Court of Appeal, First District, Division 5, California.

Monica Ann ARRAMBIDE, Plaintiff and Appellant,
v.
GAY–STRAIGHT ALLIANCE NETWORK, Defendant and Respondent.

No. A128090.
|
(San Francisco County Super. Ct. No. CGC 08–483644).
|
June 15, 2011.

Attorneys and Law Firms

Pamela Octavia Pitt, Maria Ann Bourn, Law Office of Pamela Pitt, San Francisco, CA, for Plaintiff and Appellant.

Guy Wainwright Stilson, Low, Ball & Lynch, San Francisco, CA, for Defendant and Respondent.

Opinion

BRUINIERS, J.

Appellant Monica Ann Arrambide was offered employment as a program director for The Gay–Straight Alliance Network (GSAN), a nonprofit organization located in San Francisco. She relocated from the state of Texas to accept the position. Arrambide's employment was terminated after one month.

Arrambide sued GSAN claiming, among other things, that the authority of the position and the working environment had been materially misrepresented in order to induce her to accept the job. Her suit included claims for wrongful termination in violation of public policy, promissory fraud and deceit, negligent misrepresentation, promissory estoppel, negligent infliction of emotional distress, breach of the implied covenant of good faith and fair dealing, and California Labor Code violations. The trial court granted GSAN's motion for summary judgment.[1] We find that Arrambide presented triable issues of fact as to her claims for promissory fraud and fraudulent inducement of an employment contract in violation of Labor Code section 970. We therefore reverse in part.

[1] Arrambide also sued for breach of contract, intentional infliction of emotional distress, race discrimination and failure to prevent race discrimination, but she does not challenge the trial court's grant of summary adjudication of those claims in this appeal.

I. BACKGROUND

We summarize the evidence offered in support of and opposition to GSAN's motion for summary judgment, construing Arrambide's evidence liberally and GSAN's evidence narrowly and drawing all reasonable inferences in favor of Arrambide, as we must. (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 254, 100 Cal.Rptr.3d 296 (*Nazir*).)

In the words of Carolyn Laub, its founder and executive director, GSAN is dedicated to "empower[ing] LGBTQ (Lesbian, Gay, Bisexual, Transgender, and Queer/Questioning) youth through leadership development, community resources, education, and the formation of individual 'GSA [Gay Straight Alliance] clubs' in schools." Arrambide had worked with LGBTQ youth since about 1989, and she had known Laub since about 2000. In 2005, Arrambide began working for the Texas GSA Network (Texas GSA). In about 2006, Laub invited Arrambide to sit on a national steering committee, where they worked together closely for about three years. GSAN also consulted with Texas GSA and on two occasions, Laub visited Texas, stayed in Arrambide's home, and directly observed how Arrambide worked with youth and staff. Both Laub and Arrambide were happy with the outcome of their work together in Texas.

The Hiring Process

In 2008, Arrambide learned that GSAN was looking for a program director and she applied. Based on Arrambide's "very relevant experience" working at LGBTQ youth organizations, Laub and other members of the hiring committed considered her a "very strong candidate."

Before she accepted the job, Arrambide saw a written job description of the program director position, which stated that the program director would "manage a team of organizers and project staff" and would "supervise staff," among other duties. Qualifications for the position included experience directly supervising staff. Arrambide and Laub also had five to six phone conversations about the position and an in-person interview. During these contacts, Laub made certain promises about the job. She said that Arrambide would be "the second in charge," and

"second in charge, the second level down of management."[2] Arrambide understood, and Laub confirmed at her deposition, that the program director position included supervision of certain designated staff. Arrambide told Laub she wanted an executive director position some day, and Laub agreed to work closely with her and mentor her.

[2] GSAN argues it is undisputed that Laub told Arrambide she would be a "second-senior" staff member. GSAN cites its statement of undisputed material facts, which stated, "Laub discussed the nature and responsibilities of Program Director position, including the following: [¶] ... the Program Director was the second-senior (to the Executive Director) staff member at GSAN...." Arrambide agreed this fact was undisputed. However, the phrase "second-senior" in the statement of fact was not placed in quotation marks, and the evidence GSAN cited in support of this statement demonstrated that Laub did not recall the exact phrase she used:

"Q.—[D]id you tell her she would be second in charge?

"A. I don't know that I used that specific term but that is what she would be and what she was." GSAN acknowledged the equivocal nature of this testimony in its response to Arrambide's statement of additional undisputed facts.

Arrambide had concerns about GSAN staff turnover. Former GSAN Program Director Tanya Mayo and former GSAN National Program Director Ruth Obel–Jorgensen had made comments to Arrambide suggesting they were not happy with the GSAN working environment. Arrambide had also noticed that several people suddenly left GSAN. Arrambide asked about the turnover and Laub said Mayo had found another job that paid better and was more compatible with her childcare responsibilities, and that other staff reached a point in their professional development where they needed to move on. She also mentioned that a funding source for GSAN did not come through. Laub said GSAN was an amazing organization to work for, that GSAN valued staff input, and that the staff was happy.

Arrambide found it difficult to decide whether to leave Texas GSA to take the GSAN position. She finally decided to take the GSAN position if she could get a $5,000 increase in the promised salary. Laub offered the additional $5,000 on her own initiative and Arrambide accepted the job. Arrambide asserts that had she known the true reasons why GSAN staff had left the organization and the truth about Laub's challenges as a leader, she would not have accepted the job.

On September 25, 2008, GSAN sent Arrambide a letter confirming her acceptance of their offer of employment. The letter stated, "In order to clarify the terms of your employment, and to be sure that our mutual expectations are clear, we want you to know ... [that] [w]e are an at-will employer. This means that either you or [GSAN] may terminate the employment relationship at any time and for any reason, with or without cause." Arrambide signed the letter, and she moved from Texas to the San Francisco Bay Area to start working at GSAN.

