STATE OF MICHIGAN

COURT OF APPEALS

BERNARD JOHN WALSH, Plaintiff-Appellee/Cross-Appellant,	UNPUBLISHED July 17, 2014
v	No. 312611 Bay Circuit Court
KRAFT FOODS GLOBAL, INC., Defendant-Appellant/Cross-Appellee.	LC No. 10-003663-NZ

Before: WILDER, P.J., and FITZGERALD and MARKEY, JJ.

PER CURIAM.

Defendant-appellant/cross-appellee, Kraft Foods Global, Inc., appeals as of right a judgment for plaintiff-appellee/cross-appellant, Bernard John Walsh, in this breach of contract case. We reverse.

I

Plaintiff has a bachelor's degree in business administration and started working at Tombstone, which later became a subsidiary of defendant, in 1991. On August 12, 1991, plaintiff signed an employment application that provided, in relevant part:

> I further agree that I have the right to terminate my employment without notice at any time for any reason and Tombstone also retains this right. I understand that no Tombstone manager or representative other than the President or the Senior Human Resource Executive of Tombstone Pizza has authority to enter into an agreement for employment for any specific period of time or to make any agreement contrary to the above.[1]

[1] Plaintiff never talked to the President or the Senior Human Resource Executive about a different agreement.

In July 1998, plaintiff became a district manager, supervising sales representatives who sold and restocked pizzas at stores. Plaintiff testified that, as a manager, he hired employees who completed an application that was similar to the application he had completed:

> In consideration of my employment by Kraft Foods, Inc., I agree to learn and conform to Kraft Foods' rules and regulations. I further agree that employment with Kraft Foods is at–will and that either I or the Company may terminate my employment without notice at any time for any reason. I understand that I have no written or oral employment contract with the company. I understand that no Kraft Foods manager or representative, other than the Senior Vice-President of Human Resources, has authority to enter into an agreement for employment for any specified period of time or to make any agreement contrary to the above.

On September 23, 2009, plaintiff was terminated. Defendant explained the bases of the termination were plaintiff's falsification of company documents and insubordination regarding a human resources initiative. Plaintiff testified that he did not enjoy the benefit of the company's policies, including the Progressive Discipline Policy in the District Manager's Resource Guide and the Issue Resolution Policy and the Arbitration Policy in the Kraft Pizza Company (KPC) Sales Employee Handbook, when he was terminated.

Plaintiff filed a complaint alleging a just-cause employment contract with defendant, or at least legitimate expectations for just-cause employment. He further alleged that he was terminated without just cause and in violation of defendant's policies and procedures, including 1) the arbitration clause, 2) the just-cause employment agreement, 3) the Issue Resolution Policy, and 4) the Progressive Discipline Policy. Plaintiff alleged that defendant's breach caused him to lose his job, back pay, future pay, future raises, and benefits, and forced him into unemployment, which caused mental anguish and a disruption of his lifestyle.

Defendant denied that plaintiff had a just-cause employment contract or legitimate expectations for just-cause employment. Defendant further claimed that it did not breach its policies. Defendant moved for summary disposition, arguing that plaintiff was an at-will employee, but the trial court denied the motion, concluding that there was a question of fact regarding whether plaintiff had a "reasonable expectation of employment."

At trial, defendant moved for directed verdict, but the trial court reserved its ruling. The jury found that one or more of defendant's policies were applicable to plaintiff and plaintiff was wrongfully discharged in violation of one or more of those policies. The jury found that plaintiff suffered economic damages totaling $1,205,772 as a result of his wrongful discharge. A supplemental jury verdict provided that the verdict was not based on the KPC Sales Employee Handbook, but instead was based on the District Manager's Resource Guide and the Issue Resolution Policy.

Following trial, defendant moved for JNOV, and alternatively, a new trial. Defendant argued, in relevant part, that the policies relied upon by the jury did not create legitimate expectations of just-cause employment and no reasonable jury could have found that defendant

breached either policy. The trial court denied the motions for a directed verdict, JNOV, and a new trial, and subsequently entered a judgment for plaintiff.

II

On appeal, defendant argues that plaintiff was an at-will employee, that the policies relied upon by the jury did not create legitimate expectations of just-cause employment, and that as a result, the trial court erred by denying defendant's motions for directed verdict and JNOV. We agree.

This Court reviews de novo a trial court's ruling on motion for a directed verdict and JNOV. *Zaremba Equipment, Inc v Harco Nat'l Ins Co*, 302 Mich App 7, 15; 837 NW2d 686 (2013). "A motion for directed verdict or JNOV should be granted only if the evidence viewed in [the light most favorable to the nonmoving party] fails to establish a claim as a matter of law." *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 131; 666 NW2d 186 (2003).

