2016 IL App (2d) 160047-U
No. 2-16-0047
Order filed November 17, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MARK DIEFENBACHER, Plaintiff-Appellant, v. ADVOCATE CONDELL MEDICAL CENTER, JONATHAN KUSMIERSKI, and ROBERT GOHEEN, Defendants (Advocate Condell Medical Center, Defendant-Appellee).	)	Appeal from the Circuit Court of Lake County. No. 15-L-206 Honorable Jorge L. Ortiz. Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Presiding Justice Schostok and Justice McLaren concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's dismissal of plaintiff's first amended complaint was affirmed where (1) defendant attached proper "affirmative matter" in support of its section 2-619(a)(9) motion to dismiss and (2) the disclaimer contained in defendant's employee handbook negated the creation of an employment contract between plaintiff and defendant. The trial court properly denied plaintiff's motion to reconsider where plaintiff did not present newly discovered evidence.

¶ 2 Plaintiff, Mark Diefenbacher, appeals from the trial court's dismissal of his first amended complaint for breach of employment contract. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On July 13, 2015, plaintiff filed a four-count first amended complaint. Count I alleged that defendants – Advocate Condell Medical Center (Advocate), Jonathan Kusmierski, and Robert Goheen[1] – wrongfully terminated and breached plaintiff's oral and implied employment contract based on pretextual and defamatory reasons. Count II alleged defamation based on false accusations of sexual harassment and theft. Counts III and IV alleged intentional and negligent infliction of emotional distress, respectively. Plaintiff did not attach any documents to his complaint. Only count I for breach of employment contract is at issue in this appeal.

¶ 5 Plaintiff's first-amended complaint alleged as follows. On June 23, 2004, plaintiff was hired by Advocate as a bio-medical engineer technician at Advocate's hospital in Libertyville, Illinois. He was hired pursuant to an "oral and implied contract" for an indefinite period of time, and his employment contract was "reinforced and amplified" by Advocate's "Associate Handbook" (handbook) and "certain" personnel practices, memoranda, policies, and procedures. These written policies and procedures included a program of "progressive discipline," which limited the grounds for employee discharge and created pre-termination steps and procedures. Based on these policies, plaintiff reasonably expected to be protected by an investigation before discipline or termination could be imposed, and he believed that he could be terminated only for good cause.

[1] The complaint alleged that Kusmierski and Goheen were agents and employees of Advocate. Neither Kusmierski nor Goheen filed an appearance or participated in the proceedings in any manner. They are not parties to this appeal.

¶ 6 The first-amended complaint also alleged that, beginning in January 2013, Advocate's employees engaged in a course of harassment, intimidation, and hostility against plaintiff designed to cause him to voluntarily resign from his position. Specifically, plaintiff alleged that Advocate's employees falsely accused him of sexual harassment and theft from suppliers. Due to these false accusations and other harassment, plaintiff alleged that he suffered severe emotional distress. Moreover, plaintiff alleged that he was denied access to proof of the allegations and was prohibited from speaking to fellow workers or suppliers about the alleged incidents. He was also denied arbitration or an independent hearing, as well as "contact" with the alleged victims as provided for in pages 21 and 22 of the handbook. Advocate breached the "total employment agreement" when it terminated plaintiff's employment on March 15, 2013. Up until his termination, plaintiff performed all of the conditions of the employment agreement.

¶ 7 On August 14, 2015, Advocate filed a combined motion to dismiss under section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2014)). Advocate argued that, under section 2-615 of the Code (735 ILCS 5/2-615 (West 2014)), plaintiff failed to state a cause of action for breach of employment contract. Specifically, Advocate argued that plaintiff's allegation that he was employed for an indefinite period of time established that he was an at-will employee, and plaintiff failed to plead facts that established the terms of the employment contract or the duration of the employment relationship. Advocate also argued that, under section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2014)), the "Associate Acknowledgment" section of the handbook contained a disclaimer that explicitly informed plaintiff of his at-will employment status. Advocate noted that each employee is required to electronically log onto its "Document Acknowledgment System" and acknowledge receipt of the employee handbook, which again expressly informed plaintiff of his at-will status.

