STATE OF MICHIGAN

COURT OF APPEALS

ANTHONY TRUCHAN, RICHARD CARNILL, PAMELA MANLEY, RON MIJAL, and NORENE FRITZ,

Plaintiff-Appellees,

v

CONDUMEX, INC.,

Defendant-Appellant.

UNPUBLISHED
June 21, 2002

No. 227505
Wayne Circuit Court
LC No. 98-832981-CZ

Before: Whitbeck, C.J., and Wilder and Zahra, JJ.

PER CURIAM.

Defendant Condumex, Inc., appeals as of right the trial court's judgment in favor of plaintiffs in this breach of contract action concerning severance pay. We reverse and remand.

I. Basic Facts And Procedural History

Condumex, which is headquartered in Mexico, manufactures products used in the automobile industry. Before June 1998, Condumex maintained facilities in Arlington, Texas and Livonia, Michigan. Condumex employed all five plaintiffs in various capacities in its Livonia facility. On December 8, 1997, Condumex announced that it would be ceasing its operations in Livonia, explaining in an "information sheet" to its employees:

> The Company has decided to consolidate its operations in Texas. The entire Livonia, Michigan operation will be moved to the Company's offices in Arlington, Texas. We expect that the transfer of operations will be completed sometime between March 1, 1998 and (but not later than) June 30, 1998. *The intent of Condumex is to relocate all employees from Livonia to Arlington as part of the transfer.*
>
> We are planning on constructing our own office and warehouse building in the Dallas/Fort Worth area. We estimate that the new building will be completed during 1999. In order to induce all employees to remain with the Company, the following items will be provided to each employee of the Livonia office:

- *An offer is hereby made to relocate your position with the Company to Texas, at the same rate of pay and under the same terms and conditions of employment (see the Condumex, Inc. Associate Handbook of Policies and Procedures) as that which exists in Livonia.*

- Condumex will pay each employee the actual expense of moving the furniture and belongings of the employee from his/her current residence to the Dallas/Fort Worth area. It is anticipated that the cost will be between $5,000.00 and $7,500.00 per employee family.

- The Company will make available a local (Texas) real estate agent for consultation and information regarding the move to the Dallas/Fort Worth, Texas area. The Company plans on bringing him to Livonia to make a presentation to the employees about their move to Texas, and he will be available by telephone on a permanent basis.

- The Company will pay for transportation by bus, airplane (coach fare) or train for the employee, his/her spouse, children and other dependents (as defined by the IRS Form 1040 dependent requirements) to move to the Dallas/Fort Worth, Texas area.

- Upon arrival in Texas, payment of up to one (1) month's rent in an apartment (or comparably priced hotel) to allow the employee and his/her family to find a permanent residence.

- *It is the strong desire of the Company that all employees will make the move to Texas. The same jobs are available in Texas, and therefore, this is not a layoff situation. In the event an employee decides that he or she does not want to stay with the Company, the Company will view that situation as a voluntary termination of employment by the employee.*

- This offer of employment will remain open until January 30, 1998.[1]

Subsequent discussions between management and employees convinced Condumex to supplement the assistance it was offering employees moving to Texas, which Condumex detailed in a January 30, 1998 memorandum using a question and answer format. The memorandum made clear that Condumex would not be guaranteeing employment to employees who moved to Texas and that "[t]he status of all employees as at-will employees is not going to be altered in any way."[2] In response to a question concerning whether employees who elected not to move to Texas would be allowed to remain at Condumex through March 1, 1998, so that they could collect their vacation benefits, Condumex reiterated that it was unwilling to alter the employees' at-will status. Asked whether Condumex would lay off employees working in Livonia if it found a replacement in Texas before the company relocated, Condumex stressed, "If you decide not to

[1] Emphasis added.

[2] Italics removed.

relocate to Arlington, this will be considered a voluntary resignation. There is no current intention to lay off any employees prior to the moving of the various departments." Further, in answer to a question concerning retirement benefits suggesting that "this relocation is really a layoff situation," Condumex indicated that the benefits would be entirely vested because this move was "considered a partial plan termination due to relocation, but not a layoff."

Condumex provided each employee with a form on which to indicate whether the employee intended "to remain employed with Condumex, Inc. and move with the Company to Arlington, Texas" or would "not move with the Company," but would "separate" from the employee's position at a date Condumex would designate. The preface to the election form stated:

> As an employee of Condumex, Inc., I have been advised and I understand that all operations of the Company currently located in the Livonia, Michigan office are being transferred to and consolidated in Arlington, Texas. *I further understand that Condumex, Inc. has expressed a desire that I remain with the Company* and has offered to provide some moving expenses, transportation to the Dallas/Fort Worth, Texas area for myself and my family, as well as temporary living quarters for myself and my family in the event I agree to continue my employment with the Company.
>
> I make this election freely and voluntarily of my own volition. *I understand that an election to separate employment will be considered final and irrevocable.*[3]

After providing check-off boxes for each of the two options and a place for the employee to sign the form, the bottom of this election form stated, "This form is to be returned to your supervisor or any other supervisor no later than February 3, 1998. Failure to timely return this form will be considered an election not to remain employed with the company after the move."[4]

On February 3, 1998, the deadline for returning the election form, Condumex circulated another memorandum offering additional relocation assistance. Again, this memorandum noted that Condumex "wished to reiterate the company's objective of maximizing the total number of current employees that choose to relocate to Arlington . . . ."