Staff Problems at GSAN Before Arrambide Was Hired

In 2004, there had been tension between Laub and GSAN Program Director Stephanie Cho about Laub's treatment of program staff, which included Sean Saifa Wall, Bev Tang, and Ome Lopez. Wall averred that Laub frequently circumvented Cho and directly monitored Wall's work. In about October, Laub demoted Cho to the position of organizing director, which had no job description, and interviewed candidates for a new associate director position. Wall, Tang and Lopez protested the change. In November, Laub fired Cho and refused to explain the reasons for the termination to the program staff. Tang and Lopez resigned from GSAN in express protest of the termination and Wall also resigned.

Beginning in about 2005,[3] GSAN hired consultants to coach Laub on her leadership and management skills. In about the fall of 2007, GSAN lost a significant source of funding and laid off staff. In October 2007, the program staff (Marco Castro–Bojorquez, Lai–San Seto, Robin McGehee, and Obel–Jorgensen) submitted a petition to the GSAN board that began, "In light of the recent layoffs of [GSAN] program staff, the early departure of the Program Director, and the abrupt executive decision to eliminate the expected Associate Director position, the following proposal has been developed by the remaining Program Team ... to ensur[e] job satisfaction and eliminate employee turnover." The proposals included a degree of autonomy for the program staff with limited supervision by the Executive Director; promotion of the operations manager to the associate director position or the hiring of a program director by June 2008; and adoption of a grievance procedure.

[3] Laub testified that Marj Plumb began working as her coach as early as 2006 and that Kim Fowler was her prior coach. GSAN did not dispute Arrambide's statement of undisputed fact that Kim Fowler was Laub's coach for one or two years before Plumb.

In a move the GSAN board of directors thought would alleviate some of these concerns, GSAN hired Rick Smith as an interim managing director for six months beginning in December 2007. In a May 2008 memo, Smith wrote

that GSAN had "continued to experience significant transition of staff," including the departures of Obel–Jorgensen and Castro–Bojorquez, and that Laub was working on her management style. Obel–Jorgensen averred that she resigned in March 2008 due to Laub's poor leadership skills (including micromanagement and disparagement of staff and a hierarchical and uncompromising leadership style) and that she told Laub in person why she was resigning. The program director position had been vacant for more than a year before Arrambide filled the position.[4]

[4] When asked at her deposition when the program director position first became open, Laub responded, "I believe it was sometime in November, December of 2007." However, the October 2007 staff petition specifically requested that the program director position be filled, strongly suggesting that it was then vacant, and GSAN did not dispute Arrambide's statement of undisputed material fact that "[t]he position had been vacant for 18 months before [she] took the job."

Arrambide's Tenure at GSAN

On Arrambide's first day at work, November 6, 2008, Laub played a prank on her. Although Arrambide was supposed to have an enclosed glass office, a "Welcome Monica" sign was hung over a corner cubicle that had a malfunctioning computer and an unstable chair. No one told Arrambide it was a joke until the next morning, and Arrambide was upset. On the first day of work, Arrambide met with Laub for about four hours to go over paperwork. On Arrambide's second day at work, November 7, 2008, she met with Laub again for about two hours. Arrambide testified that they never again had a formal one-on-one meeting until December 2, when Laub told Arrambide she was considering firing her.

During their November 7, 2008 meeting, Laub showed Arrambide an organizational chart that placed Arrambide and two other staff members on the same level of the organization, one level down from Laub. Arrambide was shocked that she was not the "second person in charge," higher in rank over all employees except Laub. During the meeting, Arrambide said something to Laub about gathering her staff for a meeting and Laub told her she did not like the phrase, "my staff," which she considered very divisive. When Arrambide changed her wording to "program team," Laub again said "that's not how I would phrase it as well because we all do programming. I myself do programming." Arrambide then said, "what about the staff I supervise," and Laub said, "no, in some aspects ... [I do] supervision as well so that's not a term." Similarly, when Arrambide mentioned that Laub would hand over staff, programs and responsibilities to her, Laub said, " 'You're under the impression I'm handing you something and I'm handing you nothing.' "

On the evening of November 7, 2008, Laub sent an email to her coach stating, "Things haven't gone so well so far in my first 2 days working with Monica. I'm very worried that this will not work out.... I'm not confident that she is approaching her role with the ideas about partnership that I'm looking for."

Before Arrambide arrived at GSAN, she had sent green boxes to GSAN's three offices as part of a team-building exercise for her program staff. The staff members were supposed to work together to solve a puzzle, a process that would culminate when they opened the boxes together at a program staff meeting. When Arrambide attempted to organize that meeting during her first week on the job, Laub criticized her for excluding the other senior staff from the activity. Laub wrote, "[P]lease remember that every single staff person is involved in programs...."

At a November 12, 2008 staff meeting about GSAN's 10th anniversary party, someone mentioned that wine had been donated. Arrambide expressed concern that adults would be drinking at the event with youth present and Laub disagreed. The parties dispute whether Arrambide was inappropriately adversarial during this discussion. At the anniversary party the next day, Laub noticed that Arrambide was laying out name tags in a manner inconsistent with how Laub had decided to do so and Laub corrected her. The parties dispute whether Arrambide was dishonest or unprofessional during this incident.

From November 17 to 28, 2008, Laub was out of the office. Laub and Arrambide exchanged some emails but did not talk on the phone or in person. During this period, three incidents occurred. Laub directed Arrambide to discipline a staff member, Kylie Hosmon, about a Facebook posting and Laub was dissatisfied with Arrambide's response; a senior staff member objected to a phrase used in a youth biography that was to be published in the program book for the YES (Youth Empowerment Summit) conference and Laub was dissatisfied with Arrambide's response; and Laub and Arrambide exchanged emails about GSAN's proofreading procedures that became testy. The parties dispute whether Arrambide acted professionally in these incidents and whether Laub was effectively preventing Arrambide from acting as a supervisor.