¶ 8 In support of its section 2-619(a)(9) motion, Advocate attached the Associate Acknowledgment section of the handbook, which stated:

> "This Associate Handbook is effective July 1, 2010 and supersedes all previously issued handbooks or policy statements governing terms and conditions of employment. The handbook is not all-inclusive of the policies and procedures that govern associates' employment or that may be implemented at any time. Particular situations may be governed by specific provisions of a policies or procedural statement not included in this handbook. In the event of a discrepancy between the descriptions contained in this handbook and a system policy, the system policy will govern.
>
> Advocate's policies and procedures serve as guides to action and decision-making, ensuring consistency and fairness within the framework of Advocate's mission, values and philosophy. All advocate associates are responsible for being aware of and complying with all Advocate system and site policies and procedures. Copies and future revisions of these policies are available through AdvocateOnline or your supervisor.
>
> Advocate reserves the right – at its sole discretion – to change, suspend or cancel, with or without notice, all or any part of the policies, procedures, programs and benefits discussed in this handbook.
>
> Neither the provisions of this handbook nor any other Advocate policy statements establish contractual rights, in whole or in part, between Advocate and its associates. Neither Advocate nor its associates are committed to any employment relationship for a definite period of time and either party may terminate the relationship at any time for any reason, with or without notice.

> The application of Advocate's policies and procedures set forth in this handbook and elsewhere to exempt associates is subject, in all cases, to the requirements of the Fair Labor Standards Act (Act) and Illinois Minimum Wage Law (Law); these policies and procedures are to be applied and interpreted consistently with the Act and Law.
>
> In an effort to be good stewards of our environment and our financial resources, Advocate provides this handbook to our associates in an electronic format. **All associates are required to acknowledge receipt of the Advocate Associate Handbook**. To submit your acknowledgment, please follow these steps: [enumerated directions]." (emphasis in original).

¶ 9 Advocate also attached forms from its Document Acknowledgement System that showed that plaintiff electronically acknowledged receipt of the handbook on January 6, 2012. When plaintiff acknowledged receipt, he was again presented with the same text, verbatim, that was included in the Associate Acknowledgment section of the handbook.

¶ 10 In his response to Advocate's motion to dismiss, plaintiff argued that the handbook created an "extremely detailed procedure" for resolving conflicts via the Conflict Resolution Program, which he attached as an exhibit. Plaintiff argued that he was terminated without being offered any of the procedures identified in the program. Plaintiff also argued that Advocate's disclaimer language in the Associate Acknowledgment section was ambiguous and contradictory.

¶ 11 Advocate replied that the Conflict Resolution Program did not create an enforceable contract; it dealt only with conflicts between an associate and a fellow employee or supervisor; it did not address termination procedures or employment status; and it did not contain clear, unequivocal, or mandatory language regarding disciplinary procedures.

¶ 12 On October 15, 2015, the trial court dismissed plaintiff's first amended complaint with prejudice. As to count I, the court found that plaintiff was an at-will employee, the disclaimer in the Associate Acknowledgment section of the handbook was clear and unambiguous, and the Conflict Resolution Program did not create an offer to enter a contract. The order also contained language indicating that it was final and appealable.

¶ 13 On November 13, 2015, plaintiff filed a motion to reconsider. Plaintiff argued that the trial court erred in applying existing law, because Advocate's disclaimer was ambiguous and hidden. He also argued that the Conflict Resolution Program and another written policy, the Corrective Action Policy, created an enforceable contract. Plaintiff attached the Corrective Action Policy (which had a "Template Date" of May 15, 2014) to his motion to reconsider, as well as the entire handbook.

¶ 14 In its response, Advocate argued that the Corrective Action Policy was not newly discovered evidence because it was available at the time of the original hearing. Advocate reiterated its previous arguments and also contended that none of the policies that plaintiff relied on contained unequivocal and mandatory language pertaining to disciplinary procedures.