Each of the five plaintiffs returned the election form to supervisors, apparently by the deadline. Anthony Truchan, Richard Carnill, Pamela Manley, and Ron Mijal indicated that they would be moving to Texas. Only Norene Fritz noted on her election form that she would not be moving to Texas. None of the plaintiffs actually moved to Texas. Each found other work by early May 1998.[5] The Livonia facility closed July 31, 1998, and, according to an affidavit from

[3] Emphasis added.

[4] Capitalization altered.

[5] Condumex emphasizes that all of the plaintiffs left the company's employ before the Livonia plant closed, all had secured new jobs with other employers as of their last day worked with Condumex, and, as a result, none involuntarily lost even one day of pay as a result of the plant closing.

Alejandro Sanchez, Condumex's vice-president of purchasing and logistics, "There was no reduction in the workforce or any downward adjustment to staffing levels at Condumex as a result of the transfer of operations to Arlington."

Whether plaintiffs sought severance pay while they were still employed at Condumex is not clear from the record. However, on October 12, 1998, they filed a complaint and jury demand alleging that Condumex had breached its contractual obligation to pay them for their severance. They claimed that the Condumex Employee's Handbook (the handbook), entitled them to this pay by stating:

SEVERANCE PAY

I. PURPOSE

To financially assist a permanently laid-off associate during his/her search for new employment.

II. SCOPE

This policy applies to all regular full-time associates of Condumex, Incorporated.

III. POLICY

Economic conditions, changes in technology or other unforeseen circumstances may require adjustments in staff levels by means of a personnel reduction in work force (lay-off). In the event of a reduction in work force, the Company will provide severance pay based on the associates [sic] position level and length of service at the time of separation.

A. *Management and supervisors*. Two (2) weeks for each year of employment.

B. *All other associates*. One (1) week for each year of employment.

However, in moving for summary disposition pursuant to MCR 2.116(C)(8) and (10), as well as in its answer to the complaint, Condumex argued that plaintiffs did not have any contractual rights stemming from this policy because the handbook also provided:

NOTICE

PLEASE NOTE THE FOLLOWING IMPORTANT INFORMATION:

This Associate Handbook includes policies and procedures applicable to you. It does not contain all the rules and regulations which apply, but is merely intended as a guide to govern the working relationship between you and the Company. *This Handbook is subject to interpretation and application at the sole discretion of the Company, including the right of management, where it deems appropriate, not to follow this Handbook.*

> Condumex, Incorporated reserves the right to modify, eliminate or add to any rule, policy or benefit contained in this Handbook at any time, with or without prior notice. *This Handbook is not intended as a statement of your rights, and nothing in this Handbook is to be construed as a contract for employment for any specified or definite period of time. This Handbook does not guarantee benefits, working conditions, or privileges of employment.*
>
> No manager, supervisor or representative of Condumex, Incorporated, other than the General Manager of our Livonia and Laredo operations, or the General Manager of our Arlington operations, has the authority to enter into any agreement of employment or to make any agreement contrary to the information set forth in this Handbook. Any such agreement must be in writing and signed by the General manager of our Livonia and Laredo operations, or the General Manager of our Arlington operations, and yourself and the Human Resources Manager.
>
> Any prior understandings or agreements regarding employment status or Company policies or procedures will be considered to be superseded by this Handbook.[6]

Even if plaintiffs did have contractual rights under the severance policy, Condumex argued, the relocation to Texas was not a layoff, as evidenced by the numerous expression of the company's desire to have all employees move to Texas and the communications indicating that the employees who did not elect to move to Texas would be ending their employment voluntarily. Thus, the severance policy, which applied to layoffs, did not apply to plaintiffs, Condumex asserted. Alternatively, Condumex contended that the policy did not apply because the "[e]conomic conditions, changes in technology or other unforeseen circumstances" noted in the severance policy were conditions precedent that did not occur. Though not directly relevant to any alleged breach of contract, Condumex also went to great lengths to emphasize that some of the plaintiffs traveled to Texas at company expense to see the area even though they were relatively certain that they would not actually move to Texas.