On December 2, 2008, Laub met with Arrambide for about an hour and said she was very disappointed in

Arrambide because every day Arrambide had done something fundamentally wrong. Laub felt Arrambide was creating "silos" with the staff and that Arrambide seemed to think Laub was "handing [her] something," which was inaccurate because the program director worked in partnership with Laub. Laub said Arrambide was very adversarial, that her vision of the work was not consistent with GSAN's, and that she was like the program directors who had failed in the past. Arrambide became emotional and Laub suggested they revisit the subject later.

Arrambide acted quiet and withdrawn during the following week at work. At a December 3, 2008 staff meeting, for example, Arrambide did not participate in a discussion of post-Proposition 8 activities. On about December 5, Laub disapproved of the omission of certain workshop descriptions from the YES conference book, which Arrambide oversaw. At the December 6 YES conference, Laub disapproved of Arrambide's decision that if there was not enough food for all the participants at a particular training, the youth would be fed before the adults. The parties disagree about whether Arrambide acted appropriately in these situations.

Arrambide's Termination and Effort to Be Rehired

On December 9, Laub and Arrambide met for about five minutes at a coffee stand. Laub told Arrambide she had decided Arrambide was not a good fit for GSAN because she and Arrambide did not communicate well. Laub terminated Arrambide and offered her a final paycheck.

On about December 11, 2008, Arrambide called Laub and said she was fighting to get her job back. On December 15, she met with Laub and Plumb. Laub started the meeting by stating that because Arrambide's employment was at-will she did not need to provide any reasons for her termination. Nevertheless, Laub provided three reasons: Arrambide's youth empowerment model, management style, and adversarial attitude. Laub specifically criticized Arrambide for saying youth should be served before adults at the YES conference, for the way she handled the youth biography in the program book, and for the way she objected to adult consumption of alcohol at the 10th anniversary event. The meeting ended with Laub agreeing to decide within three days whether to revoke Arrambide's termination. That evening, Laub emailed Arrambide to tell her that the termination was not going to be revoked. Several former employees contacted the GSAN board and attended a March 2009 board meeting to protest Arrambide's termination, but the termination was not revoked.

As of September 2009, GSAN had not sought or hired a program director to replace Arrambide. In fact, GSAN eliminated the program director position and replaced it with an associate director of special initiatives, who would not supervise program staff. Under the new staff structure, all GSAN employees reported directly to Laub.

Summary Judgment Ruling

The trial court granted summary judgment. "[GSAN] shifts the burden as to each cause of action and [Arrambide] fails to raise any triable issues of material fact. No opposition raised as to 5th cause of action for breach of contract and 9th cause of action for breach of implied covenant, and this employment was at-will. As to 1st cause of action for violation of [Labor Code] section 970, no evidence of any knowingly false representations, especially given the brief, one-month time period of employment. Second cause of action for wrongful termination fails due to lack of public policy basis per [Labor Code section] 970 and [the California Fair Employment and Housing Act (Govt.Code, § 12900 et seq.)]. As to 3rd cause of action for promissory fraud, no evidence that Laub had no intention of performing on what she and [Arrambide] had discussed. Regarding 4th cause of action for negligent misrepresentation, statements do not amount to representations as to a material fact and no evidence Laub did not actually believe what she conveyed to [Arrambide]. As to the 6th cause of action for promissory estoppel, claimed misrepresentations do not constitute 'clear promises,' and one month time period not sufficient to allow for performance. Regarding 7th cause of action for intentional infliction of emotional distress, no outrageous conduct shown. Eighth cause of action for negligent infliction fails due to basis of claim being intentional acts.... [¶] Additionally, all of [GSAN's] evidentiary objections, as raised in its written objections to the [Arrambide's] evidence submitted in opposition to the motion for summary judgment, are sustained."

II. DISCUSSION

A. *Summary Judgment Standard*

Summary judgment is appropriate "if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law...." (Code Civ. Proc., § 437c, subd. (c).) "[T]he party moving for summary judgment bears the burden of persuasion that there is no triable

issue of material fact and that he is entitled to judgment as a matter of law.... There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.... [¶] ... [¶] ... [I]f a plaintiff who would bear the burden of proof by a preponderance of evidence at trial moves for summary judgment, he must present evidence that would *require* a reasonable trier of fact to find any underlying material fact more likely than not—otherwise, he would not be entitled to judgment *as a matter of law*, but would have to present his evidence to a trier of fact." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850–851, 107 Cal.Rptr.2d 841, 24 P.3d 493, fns. omitted.) When the plaintiff bears the burden of proving facts by a preponderance of the evidence and the defendant moves for summary judgment, the defendant "must present evidence that would require a reasonable trier of fact *not* to find any underlying material fact more likely than not." (*Id.* at p. 851, 107 Cal.Rptr.2d 841, 24 P.3d 493.) In ruling on the motion, the court must draw all reasonable inferences from the evidence in the light most favorable to the opposing party. (*Id.* at p. 843, 107 Cal.Rptr.2d 841, 24 P.3d 493.) An order granting summary judgment is reviewed de novo. (*Id.* at p. 860, 107 Cal.Rptr.2d 841, 24 P.3d 493.)

B. *Procedural Issues*

Arrambide raises two procedural issues on appeal.

