STATE OF MICHIGAN

COURT OF APPEALS

DARYL McKIMMY,

Plaintiff-Appellant,

v

DAPCO INDUSTRIES, a/k/a DEXTER AUTOMATIC PRODUCTS COMPANY,

Defendant-Appellee.

UNPUBLISHED
July 1, 1997

No. 190958
Jackson Circuit Court
LC No. 95-071236

Before: Young, P.J., and O'Connell and W.J. Nykamp*, JJ.

PER CURIAM.

Plaintiff, Daryl McKimmy, appeals as of right from a judgment for defendant, Dapco Industries, based on a previously entered opinion and order granting summary disposition pursuant to MCR 2.116(C)(10). We affirm.

I. BACKGROUND AND PROCEEDINGS

A. Plaintiff's employment with Defendant

On February 1, 1993, plaintiff filed an employment application with defendant. On the application, plaintiff signed his name to a "pre-employment statement." Among the provisions of this statement was the following disclaimer:

> I hereby understand and acknowledge that, unless otherwise defined by applicable law, any employment relationship with this organization is of an "*at will*" nature, which means that the employee may resign at any time and the employer may discharge the employee at any time, with or without cause. [Emphasis added.]

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* Circuit judge, sitting on the Court of Appeals by assignment.

Four months later, defendant hired plaintiff. At the time of his hire, plaintiff was given the "Dapco Employee Handbook." The handbook describes a ninety-day probationary period during which an employee "may be terminated at the discretion of the company for any reason other than discrimination prohibited by law." The handbook also includes a section entitled "Absenteeism and Tardiness" that emphasized the importance of good attendance and prescribed stepped or "progressive" disciplinary actions for repeated poor attendance. The handbook also contains a section entitled "Conduct" describing thirty eight distinct acts of employee misconduct which would be "considered cause for disciplinary action". These thirty eight acts of misconduct were, in turn, subdivided into those which were: (1) offenses deemed serious enough to prompt discharge on the first act; (2) offenses, while less serious than the first, could, nonetheless, prompt significant discipline, including discharge, upon commission; and (3) offenses of a less significant variety such that discharge would be warranted after three or four instances of misconduct. Absences and tardiness fell within the last category of misconduct.

In a section entitled "Conclusion," the handbook contained a series of disclaimers proclaiming that the handbook could not be considered "all inclusive," *viz*., "This handbook is not a complete definition of what Dapco expects of you, nor is it a complete definition of what you may expect of Dapco." The handbook also contained the following provision: "This is an 'Employee Handbook', not an employment contract."

Several months after his employment with defendant commenced, plaintiff exhibited absenteeism and tardiness problems, culminating in a series of events which began when plaintiff allegedly reported to work two hours late. Defendant claimed that, upon inquiry from his supervisor about the reason for his tardiness, plaintiff told his supervisor that it was personal and none of his business. There were several other attendance violations with alleged attendant insubordination on the part of plaintiff. Defendant did not independently discipline plaintiff for these separate incidents. Instead, plaintiff was discharged.

B. Proceedings

Plaintiff subsequently filed a complaint, alleging wrongful discharge. Defendant moved for summary disposition on the ground that plaintiff was an at-will employee. In response, plaintiff argued that defendant's handbook created a progressive disciplinary procedure and that material questions of fact existed as to whether plaintiff's employment was subject to a just cause contract or a *Toussaint*[1] "legitimate expectations" claim. After a hearing, the circuit court dismissed plaintiff's complaint, holding that based on the "totality of wording" in defendant's handbook, plaintiff had failed to establish a material issue of fact regarding his claim of just cause employment. This appeal ensued.

II. Contract Claims

On appeal, plaintiff argues that he raised a genuine issue of material fact regarding the existence of a just-cause employment relationship with defendant. Plaintiff contends that, because defendant's employee handbook outlined a progressive system of discipline without also explicitly disclaiming a just-

cause employment relationship, his status as a just-cause employee should be determined by a jury. We disagree.