Plaintiffs' position was that the decision to move the operations such a great distance was a layoff under the severance policy because the Livonia workforce had, literally, been reduced to zero. This was, essentially, a constructive discharge theory. They also argued that their rights to the severance pay had "vested," providing testimony from former Condumex employee Jose Sanchez that Condumex management told him that if he chose not to move to Texas he would be "laid off according to company policy and receive a severance pay for the length of time" he worked at Condumex. Further, having provided evidence that Condumex paid Jose Sanchez and Jeffrey Mozal the equivalent of severance pay under confidential "separation agreements" when they challenged the company's decision not to give them severance pay, plaintiffs claimed that Condumex was selectively enforcing its severance pay policy.

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[6] Emphasis added.

After hearing arguments on the motion for summary disposition, the trial court agreed with plaintiffs on all points. The trial court concluded that the statement in the severance pay policy that it was intended to assist employees in finding new employment while laid off had little real meaning. Further:

> Assuming all other facts to be in favor of the Plaintiff; that is, that you did have a layoff. Say you laid off three people and kept Livonia open. Just a plain old lay off and you admit it is a layoff. That severance pay would be paid at the time of severance, and the purpose as stated . . . by the Defendant truly is a usury [sic] because you would pay it. I don't think anyone would argue that it has to be given back if the employee spent it on a night at the Casino at the MGM Grand instead of taking himself or herself through a difficult time. Permanent lay off, once you pay the severance pay, you have no control over how an employee uses that money . . . . And it is a vested right. It is vested because it never changed. This severance pay was in effect at all times. It never changed. And the note from the Handbooks says, please note the following important information, states that employment status, Company policies or procedures, anything else will be superseded by this Handbook. So the Handbook applies.
>
> The Handbook statement of its purpose says what the employer's intent was at the time but doesn't mean that the employee is bound to that specific intent. And under Cain and the rationale of Cain, it is a vested right.
>
> As you even admitted, if this had been a lay off . . . [t]hey would get severance.
>
> The argument is, were they laid off? Was there a reduction in force? That's the crux of this case. I don't believe that entirely shutting down an operation in its entirety with employees that ranged anywhere from two years back to 12 or 14 years employment, and saying move to Texas where we are only going to have one plant is, I don't think reasonable minds could differ that that is not a that that is a reduction in force. It is not a reasonable move, one which an employee can accomplish very simply by driving longer to and from work.
>
> It is a change in the economic condition and it requires an adjustment in the staff level at the Livonia plant. The notice to the employees says . . . as a last bullet: This offer of employment will remain open until January 3, 1998.
>
> I think by Defendant's own words they are admitting that moving to Texas is getting a new job, working in Texas at a new location.
>
> I think that the cases cited by Plaintiff are on point. There is a contract here. The right vested because it never changed. The circumstances under which the contract was to be performed did occur with the closing of the plant in Livonia and moving to Arlington, Texas.
>
> My decision is based primarily on the impossibility to maintain one's life anywhere near . . . . Livonia, Michigan and keep their employment with the

> company in Arlington, Texas. And the fact that Defendant recognizes it by saying, the offer of employment is only open to a day. These terms and conditions to avoid severance pay, to the Court, clearly is simply an avoidance of severance pay pursuant to the contract . . . . [This] is an instance where I don't think there is, reasonable minds could not differ that there was a reduction in force, and I don't believe there is any ambiguity in the contract. I don't find an ambiguity. It is a reduction in force. Severance pay vested. Under Cain there was consideration. Pay it.

In the resulting order, the trial court denied Condumex's motion for summary disposition and, pursuant to MCR 2.116(I)(2), the trial court granted summary disposition in favor of plaintiffs under MCR 2.116(C)(10).

Following the order granting summary disposition to plaintiffs, the parties disputed the proper amount that plaintiffs should be awarded in the judgment. Ultimately, on May 3, 2000, the trial court entered judgment in favor of plaintiffs, awarding $28,140 to Truchan, $2,499.20 to Carnill, $7,502.40 to Mijal, $6,349.20 to Manley, and $5,817.80 to Fritz, subject to a twelve percent interest rate.

On appeal, we must decide whether the handbook granted plaintiffs contractual rights to severance pay and, if so, whether a question of disputed material fact existed concerning whether Condumex breached the contract by failing to give plaintiffs severance pay.

II. Standard Of Review And Legal Standard

In *Henderson v State Farm Fire & Casualty Co*,[7] the Michigan Supreme Court succinctly outlined the interaction between the standard of review an appellate court must apply to a summary disposition issue and the critical questions addressed in the relevant legal standard:

> We review the grant or denial of a motion for summary disposition de novo. Further, the construction and interpretation of [a] . . . contract is a question of law for a court to determine that this Court likewise reviews de novo. . . . It is axiomatic that if a word or phrase is unambiguous and no reasonable person could differ with respect to application of the term or phrase to undisputed material facts, then the court should grant summary disposition to the proper party pursuant to MCR 2.116(C)(10). Conversely, if reasonable minds could disagree about the conclusions to be drawn from the facts, a question for the factfinder exists.[8]

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[7] *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 353; 596 NW2d 190 (1999).