¶ 15 In his reply, plaintiff attached an affidavit from his attorney, in which the attorney averred that he "did not receive" the Corrective Action Policy until November 10, 2015.

¶ 16 On December 17, 2015, the trial court denied plaintiff's motion to reconsider. The court found that the handbook and the Corrective Action Policy were not newly discovered evidence, because plaintiff offered no reason why he could not have produced them earlier. The court also noted that, because of the "Template Date," it was not clear whether the Corrective Action Policy that was attached to plaintiff's motion was the actual policy in effect at the time of plaintiff's termination. Nevertheless, the court found that neither the handbook nor the

Corrective Action Policy, by their own terms, established a contract of employment. The court noted that the Corrective Action Policy clearly stated that actions under the policy were discretionary and that immediate termination of employment may occur without warning. The court also found that the Associate Acknowledgment section contained a clear and unambiguous disclaimer, of which plaintiff acknowledged receipt on at least two occasions.

¶ 17 Plaintiff timely appealed.

¶ 18 II. ANALYSIS

¶ 19 Plaintiff first contends that the court erred in dismissing his first amended complaint for breach of employment contract. The court granted Advocate's motion to dismiss under both section 2-615 and section 2-619 of the Code. On appeal, however, the parties' briefs focus solely on the propriety of the court's dismissal under section 2-619.

¶ 20 A section 2-619 motion to dismiss admits the legal sufficiency of the complaint, but asserts that a defense outside the complaint defeats the claim. *Doe v. University of Chicago Medical Center*, 2015 IL App (1st) 133735, ¶ 35. In ruling on a section 2-619 motion, the court accepts as true all well-pleaded facts and any reasonable inferences that may arise from them. *Doe*, 2015 IL App (1st) 133735, ¶ 35. Conclusions of law, however, are not taken as true. *Coady v. Harpo, Inc.*, 308 Ill. App. 3d 153, 158 (1999). The court also construes the motion and the supporting documents in the light most favorable to the nonmovant. *Piser v. State Farm Mutual Auto Insurance Co.*, 405 Ill. App. 3d 341, 345 (2010). We review *de novo* the trial court's dismissal of a complaint under section 2-619. *Doe*, 2015 IL App (1st) 133735, ¶ 35.

¶ 21 A. Affirmative Matter

¶ 22 Plaintiff initially argues that Advocate failed to attach "affirmative matter" in support of its section 2-619(a)(9) motion to dismiss. Specifically, plaintiff contends that Advocate's use of

the disclaimer provision in the Associate Acknowledgment section of the handbook was improper, as the disclaimer merely refuted his allegations that Advocate's handbook and policies created an enforceable employment contract.

¶ 23 We agree with Advocate that plaintiff forfeited this argument by failing to raise it in either his response to the motion to dismiss or in his motion to reconsider. See *Mabry v. Boler*, 2012 IL App (1st) 111464, ¶ 15 ("Generally, arguments not raised before the circuit court are forfeited and cannot be raised for the first time on appeal."). Forfeiture aside, we reject plaintiff's argument.

¶ 24 Section 2-619(a)(9) of the Code provides that a defendant may file a motion to dismiss on the grounds that the asserted claim is "barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2014). The "affirmative matter" must be apparent on the face of the complaint or be supported by affidavits or other evidentiary materials. *Doe*, 2015 IL App (1st) 133735, ¶ 37. "Affirmative matter" either negates an alleged cause of action completely or refutes crucial conclusions of law or conclusions of material fact unsupported by allegations of specific fact contained in or inferred from the complaint. See *Smith v. Waukegan Park District*, 231 Ill. 2d 111, 121 (2008). The "affirmative matter" presented by the movant must do more than refute a well-pleaded fact in the complaint. *Doe*, 2015 IL App (1st) 133735, ¶ 39.

