IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

JEANNE RHOADES, Plaintiff, vs. BJC HEALTH SYSTEM, et al., Defendants.	)	Case No. 4:17-cv-02486

DEFENDANTS' MEMORANDUM IN SUPPORT
OF THEIR MOTION TO DISMISS

I. INTRODUCTION

Plaintiff's claims for "breach of contract" is predicated on four employment policies contained in Defendants' on-line handbook, titled "BJC HR Policies." As a matter of Missouri law, such employment policies and "employee handbooks" are not contracts and thus cannot be the basis for a breach of contract claim. Moreover, the very first policy in Defendants' collection of policies explicitly states, "**BJC HR policies do not constitute a contract of employment** and may be changed at any time at BJC's sole discretion." Not surprisingly, because there is no contract, Plaintiff's Complaint fails to make even basic allegations of contract formation.

Pursuant to Missouri law and the terms of these policies, Plaintiff does not and cannot plead a plausible breach of contract claim. Accordingly, the Court should dismiss with prejudice all claims against Defendants BJC Health System d/b/a BJC Healthcare, Missouri Baptist Medical Center, Barnes-Jewish Hospital, St. Louis Children's Hospital, Christian Hospital Northeast-Northwest, and CH Allied Services, Inc. (collectively "Defendants").

II. FACTUAL BACKGROUND

Defendants maintain a collection of "personnel policies" relating to employment at hospitals affiliated with Defendant BJC Health System. *See* Complaint ¶¶ 10 – 16. Among these "BJC HR Policies" are four that describe various payments eligible employees may receive: (1) Policy 5.07.1 titled "On-Call Pay"; (2) Policy 5.07.2 titled "Call-back pay"; (3) Policy 5.15.2 titled "Voucher Pay"; and, (4) Policy 4.01 titled "Paid Time Off." (*Id.;* Complaint, Exs. A-D). Defendants' very first "personnel policy" (Policy 2.02 titled "Policy on Policies"), however, specifically states that: "**BJC HR policies do not constitute a contract of employment** and may be changed at any time at BJC's sole discretion." (emphasis supplied).[1]

In her Complaint, Plaintiff claims that she should have received, but did not receive, on-call pay, call-back pay, voucher pay, and paid time off. (Complaint ¶¶ 10 – 16). Plaintiff also claims she should have received corresponding additional contributions to her employee retirement benefits. (*Id.*). Plaintiff makes these claims not only for herself, but also for a group of others who, like her, worked on a cardiac surgical team at one or more of Defendants' hospitals. (Complaint, ¶¶ 21-29). Plaintiff asks the Court to award her and the putative class members

[1] In considering a Rule 12(b)(6) motion to dismiss, the Court generally may not consider matters outside the pleading. However, "documents embraced by the pleadings are not matters outside the pleading." *Gorog v. Best Buy Co., Inc.*, 760 F.3d 787, 791 (8th Cir. 2014) (internal punctuation and citation omitted). In an alleged breach of contract case, the contract documents are "embraced by the pleadings." *Id.* Thus, "[i]n a case involving a contract, the court may examine the contract documents in deciding a motion to dismiss." *Stahl v. U.S. Dep't of Agriculture*, 327 F.3d 697, 700 (8th Cir. 2003). This is true even if all the relevant documents are not initially attached to the Complaint, but rather are submitted as part of the motion to dismiss. *See Gorog*, 760 F.3d at 790-91; *Rosenblum v. Travelbyus.com Ltd.*, 299 F.3d 657, 660-62 (7th Cir. 2002) ("Travelbyus is entitled to take the position that Mr. Rosenblum has appended only a part of the relevant instrument and to append what it contends is the remainder."), cited with approval in *Stahl*, 327 F.3d at 700; *see also Enervations, Inc. v. Minnesota Mining and Mfg. Co.*, 380 F.3d 1066, 1068-69 (8th Cir. 2004) (documents directly or indirectly referenced in the Complaint are not outside the pleading). *See* Affidavit of Caitlin O'Brien, attached hereto as Exhibit A, and Exhibit BJC-1 (Table of Contents – BJC HR Policies) and Exhibit BJC-2 (Policy on Policies) to that affidavit.

damages, declaratory relief, and injunctive relief. Because Plaintiff fails to state a claim on which relief can be granted, Defendants have filed this Motion pursuant to Federal Rule of Civil Procedure 12(b)(6).