[8] Citations omitted.

III. Contract Rights

A. The Condumex Handbook

The handbook itself is the most logical starting place for determining whether plaintiffs had a contractual right to severance pay. The severance pay policy identifies the purpose of its existence and the terms under which it may apply, but not whether Condumex employees have any rights to enforce the policy. More relevant at the outset is the preface to the handbook, which clarifies the relationship between the policies it contains as a whole and plaintiffs' employment with Condumex.

Viewed broadly, the handbook preface emphasizes in a number of different ways that Condumex did not intend for it to provide employees with any rights. For instance, the second paragraph of the preface states that the handbook "is not intended as a statement of [employees'] rights . . . ." The independent clause at the end of the sentence applies that principle to the length of any employment relationship, emphasizing that all employees work at-will by saying that the handbook may not "be construed as a contract for employment for any specified or definite period of time." In, perhaps, its strongest statement, the preface indicates that the handbook "does not guarantee benefits, working conditions or privileges of employment." Further, the preface provides Condumex with no less than four options for directly avoiding the policies and procedures published in the handbook: Condumex may create policies and procedures not contained in the handbook; Condumex may interpret and apply the handbook as it sees fit; Condumex management may decide not to apply the terms of the handbook; and Condumex may "modify, eliminate or add to any rule, policy or benefit" in the handbook.

The way Condumex applied the handbook was, at least in some respects, arguably somewhat contrary to the notion that it was not intended to define its relationship with its employees. The preface to the handbook indicates that it has "policies and procedures applicable" to employees and was "intended as a guide to *govern* the working relationship between" Condumex and its employees.[9] In the concluding paragraph, the preface also notes that the version of the handbook dated November 1, 1994, was, at least at that time, the definitive statement on the employer-employee relationship, "superced[ing]" all other "understandings or agreements." Also, there is no evidence in the record that Condumex ever enacted a policy or procedure controlling severance pay outside of the handbook, altered the policies and procedures in the handbook, interpreted the language of the handbook to disallow severance pay, rescinded the severance pay policy, or took any action whatsoever to affect the severance policy in the handbook before plaintiffs left its employ.

Overall, this conduct illustrates the fact that the handbook was an effective way to define the employer-employee relationship, as Condumex had hoped. A circumstance in which Condumex would find it necessary to rely on the nonbonding nature of the handbook evidently never arose. However, nothing about Condumex's conduct expressly or impliedly altered the nature of the strong disclaimers in the preface to the handbook. Indeed, the handbook appears to have remained the definite statement on the employer-employee relationship even while

[9] Emphasis added.

Condumex was moving its operations in Michigan to Texas. There is no dispute in the record that the handbook preface – with its unambiguously strong disclaimers – remained as much an integral part of the handbook at the time plaintiffs left Condumex's employ as it was at the time Condumex drafted the handbook.

With this background, the initial relevant legal question still remains: did the handbook grant plaintiffs contractual rights to severance pay?

B. *Toussaint* And Its Limitations

The logical starting point for analysis in a "handbook case" such as this is the most famous handbook case of them all, *Toussaint v Blue Cross & Blue Shield.*[10] There, the plaintiff was handed a manual of Blue Cross personnel policies which reinforced his belief that he would be with the company "as long as I did my job." The handbook stated that the disciplinary procedures applied to all Blue Cross employees who had completed their probationary period and that it was the "policy" of the company to release employees "for just cause only."[11]

The Michigan Supreme Court held that a provision of an employment contract providing that an employee shall not be discharged except for cause is legally enforceable, although the contract is not for a definite term; that is, although the term is "indefinite."[12] The Court then articulated two subcategories of this general proposition. The first subcategory was that of an express contract or agreement, either oral or written. The second subcategory was the situation in which an employer creates a situation "instinct with an obligation;"[13] the Court endowed this theory with the sobriquet of "legitimate expectations."[14]

With respect to the first category, the Court emphasized that there must be an express agreement to terminate only for cause, or statements of company policy or procedure to that effect.[15] Thus, in cases where an employee claims that there was an express contract or agreement for just-cause employment, it is essential that the employee have "negotiated" with an employer for job security and that the employee agree to terminate only for cause.[16] Here, the claim does not concern just cause employment but, rather, an asserted entitlement to severance pay. Plaintiffs assert that this entitlement derives from the severance pay policy in the Condumex handbook and is therefore "contractual in nature," because they performed services for years after Condumex issued the severance pay policy. While plaintiffs based their claim on a breach of contract theory, their argument – in large part accepted by the trial court – is

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

[11] *Toussaint, supra* at 597-568.

