's facility. Nick Michaels, a dispatcher, instructed plaintiff to complete a post-accident report, explaining that John McNamara, plaintiff's route supervisor, had requested that

plaintiff do so. Michaels told plaintiff that he was to go to a medical clinic near the Fox Valley Mall in Aurora to complete a drug test.

¶ 8 Plaintiff asked Michaels if he knew when the clinic closed. At about 5:30 p.m., Michaels called the clinic and learned that it closed at 6 p.m. Plaintiff expressed concerns to Michaels that, because the roads were slick from the cold and rain, he was tired from working for 14 hours, and it was rush hour, he could not safely drive to the clinic in 25 minutes. Michaels requested further instructions from McNamara, who advised him that it was necessary for plaintiff to drive to the clinic even if it was closed when he arrived. When plaintiff reiterated his safety concerns, Michaels said that he would not accept that answer, that they would “still like [plaintiff] to try,” and that if plaintiff drove to the clinic and it was closed then he was to call from the clinic parking lot and report that he did not make it in time.

¶ 9 Once plaintiff was in his personal vehicle, he contacted Michaels and again expressed his safety and timing concerns. Michaels told plaintiff that they would figure out what to do when plaintiff finished his route the next day and that plaintiff could take the drug test the next day.

¶ 10 On November 9, 2011, plaintiff returned to work and completed his route at around 11:15 a.m. After he did so, Michaels advised him to report to the warehouse.

¶ 11 After arriving, plaintiff met with McNamara and defendant’s human resources director, Jose Guajardo. Guajardo informed plaintiff that he was being suspended, pending an investigation, for refusing to take a drug test. Although plaintiff stated that he was ready to take the test, Guajardo told him that it was no longer necessary. Plaintiff was issued a corrective action that stated that he was “resistant to the instructions given to him and never went for the drug screen.” The corrective action further stated that “company policy state[d] that when

instructed, drug screens are timely and refusing to follow through is contrued [*sic*] a positive result.”

¶ 12 A termination report, dated November 22, 2011, stated that plaintiff was fired for refusing to go to the clinic but did not mention that he violated a company policy. An investigation report, completed by Guajardo, included no findings as to whether plaintiff had violated a company policy or, if so, which policy he violated.

¶ 13 Previously, on January 13, 2011, plaintiff received a written warning regarding an accident that he had been involved in. On October 5, 2011, he received another written warning for failing to check invoices.

¶ 14 Plaintiff filed an amended two-count complaint. In count I he alleged that he had been terminated in breach of an employment contract. He alleged three bases giving rise to that contract: (1) a written accident policy that provided that if an employee had three chargeable accidents within 24 months he would be subject to discipline; (2) the fact that defendant had issued him several warning reports indicating that further incidents of insubordination would result in discipline; and (3) the fact that defendant had suspended him pending an investigation into his refusal to take the drug test. He alleged that those three actions by defendant constituted offers of continued employment, which he accepted by continuing to work, and that defendant breached the resulting employment contract when it terminated him.

¶ 15 In count II, for intentional interference with his expectation of new employment, he alleged that, after his termination, he had received offers of employment from three prospective employers. All of the offers were conditioned on his passing a background check. In each instance, the offer was withdrawn after defendant submitted a false report that plaintiff had left its employment because he “[d]id not follow company post-accident policy[.]” Plaintiff alleged

that defendant knowingly furnished the false information and did so to unjustifiably prevent him from obtaining future employment.

¶ 16 Defendant filed a combined motion to dismiss pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2012)). Relying on section 2-615 of the Code (735 ILCS 5/2-615 (West 2012)), defendant contended that count I should be dismissed because plaintiff failed to allege facts sufficient to overcome the presumption of at-will employment. Alternatively, defendant sought dismissal of count I pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2012)), relying on the disclaimer in the applicant statement of plaintiff's employment application. As to count II, defendant moved to dismiss under section 2-615, contending that qualified privileges under section 391.23 of the Code of federal Regulations (CFR) (49 C.F.R. § 391.23 (2012)) and Illinois law barred any claim unless it "knowingly furnish[ed] false information" as to the reason for plaintiff's termination.