By presumption in Michigan, "employment relationships are terminable at the will of either party." *Lytle v Malady*, 458 Mich 153, 163; 579 NW2d 906 (1998), citing *Lynas v Maxwell Farms*, 279 Mich 684, 687; 273 NW 315 (1937). Furthermore, once a disclaimer describing employment at-will is signed by an employee, excepting any subsequent modification, the employee may be terminated for any reason or for no reason. *Clement-Rowe v Michigan Health Care Corp*, 212 Mich App 503, 506; 538 NW2d 20 (1995). The presumption of at-will employment can be rebutted with either a contract for a definite term of employment or a just-cause termination contract. *Lytle*, 279 Mich at 164, citing *Rood v General Dynamics Corp*, 444 Mich 107, 117; 507 NW2d 591 (1993). As our Supreme Court explained in *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579; 292 NW2d 880 (1980), a plaintiff can prove a definite term of employment or a just-cause termination contract in three ways: 1) a contractual provision, 2) "an express agreement, either written or oral, regarding job security that is clear and unequivocal," or 3) an implied contractual provision, where an employer's policies and procedures instill a "legitimate expectation" of job security in the employee. *Id.*

Plaintiff had neither a contract for a definite period of employment nor a contract providing for just-cause termination. Plaintiff instead claimed he had a legitimate expectation of just-cause employment.

The determination whether an employee had a legitimate expectation of just-cause employment under *Toussaint* is a two-step process. See *Rood*, 444 Mich at 138-139. "The first step in analyzing a legitimate expectations claim . . . is to determine, what, if anything, the employer has promised. Promises, like contracts, may be either express or implied." *Id*. at 138. "Not all policy statements will rise to the level of a promise." *Id*. at 139. Where there is merely "a policy to act in a particular manner as long as the employer so chooses, [it] is grounds to defeat any claim that a recognizable promise in fact has been made." *Lytle*, 458 Mich at 165. "Also . . . [t]he more indefinite the terms, the less likely it is that a promise has been made. And, if no promise is made, there is nothing to enforce." *Rood*, 444 Mich at 139. If "a promise has been made, the second step is to determine whether the promise is reasonably capable of instilling a legitimate expectation of just-cause employment in the employer's employees." *Id*.

"[O]nly policies and procedures reasonably related to employee termination are capable of instilling such expectations." *Id*.

Plaintiff agreed in his Application for Employment that he and defendant retained the right to terminate his employment at any time for any reason. *Lytle*, 458 Mich at 171 n 17; *Clement-Rowe*, 212 Mich App at 506. Afterward, plaintiff knew that defendant continued to act as an at-will employer because plaintiff hired sales representatives for defendant who were also at-will employees. These facts demonstrate plaintiff was an at-will employee who could be terminated for any reason or no reason at all, *Clement-Rowe*, 212 Mich App at 506, and contrary to plaintiff's claim, neither the Issue Resolution Policy nor the District Manager's Resource Guide could have created a legitimate expectation of just-cause employment. *Rood*, 444 Mich at 141; *Biggs*, 194 Mich App at 239-240.

The Issue Resolution Policy, which was printed in the KPC Sales Employee Handbook, had two components: 1) the Review Component—a procedure for employees to have their concerns about employment decisions that affect them reviewed by defendant's hierarchy, and 2) the Arbitration Component—independent arbitration for "eligible" employees. No promise existed in the Issue Resolution Policy because the KPC Sales Employee Handbook contained a contract disclaimer—"This Handbook does not constitute a contractual obligation of any kind to any . . . employee." Moreover, defendant retained the discretion not to apply its policies to any individual employee. Because there was merely "a policy to act in a particular manner" as long as defendant chose, *Lytle*, 458 Mich at 165, the Issue Resolution Policy did not rise to the level of a promise and it did not affect plaintiff's at-will employment relationship with defendant. *Rood*, 444 Mich at 139.

The Progressive Discipline Policy in the District Manager's Resource Guide for managing sales representatives provided: 1) a disciplinary scheme for sales representatives involving a series of warnings, 2) a requirement that discharge be preceded by a thorough investigation, and 3) a non-exhaustive list of examples of serious misconduct that could result in immediate termination. Plaintiff could not have reasonably believed the Progressive Discipline Policy applied to him—a manager. This policy only guided managers regarding how to discipline their sales representatives. The same is true for the entire District Manager's Resource Guide. As defendant argues, the guide was filled with documents and policies for managers to use in hiring and supervising their sales representatives. The guide's contents did not apply to managers like plaintiff. Therefore, neither the Progressive Discipline Policy, nor the District Manager's Resource Guide as a whole, constituted promises to plaintiff and they did not affect plaintiff's at-will employment.[2]

We conclude that, as a matter of law, plaintiff was an at-will employee and he had no legitimate expectation for just-cause employment. Because we further conclude that the trial

[2] Even if the guide applied to plaintiff, it did not promise just-cause employment. See *Biggs v Hilton Hotel Corp*, 194 Mich App 239-240; 486 NW2d 61 (1992) (no promise of just-cause termination where nothing in the manual states an employee would not be terminated except for one of the reasons listed in the disciplinary section).

court erred by denying the motions for directed verdict and JNOV, we need not address the remaining claims on appeal and cross-appeal.

We reverse the trial court's order denying defendant's motions for a directed verdict and JNOV and vacate the judgment. As the prevailing party, defendant may tax costs pursuant to MCR 7.219.

/s/ Kurtis T. Wilder
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey