STATE OF MICHIGAN

COURT OF APPEALS

RICHARD MERLINO,

Plaintiff-Appellant,

v

MGM GRAND DETROIT, LLC, d/b/a MGM GRAND DETROIT CASINO,

Defendant-Appellee.

UNPUBLISHED
September 14, 2004

No. 247165
Wayne Circuit Court
LC No. 01-138921-CL

Before: Murphy, P.J., and Griffin and White, JJ.

PER CURIAM.

Plaintiff filed suit alleging that he was wrongfully terminated from his position as a pit manager[1] at defendant's casino after several female co-workers filed written complaints with defendant alleging that plaintiff had sexually harassed them by making inappropriate comments. Plaintiff appeals as of right from an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) and dismissing plaintiff's complaint with prejudice. We reverse, and remand for further proceedings.

A trial court's ruling on a motion for summary disposition under MCR 2.116(C)(10) is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 644 NW2d 151 (2003). Our Supreme Court stated the legal standard to be applied to a motion for summary disposition brought under MCR 2.116(C)(10) in *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999):

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to

[1] A pit manager, apparently, is a person that oversees an area of a casino that contains a grouping of game tables.

establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4). *Quinto v Cross & Peters Co*, 451 Mich 358; 547 NW2d 314 (1996).

The parties first dispute whether plaintiff could only be terminated for just cause. Specifically, defendant asserts that, pursuant to plaintiff's employment contract, plaintiff could be terminated for just cause at any time without notice, and could be terminated without cause upon sixty days' notice. Therefore, defendant asserts that, even if just cause did not exist for plaintiff's termination, defendant has only violated the sixty-day notice provision and plaintiff's damages are limited to the amount of wages that he would have received during that notice period. Plaintiff, however, asserts that the manuals and policies that defendant subsequently circulated, coupled with a provision of his contract that states that he would become entitled to all of the employee benefits commensurate to an employee in his position after a sixty-day introductory period, effectively modified his contract. Therefore, plaintiff contends that, after his initial sixty-day period, the notice provision in his letter of acceptance was no longer part of his contract and he could only be terminated for just cause.

Our Supreme Court has recognized that employment relationships are generally presumed to be terminable at the will of either party. *Lytle v Malady (On Reh)*, 458 Mich 153, 163-164; 579 NW2d 906 (1998) (citation omitted). The employee may, however, rebut this presumption by introducing sufficient proofs that contractual obligations and limitations have been placed on the employer's right to terminate. *Id*. at 164 (citations omitted). The presumption of at-will employment is overcome with proof of either a contract provision for a definite term of employment, or one that forbids discharge absent just cause. *Id.* A plaintiff can prove such contractual terms in the following three ways: (1) introducing proof of a contractual provision forbidding discharge absent just cause, or providing for a definite term of employment, (2) introducing evidence of a clear and unequivocal, written or oral, express agreement regarding job security, or (3) introducing proof of "a contractual provision, implied at law, where an employer's policies and procedures instill a 'legitimate expectation' of job security in the employee." *Id*. (citations omitted).

Plaintiff's employment contract-acceptance letter in the present case provides:

> 7. Termination Right: Either party shall have the right to terminate this agreement and your employment hereunder, without cause, on 60 days notice without further obligations to the other.
>
> 8. Employee Benefits: You shall be entitled to all the employee benefits commensurate to a person of your position that are in place at the Company on your 61st day of employment, subject to change from time to time at the discretion of the Company.

These provisions do not forbid the termination of plaintiff's employment absent just cause. Rather, paragraph seven merely states that plaintiff must be given sixty days' notice if terminated without cause. Moreover, plaintiff testified during his deposition that he had never

engaged in any negotiations before beginning his employment with defendant wherein it was agreed that he could only be terminated for just cause. Furthermore, plaintiff also testified that he was never personally told by defendant or any of its managers that the statements in defendant's employee handbook and policy manuals superseded his initial letter of acceptance. Thus, in order to prove that he could only be terminated for just cause, plaintiff must satisfy the third prong set forth in *Lytle, supra* at 164.

Our Supreme Court has stated that a two-step inquiry must be used to evaluate an employee's claim that he had a legitimate expectation that his employment could only be terminated for just cause. *Id.* "The first step is to decide 'what, if anything, the employer has promised,' and the second requires a determination of whether the promise is 'reasonably capable of instilling a legitimate expectation of just-cause employment . . . .'" *Id*. at 164-165, quoting *Rood v General Dynamics Corp*, 444 Mich 107, 138-139; 507 NW2d 591 (1993) (omission in original). Moreover, not all statements within a policy are sufficient to constitute a "promise" that an employee will only be terminated for just cause. *Lytle, supra* at 165. Rather, in order to show such a promise, the employee must demonstrate that the employer's actions equated to a manifestation of an intention by the employer to refrain from terminating the employee absent just cause sufficient to justify the employee in understanding that such a commitment has been made. *Id*., quoting *Rood, supra* at 139, quoting Restatement Contracts, 2d, § 2(1), pp 8-9. Thus, "[a] lack of specificity of policy terms or provisions, or a policy to act in a particular manner as long as the employer so chooses, is grounds to defeat any claim that a recognizable promise in fact has been made." *Lytle, supra* at 165, citing *Rood, supra* at 139.