¶ 25 Here, the crux of plaintiff's claim was that Advocate's handbook and "certain" written policies and procedures created an enforceable contract that provided pre-termination procedures and otherwise limited the grounds for disciplinary action against employees. [2] Section 2-606 of the Code provides that if a claim or defense is founded on a written instrument, a copy of the

[2] On appeal, plaintiff does not argue that there was an oral contract.

instrument or its relevant provisions "must be attached to the pleading as an exhibit or recited therein," unless the pleader attaches an affidavit stating facts showing that the instrument is not accessible. See 735 ILCS 5/2-606 (West 2014). The exhibits to which section 2-606 applies generally consist of instruments that form the basis of the suit, such as contracts. *Velocity Investments, LLC v. Alston*, 397 Ill. App. 3d 296, 298 (2010).

¶ 26 Plaintiff pleaded that the handbook and "certain" written policies and procedures created a contract. In violation of section 2-606, he did not attach any of the alleged documents to his complaint or otherwise include an affidavit explaining why they were unavailable. Nor did plaintiff allege any facts or details about the "Progressive Discipline" policy, the "self-imposed limitations" on termination and discipline, or the mandatory pre-termination steps and procedures that he relied on. When plaintiff failed to attach these documents to the complaint, it was entirely appropriate for Advocate to submit the disclaimer provision of the handbook in support of its section 2-619(a)(9) motion to dismiss. Indeed, Advocate's defense was that the disclaimer negated plaintiff's claim that Advocate's handbook and written policies and procedures created an enforceable contract. Because the question of whether a contract exists is a matter of law for determination by the court (*Bennett v. Evanston Hospital*, 184 Ill. App. 3d 1030, 1033 (1989)), the documents submitted by Advocate were clearly relevant to determining whether a contract existed between the parties. See also *Reynolds v. Jimmy John's Enterprises, LLC*, 2013 IL App (4th) 120139, ¶ 30 ("Section 2-619(a)'s purpose is to provide litigants with a method of disposing of issues of law and easily proved issues of fact – relating to the affirmative matter – early in the litigation.").

¶ 27 *Perkaus v. Chicago Catholic High School Athletic League*, 140 Ill. App. 3d 127 (1986), is instructive. In *Perkaus*, the plaintiff was injured in a rugby game between club teams fielded

by two high schools. *Perkaus*, 140 Ill. App. 3d at 129. The plaintiff filed a negligence claim against the defendant, alleging that its constitution and bylaws created a legal duty to regulate certain aspects of the rugby game. See *Perkaus*, 140 Ill. App. 3d at 129-131. The trial court dismissed the claim after the defendant filed a section 2-619(a)(9) motion to dismiss that attached its constitution and bylaws as "affirmative matter." *Perkaus*, 140 Ill. App. 3d at 130, 131-32. The appellate court rejected the plaintiff's contention that the defendant could not rely on its constitution and bylaws in support of its motion to dismiss. *Perkaus*, 140 Ill. App. 3d at 134-35. The court noted that the plaintiff pleaded the constitution and bylaws in his complaint, but failed to attach copies of them. *Perkaus*, 140 Ill. App. 3d at 134. The court reasoned that the defendant's use of those documents was proper, because they directly contradicted plaintiff's "conclusional allegations" that the defendant regulated, coordinated, and oversaw the rugby game. *Perkaus*, 140 Ill. App. 3d at 135. The court also reasoned that the documents were properly used to challenge the plaintiff's conclusion of law that based on the constitution and bylaws, the defendant had a legal duty to protect participants in the game or otherwise regulate the equipment and qualification of the coaches. *Perkaus*, 140 Ill. App. 3d at 135.

¶ 28 Here, like *Perkaus*, plaintiff filed a complaint relying on Advocate's handbook and written policies, but he failed to attach them to his complaint. Advocate properly filed the Associate Acknowledgment section of the handbook as affirmative matter to establish, as a matter of law, that no contract existed based on the handbook or policies. Also like *Perkaus*, the disclaimer directly contradicted plaintiff's unsupported "conclusional allegation" that Advocate had to conduct a complete investigation before it could discharge an employee.