[12] *Id.* at 598.

[13] *Id.* at 613.

[14] *Id.* at 619.

[15] *Id.* at 610.

[16] *Bracco v Michigan Technological University,* 231 Mich App 578, 590; 588 NW2d 467 (1998).

primarily that they had a vested right to severance pay based upon a provision in the handbook that they assert is contractual.

Using the analytical approach contained in *Toussaint* – with the clear understanding that this case involves severance pay, not wrongful discharge – we see nothing in this record that supports the notion of express contract or agreement, either oral or written, concerning severance pay. First, there is no evidence whatever that plaintiffs, or anyone else, actually "negotiated" any aspect of the severance pay policy. Second, there is no evidence that Condumex actually agreed in its handbook to extend the severance pay policy to the plaintiffs or to anyone else; indeed the handbook specifically states that it is not a statement of employee rights, that it is not to be construed as a contract for employment, and that it does not guarantee benefits, working conditions, or privileges of employment.

Plaintiffs, however, might argue that Condumex agreed to extend severance pay to plaintiffs *independently* of its handbook provisions, just as Blue Cross, *independently* of its handbook provisions, assured Charles Toussaint that he would be with the company as long as he did his job. This agreement, plaintiffs might assert, was contained in the December 8, 1997, information sheet, as supplemented by the January 30, 1998, question and answer memorandum. The problem with this argument is that, while Condumex did make an offer, that offer was to relocate the positions with the company to Texas "at the same rates of pay and under the same terms and conditions of employment (see the Condumex, Inc. Associate Handbook of Policies and Procedures) as that which exists in Livonia." Thus, the express offer was one relating to relocation, not to severance pay. Indeed, Condumex expressly stated that if an employee did not wish to stay with the company, the company would view that situation as a voluntary termination of employment by the employee. Rather clearly, the severance pay policy contained in the Condumex handbook did not apply to voluntary terminations. As a matter of law, we can see no basis for, nor any possible factual development that would justify, finding that an express contract or agreement, either oral or written, existed that entitled plaintiffs to severance pay. Indeed, we note that, while not expressed in such terms, plaintiffs assertion that there was a vested right in such severance pay is actually a variant of the 'legitimate expectations" subcategory that the Court first articulated in *Toussaint.*

In *Toussaint,* the Court articulated a principle of "sweeping generality."[17] The Court said that:

> While an employer need not establish personnel policies or practices, where an employer chooses to establish such policies and practices and makes them known to its employees, the employment relationship is presumably enhanced. The employer secures an orderly, cooperative and loyal work force, and the employee the peace of mind associated with job security and the conviction that he will be treated fairly. No pre-employment negotiations need take place and the parties' minds need not meet on the subject; nor does it matter that the employee knows nothing of the particulars of the employer's policies and practices or that the employer may change them unilaterally. It is enough that the

[17] See *Bracco, supra* at 591.

> employer chooses, presumably in its own interest, to create an environment in which the employee believes that, whatever the personnel policies and practices, they are established and official at any given time, purport to be fair, and are applied consistently and uniformly to each employee. The employer has then created a situation "instinct with an obligation."[18]

This "legitimate expectations" subcategory is certainly not based upon traditional contract analysis,[19] and the Court rather quickly began to define its limits. In *Rowe v Montgomery Ward*,[20] Justice Riley stated:

> But unless the theory has some relation to the reality, calling something a contract that is in no sense a contract cannot advance respect for the law. Thus, we seek a resolution which is consistent with contract law relative to the employment setting while minimizing the possibility of abuse by either party to the employment relationship.

The Court then held that it should use an objective test, "looking to the expressed words of the parties and their visible acts."[21]

The Court took a similar approach in *Rood v General Dynamics Corporation.*[22] There, in dealing with the legitimate expectations subcategory, the Court used a two-step analysis derived from *Toussaint*, examining first what, if anything, the employer has promised, and second whether the promise, if made, was capable of instilling a legitimate expectation of just-cause employment.[23]

Once again, we emphasize that the legitimate expectations subcategory created in *Toussaint* deals explicitly with situations revolving explicitly around wrongful discharge claims. This is not such a situation. Nevertheless, the analytical approach contained in *Toussaint* and refined in *Rowe* and *Rood* remains helpful. Here Condumex, in its handbook, set out a policy designed "[t]o financially assist a permanently laid-off associate during his/her search for new employment." On its face, this policy would not apply to plaintiffs; each of them had obtained new employment while still with Condumex and, thus, was not engaged in a "search for new employment."

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[18] *Toussaint, supra* at 613.

