

STATE OF MICHIGAN
COURT OF APPEALS

LORETTA CARTER,

Plaintiff-Appellant,

v

BOARD OF REGENTS OF THE UNIVERSITY OF
MICHIGAN,

Defendant-Appellee.

UNPUBLISHED

May 28, 1996

No. 179924

LC No. 93 14791 CM

Before: Fitzgerald, P.J., and Corrigan and C.C. Schmucker,* JJ.

PER CURIAM.

In this wrongful discharge action, plaintiff Loretta Carter appeals of right the order granting summary disposition to defendant Board of Regents of the University of Michigan. We affirm.

Plaintiff was employed by the University of Michigan School of Dentistry for over twenty years. In November, 1990, she was promoted to Clinic Operations Manager of Patient Services, where she supervised seventy employees. The Dental School had an "imprest fund," or a petty cash fund, which totaled \$5,000. The University's Standard Practice Guide (SPG) provided:

Imprest cash funds must not be maintained in checking or other bank accounts without specific authorization from the Vice President and Chief Financial Officer, subsequent to approval by the Regents. A cash receipt or suitable evidence of payment must be obtained for each cash expenditure and evidence must specifically identify items which are acquired, or services which are rendered. By claiming reimbursements, the individual is stipulating that the goods or services are to the best of his/her knowledge appropriate to the account being charged, and that the charges are a legitimate expense within University guidelines. The maximum amount reimbursable under this procedure is \$200.00 for any one purchase. Obtaining two or more cash receipts for the same type purchase and thereby exceeding the \$200.00 purchase limit will not be allowed.

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

On at least three occasions, plaintiff used post-dated personal checks to remove cash from the imprest fund for her personal use. Diana Benns, custodian for the fund, testified in her deposition that plaintiff wrote a post-dated check on March 15, 1991, for which Benns gave plaintiff \$550 in cash from the fund. Three days later, on March 18, 1991, Benns gave plaintiff \$500 cash from the fund. Plaintiff then gave Benns a post-dated check for \$1,050 to cover both cash amounts. In early April, 1991, plaintiff gave Benns another post-dated check for \$500, and received \$500 cash from the fund.

On April 17, 1991, a surprise audit of the fund yielded the two personal checks from plaintiff: (1) a check for \$1,050 dated March 30 that had not yet been cashed, and (2) a check for \$500 dated April 30. The SPG prohibited employees from using the imprest fund for personal business:

The following guidelines and procedures must be adhered to in the operation and disbursing of Imprest Fund monies:

1. Custodian is personally responsible for fund.
2. Imprest cash funds must be used only in connection with University business and must not be loaned to or used by any individual for personal use or for the cashing of personal checks.

The University conducted an investigation, and concluded that plaintiff had violated University policy. The investigation revealed that plaintiff's receipt of cash from the fund on March 18, 1991, occurred after hours, when the Patient Business Office was closed. Notably, at the end of March, plaintiff had requested that responsibility for the fund be relinquished to Patient Services, where she was the Clinical Operations Manager.

On April 22, 1991, Arlie Braman, a member of the Dental School, met with plaintiff, informed her of the possibility of her discharge, and told her that a Disciplinary Review Conference (DRC) had been scheduled for later that afternoon. Braman said that plaintiff told him that she did not wish to have a DRC. Plaintiff later denied that Braman had mentioned a DRC, and denied telling him that she did not want a DRC. Plaintiff later met with her supervisor, Dr. Dennis Turner, Assistant Dean for Patient Services. On April 23, 1991, plaintiff met with Turner and J. Bernard Machen, Dean of the School of Dentistry. At that meeting, plaintiff informed the men that cashing checks from the imprest fund was a long-standing practice. On May 1, 1991, Machen met with plaintiff and informed her that she had the choice between resignation and termination. The University terminated her employment on May 14, 1991.