We review the circuit court's order granting summary disposition de novo to determine whether the moving party was entitled to judgment as a matter of law. *Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 86; 520 NW2d 633 (1994). A motion pursuant to MCR 2.116(C)(10) tests the factual basis underlying the plaintiff's claim. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). In ruling on the motion, the trial court must consider the affidavits, pleadings, depositions, admissions, and other admissible documentary evidence submitted by the parties. MCR 2.116(G)(5); *SSC Associates Ltd Partnership v General Retirement System of Detroit*, 192 Mich App 360, 364, 366; 480 NW2d 275 (1991). Giving the benefit of all reasonable doubt to the opposing party, the trial court must determine whether a record might be developed that would leave open an issue of material fact upon which reasonable minds could differ. *SSC Associates, supra*, 192 Mich App at 364. Summary disposition is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Mitchell v Dahlberg*, 215 Mich App 718, 725; 547 NW2d 74 (1996).

When plaintiff applied for his job with defendant he signed a "pre-employment statement" which clearly stated that if employed, his employment with defendant would be on an at-will basis. In addition, defendant's employee handbook explicitly warned, "This is an 'Employee Handbook', not an employment contract. We conclude that these facts are dispositive regarding plaintiff's claim of just-cause employment.

Although employment contracts for an indefinite period are presumptively terminable at will, a just-cause provision may become part of the employment relationship either through an express or implied-in-fact contract, or as a result of legitimate expectations of job security instilled by the policies and procedures of the employer. *Rood v General Dynamics*, 444 Mich 107, 116-118; 507 NW2d 591 (1993). Plaintiff contends that his proofs established a factual issue concerning just-cause employment under both analyses. As the following discussion illustrates, plaintiff's argument fails because of the presence of express disclaimers in defendant's employment application and handbook.

A. Express Contract

Plaintiff argues that defendant's progressive discipline policy created an express contract for just-cause employment. We disagree. Just-cause employment contractual liability, as opposed to *Toussaint's* legitimate expectations theory of liability, is analyzed under conventional contract principles. *Rood, supra,* 444 Mich at 118. An employer's policy of discharge only for cause will become part of an employment contract only when the circumstances clearly and unambiguously indicate that the parties so intended. *Id.* at 137. The Supreme Court recently confirmed this principle in *Dolan v Continental Airlines/Continental express,* ___ Mich ___; ___ NW2d ___; 1997 Mich LEXIS 1049. Otherwise stated, an express disclaimer stating that there is no employment contract and that employment is on at-will basis clearly indicates that the parties did *not* intend just-cause employment.

This point was emphasized by the Michigan Supreme Court, in *Heurtebise v Reliable Computers, Inc*, 452 Mich 405; 550 NW2d 243 (1996). The Court held that an arbitration provision in one section of an employee handbook could not be considered contractually binding where another section of the handbook contained a disclaimer warning that nothing in the handbook was intended to create an employment contract. *Id.* at 413-414. The *Heurtebise* Court explained that the general disclaimer demonstrated that the employer did not intend to be bound by *any* part of the handbook. *Id*. at 414. The same logic applies to defendant's employee handbook which contains a similar disclaimer. A reasonable person would not interpret the words and acts of the parties as manifesting an intent to be bound to a just-cause employment contract. *Rood, supra*, 444 Mich at 119; see also *Biggs v Hilton Hotel Corp*, 194 Mich App 239, 240-242; 486 NW2d 61 (1992)(reasoning that it was logical for an employer to desire a systematic method of dealing with employees but that by doing so, an employer does not create just-cause employment).[2]

B. "Legitimate Expectations"

The *Toussaint* "legitimate expectations" theory is not based on contract law, but is instead based solely on public policy considerations. *Rood, supra*, 444 Mich at 118. To avoid summary disposition, a plaintiff must show that the defendant has made a promise reasonably capable of instilling a legitimate expectation of just-cause employment. *Id.* at 138-139. Plaintiff has not done so.

In all claims brought under this theory,

> the trial court should examine the employer policy statement, concerning employee discharge, if any, to determine, as a threshold matter, whether such policies are reasonably capable of being interpreted as promises of just-cause employment. If the employer['s] policies are incapable of such interpretation, then the court should dismiss the plaintiff's complaint on defendant's motion for summary disposition. MCR 2.116(C)(10). If, however, the employer's policies relating to employee discharge are capable of two reasonable interpretations, the issue is for the jury. [Rood, supra, 444 Mich 140-141].