1. *GSAN's Response to Opposition to GSAN's Statement of Undisputed Material Facts*

Arrambide argues GSAN's response to Arrambide's opposition to GSAN's statement of undisputed material facts[5] contained argument and was an improper device to exceed the page limit on reply briefs. (See Cal. Rules of Court, rule 3.1113(d).)[6] She made the same argument in the trial court. GSAN argues on appeal that Arrambide was not prejudiced by any error because the trial court ignored the response when it ruled on the summary judgment. We construe this statement as a concession that this court may also properly ignore the response and we have done so.

[5] GSAN also filed a response to Arrambide's separate statement of undisputed material facts. Although Arrambide objected to this response in the trial court, she does not renew her objection on appeal.

[6] Although Arrambide relies in part on *Nazir*, the error condemned in that case was the moving party's presentation of new evidence in reply to the opposing party's statement of additional disputed facts, an error that did not occur here. (*Nazir, supra,* 178 Cal.App.4th at pp. 248–253, 100 Cal.Rptr.3d 296.)

2. *Evidentiary Objections*

At the time GSAN filed its reply papers, it also filed objections to portions of four declarations Arrambide submitted in opposition to the summary judgment motion. One of the grounds of objection was that exhibits mentioned in each of the declarations were not attached to the declarations. In response to the objections, Arrambide refiled the challenged declarations with the exhibits attached. GSAN objected to Arrambide's refiling of the challenged declarations as untimely. Arrambide also challenged GSAN's evidentiary objections because they were not in the format prescribed by court rules. (Cal. Rules of Court, rule 3.1354.) GSAN acknowledged that its objections had not been in the proper format and refiled them. The amended evidentiary objections were untimely. (*Id.*, rule 3.1354(a).)

The trial court simply sustained "all of [GSAN]'s evidentiary objections" without explanation in its written order. "[A] trial court presented with timely evidentiary objections in proper form must expressly rule on the individual objections, and if it does not, the objections are deemed waived and the objected-to evidence included in the record." (*Demps v. San Francisco Housing Authority* (2007) 149 Cal.App.4th 564, 578, 57 Cal.Rptr.3d 204.) A conclusory ruling which does not address the individual objections, and which provides no meaningful basis for review, can be considered a waiver. (*Nazir, supra,* 178 Cal.App.4th at p. 255, 100 Cal.Rptr.3d 296.)

To the extent that we are able to address the merits, we believe that the proper standard of review of such evidentiary rulings is abuse of discretion. (See *Nazir, supra,* 178 Cal.App.4th at p. 255 & fn. 4, 100 Cal.Rptr.3d 296 [applying abuse of discretion standard of review to evidentiary rulings based solely on summary judgment papers, but noting split in authority].) Applying that standard, we conclude that the court abused its discretion, at least in part.[7] First, GSAN's only objection to the *exhibits* to the declarations (even after the declarations were refiled with the exhibits attached) was that the exhibits were not attached to the originally-filed declarations. GSAN raised no substantive objections to the exhibits, which were relevant and admissible. Each of the declarants averred that the contents of the exhibits were true. The exhibits, which describe staff discontent with Laub's leadership before Arrambide arrived at

GSAN and demonstrate that Laub knew that certain staff members left GSAN because they were unhappy with her management and not for other reasons, stated facts that are within the personal knowledge of the declarants and that are relevant to the issues before the court on the summary judgment motion. The exhibits should not have been stricken.

[7] At the hearing, the court said, "Many of the portions of the declarations were speculative, lacked foundation and were impermissible opinion." We infer from this comment that the court sustained objections on substantive grounds only and not on the ground that exhibits to the declarations were missing in the first filing.

Moreover, the court should have overruled GSAN's separate objection to paragraph 3 of the Obel–Jorgensen declaration. Obel–Jorgensen averred therein, "I notified [Laub] of my resignation in a one-on-one meeting. I told [Laub] that I respected the work she did in founding the organization but could not wait for her to develop her skills as leader and as manager, as she acknowledged she needed to do, given what I had experienced myself and based on her past failed attempts to change." GSAN objected to this paragraph because it "fails to provide what, if anything, Ms. Obel–Jorgensen *told* Ms. Laub were her reasons for resigning. Thus, for purposes of [Arrambide's] fraud claims, Obel–Jorgensen provides no evidence that Ms. Laub knew ... of any reason for Obel–Jorgensen's resignation other than what Ms. Laub knew and understood from her." This is inaccurate. The paragraph states that Obel–Jorgensen "told" Laub that she was leaving because of her disapproval of Laub's management style.

The evidence the trial court improperly excluded has been included in our review of the summary judgment evidence, *ante.*

C. *Fraud Claims*

Two of Arrambide's claims (promissory fraud and fraudulent inducement of an employment contract in violation of Labor Code section 970) require proof of fraud. That is, they each require proof that GSAN, acting through Laub, knowingly made misrepresentations during the hiring process, intending that Arrambide rely on those representations when accepting the program director position. As to each claim, the trial court ruled that Arrambide failed to raise triable issues on the fraudulent nature of Laub's comments. Therefore, we first consider whether Arrambide raised triable issues on this question. Because we conclude that she has, we then examine whether the trial court erred in granting summary adjudication of each of the specific claims.

1. *Misrepresentations*

To establish fraud, a plaintiff must show misrepresentation, knowledge of falsity, and an intent to induce reliance.[8] (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638, 49 Cal.Rptr.2d 377, 909 P.2d 981 (*Lazar*) .) A misrepresentation may be a false representation of material fact or concealment or nondisclosure of material fact in certain circumstances. (*Ibid.*) Promissory fraud requires that a promise be made without an intention to perform. (*Ibid.*) " '[F]alse representations made recklessly and without regard for their truth in order to induce action by another are the equivalent of misrepresentations knowingly and intentionally uttered.' [Citation.]" (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 974, 64 Cal.Rptr.2d 843, 938 P.2d 903 (*Engalla*).)

