

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 07-CV-00753-MSK-BNB

ALEXANDER L. TRUJILLO,
DAVID HENRICHSEN,
GILBERT LUCERO,
ALAN ROMAN,
COLBY DOOLITTLE,
OTTO KNOLLHOFF, and
MATT MARTIN,
on behalf of themselves and
all others similarly situated,

Plaintiffs,

v.

THE CITY OF COLORADO SPRINGS,

Defendant.

DEFENDANT'S MOTION TO DISMISS

COME NOW Defendant, the City of Colorado Springs ("the City"), which moves to dismiss the Plaintiffs' Third, Fourth, Fifth and Sixth Claims for Relief for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6).

The City certifies that, pursuant to D.C.Colo.L.Civ.R. 7.1 (A), counsel discussed the grounds for this motion and the relief requested with counsel for the Plaintiffs on June 22, 2007. Plaintiffs' counsel opposes the relief requested herein.

FACTS

The Amended Complaint alleges seven causes of action against the City: (1) violation of the Fair Labor Standards Act (FLSA) under an alleged theory that plaintiffs worked off-the-clock without pay; (2) violation of the FLSA for alleged improper

calculation involving compensatory time payments; (3) breach of contract; (4) promissory estoppel; (5) implied contract; (6) unjust enrichment; and (7) declaratory judgment under the FLSA. The City moves to dismiss the claims for breach of contract, promissory estoppel, implied contract, and unjust enrichment.

ARGUMENT

1. Breach of Contract

A. Burden of Proof

In a contract action, the plaintiff has the burden of proof by the preponderance of evidence. *Western Distrib. Co. v. Diodosio*, 841 P.2d 1053, 1057-58 (Colo. App. 1992).

B. Elements

Under Colorado law, a party attempting to recover on a claim for breach of contract against a municipal corporation must prove the following elements: (i) existence of a contract whose terms are in conformity with the municipality's charter, code, and other municipal laws; (ii) performance by the plaintiff or some justification for nonperformance; (iii) failure to perform the contract by the defendant; and (iv) resulting damage to the plaintiff. *Id. at 1058*; *see also Chellsen v. Pena*, 857 P.2d 472 (Colo. Ct. App. 1992) ("One who contracts with a municipality is charged with knowledge of its limitations and restrictions in making contracts.").

Plaintiffs must comply with various municipal charter, code, and other municipal laws of the City of Colorado Springs including the following:

No Liability Without Appropriation. Neither the Council nor any administrative officer or employee of the City shall have authority to make any contract involving the expenditure of public money, or impose upon the City any liability to pay money, unless and until a definite amount of money shall have been appropriated for the liquidation of

all pecuniary liability of the City under such contract or in consequence thereof to mature during the period covered by the appropriation. Such contract shall be *ab initio* null and void as to the City for any other or further liability, provided, first, that nothing herein contained shall prevent the Council from providing for payment of any expense, the necessity of which is caused by any casualty, accident, or unforeseen contingency arising after the passage of the annual appropriation ordinance; and, second, that the provisions of this section shall not apply to or limit the authority conferred in relation to bonded indebtedness, nor for monies to be collected by special assessments for local improvements.

Colorado Springs Charter § 7-60.

Contracts.

A. The City Manager shall have the power and duty to approve and execute, by signature, all contracts of, or on behalf of, the City, subject only to approval as to form by the City Attorney's Office in accord with section 1.2.404 of this article.

B. It shall be the City Manager's duty to ensure that all City contracts are procured in compliance with the requirements of this Code and any related rules and regulations.

* * *

D. No City contract shall be approved or executed under this section unless and until sufficient funds have been appropriated by the City Council and are available for the contract.

Colorado Springs Municipal Code § 1.2.313

Approve Contracts. The City Attorney shall approve as to form all contracts, deeds and leases to which the City or its enterprises is a party.

Colorado Springs Municipal Code § 1.2.404

Attest Contracts:

A. The Clerk shall attest all contracts and all other legal documents of the City which require attestation.

Colorado Springs Municipal Code § 1.2.505

Personnel Policies and Procedures:

A. The City Manager, the Executive Director of Utilities and the Memorial Hospital Board of Trustees shall promulgate personnel policies and procedures and make any changes as deemed necessary. Unless otherwise provided, these policies and procedures shall apply to employees as designated by their respective organization. The policies and procedures are not intended to be an express or implied contract. It shall be the responsibility of each employee to be familiar with these policies and procedures.

B. The City retains the sole right to modify, suspend, interpret or cancel in whole or in part the provisions of any policies and procedures at any time, and for any reason, with or without notice.

Colorado Springs Municipal Code § 1.4.102

C. Elements Not Supported by the Complaint

Element (i): Plaintiffs cannot establish that an express contract existed that complied with the City's Charter and Municipal Code inasmuch as there are no allegations in the complaint that (a) sufficient funds have been appropriated by the City Council for the alleged contract; (b) the City Manager (or his designee) approved and signed any alleged contract; (c) the City Attorney approved any such alleged contract; and (d) the Clerk attested the alleged contract. The alleged contract is against the authority of the Charter and Code and is therefore not a valid, enforceable contract. *Keeling v. City of Grand Junction*, 689 P.2d 679, 680-81 (Colo. Ct. App. 1984) (holding

plaintiffs did not have a vested contractual right in a contract that was contrary to the authority of the city code).

