STATE OF MICHIGAN

COURT OF APPEALS

GARY BRUGGER,

Plaintiff-Appellant,

v

CITY OF HOLLAND,

Defendant-Appellee.

UNPUBLISHED
May 29, 2014

No. 313925
Ottawa Circuit Court
LC No. 12-002711-CZ

Before: GLEICHER, P.J., and HOEKSTRA and O'CONNELL, JJ.

PER CURIAM.

In this wrongful termination action, plaintiff appeals as of right the trial court's order granting defendant summary disposition under MCR 2.116(C)(10). We affirm.

The issues in this appeal turn on the provisions of defendant's employee handbook. The handbook provided that employees within plaintiff's classification "will not be terminated except for 'just cause' as defined [in the handbook]." The handbook then defined "just cause" as follows:

> "Just cause" for discharge exists whenever a covered employee engages in any action or conduct, whether or not specifically identified in this Handbook, that warrants discharge. The City, in its sole discretion determines whether the employee's action or conduct warrants discharge. [City of Holland City/HBPW Employee Handbook, p 10.]

Defendant determined that just cause existed for discharging plaintiff because of plaintiff's job performance and his communication skills. Plaintiff sued for wrongful termination. The trial court granted defendant's motion for summary disposition, upon finding that the handbook provisions precluded plaintiff's claim.

We review de novo the trial court's summary disposition ruling. *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012). MCR 2.116(C)(10) provides that a trial court can grant summary disposition when "there is no genuine issue of material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." "In determining whether a genuine issue of material fact exists, the court must consider all documentary evidence in a light most favorable to the nonmoving party." *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App

466, 475; 776 NW2d 398 (2009). Our review "is limited to the evidence that had been presented to the circuit court at the time the motion was decided." *Id*. at 475-476.

Plaintiff argues that the trial court failed to apply our Supreme Court's decision in *Toussaint v Blue Cross & Blue Shield of Mich*, 408 Mich 579; 292 NW2d 880 (1980). In *Toussaint*, our Supreme Court held:

> [W]here an employer has agreed to discharge an employee for cause only, its declaration that the employee was discharged for unsatisfactory work is subject to judicial review. The jury as trier of facts decides whether the employee was, in fact, discharged for unsatisfactory work. A promise to terminate employment for cause only would be illusory if the employer were permitted to be the sole judge and final arbiter of the propriety of the discharge. [*Id*. at 621.]

After *Toussaint*, however, this Court recognized that when an employer expressly reserves for itself the sole discretion to determine what constitutes just cause for termination, an employee terminated for "just cause" cannot state a claim for breach of the just cause provision. *Thomas v John Deere Corp*, 205 Mich App 91, 94; 517 NW2d 265 (1994). The *Thomas* Court stated, "[e]mployers and employees are free to bind themselves as they wish . . . ." 205 Mich App at 94 (citations omitted).]

In *Thomas*, as in this case, the plaintiff produced "evidence from which it is possible to conclude that defendant had imposed a contract that did limit its discretion to terminate plaintiff's employment." *Id*. at 94. Nonetheless, the *Thomas* Court concluded "the same evidence . . . also establishes that defendant reserved for itself the sole authority to determine whether termination was justified." *Id*. at 94-95. In light of those findings, the court concluded that "the particular employment contract alleged by plaintiff does not give courts the authority to second-guess defendant's determination." *Id*. at 95.

The *Thomas* precedent controls this case. As quoted *supra*, defendant in this case reserved the "sole discretion" to determine whether there was just cause to discharge an employee. The handbook presents no factual issues concerning defendant's authority to determine grounds for discharge. Because there is no genuine issue of material fact regarding defendant's authority and interpretation of the grounds for discharge, the trial court correctly determined that defendant was entitled to judgment as a matter of law on plaintiff's wrongful discharge claim. *Thomas*, 205 Mich App at 95.

Plaintiff argues that *Thomas* is factually distinguishable from this case. We disagree. In *Thomas*, as in this case, the court found there was evidence supporting the notion that plaintiff was a just-cause employee: "[p]laintiff's supervisor admitted that every employee of defendant could be fired only for good and just cause. . . . Defendant held itself out to all its employees . . . as a company that would terminate only for cause." *Id*. at 94. And, like defendant in this case, the defendant in *Thomas* retained the right to determine in its sole discretion what constituted "just cause" for termination. *Id*. Therefore, rather than being factually distinguishable, this case is factually analogous to *Thomas*.

Plaintiff next argues that *Thomas* contradicts *Toussaint*, and that we must follow *Toussaint* instead of *Thomas*. Again, we disagree. *Thomas* does not contradict *Toussaint's* holding that a terminated employee may be entitled to judicial review of a just cause termination, *Toussaint*, 408 Mich at 621. Rather, *Thomas* holds that an employer may contractually create an *employment relationship falling somewhere between at-will and just-cause employment. Thomas*, 205 Mich App at 94. Thus, *Toussaint's* holding remains undisturbed by *Thomas*.