[8] The additional elements of justifiable reliance and damages are discussed *post.*

Drawing all reasonable inferences in favor of Arrambide, we conclude that a reasonable trier of fact could find on the evidence presented that Laub intentionally misrepresented that the program director would be "second in charge" with supervisory responsibilities and misrepresented that Laub intended to employ and maintain someone in the position as described to Arrambide. We conclude Arrambide's other claims of misrepresentation are not supported by the record.

a. *"Second in Charge" with Supervisory Authority*

A reasonable factfinder could find that Laub misrepresented the nature of the program director position to Arrambide, specifically by saying the program director would be "second in charge" and would directly supervise the program staff. "Second in charge" implies that the program director would be the second-highest ranked individual in the organization with respect to all other employees. In fact, the program director at best was one of three senior staff members who ranked just below Laub and who, together with Laub, formed a "senior management team" that, insofar as the record indicates, never met while Arrambide was employed at GSAN. "Second in charge" also implies that the program director would have higher rank than certain other GSAN employees, with genuine supervisory authority over them. Indeed, Laub specifically represented to Arrambide that

she would have such supervisory authority. Although Arrambide *nominally* had such authority, a reasonable trier of fact could find that the de facto supervisory authority resided with the executive director. Evidence supporting this inference includes Laub's resistance to Arrambide's use of the phrase "my staff" or any variation thereof, her resistance to a separate meeting of the program staff, her comment that she was not handing over any responsibilities to Arrambide, her failure to identify substantive program responsibilities for Arrambide that could be delegated to the program staff, and her intervention in several situations where Arrambide was nominally exercising supervisory authority (including decisions about how to handle the Hosmon Facebook incident, the youth biography and omitted workshop descriptions in the YES program book, the possible food shortage at the YES conference).

Further, a reasonable factfinder could find that Laub never intended to allow Arrambide or any other employee to fill and maintain the program director position as it was described to Arrambide. The program director position was vacant for at least a year before Arrambide was hired. Arrambide was fired about one month after assuming the position and the position remained vacant for at least 18 months after her termination. Moreover, the position had been reconceived by that time as a nonsupervisory position. A reasonable factfinder could infer that Laub's conduct very early on in Arrambide's tenure indicated a hostility toward the position. Within the first few days of Arrambide's employment, Laub objected to Arrambide's use of the phrase "my staff," her statement that Laub would be handing over to her any authority in the organization, and her plans to hold a program staff meeting, conduct that supports an inference that Laub never intended to carry through on her promises that Arrambide would be "second in charge" with supervisory authority. Moreover, Laub's rapid disenchantment with Arrambide, despite their long association and the absence of any clear misconduct by Arrambide in her first few days on the job, supports an inference that Laub never intended to allow Arrambide to assume and stay in the program director position.[9] On Arrambide's second day on the job, Laub concluded she was probably not going to work out.

[9] Factual conflicts exist as to whether Arrambide's conduct on the job provides a reasonable explanation for Laub's decision to terminate her.

Moreover, evidence of the staff history at GSAN both supports an inference that Laub historically disliked working with a program director who had supervisory authority over program staff and also provides a possible explanation for why Laub would hire Arrambide even though she never intended to maintain her in the program director position: Laub was under institutional pressure to do so. Laub had previously clashed with program directors and program staff about her supervisory style and program staff's desire for greater autonomy. Coaches for Laub and an interim director were hired at least in part to help resolve these recurrent problems. At some point in 2004, Laub announced plans to replace the program director with an associate director. In 2007, she apparently backed away from the associate director plan even though the program director position remained vacant. In 2008, following the 2007 staff petition to the board and in cooperation with the interim director, she then set out to hire a new program director. A reasonable factfinder could find that she did so to calm staff or board concerns and not because she intended to hire a permanent program director with supervisory authority. Within one month she fired Arrambide, the program director position was left vacant for 18 months after Arrambide left, and the position was ultimately stripped of supervisory authority.

On these facts, a reasonable factfinder could find that Laub told Arrambide that she was hiring her to be a "second in charge" program director with supervisory authority over the GSAN program staff but never intended to allow her or any other person to assume and remain in that position.

b. *Other Claims of Misrepresentation*

Arrambide argues Laub misrepresented the reasons former GSAN staff had left the organization in order to induce Arrambide to accept the program director position. These representations were material to the hiring process insofar as they reflected the working conditions at GSAN. We agree that Arrambide raised a triable issue of fact about whether Laub intentionally misrepresented the reasons Obel–Jorgensen left the organization. However, Arrambide acknowledges that she was already on alert that Obel–Jorgensen might have been unhappy with GSAN based on a conversation she had with Obel–Jorgensen, and she does not produce any evidence that she was unable to contact Obel–Jorgensen directly to confirm the reasons she left the organization before she accepted the job. With respect to other staff, Arrambide has not raised a triable issue about whether Laub misrepresented the reasons for the departures. Regarding Mayo, Arrambide produced evidence that Mayo left because of dissatisfaction with Laub,[10] but not that Laub was ever apprised of this reason for Mayo's departure. Regarding other staff, Arrambide relies primarily on the 2004 resignations of Lopez and Tang in protest over the

termination of Cho. However, she does not dispute the evidence that in the much more recent past (fall 2007) several staff left abruptly due to funding problems, not discontent. Further, Arrambide does not produce evidence that any staff employed by GSAN at the time she started work there were unhappy other than Hosmon. In the totality of the circumstances, we cannot conclude that Laub's partial nondisclosure of Obel–Jorgensen's reasons for leaving GSAN alone misrepresented the working conditions at GSAN so as to support an action for fraud.

[10] The evidence Arrambide presents is hearsay (her testimony about Mayo's comments to her), but GSAN did not object to the evidence on this ground. In any event, even accepting Mayo's statements as true, they do not indicate that Mayo ever told Laub the reasons why she left the organization.