In cases where a plaintiff is asserting that manuals or statements by the employer created a legitimate expectation that they would not be terminated absent just cause, trial courts are to examine employer policy statements that reference employee discharge to determine whether they can be reasonably interpreted as promises of just-cause employment. *Rood, supra* at 140. If they cannot be, then summary disposition is appropriate. *Id.* However, if the policies are capable of two reasonable interpretations, then the issue of whether the policies created a promise by the employer that the employee would only be terminated for just cause is an issue for the jury. *Id.* at 140-141.

In the present case, plaintiff first presents a "Management Training Courses" manual that states, "[employees] generally will not be separated if they have completed their Introductory Period unless there is 'Just Cause.'" Because defendant qualified its statement through the use of the term "generally," this manual cannot reasonably be interpreted as a promise that plaintiff would only be terminated for just cause. However, as noted by plaintiff, paragraph eight of his contract provides that he will be entitled to all employee benefits commensurate with a person in his position upon his sixty-first day of employment. Defendant's employee handbook provides, "[a]s part of our commitment to fair treatment, no [employee] who has completed his or her introductory period will be separated from MGM Grand Detroit without 'just cause.'" The handbook thereafter discusses the use of progressive counseling and lists several offenses that it defines as "serious misconduct" that constitute just cause for immediate separation. Moreover, defendant's company policy manual states, "MGM Grand Detroit is committed to a Guarantee of Fairness, which means that [employees] who have completed their Introductory Period will not be terminated except for 'Just Cause' or a reduction in staff. [Employees] will be given

progressive counseling and will have the opportunity to have any suspension or termination reviewed before a Peer Review Panel." Furthermore, unlike in *Lytle*, neither the employee handbook nor the policy manual contained a specific disclaimer of just-cause employment or statement by defendant that it did not intend to be bound by any provision within them.[2] *Lytle*, *supra* at 168-171, citing *Heurtebise v Reliable Business Computers, Inc,* 452 Mich 405, 413; 550 NW2d 243 (1996).

When read in juxtaposition with paragraph eight of plaintiff's employment contract-acceptance letter, defendant's statements in its handbook and policy manual could be reasonably interpreted as a promise by defendant that plaintiff would only be terminated for just cause after his initial sixty-day period. Moreover, we believe that a jury could reasonably determine that these materials instilled a legitimate expectation in plaintiff that the clause in his contact stating that he could be terminated at will upon sixty days' notice was no longer applicable after the sixty-day orientation period. Therefore, we conclude that the determination of whether plaintiff was employed pursuant to a just-cause employment contract is a question for the jury, and that summary disposition was not appropriate on this issue.[3]

Plaintiff next asserts that the trial court erred in determining that there was no genuine issue of material fact in regard to whether he made the comments alleged and in finding that his termination was for just cause. We agree.

Our Supreme Court has stated that, if a just-cause employment contract is found to exist, "[an employer's] decision to terminate the employee is subject to judicial review." *Renny v Port Huron Hosp*, 427 Mich 415, 429; 398 NW2d 327 (1986), citing *Toussaint v Blue Cross & Blue*

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[2] Neither party has presented a complete employee handbook or policy manual. However, no such provision is contained in any of the portions presented to this Court.

[3] Defendant asserts, and the trial court determined, however, that plaintiff's contract could be read congruously with the handbook and policy manual, thereby leaving paragraph seven of plaintiff's contract unaffected. We conclude that a jury must resolve and determine if the documents are to be read in such a fashion after hearing evidence concerning the documents and intent, not the trial court as a matter of law. While the trial court's interpretation is not unreasonable and could be adopted by the jury, other reasonable interpretations of the documents have been set forth. In the context of contract law, if language is reasonably susceptible to more than one interpretation, ambiguity exists. *Rinke v Automotive Moulding Co,* 226 Mich App 432, 435; 573 NW2d 344 (1997). "If a contract is subject to two interpretations, factual development is necessary to determine the intent of the parties and summary disposition is inappropriate." *Mahnick v Bell Co,* 256 Mich App 154, 159; 662 NW2d 830 (2003)(citation omitted). Where the meaning of language is unclear, the trier of fact determines the intent of the parties. *Id.*; see also *Rood, supra* at 140-141.