Moreover, under Colorado law, a statute or ordinance will be considered a contract only when its language and the surrounding circumstances manifest a legislative intent to create private contractual rights enforceable against the state or municipality. “It is presumed that a law is not intended to create private contractual vested rights, but merely declares a policy to be pursued until the legislature shall ordain otherwise.” *Colorado Springs Fire Fighters Ass’n, Local 5 v. City of Colorado Springs*, 784 P.2d 766, 773 (Colo. 1989) (citing *Dodge v. Board of Educ.*, 302 U.S. 74, 79 (1937); *Alderton v. State of Colorado*, 17 P.3d 817, 819 (Colo. Ct. App. 2000)). Here, the Code provides that the personnel policies and procedures are not intended to be an express or implied contract, thereby evidencing a legislative intent against creating contractual rights.

Additionally, Plaintiffs make no allegations in their Complaint that they had an express contract with the Defendants. Indeed, Plaintiffs appear to be proceeding under a implied contract theory inasmuch as they did not sign any written contract. *See* Amended Complaint at ¶¶ 76-87. Thus, the Third Claim for Relief for breach of contract should be dismissed.

2. Promissory Estoppel

A. Burden of Proof

Plaintiff has the burden of proof to establish application of the promissory estoppel doctrine under a preponderance of the evidence. *Nicol v. Nelson*, 776 P.2d 1144, 1147-48 (Colo. Ct. App. 1989).

B. Elements

The elements of a promissory estoppel claim are: (i) the promisor made a promise to the promisee; (ii) the promisor should have reasonably expected that the promise would induce action or forbearance by the promisee; (iii) the promisee reasonably relied on the promise to his or her detriment; and (iv) the promise must be enforced to prevent injustice. *Vigoda v. Denver Urban Renewal Auth.*, 646 P.2d 900, 905 (Colo. 1982).

C. Elements Not Supported by the Complaint

Element (i): The City's personnel policies and procedures, as a matter of law, did not constitute a promise. Under Colorado law, if a statement by an employer is "merely a description of the employer's present policies . . . it is neither a promise nor a statement that could reasonably be relied upon as a commitment." *Jaynes v. Centura Health Corp.*, 148 P.3d 241, 247 (Colo. Ct. App. 2006); *Soderlun v. Pub. Serv. Co. of Colo.*, 944 P.2d 616, 620 (Colo.Ct.App.1997); *Young v. Dillon Co's*, 468 F.3d 1243, 1254 (10th Cir. 2006).

Element (iii): As a matter of law, the Plaintiffs did not reasonably rely on the personnel policies and procedures to their detriment. *Jaynes*, 148 P.3d at 247 (" . . .if a statement by an employer is 'merely a description of the employer's present policies . . . , it is neither a promise nor a statement that could reasonably be relied upon as a commitment'"), quoting *Soderlun*, 944 P.2d at 620.

In light of Code § 1.4.102 disclaiming that the personnel policies and procedures are intended to be an express or implied contract, Plaintiffs could not have reasonably believed that they had a valid contract with the City. *George v. Ute Water Conservancy Dist.*, 950 P.2d 1195, 1198 (Colo. Ct. App. 1997) (recognizing that promissory estoppel

and contract-based claims fail if the employer has clearly and conspicuously disclaimed intent to enter into a contract); *Chellsen*, 857 P.2d at 476 (“One who contracts with a municipality is charged with knowledge of its limitations and restrictions in making contracts.”); *Department of Transp. v. First Place, LLC*, 148 P.3d 261, 267-68 (Colo. Ct. App. 2006) (holding that plaintiff could not establish promissory estoppel claim against government agency where promise would have been contrary to statute or regulation and therefore there could be no justifiable reliance on part of plaintiff); *Keeling*, 689 P.2d at 680-81 (same).

Additionally, while Plaintiffs allege in conclusory fashion that they suffered a detriment, they do not ever specify in their pleading what detriment they suffered, thereby requiring dismissal of the promissory estoppel claim. See Amended Complaint at ¶ 77.

Element (iv): Plaintiffs have not demonstrated that the alleged promise must be enforced to prevent injustice. There are no circumstances present that would justify enforcing any alleged promise against the City in light of Plaintiffs’ promissory estoppel theory conflicting with the Charter and Code. *Cherry Creek Aviation, Inc. v. City of Steamboat Springs*, 958 P.2d 515, 522 (Colo. Ct. App. 1998) (discussing that the doctrine of estoppel is not applied as freely against a municipal corporation as it is against an individual). Inasmuch as promissory estoppel is an equitable claim, “[t]his final element of promissory estoppel involves a discretionary decision for the court, and is not a question of fact for the jury.” *Jones v. Denver Pub. Schs.*, 427 F.3d 1315, 1326 (10th Cir. 2005). Taken together, the Court should dismiss Plaintiffs’ promissory estoppel claim.