¶ 17 After hearing arguments on defendant's motion to dismiss, the trial court issued a written order dismissing the amended complaint with prejudice. As to count I, the court, citing section 2-615, found that, in light of the disclaimer and the allegations regarding the accident policy and the disciplinary reports and procedures, it was not reasonable for plaintiff to have considered any of those as an employment offer. Therefore, the court found that plaintiff was an at-will employee and ruled that he failed to state a claim for wrongful termination.

¶ 18 As to count II, the court found that plaintiff failed to allege that defendant conveyed false information to any of the prospective employers. Thus, the court ruled that plaintiff failed to state a cause of action in count II. Plaintiff then filed this timely appeal.

¶ 19

II. ANALYSIS

¶ 20 On appeal, plaintiff raises the following contentions. As to his claim for wrongful termination, he maintains that the trial court ignored his allegations of an enforceable employment contract and improperly relied on the disclaimer in the applicant statement. As to his claim for intentional interference with his expectation of new employment, he argues that the court, in dismissing that claim under section 2-615, improperly relied on matters outside the amended complaint, specifically the qualified privilege under section 391.23 of the CFR. He further posits that he sufficiently alleged a claim for relief in count II.

¶ 21 Section 2-619.1 of the Code permits a combined motion to dismiss under sections 2-615 and 2-619. *Diotallevi v. Diotallevi*, 2013 IL App (2d) 111297, ¶ 25. A section 2-615 motion attacks the legal sufficiency of the complaint. *La Salle National Bank v. City Suites, Inc.*, 325 Ill. App. 3d 780, 789 (2001). A motion under section 2-619 admits the legal sufficiency of the complaint but raises defects, deficiencies, or other affirmative matters that appear on the face of the complaint or that are established by external submissions that defeat the claim. *Krilich v. American National Bank & Trust Co. of Chicago*, 334 Ill. App. 3d 563, 569-70 (2002). A motion to dismiss under either provision admits all well-pled allegations in the complaint and reasonable inferences to be drawn therefrom. *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 184 (1997). We review *de novo* a dismissal under either section. *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 368 (2003). We may affirm or reverse on any basis in the record. *Huang v. Brenson*, 2014 IL App (1st) 123231, ¶ 16 (citing *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 261 (2004)).

¶ 22 A. Count-Wrongful Termination

¶ 23 Generally, in an at-will employment relationship, either party may terminate the employment at any time without liability for breach of contract. *Janda v. United States Cellular*

Corp., 2011 IL App (1st) 103552, ¶ 63. Consequently, an employer may terminate an at-will employee at any time for good cause, bad cause, or no cause. *Janda*, 2011 IL App (1st) 103552, ¶ 63. An employment relationship is presumed to be at will, and the presumption can be overcome only by a showing that the parties agreed otherwise. *Janda*, 2011 IL App (1st) 103552, ¶ 63.

¶ 24 An employment policy can, in some instances, create enforceable contract rights. *Janda*, 2011 IL App (1st) 103552, ¶ 71 (citing *Duldulao v. Saint Mary of Nazareth Hospital Center*, 115 Ill. 2d 482, 490 (1987)). There are three requirements for a policy to be considered a contract: (1) the language must contain a clear promise that an employee would reasonably believe is an offer; (2) the policy must be disseminated in such a way that the employee is aware of it; and (3) the employee must accept the offer by commencing or continuing to work after learning of it. *Janda*, 2011 IL App (1st) 103552, ¶ 71. The question of whether the first requirement was met is a legal one. *Janda*, 2011 IL App (1st) 103552, ¶ 72.

¶ 25 In this case, plaintiff relies first on a written accident policy, which provided that, if an employee received three written warnings arising from chargeable accidents within a 24-month period, disciplinary action would result. He contends that the accident policy established a contract under which he could be terminated only if he first received a written warning.