Plaintiff also asserts that the trial court erred in dismissing his claim of wrongful termination because there is a question of fact regarding whether defendant uniformly applied its employment policies. He argues that because other instances of poor communication involving other employees did not result in their terminations, defendant did not have just cause to terminate plaintiff. Plaintiff's argument would require this Court to review defendant's determination of what constituted just cause for terminating plaintiff. We will not review an employer's determination of just cause for discharge when the employer reserves the authority to make this determination in its sole discretion. *Thomas*, 205 Mich App at 95.

Lastly, plaintiff argues that his wrongful termination claim should not have been dismissed, because the "true reason" for plaintiff's termination was his report of harassment. Again, any review of whether there was just cause for plaintiff's termination would require us to second-guess defendant's determination, which would be contrary to *Thomas*, 205 Mich App at 95.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Peter D. O'Connell

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GLEICHER, P.J. (*dissenting*).

Plaintiff Gary Brugger and defendant City of Holland entered into a just cause employment agreement. More accurately, the City's employee handbook purported to establish a just cause employment relationship. In a paragraph titled, "'Just Cause' Employment," the handbook provided that Brugger would not be discharged absent "just cause." But in the next paragraph, the City granted unto itself "sole discretion" to determine "whether the employee's action or conduct warrants discharge."

The majority discerns no contradiction inhering in these two provisions. It holds that the "sole discretion" provision extinguishes the authority of a judge or jury to "second-guess" the City's employment decision. According to the majority's logic, the City's subjective belief that just cause existed for termination is good enough – even if the decision was actually arbitrary, capricious, or made in bad faith.

I believe that by promising Brugger just cause employment, the City forfeited the ability to insulate its termination decision from judicial review, and respectfully dissent.

Relying primarily on *Thomas v John Deere Corp*, 205 Mich App 91; 517 NW2d 265 (1994), the majority concludes that neither this Court nor a jury may review the City's decision to terminate Brugger. In my view, the majority has not only misinterpreted nonbinding language in *Thomas*, but has disregarded our Supreme Court's binding opinion in *Toussaint v Blue Cross & Blue Shield of Mich*, 408 Mich 579; 292 NW2d 880 (1980).

In *Toussaint*, 408 Mich at 619, our Supreme Court highlighted that "[i]f there is in effect a policy to dismiss for cause only, the employer may not depart from that policy at whim simply because he was under no obligation to institute the policy in the first place." The Court emphasized, "Having announced the policy, presumably with a view to obtaining the benefit of

improved employee attitudes and behavior and improved quality of the work force, the employer may not treat its promise as illusory." *Id.* The Court proceeded to set forth in the clearest possible terms an extraordinarily pertinent example of an illusory promise:

> We all agree that where an employer has agreed to discharge an employee for cause only, its declaration that the employee was discharged for unsatisfactory work is subject to judicial review. The jury as trier of facts decides whether the employee was, in fact, discharged for unsatisfactory work. *A promise to terminate employment for cause only would be illusory if the employer were permitted to be the sole judge and final arbiter of the propriety of the discharge. There must be some review of the employer's decision if the cause contract is to be distinguished from the satisfaction contract.* [*Id.* at 621 (emphasis added).]

The Supreme Court's commandment that "[t]here must be some review of the employer's decision" in the just cause employment setting constitutes controlling authority. The language from *Thomas* cited by the majority does not. Unlike the written contract promising Brugger just cause employment, the plaintiff if *Thomas* "had not been explicitly promised that he could be fired only for just cause." *Thomas*, 205 Mich at 94.[1] Thus, *Thomas* simply does not apply to this case.

Toussaint stands for the proposition that when a just cause relationship has been contractually established, a jury or judge must decide whether just cause existed for an employee's termination from employment: "The jury as trier of fact decides whether the employee was, in fact, discharged for unsatisfactory work." *Toussaint*, 408 Mich at 621. *Toussaint* teaches that a promise of just cause employment must be enforced by someone other than the employer:

> 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. An instruction which permits the jury to review only for reasonableness inadequately enforces that promise.
>
> In addition to deciding questions of fact and determining the employer's true motive for discharge, the jury should, where such a promise was made, decide whether the reason for discharge amounts to good cause: is it the kind of thing that justifies terminating the employment relationship? Does it demonstrate that the employee was no longer doing the job? [*Id.* at 623 (citations omitted).]

[1] The *Thomas* Court failed to describe the contract at issue, other than to analogize it to the contract construed in *Rood v Gen Dynamics Corp*, 444 Mich 107, 119-127; 507 NW2d 591 (1993). The pages of *Rood* cited in *Thomas* concern an alleged *oral* promise of just cause employment. In *Rood*, the Supreme Court rejected that the statements objectively manifested an intent that his employment would legally qualify as for cause.

As *Toussaint* recognized, permitting an employer to maintain "sole discretion" to discharge an employee eviscerates the "just cause" employment clause. "Sole discretion" clauses render "just cause employment" meaningless. Armed with a "sole discretion" clause, the City can fire at will, despite pledging to terminate only for cause. After all, who will know whether cause existed? Having announced a just cause termination policy, the City is obligated under *Toussaint* to permit a jury to assess the reasonableness of its termination decision. I would reverse for a trial.

/s/ Elizabeth L. Gleicher