3. Implied Contract

A. Burden of Proof

A plaintiff has the burden of proof to establish a breach of implied contract under a preponderance of evidence. *See Welsch v. Smith*, 113 P.3d 1284, 1289 (Colo. Ct. App. 2005) (“It is axiomatic that the party asserting a cause of action in a civil case carries the burden of establishing a prima facie case”).

B. Elements

To establish an implied contract against a municipal corporation, an employee must show (i) that the employer's actions manifested an intent to be bound; and (ii) the implied contract is not contrary to charter, code, or other municipal laws. *Judiscak v. Digital Equip. Corp.*, 166 F.3d 1221 at *2 (10th Cir. 1998); *George.*, 950 P.2d at 1198.

C. Elements Not Supported by the Complaint

Element (i): The Complaint does not allege any specific facts that the City intended to be bound by an alleged promise. In fact, to the contrary, Code § 1.4.102 reveals that the City did not intend to be contractually bound by its personnel policies and procedures. Thus, the implied contract claim should be dismissed.

Element (ii): Plaintiffs’ implied contract claim violates the Charter and Code inasmuch as (a) sufficient funds have not been appropriated by the City Council for the alleged contract; (b) the City Manager (or his designee) did not approve and sign any alleged contract; (c) the City Attorney did not approve any such alleged contract; and (d) the Clerk did not attest the alleged contract.

Additionally, the implied contract violates Code § 1.4.102 which states, in relevant part, “The policies and procedures are not intended to be an express or implied

contract.” A municipal corporation cannot be obligated upon an alleged implied contract which is contrary to charter and code provisions. *See Chellsen*, 857 P.2d at 476); *Keeling*, 689 P.2d at 680-81. Thus, the implied contract claim should be dismissed.

4. Unjust Enrichment

A. Burden of Proof

The Plaintiff has the burden of proof to establish a claim of unjust enrichment. *Grau v. Mitchell*, 397 P.2d 488, 489-90 (Colo. 1964).

B. Elements

To establish a right to recover sums on the basis of unjust enrichment, a plaintiff must establish: (i) that a benefit was conferred upon an adverse party; (ii) that the benefit was appreciated by the adverse party; and (iii) that the benefit was accepted by the adverse party under such circumstances that it would be inequitable for it to be retained without payment of its value. *Cablevision of Breckenridge v. Tannhauser Condo. Ass’n*, 649 P.2d 1093, 1096-97 (Colo. 1982).

C. Elements Not Supported by the Complaint

Element (iii): Plaintiffs cannot establish any inequity that would satisfy the final element of the claim inasmuch as Plaintiffs’ theory of recovery conflicts with the municipal charter and code provisions, as discussed above. As a general rule, those who deal with government are expected to know the law. *Emery Mining Corp. v. Sec’y of Labor*, 744 F.2d 1411, 1416 (10th Cir. 1984); *Department of Transp.*, 148 P.3d at 267. Additionally, Plaintiffs were not ever told that the City’s personnel policies somehow established a contract. Indeed, Plaintiffs unjust enrichment claim is a meritless theory of

recovery that attempts to place duties on the City for the payment of compensation not otherwise required by the Fair Labor Standards Act.

CONCLUSION

For the forgoing reasons, the Defendant City of Colorado Springs' Motion to Dismiss should be granted and the Third, Fourth, Fifth and Sixth Claims for Relief should be dismissed with prejudice.

Respectfully submitted,

s/ Steven W. Moore

Steven W. Moore
BAKER & HOSTETLER LLP
303 E. 17th Ave., Suite 1100
Denver, CO 80203
Telephone: 303.764.4036
Facsimile: 303.303.861.7805
Email: smoore@bakerlaw.com

And

PATRICIA K. KELLY
City Attorney/Chief Legal Officer
Stacy L. Gatto, Deputy City Attorney
Office of the City Attorney
P.O. Box 1575, mail code 510
30 South Nevada Ave., Suite 501
Colorado Springs, CO 80903-1575
Telephone: 719.385.5909
Facsimile: 719.385.5535
Email: sgatto@springsgov.com

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of June, 2007, I electronically filed the foregoing **DEFENDANT'S MOTION TO DISMISS** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

Scott W. Johnson
Paul W. Hurcomb
P.O. Box 1678 (80901)
24 South Weber, Suite 400
Colorado Springs, CO 80903
Telephone: 719.475.0097
Facsimile: 719.633.8477
Email: swjohns@sparkswillson.com
pwhurcomb@sparkswillson.com

s/ Steven W. Moore _____
Steven W. Moore
Attorney for Defendants
BAKER & HOSTETLER LLP
303 E. 17th Ave., Suite 1100
Denver, CO 80203
Telephone: 303.764.4036
Facsimile: 303.303.861.7805
Email: smoore@bakerlaw.com

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