Shield of Michigan, 408 Mich 579, 621-624; 292 NW2d 880 (1980). In recognizing this principle, our Supreme Court has defined the role of the jury as follows:

> The jury decides as a matter of fact whether the employee was discharged for cause. While the jury may not substitute its opinion for that of the employer's, it may determine whether the employee committed the specific misconduct for which he was fired, whether the firing was pretextual, whether the reason for discharge amounted to good cause, or whether the employer was selectively applying the rules. It is not enough that an employer acted in good faith or was not unreasonable. [*Renny, supra* at 429, citing *Toussaint, supra* at 621-624.]

This rule, however, is not without exception. An employer may negate an employee's ability to seek judicial review of its decision to terminate by placing a provision in the employment contract reserving unto itself the sole authority to decide whether termination is justified and for just cause, and providing the manner by which it will make such a determination. *Thomas v John Deere Corp*, 205 Mich App 91, 94-95; 517 NW2d 265 (1994). So long as the employer follows the procedures it has provided in the contract, the employer's decision that just cause for termination existed does not equate to a breach of contract and is not subject to review by the courts, even though just cause may not have actually been present. *Id.* at 95.

Although it does not cite *Thomas*, or any other related authority, defendant attempts to invoke the principle stated therein to defeat plaintiff's assertion that defendant's determination that just cause existed for his termination is subject to judicial review. Specifically, defendant asserts that its policy manual defines just cause as "a valid business reason, including but not limited to situations where [an employee] . . . violates a policy or rule of conduct, or disrupts company operations," and that plaintiff's actions clearly violate defendant's sexual harassment policy. However, the excerpts provided from defendant's employee handbook and policy manual do not contain any provision reserving unto defendant the sole authority to decide whether an employee actually committed the misconduct alleged, that the alleged misconduct equated to sexual harassment as defined in defendant's policy manual, or that termination of the employee is justified.

Indeed, the only reference in those materials to defendant's ability to determine whether termination is justified states that employees may be immediately terminated for just cause for engaging in "Conduct which MGM Grand Detroit determines violates its policies against sexual harassment and/or other harassment in such a manner to warrant immediate discharge." While this clause states that defendant may determine that an employee has engaged in conduct that violates its sexual harassment policy, thus providing just cause as defined in its policy manual for immediate termination, it does not state that defendant has reserved onto itself the sole authority to do so. Moreover, it does not state that defendant has reserved onto itself the sole authority to determine whether the employee did, in fact, engage in the alleged misconduct. Therefore, we conclude that defendant's assertion that plaintiff is not entitled to have a jury review whether his termination was for just cause is without merit.

Plaintiff's primary assertion is that the trial court erred in determining that there is no genuine issue of material fact as to whether he did, in fact, make the comments alleged. We

believe that plaintiff's assertion is correct. As stated above, our Supreme Court has held that an employer's determination that an employee committed the specific misconduct for which he was terminated is subject to review by a jury. *Renny, supra* at 429. Specifically, in *Toussaint, supra* at 621, our Supreme Court stated, "Where the employer claims that the employee was discharged for specific misconduct – intoxication, dishonesty, insubordination – and the employee claims that he did not commit the misconduct alleged, the question is one of fact for the jury: did the employee do what the employer said he did?"

In the present case, plaintiff testified that he denied making the alleged comments before being terminated, and again denied having made them during his deposition. Defendant, however, relies on the fact that, during his deposition, plaintiff stated that he had never had any altercations with any of the women before, had never disciplined them, could not offer a hypothesis as to any motive they would have to fabricate their reports, and offered no evidence to undermine their credibility. Therefore, defendant asserts that plaintiff's deposition testimony that he did not make the alleged comments is nothing more than a conclusory denial that is insufficient to create a genuine issue of material fact. Defendant's assertion is without merit. Specifically, the determination of whether plaintiff did, in fact, make the comments alleged involves weighing the credibility of plaintiff against that of his female co-workers. In reviewing a motion for summary disposition, a trial court may not assess credibility or make factual determinations. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Accordingly, the trial court inappropriately granted defendant's motion for summary disposition[4].

[4] Defendant devotes a considerable portion of its brief to discussing holdings from other jurisdictions, which it cites for the proposition that an employer's decision that an employee's actions equate to sexual harassment should be granted great deference, and that an employer's determination that the employee did, in fact, commit the alleged conduct should also be granted deference. Moreover, defendant cites these cases for the proposition that, regardless of whether the employee did, in fact, commit the misconduct alleged, the employer's decision to terminate the employee should not be deemed wrongful if the employer acted in good faith in reaching its conclusion by conducting an investigation, and asserts that this should be the law in Michigan. We decline to specifically address the cases cited by defendant because they are not consistent with the law within this jurisdiction. Specifically, our Supreme Court has held that "[i]t is not enough that an employer acted in good faith or was not unreasonable." *Renny*, *supra* at 429, citing *Toussaint, supra* at 623 ("Where the employee has secured a promise not to be discharged except for cause, he has contracted for more than the employer's promise to act in good faith or not to be unreasonable").

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Richard Allen Griffin