Arrambide also argues Laub misrepresented that she would be sent to the January 2009 Creating Change Conference in Denver, Colorado if she accepted the position as program director. Arrambide relies on evidence suggesting that she, unlike other GSAN staff, might not have been told to purchase a ticket for the conference before she was terminated. However, this evidence is ambiguous as to Laub's intent at that time and in any event does not support an inference that *before September 30, 2008*, i.e., during the hiring process when Laub made the promise, Laub did not intend to send Arrambide to the conference.

Finally, Arrambide argues Laub misrepresented that she would be given 90 days to prove herself if she accepted the program director position. Arrambide relies on language in her employment offer letter that stated, "The first 90 days of your employment is an orientation period. You should receive a work review at the end of that period." The same letter stated that she was an at-will employee. A scheduled performance evaluation does not alter the nature of an employee's express at-will employment. (See *Lenk v. Total–Western, Inc.* (2001) 89 Cal.App.4th 959, 969–970, 108 Cal.Rptr.2d 34 (*Lenk*).)

2. *Promissory Fraud*

As we discuss *post*, Arrambide may maintain an action for promissory fraud even though she was an at-will employee. We conclude that she has presented sufficient evidence to state a cause of action for promissory fraud.

a. *Legal Standard*

"A promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud. [Citations.] [¶] An action for promissory fraud may lie where a defendant fraudulently induces the plaintiff to enter into a contract. [Citations.] In such cases, the plaintiff's claim does not depend upon whether the defendant's promise is ultimately enforceable as a contract." (*Lazar, supra,* 12 Cal.4th at p. 638, 49 Cal.Rptr.2d 377, 909 P.2d 981.)

In *Lazar*, the plaintiff alleged that the defendant employer intensively recruited him to leave his long-term and high-paying job in New York, where his wife and children were settled, and move to California to work for defendant. (*Lazar, supra,* 12 Cal.4th at p. 635, 49 Cal.Rptr.2d 377, 909 P.2d 981.) In response to specific inquiries by the plaintiff during the hiring process, the employer provided knowingly false assurances that the plaintiff would continue to be employed as long as he satisfactorily performed his job, that the company was financially strong and expanding, and that the plaintiff would receive regular pay raises. (*Id.* at pp. 635–636, 49 Cal.Rptr.2d 377, 909 P.2d 981.) Less than two years after the plaintiff started working in the position, he failed to receive a promised commission, his job was eliminated, and he was terminated. (*Id.* at pp. 636–637, 49 Cal.Rptr.2d 377, 909 P.2d 981.) The court held that the plaintiff pled a valid cause of action for promissory fraud. (*Id.* at p. 639, 49 Cal.Rptr.2d 377, 909 P.2d 981.)

In *Lazar*, one of the defendant's alleged promises was that the plaintiff would not be fired without good cause. (*Lazar, supra,* 12 Cal.4th at p. 636, 49 Cal.Rptr.2d 377, 909 P.2d 981.) Here, Arrambide does not so allege. Indeed, because she (unlike the plaintiff in *Lazar*) signed an employment contract acknowledging that her employment was at-will (see *id.* at p. 636, 49 Cal.Rptr.2d 377, 909 P.2d 981), she would not be able to prevail on a promissory fraud claim based on breach of a promise to fire only for good cause. (See *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 393–394, 46 Cal.Rptr.3d 668, 139 P.3d 56 (*Dore*).)[11]

[11] In *Dore*, the plaintiff claimed that the employer induced him to leave long-standing, secure employment by promising him that his employment with defendant would continue as long as his work was satisfactory and he would not be terminated without good cause. (*Dore, supra,* 39 Cal.4th at p. 393, 46 Cal.Rptr.3d 668, 139 P.3d 56.) However, "Dore conceded in his deposition that no one at AWI specifically told him he would be employed there so long as his work was satisfactory or that he could be fired only for good

> cause. Dore admits, moreover, that he read, signed, and understood AWI's letter stating 'the terms' of his [at-will] employment.... [The letter] defeats any contention that he reasonably understood AWI to have promised him long-term employment." (*Id.* at pp. 393–394, 46 Cal.Rptr.3d 668, 139 P.3d 56.)

At-will employment, however, does not bar all promissory fraud claims for fraudulent inducement of employment contracts. "Contrary to [the employer's] unabashed argument at the hearing on appeal, an 'at-will' employer does not have carte blanche to lie to an employee about any matter whatsoever to trick him or her into accepting employment." (*Agosta v. Astor* (2004) 120 Cal.App.4th 596, 607, 15 Cal.Rptr.3d 565.) "Fraudulent inducement *causing damages unrelated to the employee's discharge* is an actionable tort regardless of whether he or she is [an] 'at-will[ ]' " employee. (*Id.* at p. 606, 15 Cal.Rptr.3d 565, italics added.) In *Agosta*, the plaintiff initially rejected the defendant's offer of employment, and the employer agreed to the employee's financial demands in order to lure him away from a competitor. The parties signed a written employment agreement that set forth the financial terms and stated the employment was at-will. Within days of hiring the employee, the employer reneged on the promised economic terms of employment and ultimately terminated the employee. (*Id.* at pp. 599–602, 15 Cal.Rptr.3d 565.) The court held that, while at-will employment term was effective, the employee raised a triable issue regarding fraud. (*Id.* at pp. 604–607, 15 Cal.Rptr.3d 565). "Agosta produced evidence from which a jury could reasonably infer Astor promised him the compensation he sought to lure him into changing employment, Astor *never intended to live up to the agreement*, and Agosta suffered compensable damages apart from damages caused by his firing. At a minimum, it appears that ... Agosta is entitled to compensation for 'the loss of security and income associated with his former employment.' [Citation.]" (*Id.* at pp. 606–607, 15 Cal.Rptr.3d 565, italics added.)