III. LEGAL STANDARD

"To survive a 12(b)(6) motion to dismiss, 'a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citation and punctuation omitted). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* "A claim has facial plausibility (only) when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* A claim that does not allow for the reasonable inference that the defendant is liable for the alleged misconduct must be dismissed. *Id.*

IV. ARGUMENT

Plaintiff's Complaint does not and cannot plausibly allege a breach of contact claim. Indeed, the Complaint does not allege even the most basic elements of contract formation, much less a plausible claim that Defendant(s) breached a contract under Missouri law. It cannot. Employment policies are not contracts, and thus cannot be the basis for a breach of contract claim.

A. Plaintiff's Complaint Fails To Allege The Elements Of A Contract Claim.

"The essential elements of a valid employment contract include: an offer, acceptance, and consideration." *Newlin v. GoJet Airlines, L.L.C.*, No. 4:10CV1458 HEA, 2011 WL 743081, at *3 (E.D. Mo. Feb. 24, 2011) (dismissing employee's breach of contract claim because employee failed to plead facts showing the handbook was a contract). Plaintiff makes no allegations, even conclusory ones, that: any Defendant ever made any offer to Plaintiff; that Plaintiff accepted any

such offer; or that there was any consideration exchanged between the parties to support such an offer. Instead, Plaintiff pleads only that Defendants had "personnel policies." (Complaint, ¶¶ 10-16). That is not the same as pleading a contract. To the contrary, "[e]mployer policies unilaterally imposed on at-will employees (i.e. terms and conditions of employment) are not contracts enforceable at law." *Morrow v. Hallmark Cards, Inc.*, 273 S.W.3d 15, 25 (Mo. Ct. App. 2008) (parenthetical in original). Even if Plaintiff had recited the elements of contract formation and breach, her failure to plead supporting factual allegations is fatal to her claim. *Iqbal*, 556 U.S. at 678-79. The Complaint should be dismissed.

B. Defendants' "Personnel Policies" Cannot Provide The Basis For Plaintiffs' Claim.

Rather than making factual allegations about contract formation or breach, the Complaint seems to assert in conclusory fashion simply that Defendants have a contractual obligation to follow their own policies. As a matter of Missouri law, that is not correct.

In 1988, the Missouri Supreme Court made clear that an employer's "unilateral act of publishing its handbook was not a contractual offer to its employees." *Johnson v. McDonnell Douglas Corp.*, 745 S.W.2d 661, 662 (Mo. 1988). Instead, a collection of policies is just that – the employer's "self-imposed policies." *Id.* Because the publication of employment policies creates no contractual offer, likewise "no power of acceptance was created in the plaintiff." *Id.* As a result, there can be no breach of contract action based on a handbook policy.

Moreover, this black-letter law – i.e., that employment policies do not create enforceable contracts or contract offers – has been specifically applied to defeat contract claims brought by employees, like Plaintiff, who allege they have been denied monetary benefits described in an employment policy. Thus, in *West Cent. Missouri Regional Lodge No. 50 v. Bd. of Police Cmm'rs of Kansas City, Mo.*, 939 S.W.2d 565, 567-68 (Mo. Ct. App. 1997), the Missouri Court of Appeals affirmed the circuit court's dismissal of employees' claim that they were denied

annual raises promised in an employee manual. Similarly, in *Jennings v. SSM Health Care St. Louis*, 355 S.W.3d 526 (Mo. Ct. App. 2011), the Court of Appeals affirmed dismissal of an employee's claim that publication of a severance policy thereby created a contractual obligation. 355 S.W.3d at 533-34 ("By publishing a severance policy as a part of its general corporate policies and procedures, SSM did not make a contractual offer."). In short, "[a]n employee handbook does not constitute an employment contract. Plaintiff has failed to plead any of the elements of a contract. As such, plaintiff is unable to support the breach of contract claim. . . . Thus, defendant's Motion to Dismiss . . . [should] be granted." *Perry v. Patriot Mfg., Inc.*, 2006 WL 2707361, * 2 (E.D. Mo.) (internal punctuation and citation omitted).

C. The Policies On Their Face Are Not Contracts.

Even if Missouri law did not otherwise foreclose Plaintiff's breach of contract claim, the language of the employment policies does.