¶ 29 Plaintiff's reliance on *Doe* and *Gajda v. Steel Solutions Firm, Inc.*, 2015 IL App (1st) 142219, does not warrant a contrary result. Those cases involved motions to dismiss in which

the "affirmative matter" relied upon by the defendants were affidavits that merely refuted well-pleaded factual allegations by presenting the defendants' versions of the events. See *Doe*, 2015 IL App (1st) 133735, ¶¶ 13-22, 52-56 (affidavit merely contradicted well-pleaded factual allegations that plaintiff sought transportation or safety escort on the night that she was injured and that she was promised that a safety desk would always be manned by personnel); see also *Gajda*, 2015 IL App (1st) 142219, ¶ 32 (affidavit merely contradicted the plaintiffs' allegations that they were employees of the defendant companies and that the defendant companies were alter egos of each other). Here, unlike in *Doe* and *Gajda*, the "affirmative matter" attached to Advocate's motion to dismiss did not merely present its version of the events, but instead was a provision of the alleged contract that was pleaded by plaintiff. As explained above, it was also a document that plaintiff himself should have attached to the first amended complaint.

¶ 30 Furthermore, there are numerous cases in which the court examined portions of an employer's handbook or policies at the dismissal stage to determine whether an employment contract existed as a matter of law. See, *e.g.*, *Wood v. Wabash County*, 309 Ill. App. 3d 725, 728-29 (1999); *Bjorn v. Associated Regional and University Pathologists, Inc.*, 208 Ill. App. 3d 505, 506-08 (1990); *Spann v. Springfield Clinic*, 217 Ill. App. 3d 419, 420-25 (1991); *Ross v. May Co.*, 377 Ill. App. 3d 387, 390-93 (2007).

¶ 31 B. Breach of Employment Contract

¶ 32 As to the merits, plaintiff claims that the trial court erred in holding that Advocate's handbook, policies, and practices did not create an employment contract. Specifically, plaintiff argues that the handbook, Conflict Resolution Program, and the Corrective Action Policy formed the basis of the contract.

¶ 33 As mentioned, plaintiff did not attach any exhibits to his first amended complaint. He attached the Conflict Resolution Program to his response to the motion to dismiss, but he did not attach the entire handbook or the Corrective Action Policy until he filed his motion to reconsider. Therefore, when the trial court ruled on Advocate's motion to dismiss, it considered only the pleadings, the Conflict Resolution Program, and the Associate Acknowledgment section of the handbook. In reviewing whether the trial court properly granted Advocate's motion to dismiss, we must necessarily limit our consideration to only those documents that were before the trial court at that time.

¶ 34 Generally, an employment relationship without a fixed duration is terminable at will by either party. *Duldulao v. Saint Mary of Nazareth Hospital Center*, 115 Ill. 2d 482, 489 (1987). This presumption, however, can be overcome by demonstrating that the parties contracted otherwise. *Duldulao*, 115 Ill. 2d at 489. Specifically, an employee handbook or other policy statement will create enforceable contractual rights if the traditional requirements for contract formation are present. *Duldulao*, 115 Ill. 2d at 490. Those requirements are: (1) the language of the policy statement or handbook must contain a promise clear enough that an employee would reasonably believe that an offer has been made; (2) the statement must be disseminated to the employee in such a manner that the employee is aware of its contents and reasonably believes it to be an offer; and (3) the employee must accept the offer by commencing or continuing to work after learning of the policy statement. *Duldulao*, 115 Ill. 2d at 490. Nevertheless, "where the employee manual contains a disclaimer indicating that the manual promises nothing and does not act as a contract, no enforceable contractual rights will be conferred on the employee based on that manual." *Ivory v. Specialized Assistance Services, Inc.*, 365 Ill. App. 3d 544, 546 (2006).