Similarly, in *Helmer v. Bingham Toyota Isuzu* (2005) 129 Cal.App.4th 1121, 29 Cal.Rptr.3d 136, the plaintiff quit his job where he was earning $5,700 to $6,000 a month and accepted a new position on the promise he would earn at least $5,700 a month. Once in the new position, he earned no more than $5,100 a month and he was terminated after he complained. He was unable to regain his old job. (*Id.* at pp. 1123–1125, 29 Cal.Rptr.3d 136.) The court upheld a jury finding of promissory fraud. (*Id.* at pp. 1123, 1132, 29 Cal.Rptr.3d 136.)

Finally, in *Lenk, supra,* 89 Cal.App.4th 959, 108 Cal.Rptr.2d 34, the defendant employer fraudulently misrepresented the financial health of the company and the plaintiff prospective employee's prospects for advancement within the company. The defendant represented that the company had $40 million in annual revenue, that it planned to move its corporate headquarters to the town where the plaintiff lived, and that the plaintiff would be first in line for a corporate purchasing position. In fact, the company had $30 million in annual revenue and was in very poor financial condition, and it was planning to automate its purchasing operation. The plaintiff accepted the job and signed documents acknowledging his employment was at-will. Six months later, the purchasing department was computerized and plaintiff was terminated for economic reasons. (*Id.* at pp. 963–967, 108 Cal.Rptr.2d 34.) The court upheld a jury verdict for the plaintiff on his fraud claims. (*Id.* at pp. 967, 969, 973, 108 Cal.Rptr.2d 34.)

We conclude that Arrambide may state a cause of action for promissory fraud even though she was an at-will employee.

b. *Application to Facts*

As explained *ante,* a reasonable factfinder could find that Laub intentionally induced Arrambide to accept the program director position by falsely promising that GSAN was hiring a program director that would be "second in charge" with supervisory authority over the program staff. A reasonable factfinder could also find that Arrambide reasonably relied on those representations. "Actual reliance occurs when a misrepresentation is ' "an immediate cause of [a plaintiff's] conduct, which alters his legal relations," ' and when, absent such representation, ' "he would not, in all reasonable probability, have entered into the contract or other transaction." ' [Citations.] 'It is not ... necessary that [a plaintiff's] reliance upon the truth of the fraudulent misrepresentation be the sole or even the predominant or decisive factor in influencing his conduct.... It is enough that the representation has played a substantial part, and so has been a substantial factor, in influencing his decision.' [Citation.] [¶] Moreover, a presumption, or at least an inference, of reliance arises whenever there is a showing that a misrepresentation is material. [Citations.] A misrepresentation is judged to be 'material' if 'a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question' [citations], and as such materiality is generally a question of fact...." (*Engalla, supra,* 15 Cal.4th at pp. 976–977, 64 Cal.Rptr.2d 843, 938 P.2d 903.)

A reasonable factfinder could find that, given Arrambide's long career working with LGBTQ youth, her satisfaction working at Texas GSA, and her expressed desire to become executive director of such an organization, she would not have taken the GSAN position had she known it would not have had genuine management rank. Arrambide suffered damages due to her reliance on the representations because she left her position at Texas GSA.

3. *Labor Code Section 970*

Labor Code section 970 states, "No person, or agent or officer thereof, directly or indirectly, shall influence, persuade, or engage any person to change from one place to another in this State or from any place outside to any place within the State, or from any place within the State to any place outside, for the purpose of working in any branch of labor, through or by means of knowingly false representations, whether spoken, written, or advertised in printed form, concerning ... [¶] ... [t]he kind, character, or existence of such work;...." Under Labor Code section 972, "any person, or agent or officer thereof[,] who violates any provision of section 970 is liable to the party aggrieved, in a civil action, for double damages resulting from such misrepresentations."

Laub's representations that the program director position was "second in charge" with genuine supervisory authority over program staff and that she intended to fill and maintain the program director position described to Arrambide were representations concerning the kind and character of the promised work. Because a reasonable factfinder could find that Laub intentionally misrepresented these facts for the purpose of influencing Arrambide to move from Texas to California to work in the position, a factfinder could find that GSAN violated Labor Code section 970.

D. *Other Causes of Action*

1. *Negligent Misrepresentation*

Arrambide cannot premise her negligent misrepresentation claim on Laub's representations that the program director would be "second in charge" with genuine supervisory authority or that she intended to fill the program director as it was described to Arrambide. Negligent misrepresentation is actionable only as to representations of past or existing facts, not opinions as to future events or promises. (*Neu–Visions Sports, Inc. v. Soren/McAdam/Bartells* (2000) 86 Cal.App.4th 303, 309–310, 103 Cal.Rptr.2d 159; *Tarmann v. State Farm Mut. Auto. Ins. Co.* (1991) 2 Cal.App.4th 153, 158–159, 2 Cal.Rptr.2d 861.)

2. *Wrongful Termination in Violation of Public Policy*

Arrambide premises her claim for wrongful termination in violation of public policy on a violation of Labor Code section 970. The trial court granted GSAN summary adjudication of this cause of action "due to [a] lack of public policy basis per [Labor Code section] 970...." We affirm for a different reason.

A claim for wrongful termination in violation of public policy arises when "an at-will employee ... is discharged for performing an act that public policy would encourage, or for refusing to do something that public policy would condemn. [Citations.]" (*Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1090, 4 Cal.Rptr.2d 874, 824 P.2d 680.) "[T]here can be no right to terminate for an unlawful reason or a purpose that contravenes fundamental public policy." (*Id.* at p. 1094, 4 Cal.Rptr.2d 874, 824 P.2d 680.) Arrambide does not allege that she committed an act protected by public policy or refused to commit an act condemned by public policy. She does not argue that she was *terminated* in violation of Labor Code section 970. She argues that she was *fraudulently induced to accept* the GSAN job in violation of Labor Code section 970. Her wrongful termination claim has no support in the evidence.

