# STATE OF MICHIGAN

# COURT OF APPEALS

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CARL A. BENGEL and SALLY S. BENGEL,

Plaintiffs-Appellants,

v

W. A. FOOTE MEMORIAL HOSPITAL,

Defendant-Appellee.

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UNPUBLISHED
August 3, 1999

No. 209604
Jackson Circuit Court
LC No. 97 08 0542 CK

Before: Markey, P.J., and McDonald and Fitzgerald, JJ.

PER CURIAM.

Plaintiff Carl A. Bengel was employed as a medical technologist by defendant W.A. Foote Memorial Hospital until he was discharged in 1995. Plaintiffs alleged in their complaint allegations of wrongful discharge and a derivative claim of loss of consortium.[1] Defendant filed a motion for summary disposition under MCR 2.116(C)(10), which was granted. Plaintiffs appeal as of right. We reverse.

One of plaintiff's co-workers filed a complaint with her supervisor that plaintiff had grabbed, stroked and rubbed her thigh under a table in the hospital cafeteria during a work break. The complainant stated that she felt the touching was not innocent but was overtly sexual in nature, and she stated in her affidavit that she has had problems on numerous occasions with plaintiff invading her personal space with his body. Defendant hospital investigated the complaint, and through its investigation several employees reported that plaintiff had "gotten too close to them" physically, offended them by inappropriately touching or rubbing them or had made inappropriate sexual comments.

In his affidavit, plaintiff stated that the complainant had touched his knee when seating herself, and he had merely patted her knee stating that it was "ok." In his affidavit, plaintiff also denied specific allegations of physical contact and stated that some of the contact with co-workers was not initiated by him.

Defendant terminated plaintiff's employment. Defendant stated the reasons for the termination was the complaint, the multiple specific and consistent complaints regarding plaintiff received during the

investigation, the hospital's policy on sexual harassment and the inclusion of sexual harassment in the definition of gross misconduct—which typically resulted in discharge.

In granting defendant's motion for summary disposition, the lower court relied on an unpublished opinion of this Court to hold that defendant had reserved the sole discretion to determine the justice of its own decision, and therefore the termination of plaintiff's employment would not be subject to judicial review.

Plaintiffs' first allegation of error is that the trial court erred in relying on an unpublished opinion of this Court. We agree.

The trial court acknowledged that *Keena v City Bank & Trust Co N.A.*, unpublished opinion per curiam of the Court of Appeals, issued October 21, 1997 (Docket No. 178331), is an unpublished opinion, but still improperly relied on it as precedent, MCR 7.215(C)(1); *WE Westfall, Inc v Michigan Bell Telephone Co*, 129 Mich App 301, 303; 341 NW2d 514 (1983), rather than merely persuasive authority. See *Steele v Dep't of Corrections*, 215 Mich App 710, 714 n 2, 715; 546 NW2d 725 (1996). However, we will not reverse when a trial court reaches the correct result regardless of the reasoning employed. *Zimmerman v Owens*, 221 Mich App 259, 264; 561 NW2d 475 (1997). Therefore, if the lower court correctly granted the motion for summary disposition, albeit with improper reliance on an unpublished case, we will not reverse.

Second, plaintiffs contend that the trial court erred when it determined that defendant's decision was not fully reviewable by the trier of fact. We agree.

In dealing with a case in which there is an allegation of wrongful termination, first the court must determine the type of employment situation the discharged employee had, i.e., at-will, a "just cause" contract, or satisfaction contract. In this case, the question of whether there was a "just cause" employment environment was conceded. If there is a "just cause" contract, as in this case, an employer's declaration that an employee was discharged for unsatisfactory work is subject to judicial review. *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579, 621-622; 292 NW2d 880 (1980). However, an employer can prevent judicial review when the employer reserves for itself sole discretion in determining the justice of its own decision. *Thomas v John Deere Corp*, 205 Mich App 91, 95; 517 NW2d 265 (1994).

Because the general rule is that these decisions are reviewable, except if the employer reserves sole discretion, then it is necessary to determine whether defendant fit the exception. In rendering its decision, the *Thomas* Court did not quote the exact language of the contract that provided the basis for its finding that the defendant had "reserved for itself the authority to determine whether there was good and just cause." *Id.* at 95. The *Thomas* Court merely stated "the same evidence relied on to demonstrate that defendant had limited its ability to terminate plaintiff's employment also establishes that defendant reserved for itself sole authority to decide whether termination was justified." *Id.* at 94-95.

The corrective plan policy at issue in this case states, in part, that "[a]ny unsatisfactory behavior, performance or conduct, etc., may be subject to this Corrective Action policy" (Emphasis added). The

language of the handbook states that conduct may be subject to the corrective action plan, but according to the explicit language of the handbook, all conduct is not necessarily subject to it. Defendant concludes that "the hospital clearly retained discretion to determine whether a violation of the policy had been committed, and whether discharge was appropriate sanctions," without explaining how the information provided in the corrective action plan clearly retained this discretion for defendant.

We conclude that because defendant did not reserve for itself the sole discretion to decide whether the termination was justified, its decision to terminate the employee is subject to judicial review. See *Toussaint, supra* at 621. Thus, the trial court erred in its determination that the decision was not reviewable by a jury.[2]

We also find the trial court improperly granted summary disposition because there was a genuine issue of material fact. In the present case, plaintiff argues that his touching of the complainant did not amount to behavior as defined as sexual harassment in the hospital policy. Defendant defined sexual harassment in the employee handbook, which states in part:

> Sexual harassment is any unwelcome sexual advance, request for sexual favor, or other verbal and physical conduct of a sexual nature, whether explicit or implied.
>
> Conduct of a sexual nature that has the purpose or effect of interfering with an employee's job performance or creates an intimidating hostile or offensive work environment is also prohibited.

Plaintiff stated in his affidavit that he merely patted the complainant on the knee, indicating that it was "ok" after her knee had touched his while she was sitting down, whereas the complainant characterized plaintiff's touching as a rubbing and grabbing of her thigh in what she perceived as a sexual nature. A court is not permitted to assess credibility in deciding a summary disposition motion. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Moreover, the jury may decide an employer's true reason for discharge and whether that reason constituted good cause. *Toussaint, supra* at 622-623. Accordingly, we find that the question of whether defendant's true reason for discharging plaintiff was for behavior that constituted sexual harassment is a question of fact and should be submitted to the jury.

We acknowledge that plaintiff contends that he was discharged eleven months before attaining twenty years' employment. However, plaintiff provides no evidence or support beyond speculation that the discharge for sexual harassment was merely a pretext. The existence of disputed fact must be established by admissible evidence; speculation and conjecture on the part of the nonmoving party will not suffice. *Libralter Plastics, Inc, v Chubb Group of Ins Cos,* 199 Mich App 482, 486; 502 NW2d 742 (1993). Therefore, this is not a genuine issue of material fact that would preclude summary disposition.

Plaintiff also contends that fundamental fairness and public policy mandate reversal and a submission of the proceedings to a jury. In light of our decision, we decline to address these issues.

Reversed.

/s/ Jane E. Markey
/s/ Gary R. McDonald
/s/ E. Thomas Fitzgerald

[1] On appeal, the claimed error before us pertained only to the wrongful discharge allegation, because the claim of error pertains only to plaintiff Carl A. Bengel, we will refer to him as "plaintiff."

[2] The jury's ability to review the decision is limited because an employer must still be permitted to establish its own standards for job performance and must be able to discharge an employee for failure to adhere to those standards. *Toussaint, supra* at 623. Yet, a jury may decide an employer's true reason for discharge and whether that reason constituted good cause. *Id*. at 622-623.