¶ 35 Here, the Associate Acknowledgment section of the handbook contained a clearly worded disclaimer that stated: "Neither the provisions of this handbook nor any other Advocate policy statements establish contractual rights[.]" It also stated that neither Advocate nor its employees "are committed to any employment relationship for a definite period of time and either party may terminate the relationship at any time for any reason, with or without notice." Thus, it was not reasonable for plaintiff to construe defendant's handbook or policies as an offer, which is necessary to create a contractual relationship between the parties.

¶ 36 Because Advocate's handbook contained a clearly worded disclaimer that negated the creation of contractual rights, we find inapplicable the case of *Wood v. Wabash County*, 309 Ill. App. 3d 725, 726-27 (1999), where the employer handbook did not contain a disclaimer. Indeed, the court in *Wood* explicitly stated that "defendant could have included a disclaimer, if properly phrased, in the handbook to ameliorate the legal consequences of the handbook, but defendant included no disclaimer anywhere in the policy handbook." *Wood*, 309 Ill. App. 3d at 729.

¶ 37 Plaintiff attempts to avoid the clear effect of the disclaimer by arguing that it was ambiguous, because a sentence that was two paragraphs above the disclaimer stated: "Advocate's policies and procedures serve as guides to action and decision-making, ensuring consistency and fairness within the framework of Advocate's mission, values and philosophy." Such language does not render ambiguous the otherwise clear disclaimer, as the sentence explicitly stated that the policies and procedures referenced in the handbook were *guides* to action and decision-making.

¶ 38 Plaintiff also argues that the disclaimer was legally insufficient because it was inconspicuous. He notes that the disclaimer language was printed in the same font and size as the rest of the Associate Acknowledgment section and it was not set apart.

¶ 39 Plaintiff relies on *Wheeler v. Phoenix Company of Chicago*, 276 Ill. App. 3d 156 (1995). In *Wheeler,* the employee handbook contained an acknowledgment that stated: "I *** understand that I can be discharged at any time, with or without notice for violation of any of the rules in the handbook." *Wheeler*, 276 Ill. App. 3d at 158. The handbook also contained provisions that mandated that a progressive disciplinary procedure "will be used," and in instances of immediate dismissal, written permission from the employer's president "will be obtained." *Wheeler*, 276 Ill. App. 3d at 158. This court held that the disclaimer did not negate the "unequivocal language" that promised the use of a progressive disciplinary policy. *Wheeler*, 276 Ill. App. 3d at 163. The court also held that, where a disclaimer does not contain the "unequivocal statement" that the handbook "is not a contract" or other words to that effect, contractual obligations may only be negated via conspicuous disclaimers. See *Wheeler*, 276 Ill. App. 3d at 162-63.

¶ 40 *Wheeler* is distinguishable. Most important, the disclaimer here contained an unequivocal statement that neither the handbook nor any policies or procedures created contractual rights between Advocate and its employees. Moreover, the disclaimer language contained in the Associate Acknowledgment section was conspicuous. It was located in a specially demarcated section of the handbook called "Associate Acknowledgment," in which the title of the section was highlighted and set apart in large font. That section had only six paragraphs, and there were only four paragraphs above the disclaimer. The disclaimer immediately followed a paragraph that stated that Advocate reserved the right, at its sole discretion, to suspend or cancel all or any programs, policies, or benefits addressed in the handbook. The Associate Acknowledgment section also explicitly required that each employee electronically acknowledge receipt of the handbook. Once the employee signed into Advocate's

Document Acknowledgment System, he or she was again presented with the exact same language from the Associate Acknowledgment section of the handbook. Plaintiff was thus required to read the disclaimer twice. Advocate attached documents to its motion to dismiss showing that plaintiff acknowledged receipt of the handbook on January 6, 2012.[3]

¶ 41 For those same reasons, we reject plaintiff's reliance on *Hicks v. Methodist Medical Center*, 229 Ill. App. 3d 610, 614 (1992) (disclaimer did not negate "precise and unequivocal" promises in handbook where it was inconspicuous and located under a section titled "Revisions"), and *Long v. Tazewell/Pekin Consolidated Communication Center*, 215 Ill. App. 3d 134, 140 (1991) (disclaimer ineffective because it was "in effect hidden within the text describing the duties" of the worker, it was not unequivocal, and it did not specifically state that the employer would not be bound by the provisions of the manual).