First, the very first of Defendants' "personnel policies" explicitly states the other "personnel policies" (including the ones Plaintiff relies on) are not contractual: "BJC HR policies do not constitute a contract of employment and may be changed at any time at BJC's sole discretion." (*See* Exhibit A). Missouri law makes clear that such a general disclaimer defeats creation of an enforceable contract, even if the particular policy relied on might otherwise support such a claim. *See Johnson v. Vatterott Educ. Ctrs., Inc.*, 410 S.W.3d 735, 740-41 (Mo. Ct. App. 2013). ("Therefore, while the Arbitration Agreement itself states that it is a binding and enforceable contract which will survive the termination of Johnson's employment, it is book-ended by sections of the Employee Handbook which state in equally clear and explicit terms that nothing in the Handbook is contractual, and that everything in the Handbook is subject to change by Vatterott at any time, in its sole discretion. . . . In these circumstances, we cannot find that Vatterott offered Johnson a binding and enforceable arbitration agreement with the "definiteness

and clarity" required to supersede the general rule that employee handbooks which are unilaterally modifiable by an employer do not give rise to contractual rights."); *Whitworth v. McBride & Son Homes, Inc.*, 344 S.W.3d 730, 739 (Mo. Ct. App. 2011) ("We nonetheless conclude that the combination of the Arbitration Agreement and the Handbook fail to establish an offer and acceptance to enter into a binding arbitration agreement. We reach this conclusion based on the provisions of the Handbook which reflect McBride & Son's express intent that the Handbook's terms and provisions are not contractual.").

Second, and related, the policies Plaintiff relies on in the Complaint are devoid of the certainty required for binding contractual language. *See Jennings*, 355 S.W.3d at 534 ("Such certainty is absent here. SSM's severance policy provides that those employees who fall under purview of the policy 'will be *eligible* for severance pay.") (emphasis in original); *West Central Missouri Regional Lodge No. 50*, 939 S.W.2d at 569 (language describing "eligibility" for pay increases did not create a contractual obligation). This lack of definiteness, particularly combined with the disclaimer language, defeats any claim there was a contract that could be breached.

For example:

POLICY	**EXAMPLES OF NON-CONTRACTUAL LANGUAGE**
Exhibit A **"On-Call Pay"**	➢ The "on-call" policy simply describes what "on-call" pay is, and explains that some employees are "**eligible**" to receive it. It makes no promises. ➢ The policy says that "**non-management employees**" are "**eligible**" to receive on-call pay. The policy never specifies who qualifies as a "non-management" employee. ➢ The policy does not say how much employees might be paid for "on call" time. Rather, it contemplates that the amount will vary: "**Contact Human Resources for the current on-call pay rates.**"
Exhibit B **"Call-Back Pay"**	➢ The "call-back pay" policy states certain employees will be "**eligible**" for call-back pay. ➢ The amount exempt employees can receive is up in the air: "Exempt employees receive **an equivalent lump sum amount** above their normal

	base salary." This amount is never defined. ➢ The policy sets forth different rules for "evening, night, weekend, and holiday shift differentials," but never specifies what qualifies as one of those special shifts. ➢ In discussing compensation for travel, the policy emphasizes that management has complete discretion to make payments: "Travel time **may be overridden** by the manager . . . ."
Exhibit C **"Voucher Pay"**	➢ The "Voucher Pay" policy only says that employees "**may be paid**" voucher pay, if "**eligible**." ➢ Voucher pay also requires pre-approval, which indicates the pay can only be received at the discretion of management: "**Pre-approval** by functional leader and top HR leader within the organization is required."
Exhibit D **"Paid Time Off (PTO) Policy"**	➢ Like all the other policies above, the PTO policy also describes employees who may be "**eligible**" for PTO. ➢ The PTO policy has a carve-out that erases any potential obligation on the part of Defendants: "**exceptions to this policy may occur** based on business needs."

These statements lack the "definiteness and clarity" required for contracts. *Johnson*, 410 S.W.3d at 741. The policies do not define with sufficient details who will receive the pay, when the payments will be made, or how much the payments will be. The policies refer to management discretion in applying the policies. And, of course, the first policy states that none of the policies are contractual, but rather may be changed at the discretion of the employer. Indeed, at the top of every policy attached to the Complaint, there is a description showing when the policies were revised and when they will be reviewed for revisions in the future.[2] A document is not a contract where, as here, one party can change it at its discretion. *West Central Missouri Regional Lodge No. 50*, 939 S.W.2d at 568 (noting the employer could modify the employee manual at its discretion).

Plaintiff's allegations do not and cannot state a claim on which relief can be granted under Missouri law. Accordingly, Plaintiff's claim should be dismissed with prejudice.

[2] Plaintiff's Complaint, Exhibits A – D.

V. CONCLUSION

For all the foregoing reasons, Defendants respectfully request the Court dismiss Plaintiff's claims with prejudice, award Defendants their costs and attorneys' fees, and issue any other relief just and proper under the circumstances.

Respectfully submitted,

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2017, a copy of the foregoing was filed with the Clerk of Court by using the CM/ECF system, which will send notice of electronic filing to the following:

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