STATE OF MICHIGAN

COURT OF APPEALS

JAMES MORTIERE,

Plaintiff-Appellant,

v

BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,

Defendant-Appellee.

UNPUBLISHED
June 18, 2002

No. 227810
Court of Claims
LC No. 98-017077-CM

Before: Owens, P.J., and Sawyer and Cooper, JJ.

PER CURIAM.

Plaintiff appeals by right the Court of Claims order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). Plaintiff had sought to recover damages under a breach of employment contract theory. We affirm.

Plaintiff contends that the trial court erroneously granted defendant's motion for summary disposition because there was a material question of fact as to whether defendant breached an enforceable employment contract by discharging plaintiff without just cause.

We review de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual support for a claim by determining whether the affidavits, pleadings, depositions, and other documentary evidence establish a genuine issue of material fact. *Id.* Whether a contract is formed under the facts presented is an issue of law subject to de novo review. *Bracco v Michigan Technological University*, 231 Mich App 578, 585; 588 NW2d 467 (1998).

Here, the trial court cited our decision in *Cunningham v 4-D Tools Co*, 182 Mich 99; 451 NW2d 514 (1989), for the proposition that an employer's offer of an employment is a unilateral contract that can only be accepted by performance: engaging in work for the employer. In addition, the trial court noted that an employer's revocation of an offer of employment before the employee reported to work would, therefore, constitute a valid revocation of the offer. See *id.* at 456-457. The trial court found that defendant revoked its offer of employment before plaintiff reported to work. Accordingly, the trial court opined that plaintiff never formally accepted the contract, thereby preventing the formation of a binding employment contract. Consequently, the

trial court concluded that there was no underlying contract to support plaintiff's claim of wrongful discharge.

Indeed, there is no factual dispute that defendant revoked its offer of employment before plaintiff reported to his first day of work. Thus, we do not believe that the trial court erred as a matter of law by concluding that an employment contract was never formed. *Cunningham*, *supra* at 456-457. We also reject plaintiff's contention that the *Cunningham* decision is distinguishable because of the *Cunningham* plaintiff's concession that the resulting employment would have been terminable "at will." Instead, as will be discussed below, because plaintiff's employment would also have been probationary during the first year, the trial court correctly concluded that plaintiff's employment would also have been terminable "at will."

Moreover, between the *Cunningham* decision and our decision in *Filcek v Norris-Schmid, Inc*, 156 Mich App 80; 401 NW2d 318 (1986), neither of which are binding pursuant to MCR 7.215(I)(1), we believe that the former provides the correct legal analysis with respect to plaintiff's claim.[1] Further, in *Filcek*, the primary issue was "whether an employee . . . who resigns his employment relying on a promise of employment with the defendant as employer has a cause of action for damages if the defendant, as here, repudiates the contract prior to the time employment is to be commenced." *Id.* at 82. Here, plaintiff announced his resignation from his previous employment before pursuing employment with defendant. Thus, unlike the facts in *Filcek*, there is no evidence that plaintiff detrimentally relied on defendant's offer of employment. Therefore, we find further support for a conclusion that no employment contract was formed between the parties.

Alternatively, we note that it is presumed that "employment relationships are terminable at the will of either party." *Lytle v Malady*, 458 Mich 153, 163; 579 NW2d 906 (1998). "However, the presumption of employment at will can be rebutted so that contractual obligations and limitations are imposed on an employer's right to terminate employment." *Id.* "The presumption of employment at will is overcome with proof of either a contract provision for a definite term of employment, or one that forbids discharge absent just cause." *Id.* at 164. The *Lytle* Court recognized three methods by which a plaintiff can prove these contractual terms:

> (1) proof of "a contractual provision for a definite term of employment or a provision forbidding discharge absent just cause"; (2) an express agreement, either written or oral, regarding job security that is clear and unequivocal; or (3) a contractual provision, implied at law, where an employer's policies and procedures instill a "legitimate expectation" of job security in the employee. [*Id.*, quoting *Rood v General Dynamics Corp*, 444 Mich 107, 117; 507 NW2d 591 (1993).]

Here, plaintiff contends that his employment was not terminable at will because the collective bargaining agreement prohibited his discharge absent "just cause." Although the collective bargain agreement prohibited defendant from discharging an employee without "just cause," the

---

[1] Because we were not bound by the *Cunningham* decision, we reject defendant's contention that plaintiff's appeal is vexatious. Therefore, we decline to award sanctions.

agreement further provided: "No matter concerning the discipline, layoff, or termination of a probationary employee shall be subject to the grievance and arbitration procedures." In other words, a probationary employee could be disciplined or even terminated without a showing of "just cause." Because plaintiff's employment status was, at most, that of a probationary employee, his employment was terminable at will. Consequently, we find further support for the trial court's conclusion that plaintiff was not entitled to relief as a matter of law.

Affirmed.

/s/ Donald S. Owens
/s/ David H. Sawyer
/s/ Jessica R. Cooper