¶ 42 Additionally, plaintiff relies on *Perman v. ArcVentures, Inc.*, 196 Ill. App. 3d 758 (1990), in arguing that the disclaimer is ineffective. In *Perman*, the employee manual contained a disclaimer that stated that the manual did not limit the employer's termination rights or constitute an employment contract. *Perman*, 196 Ill. App. 3d at 762. But it also contained a list of specific activities that could result in termination and noted that "discharges must be approved in advance by the director of employee relations, or designee, and are subject to employee appeal through established grievance procedures." *Perman*, 196 Ill. App. 3d at 762. The manual also stated that it was the employer's policy "to assure" every employee the right to appeal an unfavorable

[3] Plaintiff also acknowledged receipt of the 2009 Associate Handbook on December 28, 2009. We note that the acknowledgment language and disclaimer for the 2009 handbook were identical to the 2010 Associate Handbook, aside from the date listing the effectiveness of the respective handbooks themselves.

employment decision. *Perman*, 196 Ill. App. 3d at 762-63. The appellate court held that the "unequivocal language" in the manual negated the effect of the disclaimer. *Perman*, 196 Ill. App. 3d at 765. Specifically, the manual created enforceable contractual rights that provided an established grievance procedure for an unfavorable decision affecting employment, and the disclaimer was not set off from the rest of the text, printed in capital letters, or separately titled. *Perman*, 196 Ill. App. 3d at 765-66.

¶ 43 Unlike in *Perman*, the handbook and policies here did not contain unequivocal language that negated the effect of the disclaimer. Indeed, the Conflict Resolution Program, upon which plaintiff solely relied in responding to the motion to dismiss, does not even reference termination, but is instead focused on providing mediation and arbitration to employees who have "work-related conflicts." Moreover, none of the procedures in the Conflict Resolution Program are mandatory. It also made clear that an employee "must have contacted Human Resources (HR) within seven calendar days of the event giving rise to the conflict" to utilize the mediation or arbitration procedures. Plaintiff did not plead or argue that he complied with the provisions in the program.

¶ 44 Plaintiff also argues that the trial court erred in relying on the disclaimer, because Advocate "improperly" failed to attach the entire handbook to its motion to dismiss. As we explained above, plaintiff himself pleaded that the handbook and written policies and procedures created an enforceable contract, yet he failed to attach such documents to his complaint or attach an affidavit explaining why the same were unavailable. Nor did plaintiff argue before the trial court that Advocate was required to attach the entire handbook or that any other policies besides the Conflict Resolution Program were relevant. Plaintiff has thus forfeited this argument.

¶ 45 Even so, when a defendant files a section 2-619(a)(9) motion to dismiss, it has the initial burden of establishing that "affirmative matter" defeats the plaintiff's claim. *Doe*, 2015 IL App (1st) 133735, ¶ 37. Once the defendant satisfies the burden of putting forward "affirmative matter," the burden shifts to the plaintiff to demonstrate that the proffered defense is unfounded or requires the resolution of material fact. *Doe*, 2015 IL App (1st) 133735, ¶ 37. If the plaintiff fails to carry the shifted burden going forward, the complaint will be dismissed. *Doe*, 2015 IL App (1st) 133735, ¶ 37.

¶ 46 Plaintiff did not satisfy his burden in demonstrating that Advocate's defense, based on the disclaimer, was unfounded or required resolution of a material fact. Instead, plaintiff attached only the Conflict Resolution Program to his response to the motion to dismiss, which, as explained above, did nothing to negate the effect of the disclaimer. Plaintiff cannot blame Advocate for his choice to stand idle and proceed solely on the disclaimer and Conflict Resolution Program. Plaintiff's argument is especially incredible, considering that he *quoted* the handbook itself in his response to the motion to dismiss.[4]

¶ 47 Accordingly, the trial court did not err in dismissing plaintiff's complaint.

