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

JEANNE RHOADES, On behalf of herself and all others Similarly situated, Plaintiff, v. BJC HEALTH SYSTEM Dba BJC HEALTHCARE, et al. Defendants.	)	Cause No. 4:17-CV-02486

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS

COMES NOW Plaintiff Jeanne Rhoades, for her Response to Defendants' Motion to Dismiss[1], and states as follows:

As held in *Ley v. St. Louis County*, 809 S.W.2d 734, 736 (MoApp1991): "The thrust of the [employer's] position is that in the absence of a formal written contract employees have no enforceable rights to compensation or benefits promised by the employer. That position is obviously meritless."

Defendants by affidavit confirm that the policies which support Plaintiff's claims herein are in fact their policies and that their policies pertain and apply to their employees. Further, Defendants submit an additional section of their policies that contains a detailed set of procedures indicating Defendants at least have intended to regularly and carefully review their policies to make certain the policies are correct, lawful, competitive, assure "fair and equitable treatment of our employees" and "further BJC's mission." That policy section states that "it is

[1] Plaintiff reserves the right to timely seek remand of this proceeding.

responsibility of all members of management and those with supervisory roles to abide by and support BJC policy." **(See O'Brien Affidavit).**

Defendants' policies states that if an exempt (salaried) employee disrupts their personal life by waiting "On Call", they will be compensated. **(Petition, Exhibit A and E).** Their policies state that if an exempt employee works beyond normal hours as a result of being "Called Back", they will be compensated. **(Petition, Exhibit B and E).** Their policies states that if an exempt employee performs direct patient care outside of their shift, they will be compensated. **(Petition, Exhibit C and E).** Their policies state that exempt employees shall accrue "Paid Time Off" as additional compensation for their work. **(Petition, Exhibit D and E).**

The allegations of the Petition, which Defendants correctly acknowledge, must be taken as true for purposes of evaluating Defendants' Motion to Dismiss[2], establish that Rhoades and other class members have by their work earned, but have not received (or in the case of "Paid Time Off" received but inexplicably had it taken away), "On-Call" pay, "Call-Back" pay, "Voucher" pay, and "Paid Time Off" pay as promised by Defendants and as confirmed by Defendants' policies. **(Petition, paragraphs 11, 13, 15, 17, 31, 36, 41, 46).** Defendants' promises of compensation constitute the offer. Employees' work constitutes the acceptance and the consideration. The policies set forth in writing these benefits as part of the contract between the parties. **(Petition, paragraphs 18-19).** Defendants concede the point, offering additional contractual provisions from their policies to provide context, by affidavit. (See Defendants' Memorandum footnote 1) [3]

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[2] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)

[3] Defendants repeatedly refer to Section 2.02 of their manual, but they did not submit that section with their affidavit.

Defendants' Motion to Dismiss relies on the "totally inapposite"[4] proposition that employer manuals generally do not bind the employer as to future obligations. Plaintiffs do not seek any relief which seeks to prevent Defendants from changing their policies in the future. Plaintiffs simply seek the compensation/benefits Defendants promised for employee labor and ongoing compliance with the policies so long as they remain in effect.

The Court in *Ley v. St. Louis County*, made plain the distinction between the cases cited by Defendants such as *Johnson* and a case such as the instant one for promised compensation and benefits.

> 'The County advances two contentions in support of the trial court's action. First it contends that no contract of employment existed relying upon *Johnson v. McDonnell Douglas Corporation*, 745 S.W.2d 661 (Mo. banc 1988). That case is totally inapposite. It dealt with the attempt to utilize an employer's handbook to convert an employment-at-will into an employment contract limiting conditions of discharge. The suit was for wrongful discharge and the court held the handbook did not alter the at-will status. We are not dealing with a wrongful discharge case. There is no question plaintiff was employed by the County. That employment carried with it certain remuneration and benefits, including disability and retirement benefits provided by County ordinance. As an employee of the County police department plaintiff was entitled to such of those benefits as he qualified for as a part of the compensation for his work. *Strode v. Par Electrical Contractors, Inc.*, 722 S.W.2d 361 (Mo.App.1987) [1, 2]; *Martin v. Prier*

[4] *Ley v. St. Louis County*, 809 S.W.2d 734, 736 (MoApp1991)

Brass Manufacturing Co., 710 S.W.2d 466 (Mo.App.1986) [2]; *Ehrle v. Bank Building and Equipment Corp. of America*, 530 S.W.2d 482 (Mo.App.1975) [10, 11]. The thrust of the County's position is that in the absence of a formal written contract employees have no enforceable rights to compensation or benefits promised by the employer. That position is obviously meritless."