¶ 26 A policy that provides that progressive discipline, including warnings, may be imposed in certain circumstances, but that does not mandate such progressive discipline, does not constitute a clear promise that an employee could reasonably believe was an offer. See *Janda*, 2011 IL App (1st) 103522, ¶¶ 76, 77; *Frank v. South Suburban Hospital Foundation*, 256 Ill. App. 3d 360, 367-69 (1993). The alleged policy here did not clearly promise that discipline could be imposed only if there had been prior written warnings. Rather, it simply set forth certain

circumstances under which written warnings might be imposed. It did not mandate written warnings or any other form of progressive discipline. Thus, the accident policy was not a clear promise that a person in plaintiff's situation would have reasonably believed was an offer of an employment contract.

¶ 27 Even if it was, and assuming that plaintiff continued to work because of it, plaintiff did not allege that he was terminated because of a chargeable accident. Instead, he alleged that he was fired for refusing to take a drug test. Therefore, even if the accident policy constituted an offer that he accepted, he did not state a claim for a breach of any employment contract arising out of that policy.

¶ 28 Second, plaintiff alleged that defendant issued him two written warnings, which indicated that any further incidents of insubordination would result in discipline. Those warnings, however, did not state that plaintiff could be disciplined only following a written warning. The warning dated January 13, 2011, contained no language that could be interpreted as establishing a promise of progressive discipline. Rather, it was merely a warning based on plaintiff's having had an accident. Likewise, the October 5, 2011, warning, regarding plaintiff's failure to check invoices, was devoid of such language. Those warnings, standing alone, did not mandate that plaintiff first be warned before being fired. See *Janda*, 2011 IL App (1st) 103522, ¶ 76. Therefore, plaintiff did not state a valid claim for breach of an employment contract based on those warnings.

¶ 29 Finally, plaintiff alleged that defendant's procedure of suspending him pending an investigation of his refusal to travel to the clinic for a drug test was an offer of continued employment. That procedure, however, in no way constituted a clear promise that there would be a suspension or investigation prior to termination. Instead, it was merely an investigative

procedure implemented to ascertain the facts and to determine the appropriate response to the situation. Moreover, to the extent that plaintiff was entitled to an investigation, he received one. His dissatisfaction with how it was conducted or its outcome does not establish a breach of any alleged employment contract. Thus, plaintiff did not state a claim for breach of an employment contract.

¶ 30 Plaintiff failed to allege any policy sufficient to satisfy the first element of the test in *Duldulao*. See *Janda*, 2011 IL App (1st) 103552, ¶ 71. Because he failed to satisfy the first element, we need not consider the remaining two elements. See *Janda*, 2011 IL App (1st) 103552, ¶ 81. Thus, because plaintiff failed to allege a required element of his claim, the trial court properly dismissed count I with prejudice.

¶ 31 Alternatively, the trial court found that plaintiff's employment application contained a disclaimer that was inconsistent with his claim that there was an employment contract. Where an employee manual or handbook contains a disclaimer indicating that the manual or handbook contains no promises and does not constitute a contract, no enforceable contract rights arise under the manual or handbook. *Ivory v. Specialized Assistance Services, Inc.*, 365 Ill. App. 3d 544, 546 (2006).

¶ 32 Here, as noted, the applicant statement provided that, if hired, plaintiff understood that he was "free to resign at any time, with or without cause and with or without prior notice, and [defendant] reserve[d] the same right to terminate [his] employment at any time, with or without cause and with or without prior notice, except as may be required by law." The statement further provided that defendant understood that "no supervisor or representative of [defendant] [was] authorized to make any assurances to the contrary and that no implied oral or written agreements

contrary to the foregoing express language [were] valid unless they [were] in writing and signed by [defendant's] president.”

¶ 33 We recognize that plaintiff is not relying on the application itself as giving rise to an employment contract. Nonetheless, the language in the applicant statement, which plaintiff acknowledged by his signature, was clearly inconsistent with his claim that the accident policy, the written warnings, or the investigative procedures gave rise to an employment contract. No employee reasonably would have considered any of those as constituting an offer in light of the disclaimer in the application that clearly stated that the employment was at will. Additionally, none of those policies or procedures indicated that they were expressly approved by defendant's president as required by the applicant statement. Thus, the disclaimer provided an additional basis for dismissing count I.¹