Toussaint recognized that a reasonable juror could find that the plaintiff had a legitimate expectation of just-cause employment based on language in a handbook that expressly promised that employees would be discharged "for just cause only." *Toussaint*, *supra*, 408 Mich 599, 656. A legitimate expectation of just-cause employment may also be inferred from an employer's establishment of a specific disciplinary policy where the right to discharge the employee is made subject to the express provisions of the policy. See *Rood, supra*, 444 Mich at 139-140 (citing *Renny v Port Huron Hosp*, 427 Mich 415; 398 NW2d 327 (1986)). However, a "nonexclusive list of common-sense rules of behavior that can lead to *disciplinary action or discharge*" cannot be interpreted as a promise of just-cause employment and clearly reserves the employer's right to discharge an employee at will. *Id*. at 142. That is the case here.

Defendant's handbook simply illustrates that certain types of misconduct merit certain methods of discipline. Significantly, defendant's handbook did not explicitly promise termination for cause only, nor did it expressly make termination subject to the procedures in the handbook. Again, the handbook's provisions provide the handbook could not be considered "all inclusive,"; "This handbook is not a complete definition of what Dapco expects of you, nor is it a complete definition of what you may expect of Dapco"; and "This is an 'Employee Handbook', not an employment contract." Equally fatal to plaintiff's claim is the fact that plaintiff signed the "pre-employment statement" which specifically states that plaintiff could be discharged "at any time, with or without cause." As such, the handbook's provisions regarding progressive discipline were insufficient to instill a legitimate expectation of just-cause employment. See *Id*. at 141-142.

Plaintiff nevertheless urges this Court to apply the holding in *Lytle v Malady*, 209 Mich App 179; 530 NW2d 135 (1995), lv grt'd 451 Mich 920; 550 NW2d 535 (1996). Plaintiff contends that the *Lytle* panel held that despite the presence of a disclaimer, there was a factual issue concerning whether the plaintiff had a legitimate expectation of just cause employment because the employer's handbook expressly stated that no employee would be discharged without a proper reason or cause. *Id*. at 194. In addition to the clear distinction between this statement and the statements in this case, we conclude that the Supreme Court's holdings in *Rood* and *Heurtebise* are dispositive such that the express disclaimer of an employment contract defeats an employee's legitimate expectation of employment. Moreover, in *Clement-Rowe v Michigan Health Care Corp*, 212 Mich App 503; 538 NW2d 20 (1995), this Court held that an employee, who signed an at-will disclaimer on an employment application, in which she acknowledges that he or she understood that employment was on an at-will basis, cannot later claim that he or she had a legitimate expectation of just-cause employment. *Id*. at 505. Plaintiff, having signed such an acknowledgment, is precluded from claiming that he had a legitimate expectation of just-cause employment.

III. Conclusion

Accordingly, we conclude that the circuit court did not err in granting defendant's motion for summary disposition. First, there are no disputed issues of fact that plaintiff did not have an express or implied-in-fact employment contract for just-cause employment. The express disclaimers in the employment application and handbook indicated that the parties clearly intended that employment was on an at-will basis. Second, there are no disputed issues of fact that plaintiff could not claim a legitimate expectation of just-cause employment. Defendant's progressive discipline policy was nonexclusive and subject to the express disclaimer that no part of the handbook created an employment contract. Plaintiff's acknowledgment on his employment application of at-will employment is also dispositive to our conclusion that he had no legitimate expectation of just-cause employment.

Affirmed. Defendant, as the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Robert P. Young, Jr.
/s/ Peter D. O'Connell
/s/ Wesley J. Nykamp

[1] *Toussaint v Blue Cross & Blue Shield*, 408 Mich 579; 292 NW2d 880 (1980).

[2] For the same reasons, we reject plaintiff's argument that based on the progressive disciplinary measures in defendant's employment handbook, he had a "partial" just-cause employment relationship, relying on *Hatfield v Johnson Controls*, 791 F Supp 1243, 1250-1251 (ED Mich, 1992). In *Hatfield*, unlike this case, there was no written disclaimer of just-cause employment. *Id*. at 1251. As stated, the *Heurtebise* Court made clear that an express disclaimer that the handbook or its policies are not a contract signifies that an employer is not bound by *any* part of the handbook. *Heurtebise*, *supra*, 452 Mich at 414.