Defendants' referenced cases about discharge of at-will employees (*Newlin, Johnson v. McDonnell, Perry*) and purported agreements to arbitrate future disputes (*Morrow, Johnson v. Vatterott, Whitworth*), are not on point. [5]

Indeed, the *Morrow* Court recognized the same distinction as *Ley*: the "enforceable promise created out of an at – will employment is the employer's promise, whether expressed or implied, to pay the employee for the work performed by the employee." *Morrow v. Hallmark Cards, Inc.*, 273 S.W.3d 15, 26-27 (Mo App. 2008). See also *Foster v. BJC HealthSystem*, 121 F.Supp.2d 1280, 1288 (ED Mo 2000) (at will employee can file breach of contract claim if not paid correct amount, such contract supports Section 1981 action); accord *Skinner v. Maritz, Inc.*, 253 F.3d 337 (8th Cir 2001).

In *West Central*, the issue was not recovery of promised pay for work, but rather potential annual salary increases that required additional employer action. 939 SW2d 565, 568. Likewise, in *Jennings* the issue was potential eligibility for severance pay. 355 S.W.3d 526, 533- 534. The policies at issue under the Petition herein address compensation which was promised to be paid for work performed. **(Petition, Exhibit A, B, C, D and E).** Eligibility under Defendants' policies is not contingent on a future management decision, as in *West Central* or *Jennings*, but

[5] The *Vatterott* Court does observe that a binding arbitration agreement can be contained in an employee manual if it is declared and accepted as immutable. 410 S.W.3d at 738.

rather is declared based on employees meeting the criteria of the policies, which the Petition alleges were met. **(Petition, paragraphs 11, 13, 15, 17).**

Defendants' secondary contention that the policies are too vague to be enforced is specious.

The "On Call" pay policy **(Petition, Exhibit A)**, declares that non-management employees are eligible, that they are to be paid, that the rate of pay is "a flat dollar rate per hour," and that the pay rate is posted separately by the employer from time to time. The Petition asserts such pay has been earned by Rhoades and the class. **(Petition, paragraph 11).**

The "Call-Back" pay policy **(Petition, Exhibit B)**, declares that "call-back" pay "will be paid" at a minimum guaranteed amount. The Petition asserts that such pay has been earned by Rhoades and the class. **(Petition, paragraph 13).**

The "Voucher" pay policy **(Petition, Exhibit C)** also declares minimum guaranteed payments for work outside of shift in direct patient care role with pre-approval of the assignment (not pre-approval of the pay). The Petition asserts that such pay has been earned by Rhoades and the class. **(Petition, paragraph 15).**

The "Paid Time Off (PTO)" pay policy **(Petition, Exhibit D)**, declares the detailed process for accruing PTO. It does allow for exception, but not an exception that applies retroactively or that would allow for cancellation of earned PTO. The Petition alleges that Paid Time Off has been earned by Rhoades and the class, and that Defendants improperly have taken it back. **(Petition, paragraph 17).**

Other policies of Defendants confirm these promises of compensation and mandate full compliance by management. **(Petition, Exhibit E and F, and O'Brien Affidavit).**

If Defendants should decide in the future, based on their self-declared intent for regular and careful review (or even arbitrarily), to change their policies prospectively, the case law clearly says they can do so. But they cannot breach promises of compensation and benefits for work that has been performed. See *Ley*, *Morrow*.

An employer simply cannot take the position that its written promises of compensation are meaningless. As observed in *Morrow*, such promises are enforceable as to work that has been performed. And as held in *Ley*, Defendant's arguments for dismissal are "obviously meritless."

The Court should deny Defendants' Motion to Dismiss.

CURTIS, HEINZ, GARRETT & O'KEEFE, P.C

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served via the Court's electronic filing system this 6 day of October, 2017 to all attorneys of record.

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