[19] See Olson, *The Excuse Factory: How Employment Law is Paralyzing the American Workplace* (New York: the Free Press, 1st ed, 1997), pp 39-40, in which the author asserts that the Court, "[w]ielding novel legal arguments like a miracle Ginsu knife," reduced the concepts of mutuality, reliance and consideration to "cole slaw."

[20] *Rowe v Montgomery Ward,* 437 Mich 627, 632; 473 NW2d 268 (1991).

[21] *Id.* at 640.

[22] *Rood v General Dynamics Corp,* 444 Mich 107; 507 NW2d 591 (1993).

[23] *Id.* at 138-139.

Moreover, the severance pay policy, as Condumex notes, states that one of three events, coupled with a specific pre-condition, must occur before it becomes effective. The three events were (1) "economic conditions," (2) "changes in technology," or (3) "other unforeseen circumstances." The pre-condition was a "personnel reduction in force (lay-off)." The first of the three events, "economic conditions," was, at least in the trial court's view, at issue here. The trial court, logically, restated this event as requiring that there must be a "change in economic conditions." The trial court then essentially found that the transfer of Condumex's Livonia operation to the company's offices in Arlington, Texas constituted such a "change in economic conditions." We see nothing in the record upon which such a conclusion could be based. Certainly, there is no evidence beyond the most general of any overall change in economic conditions. While the reference in the December 8, 1997, information to the company's decision to "consolidate its operations in Texas" might give a hint of some change in Condumex's own economic conditions, a hint alone will not suffice. While there can be little question that this consolidation would have an impact upon the company's Livonia workforce, we cannot read the change in economic conditions clause in the severance pay policy as referring to such an impact.

More importantly, however, while these events "may require adjustments in staff levels," the operative word is "may." Phrased differently, we do not view the severance pay policy as being necessarily triggered by any of these events; we do not see anything that Condumex promised to its employees if any of these events, including a change in "economic circumstances" were to occur. Further we note that even if there were, by some linguistic alchemy, such a promise, it was capable of instilling a legitimate expectation of only if there were to be a layoff. Here, under the undisputed facts, we simply cannot find a basis for the trial court's declaration that there was such a layoff. Using the analysis implied in *Toussaint* and explicitly stated in *Rowe* and *Rood*, we conclude that the trial court erred as a matter of law in denying Condumex's motion for summary disposition.

C. Handbook Cases Outside The Wrongful Discharge Arena

Next, we must examine whether handbook cases outside the wrongful discharge arena of *Toussaint* may require a different result. We conclude that they do not. *Dumas v Auto Club Ins Ass'n*[24] is instructive. There, as the Supreme Court described them, the plaintiffs' claims revolved around a deferred compensation plan that the Auto Club labeled the "Accrued Commission Plan." Under this plan, members of the Auto Club's insurance sales force would receive seven percent commissions on insurance policies sold and upon policy renewals. After a substantial drop in its cash reserves in 1997, the Auto Club implemented a change in its compensation plan so that salespersons would be paid a flat rate for each policy sold. Plaintiffs sued, alleging among other things a breach of contract.[25]

The trial court, after various motions for summary disposition and partial summary disposition, divided the various plaintiffs into three groups. For our purposes, the most analogous group to plaintiffs in this matter is the trial court's Group A: those plaintiffs who were informed of the seven percent commission system upon being hired but who were not

[24] *Dumas v Auto Club Ins Ass'n*, 437 Mich 521; 473 NW2d 652 (1991).

[25] *Id.* at 525-526.

promised that the payment system would be in place for any particular duration.[26] Similarly, here, plaintiffs were presumably made aware of the severance pay policy in the handbook upon being hired but, as we have noted above, Condumex did not promise them anything independently of the handbook provisions. With respect to Group A, the trial court in *Dumas* granted summary disposition, having determined that no claim for breach of contract existed.[27] However, this Court reversed the trial court's grant of summary disposition regarding the breach of contract and unjust enrichment claims.[28]

The Supreme Court opened its discussion by stating the first question to be addressed as whether plaintiffs can maintain claims for breach of contract where defendant unilaterally altered the terms upon which the plaintiffs were compensated. The Court stated that, since no express promises of permanency were made to plaintiffs, any contractual rights to that effect had to spring from the legitimate expectations leg of *Toussaint*.[29] Similarly, here, as we have outlined above, plaintiffs' claims must rest on the same legitimate expectations leg. The Court in *Dumas* went on to state as to the Group A plaintiffs:

