STATE OF MICHIGAN

COURT OF APPEALS

RONALD STEWART,

Plaintiff-Appellee,

v

SUBURBAN MOBILITY AUTHORITY FOR REGIONAL TRANSPORTATION, a/k/a SMART, f/k/a SOUTHEASTERN MICHIGAN TRANSPORTATION AUTHORITY, a/k/a SEMTA,

Defendant-Appellant.

UNPUBLISHED

July 9, 1996

No. 167599
LC No. 91-116970-NI

Before: Marilyn Kelly, P.J., and Taylor and J. R. Cooper,* JJ.

PER CURIAM.

Defendant appeals as of right following a jury verdict for plaintiff in this wrongful discharge action. We reverse and remand.

Defendant hired plaintiff as a coach operator in 1974. After two years in this position, defendant terminated plaintiff's employment due to his acknowledged attendance problems. Shortly thereafter, defendant rehired plaintiff who eventually became a division manager, first at the Oakland terminal and later at the Wayne terminal.

On February 5, 1986, defendant circulated a memorandum that stated that, as of February 10, 1986, it was establishing new personnel policies, including the cancellation of policy no. 12.00.A.2, Conditions of Employment. On February 10, 1986, plaintiff's immediate supervisor, Albert Martin, circulated a memorandum explaining the effect of the cancellation to all salaried, non-represented employees, including plaintiff:

> Employees of the authority who are classified as salaried/non-represented (exempt or nonexempt) are employed at the satisfaction of upper management to which the

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

> employee reports. This means that if management is dissatisfied with the services being performed by the employee, or with the manner in which the employee comports him/herself, the employee my be terminated.
>
> This policy may not be changed by any employee of the Authority, except the General Manager or Acting General manager, and then only if such change is specified with respect to terms and conditions, the employee in question, and placed in writing.
>
> This policy becomes effective February 10, 1986. Employees hired prior to the effective date of this policy shall be notified of its implementation and advised of its applicability to their employment with the Authority as of February 10, 1995. [Emphasis added.]

Because plaintiff was a non-represented employee, the policy change applied to him.

Under plaintiff's supervision, the number of breakdowns and service calls at the Wayne terminal increased. Absenteeism of maintenance employees also sharply increased and employee morale was very low. Because of the numerous problems at the Wayne terminal, in July, 1986, Martin advised plaintiff that he expected to see some improvement within two weeks. On August 18, 1986, plaintiff went on vacation. When he returned to work on August 21, 1986, Martin relieved plaintiff of his position as division manager because of plaintiff's failure to improve the situation at the Wayne terminal. Martin offered to transfer plaintiff to the job of training assistant, a job with a lower salary than division manager. Martin further told plaintiff that if he took the job, he would be closely scrutinized, and if he did anything wrong, his employment would be terminated. Martin suggested that plaintiff resign and seek employment elsewhere. Plaintiff did not accept the new position and Martin terminated plaintiff's employment.

Plaintiff filed suit alleging constructive discharge, breach of a just-cause employment contract, breach of covenant of good faith and fair dealing, fraud and misrepresentation, breach of contract of good faith, and breach of the duty not to evaluate in a negligent fashion. The case was eventually tried on the claims of breach of a just-cause employment contract and constructive discharge. Finding in favor of plaintiff, the jury awarded him $192,044.

On appeal, defendant argues that the trial court erred in denying its motion for summary disposition and its motion for a judgment notwithstanding the verdict and a new trial. Defendant asserts that, as a matter of law, plaintiff could not have had a legitimate expectation that he was a just-cause employee. We agree.

Both parties agree that, at its inception, plaintiff's contract was terminable only for just cause. However, an employer may unilaterally change its written policy from one of discharge for cause to one of termination at will, provided that the affected employees are given reasonable notice of the change. *In re Certified Question*, 432 Mich 438, 441; 443 NW2d 112 (1989). Like the majority in *Osborne v Southeastern Michigan Transportation Authority,* (Docket No. 122803, unpublished per curiam

opinion, issued 7/12/91), we conclude that the February 10, 1986, memorandum unambiguously changed the contract from a just-cause contract to a contract that rendered plaintiff's employment terminable at will.[1] *Id.*; *Mitchell v GMAC*, 176 Mich App 23, 32; 439 NW2d 261 (1989). Or, at the very most, terminable subject to a requirement of sincerity, good faith and lack of fraud. *Isabell v Anderson Carriage Co*, 170 Mich 304; 136 NW 457 (1912).