¶ 48 C. Motion to Reconsider

¶ 49 Plaintiff further contends that the trial court erred in denying his motion to reconsider. In his motion, plaintiff argued that the court erred in its application of existing law when it found that the disclaimer was clear and unambiguous. Plaintiff also submitted new evidence in support of his argument, which included the entire handbook and the Corrective Action Policy.

[4] Specifically, on page two of plaintiff's response to Advocate's motion to dismiss, he quoted pages 1 and 22 of the Associate Handbook.

¶ 50 The purpose of a motion to reconsider is to bring to the court's attention newly discovered evidence, changes in the law, or errors in the court's previous application of existing law. *In re Marriage of Heinrich*, 2014 IL App (2d) 121333, ¶ 55. Where the motion was based only on the trial court's application or misapplication of existing law, we review *de novo* the trial court's decision to grant or deny the motion. *Heinrich*, 2014 IL App (2d) 121333, ¶ 55. But where the motion was based on new matters, such as additional facts or new arguments or legal theories not presented during the course of the proceedings leading to the order being challenged, the abuse of discretion standard applies. *Compton v. Country Mutual Insurance Co.*, 382 Ill. App. 3d 323, 330 (2008). Here, we conclude that, under either standard of review, the trial court did not err in denying plaintiff's motion.

¶ 51 Newly discovered evidence is evidence that was not available prior to the hearing. *Emrikson v. Morfin*, 2012 IL App (1st) 111687, ¶ 30. The movant must show that the evidence existed before the initial hearing but had not yet been discovered or was otherwise unobtainable. *Heinrich*, 2014 IL App (2d) 121333, ¶ 57. In the absence of a reasonable explanation as to why the evidence was not available at the time of the hearing, the court is under no obligation to consider it. *Emrikson*, 2012 IL App (1st) 111687, ¶ 30.

¶ 52 In his reply in support of his motion to reconsider, plaintiff's counsel attached an affidavit that stated in its entirety: "[Counsel] deposes and swears that [he] did not receive defendant's employee' [*sic*] corrective action policy until approximately November 10, 2015 and defendant's sexual harassment policy until December 2, 2015, the date of the hearing." The affidavit says nothing about whether the Corrective Action Policy was previously unavailable to plaintiff or his counsel. Nor does it address the handbook. Moreover, the Corrective Action Policy contained a "Template Date" of May 15, 2014, which was more than one year after

plaintiff's termination from Advocate. It is thus questionable whether the Corrective Action Policy that was attached was actually in effect at the time of plaintiff's discharge in March 2013. Hence, the court was not required to consider those materials. See *Gardner v. Navistar International Transportation Corp.*, 213 Ill. App. 3d 242, 248-49 (1991) ("Trial courts should not permit litigants to stand mute, lose a motion, and then frantically gather evidentiary material to show that the court erred in its ruling. *** [T]he interests of finality and efficiency require that the trial courts not consider such late-tendered evidentiary material, no matter what the contents thereof may be.").

¶ 53 Moreover, even if we consider the documents that plaintiff attached to the motion to reconsider, they did not support a claim for breach of employment contract. While the handbook and the Corrective Action Policy stated that disciplinary action will "generally" be taken in the form of progressive steps, both documents were replete with language that provided that "one or more steps in the process may be omitted" and that immediate termination of employment may occur without any warning. Such permissive and discretionary language was insufficient to negate the clear and unequivocal disclaimer contained in the Associate Acknowledgment section of the handbook. Accordingly, the trial court properly denied plaintiff's motion to reconsider.

¶ 54 III. CONCLUSION

¶ 55 Accordingly, we affirm the judgment of the circuit court of Lake County.

¶ 56 Affirmed.