¶ 34 B. Count-Interference with an Expectation of New Employment

¶ 35 Tortious interference with a prospective economic advantage has the following elements: (1) a reasonable expectancy of entering into a valid business relationship; (2) the defendant's knowledge of the expectancy; (3) an intentional and unjustified interference by the defendant; and (4) damage resulting from the interference. *Voyles v. Sandia Mortgage Corp.*, 196 Ill. 2d 288, 300-01 (2001). A plaintiff must show not merely that the defendant interfered with the expectancy but that it did so purposefully. *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 485 (1998). In that regard, a defendant must have committed some impropriety in interfering. *Dowd*

¹ To the extent that the trial court relied on the disclaimer language in the applicant statement, an affirmative matter outside the amended complaint, it should have dismissed count I under section 2-619. See *Gagnon v. Schickel*, 2012 IL App (1st) 120645, ¶ 17. Nonetheless, we may affirm on that basis. See *Huang*, 2014 IL App (1st) 123231, ¶ 16.

& *Dowd, Ltd.*, 181 Ill. 2d at 485. The tort has been extended to claims that a former employer interfered with a former employee's expectation of new employment. See, e.g., *Anderson v. Vanden Dorpel*, 172 Ill. 2d 399, 406-11 (1996).

¶ 36 In this case, the trial court relied on the qualified privilege in section 391.23 of the CFR in dismissing count II. However, in affirming the judgment, we are not restricted to the basis relied on by the court. See *Huang*, 2014 IL App (1st) 123231, ¶ 16.

¶ 37 Plaintiff alleged that defendant reported to a screening agency that he was terminated for “not follow[ing] a company post accident policy.” Plaintiff alleged that defendant, in doing so, “knowingly furnished false information” to three prospective employers. He further alleged that the information was “unsupported by fact, and was unjustified and was communicated to prevent [plaintiff] from obtaining future employment.”

¶ 38 Plaintiff contends that the screening report was knowingly false, because he was actually fired for refusing to go to a designated clinic for a drug test as directed by defendant. Defendant's statement in the screening report that plaintiff had been fired for violating a post-accident policy was not false. That is reflected in the allegations of the amended complaint that show that plaintiff's termination was at least in part based on his failure to follow the accident-related policy. Upon plaintiff's return to the facility on November 8, 2011, he was instructed to complete a post-accident report. Further, he was directed to take a drug test, which was consistent with defendant's policy regarding work-related accidents. Although plaintiff quibbles with whether he was actually involved in an accident when his truck became stuck in the mud, it is evident from the allegations that defendant treated the situation as though it was an accident.²

² We agree with defendant's characterization of the incident. An accident is defined as a sudden event or change occurring without intent or volition through carelessness, unawareness,

The fact that defendant stated in its internal report that plaintiff was fired for refusing to take a drug test did not show that the screening report was false. Even if defendant had terminated plaintiff, in part, because of his refusal to go to the clinic and take the drug test, the fact that it did not include that additional reason in the screening report did not make its stated reason false. Therefore, defendant's report that plaintiff was fired for having failed to follow a post-accident policy was not false under the alleged facts and hence not unjustified. Moreover, even if the screening report was not comprehensive in its reasons for plaintiff's termination, without more that did not demonstrate that defendant purposely interfered with plaintiff's future employment. See *Dowd & Dowd*, 181 Ill. 2d at 485.³ Thus, because the allegations of the amended complaint failed to establish an essential element of the tort, we agree with the court's dismissal of count II.⁴

¶ 39

III. CONCLUSION

¶ 40 For the foregoing reasons, we affirm the judgment of the circuit court of Kendall County dismissing with prejudice counts I and II of the amended complaint.

ignorance, or a combination of causes and producing an unfortunate result. Webster's Third New International Dictionary, at 11 (1993). Getting a delivery truck stuck in the mud to the extent that it needed to be towed could fairly be described as an unfortunate occurrence and, hence, an accident.

³ If anything, it could be said that the failure to include any reference to plaintiff's refusal to take the drug test actually benefitted him in terms of future employment.

⁴ Because we hold that the amended complaint failed to state a claim for tortious interference with an expectation of employment, we need not address the issue of whether defendant was qualifiedly immune under either Illinois or federal law.

¶ 41 Affirmed.