The dissent contends that the February 10, 1986, memorandum created confusion about plaintiff's status because it specifically stated that it cancelled only policy no. 12.00.A.2, and did not refer to policy no. 3, which set forth the just-cause language:

> Nearly all employees of SEMTA hold appointments as permanent employees as long as their performance remains satisfactory and until they reach the planned retirement age of sixty-five. They are considered permanent in the sense that they are performing work on an essential and continuing nature required in SEMTA's program. They may not be dismissed arbitrarily, but may be dismissed for cause. They also may be laid off if the work load diminishes or the functions of SEMTA change.

Like the Court in *Osborne*, we conclude that the language in "the February 10 memo precludes any reasonable person from concluding [plaintiff's] employment was anything other than 'at will'." *Id.* at 3.

Policy no. 3 clearly and unambiguously states that it applies to "nearly all employees." The February 10th memorandum explaining the conditions of employment section expressly states that it only applies to employees who are "classified as salaried non-represented (exempt or nonexempt)." Policy no. 3, when read in harmony with the memo explaining the cancellation of policy no. 12.00.A.2, unambiguously indicates that nearly all employees of SEMTA are just-cause employees, except those employees classified as salaried/non-represented, whose employment is at the satisfaction of upper management.

As proof of the ambiguity of plaintiff's employment status, the dissent relies on a memorandum dated February 13, 1989, which was admitted into evidence at trial. However, at the time the February 1989 memorandum was generated, plaintiff no longer worked for defendant. The terms of an employment contract are to be determined on the basis of the circumstances at the time the asserted contracts were made. *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 542; 473 NW2d 652 (1991); *Rowe v Montgomery Ward & Co, Inc*, 437 Mich 627; 473 NW2d 268 (1991). The 1989 memorandum had no bearing on the circumstances as they existed in 1986. Accordingly, we conclude that the trial court erred in admitting the February 1989 memorandum because it was not relevant to circumstances at the time the contracts were made. Furthermore, the February 1989 memorandum constituted a subsequent remedial act that was inadmissible pursuant to MRE 407.

Plaintiff was, at best, employed at the satisfaction of defendant's upper management. Defendant presented ample and unrebutted proof that it was dissatisfied with plaintiff's performance. Accordingly, we conclude that defendant did not breach its employment contract with plaintiff. We hold that the trial

court erred in denying defendant's motion for judgment notwithstanding the verdict. Drawing all legitimate inferences in the light most favorable to plaintiff, we conclude that reasonable jurors could not have reached a different conclusion. *Thorin v Bloomfield Hills Bd of Ed*, 203 Mich App 692, 696; 513 NW2d 230 (1994).

Defendant further argues that the trial court erred in denying its motion for judgment notwithstanding the verdict or a new trial with respect to plaintiff's constructive discharge claim. We agree.

The term "constructive discharge" has been used to describe a facially voluntary termination that should legally be described as an involuntary termination. *LeGalley v Bronson Community Schools*, 127 Mich App 482; 339 NW2d 223 (1983); *Champion v Nationwide Security*, 450 Mich 702, 710; ___ NW2d ___ (1996). The *LeGalley* Court explained the test for constructive discharge:

> A constructive discharge occurs "when the employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation." . . . A constructive discharge involves the employer's deliberate effort to make things difficult for an employee, thus forcing him or her to resign. . . .Before a constructive discharge may be found, the trier of fact must be satisfied that working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign.

A finding of constructive discharge depends on the facts of each case. *Jenkins v Southeastern Michigan Chapter, American Red Cross*, 141 Mich App 785, 796; 369 NW2d 223 (1985).

In this case, defendant informed plaintiff that it was dissatisfied with his performance and that it intended to terminate his employment. Defendant gave plaintiff the option of accepting a position that constituted a demotion and a reduction in salary, and plaintiff resigned without attempting to do the job. Plaintiff failed to present any evidence that defendant engaged in a deliberate effort to make things difficult for him. Plaintiff's evidence proved merely a situation in which an employer, dissatisfied with an employee's performance, removed the employee from one position and gave the employee the option of accepting a demotion or being terminated. Because defendant was justified in terminating plaintiff's employment, no reasonable juror could conclude that plaintiff was constructively discharged.

Given our disposition in this case, it is unnecessary for us to address the remaining issues raised in defendant's brief.

Reversed and remanded for entry of judgment in favor of defendant.

/s/ Clifford W. Taylor
/s/ Jessica R. Cooper

[1] The *Osborne* decision concerned the same employment contract and the February 10, 1986, memorandum at issue in this case.