> While the deferred compensation cases are subject to contract law, the "legitimate expectations" doctrine of *Toussaint* does not follow traditional contract analysis. Therefore, it does not logically follow that *Toussaint* should be extended to the area of compensation. Also, since employees' accrued benefits are protected by the presence of traditional contract remedies, there is no need to extend the expectations rationale to compensation.
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> In addition to the lack of precedent extending *Toussaint* to facts similar to those presented here, policy considerations weigh in favor of containing *Toussaint* to the wrongful-discharge scenario. Were we to extend the legitimate-expectations claim to every area governed by company policy, every time a policy change took place contract rights would be called into question. The fear of courting litigation would result in substantial impairment of a company's operations and its ability to formulate policy. Justice GRIFFIN'S majority opinion in *In re Certified Question*, *supra*, p 456, discussed the nature of a business policy:
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> "In other words, a 'policy' is commonly understood to be a flexible framework for operational guidance, not a perpetually binding contractual obligation. In the modern economic climate, the operating policies of a business enterprise must be adjustable and responsive to change."
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> Our opinion in *In re Certified Question* was in furtherance of this Court's traditional reluctance to limit or second guess the decision-making ability of

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[26] *Id.* at 526-527.

[27] *Id.* at 527.

[28] *Id.* at 528.

[29] *Id.* at 528.

> business management. As stated in *In re Butterfield Estate*, 418 Mich 241, 255; 341 NW2d 453 (1983), "[a] court should be most reluctant to interfere with the business judgment and discretion of directors in the conduct of corporate affairs."
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> * * *
>
> Given the traditional reluctance of courts to interfere with management decisions and the needed flexibility of businesses to change their policies to respond to changing economic circumstances, we conclude that *Toussaint* should not be extended to create legitimate expectations of a permanent compensation plan. Previous cases have not extended the legitimate-expectations theory to facts similar to these, and we decline the opportunity to extend the theory to compensation terms.[30]

Here, Condumex clearly stated that management had the right, where it deemed it appropriate, not to follow the provisions of its handbook. This is a right similar in effect to the management right to unilaterally alter the provisions of a compensation plan with which the Court in *Dumas* refused to interfere. We therefore infer that, as the Court in *Dumas* refused to extend the legitimate expectations subcategory of *Toussaint* to compensation terms, we similarly should not extend it here to cover a severance policy. See also *Heurtebise v Reliable Business Computers*[31] in which the Court held that when a defendant did not intend to be bound to any provision contained in a handbook, it is not a binding contract. The handbook in question in *Heurtebise* contained language that stated that the defendant had the right to modify any policy at its sole discretion and as future conditions might warrant. Again, this is somewhat similar to the language in the Condumex handbook in which the company reserved the right, where it deemed it appropriate, not to follow the provisions of the handbook. See further *Lytle v Malady*,[32] in which the Court held that a plaintiff cannot assert a legitimate expectation of just-cause employment based on the employer's policy to terminate for cause, particularly where the handbook specifically disclaims any intent to create contractual or binding obligations to employees. Here, once again, the Condumex handbook specifically stated that it should not be construed as creating a contract for employment for any specified or definite period of time and that it did not guarantee benefits, working conditions, or privileges of employment.

D. Severance Pay And "Vested Rights"

Plaintiffs here, however, argue that severance pay involves a "vested right" and would assert, in the language of the *Dumas* opinion, that "a change in a compensation policy which affects vested rights already accrued may give rise to a cause of action in contract."[33] Indeed, the trial court referred in its ruling below to cases dealing with accrued leave. The most important

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[30] *Id*. at 531-532.

[31] *Heurtebise v Reliable Business Computers*, 452 Mich 405, 413-414; 550 NW2d 243 (1996).

[32] *Lytle v Malady*, 458 Mich 153, 157; 579 NW2d 906 (1998).

[33] *Dumas, supra* at 530, citing *In re Certified Question, Bankey v Storer Broadcasting Co*, 432 Mich 438, 457, n 17; 443 NW2d 112 (1989).

was *Cain v Allied Electric & Equipment Co*.[34] *Cain* involved a former employee's claim to severance pay after the defendant company discharged him.[35] Defendant Allen Electric had a written set of policies applicable to employees that included a reference to severance pay, evidently in lieu of notice of discharge, "'[w]hen it becomes necessary to terminate the services of an office employee on a permanent basis . . . .'"[36] Nevertheless, another section of the policies indicated that they were not "complete and [were] subject to change or amendments either through necessity created by laws or for other reasons that may come to our [Allen Electric's] attention."[37] Further, Allen later sent out a communication to all its office employees informing them that, "Recently, management approved a permanent personnel policy for termination pay and vacation pay." As the Court described it, this communication stated a "termination pay policy." The Court stated that:

> The pertinent part thereof (insofar as this litigation is concerned) provided that an "executive" having 5 to 10 years employment should be entitled to 2 months termination. It is stipulated [by the parties] that [Cain] was classified as an "executive" employee and that he had knowledge of the personnel policies of [Allen Electric] at the time they were "adopted and exhibited" to all its supervisory and office employees, including [Cain].[38]

Plaintiff Robert Cain decided, for personal reasons, to leave his employment with Allen Electric and gave two months' notice in writing.[39] However, only two days later, Allen Electric terminated his employment.[40] A short time later, Allen Electric's board of directors passed a resolution declaring that Cain would not receive any severance pay, ostensibly, as Allen Electric argued in the subsequent lawsuit, because Cain had voluntarily terminated his own employment.[41]

When the trial court awarded Cain his severance pay, Allen Electric appealed to the Michigan Supreme Court.[42] One of the issues the Supreme Court addressed was whether Allen Electric's policies gave Cain a contractual right to severance pay.[43] Allen Electric argued that the severance policy was "'a mere gratuitous statement of policy or intent,'" and was not enforceable.[44] The Supreme Court, however, disagreed that the severance policy was effectively

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[34] *Cain v Allied Electric & Equipment Co*, 346 Mich 568; 78 NW2d 296 (1956).

[35] *Id*. at 569.

[36] *Id*. at 570.

[37] *Id*.

[38] *Id.* at 571.

[39] *Id*. at 571.

[40] *Id*.

[41] *Id*. at 572.

[42] *Id*. at 573.

[43] *Id*.

[44] *Id*.

the prospect of a gift at separation from employment that could be given or withheld at the company's discretion.[45] Quoting a variety of sources for the proposition that severance policies and other employee benefits serve the interests of employers by creating goodwill from the public's perspective, content and loyal employees, and are an easy way to clear employment rolls of individuals no longer useful,[46] the Supreme Court held that the severance pay was enforceable under contract law.[47] In particular, the Supreme Court concluded that the policy made an offer to employees, like Cain.[48] Employees who accepted this promise, as Cain did, were allowed to rely reasonably on the company's promise.[49] The Supreme Court observed:

> The offer having thus been accepted it was not within defendant's power to withdraw it when called upon to perform. *The 'change or amendment' to which the company policy was said, in its preamble, to be subject, could not encompass denial of a contract right gained through acceptance of an offer*. To assert otherwise is simply to re-assert that there was no contract.[50]

Thus, to the Supreme Court in *Cain*, as long as an employer's policy satisfied contract principles, any language offering the employer a unilateral ability to avoid or amend the policy at a later time could not affect whether the policy was enforceable while it existed.

Condumex argues that the Supreme Court, in *Toussaint, Heurtebise,* and *Lytle,* has effectively "amended and/or overruled" *Cain,* "at least to the extent that the policy sought to be enforced is included as part of an employment handbook." We need not reach such a sweeping conclusion. Rather, we note that, from the Court's rendition of the facts in *Cain*, that there were actually *two* policies in effect at the time Allen Electric terminated Cain. The first was the January 30, 1954, "supervisory and office personnel policy," with its references to "separation pay" and with disclaimers that its attorneys argued made it "not of a promissory or contractual nature." The second, apparently, was the "permanent personnel policy for termination pay" that Allen Electric's management later approved and described in its later "communication." Although the language is certainly not terribly clear, we believe that it was the second policy, the "termination pay policy," that the Court ruled was an offer of a contract that was accepted by Cain.[51]

Thus, as we interpret *Cain*, the Court there held that if there is a definitive offer of a severance policy which can be considered to have been accepted by an employee through that employee's continuation of his employment with the offering company, such an offer and acceptance cannot be defeated by reference to disclaimers in more generalized personnel policies

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[45] *Id*. at 574.

[46] *Id*. at 575-578.

[47] *Id* at 579-580.

[48] *Id*. at 579.

[49] *Id*. at 579-580.

[50] *Id*. at 580 (emphasis added).

[51] *Id.* at 580.

and handbooks. Rather clearly, that is not the case here. The *only* reference to severance pay is in the Condumex handbook; there was no separate and independent offer of severance pay to plaintiffs here. Thus, we believe *Cain* and similar "offer-and-acceptance" cases are distinguishable. Accordingly, we conclude that the trial court erred as a matter of law in its reliance on *Cain*. It is difficult to see here what Condumex could have done, short of not mentioning the severance policy in the handbook at all, to prevent the reading of its statement as an offer. Again, we note that Condumex had no less than four options for directly avoiding the policies and procedures published in its handbook: it could create policies and procedures not contained in the handbook; it could interpret and apply the handbook as it saw fit; its management might decide not to apply the terms of the handbook; and it might "modify, eliminate or add to any rule, policy or benefit" in the handbook. Therefore, as a result of our de novo review, we conclude that the trial court erred as a matter of law in not granting summary disposition to Condumex. Given our decision on this ground, we need not reach Condumex's argument that a question of disputed material fact existed concerning whether Condumex breached the contract by failing to give plaintiffs severance pay.

Reversed and remanded for entry of no cause of action in favor of Condumex. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Kurtis T. Wilder
/s/ Brian K. Zahra