3. *Breach of the Implied Covenant of Good Faith and Fair Dealing*

Although Arrambide does not contest the trial court's grant of summary adjudication on her claim for breach of contract, she argues on appeal that her employment contract, even though at-will, included an implied covenant of good faith and fair dealing that was violated when she was terminated without having been given an opportunity to perform the job. She then suggests that GSAN's alleged violation of Labor Code section 970 in fraudulently inducing her to move to California for the job combined with its violation of the implied covenant constituted a wrongful termination in violation of public policy. We disagree.

First, we have already rejected the argument that GSAN's alleged violation of Labor Code section 970 could support a claim for wrongful *termination.*

Second, the implied covenant of good faith and fair dealing cannot be used to imply a requirement of just cause termination into a written contract that provides for

at-will employment. (*Halvorsen v. Aramark Uniform Services, Inc.* (1998) 65 Cal.App.4th 1383, 1390, 77 Cal.Rptr.2d 383; see also *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 351, 100 Cal.Rptr.2d 352, 8 P.3d 1089 (*Guz*) ["the implied covenant of good faith and fair dealing imposes no independent limits on an employer's prerogative to dismiss employees"].) Arrambide does not allege that she was terminated as a mere pretext to cheat her out of some other enforceable term of her employment contract, which could constitute a breach of the implied covenant. (See *Guz*, at p. 353, fn. 18, 100 Cal.Rptr.2d 352, 8 P.3d 1089.)

Third, Arrambide's cited cases are distinguishable. In *Comeaux v. Brown & Williamson Tobacco Co.*, the Ninth Circuit suggested that an employee who was induced by a promise of employment to quit his job and relocate and who was *never allowed to commence work* could state a valid cause of action for breach of the covenant implied in a contract that if he quit his job and relocated he would be given work. (*Comeaux v. Brown & Williamson Tobacco Co.* (9th Cir.1990) 915 F.2d 1264, 1266–1267, 1272–1273.) Although the parties also agreed that the employment would be at-will, the at-will term did not take effect unless and until he commenced work for the company, which never occurred. Therefore, there was no conflict between the employee's theory of breach of the implied covenant and the at-will employment term. (*Id.* at pp. 1272–1273 .) In *Sheppard v. Morgan Keegan & Co.*, we similarly held that the implied covenant of good faith and fair dealing imposed liability where an employer induced "a new employee to sever his former employment and move across the country only to be terminated before the ink dries on his new lease, or before he has had a chance to demonstrate his ability to satisfy the requirements of the job[,]" even though the projected employment was at-will. (*Sheppard v. Morgan Keegan & Co.* (1990) 218 Cal.App.3d 61, 67, 266 Cal.Rptr. 784 (*Sheppard*).) The facts were similar to those of *Comeaux:* the plaintiff employee was never allowed to commence work and the at-will employment term never took effect. (*Id.* at pp. 64–65, 266 Cal.Rptr. 784; see also *Kohli v. Trecom Bus. Sys.* (N.D.Cal. Oct. 28, 1998, No. C 97–2170 MJJ) 1998 U.S.Dist. Lexis 17163,1998 WL 765050 [distinguishing *Sheppard, supra*, 218 Cal.App.3d 61, 266 Cal.Rptr. 784 because that plaintiff "never commenced work and thus no employment relationship had been created"].) Here, Arrambide was allowed to commence work with GSAN and the at-will employment term went into effect, thus barring her argument that the implied covenant of good faith and fair dealing required GSAN to give her a fair opportunity to prove that she could perform satisfactorily in the program director position.

4. *Promissory Estoppel*

In support of her cause of action for promissory estoppel, Arrambide argues that Laub promised her a position that was second in charge and had genuine supervisory authority, that she relied on the promise in accepting the position, and that the promise turned out not to be true. These facts are indistinguishable from the facts that underlie Arrambide's claims for promissory fraud. The difference in these causes of action is that promissory fraud requires an intentional or reckless misrepresentation, whereas promissory estoppel does not require a showing of fault. (See *Toscano v. Greene Music* (2004) 124 Cal.App.4th 685, 692, 21 Cal.Rptr.3d 732.) Arrambide has not cited any case law that an unintentional or nonreckless promise of at-will employment can support a promissory estoppel claim where the employee is allowed to assume the position but promises regarding the nature of the employment turn out not to be true. Therefore, we affirm the grant of summary adjudication as to this claim.

5. *Negligent Infliction of Emotional Distress*

Arrambide argues the trial court erred in granting summary adjudication of her claim of negligent infliction of emotional distress on the ground that Arrambide only alleged intentional wrongdoing. Arrambide's evidence indicates that Laub knew all of the relevant facts regarding her alleged false promises that Arrambide would be second in charge with genuine supervisory authority and that she intended to fill the program director position permanently. Indeed, under Arrambide's version of the events, Laub had absolute control over whether those promises were sincere and would be kept and Laub demonstrated in the first two days of Arrambide's employment that they were not sincere and would not be kept. On these facts, Laub's conduct must have been intentional or reckless and not merely negligent. We affirm the trial court's ruling.

III. DISPOSITION

The order granting summary judgment to GSAN is reversed. The case is remanded to the trial court with instructions to deny summary adjudication to GSAN of Arrambide's claims for promissory fraud and a violation of Labor Code section 970 and to grant summary adjudication of her remaining claims. GSAN shall bear Arrambide's costs on appeal.

We concur: SIMONS, Acting P.J., and NEEDHAM, J.