Plaintiff filed a grievance on May 16, 1991, and followed the grievance procedure; she was represented by an attorney at this time. Plaintiff then requested a DRC on May 23, 1991. A third step grievance hearing occurred on May 30, 1991, and plaintiff's grievance was denied in June. Plaintiff then filed the instant cause of action; defendant later moved for summary disposition. The Court of Claims ruled that plaintiff's conduct was just cause for her termination because she was a supervisor and

breached the trust that the University had placed in her. The court also determined that the University satisfied the minimum due process safeguards. Plaintiff appeals.

Plaintiff first argues that genuine issues of material fact should have precluded the lower court from granting summary disposition in this case. Under MCR 2.116(C)(10), a court may grant summary disposition when, except for the amount of damages, there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. *Horn v Dep't of Corrections*, ___ Mich App ___; ___ NW2d ___ (Docket No. 173247, issued March 22, 1996). In reviewing such a motion, a court must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the party opposing the motion and grant the benefit of any reasonable doubt to the opposing party. *Id.*

Plaintiff contends that the University impermissibly terminated her because it selectively enforced the SPG. The parties agree that plaintiff was a just cause employee of the University. Cause for discharge arises when an employee breaches the employer's uniformly applied rules, and thus breaches the employment contract. *Toussaint v BCBSM*, 408 Mich 579, 624; 292 NW2d 880 (1980). If an employer only selectively enforces rules, the rules do not exist in practice; therefore, the employer may not then rely on the defense that its employee breached the contract. An employee discharged for violating a selectively enforced rule is entitled to have a jury assess whether the violation amounted to good cause. *Id.*

Plaintiff relies on a statement from Bennis in support of her assertion that the imprest fund rules were selectively enforced. Once the moving party has submitted proper evidence in support of its summary disposition motion, the opposing party must come forward with a showing that a true dispute exists. *SSC Associates Ltd Partnership v General Retirement System of Detroit*, 192 Mich App 360, 364; 480 NW2d 275 (1991). Affidavits must be based on personal knowledge and must "set forth with particularity such facts as would be admissible as evidence to establish or deny the grounds stated in the motion." *Id.* Bennis' statement, however, is not a sworn affidavit. Because disputed facts must be established by admissible evidence, unsworn averments do not satisfy the court rule. *Id.*

In her unsworn statement, Bennis wrote that other key employees presented post-dated checks and took cash withdrawals from the imprest fund. Bennis' deposition testimony, however, is equivocal on this subject. Moreover, even assuming that other employees had the custodian cash their personal checks, plaintiff has not presented evidence that those employees oversaw the fund itself, as she did. Plaintiff has not shown that other employees presented personal checks for over one-fifth of the amount of the fund, as she did. Plaintiff has not shown that the other employees' checks were not actually cashed, as her checks were not. Plaintiff has not substantiated her allegation that the University selectively enforced the rules regarding misuse of the imprest fund. Thus, her allegations are insufficient to establish a genuine issue of material fact about her dismissal. See *Horn, supra*.

Plaintiff next asserts that she was denied due process because she did not receive an opportunity for a hearing and did not receive a DRC. Plaintiff was employed by the University, a public

institution. Public employees have a property right in continued employment that the state may only take away consistent with due process guarantees. *Garner v Michigan State University*, 185 Mich App 750, 759; 462 NW2d 832 (1990).

The United States Supreme Court addressed due process in the context of public employment in *Cleveland Bd of Education v Loudermill*, 470 US 532; 105 S Ct 1487; 84 L Ed 2d 494 (1985). While the Court called for a pretermination hearing process, it did not stringently define the requirements within that process, and merely referred to “*some* form of pretermination hearing,” and “*some* opportunity for the employee to present his side of the case.” 84 L Ed 2d at 504. The Court stated that the hearing “need not be elaborate,” and that a hearing less than a full evidentiary hearing would suffice. The Court identified the requirements of due process in the pretermination stage: “The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer’s evidence, and an opportunity to present his side of the story.” *Id.* at 506.

The SPG addressed the University’s procedures regarding discipline as follows, in part:

Performance, conduct or behavior which is adverse to orderly or efficient University operation is misconduct and just cause for taking disciplinary action, including discharge.

* * *

When discharge is contemplated, the University will notify the staff member, who, prior to a final decision by the University, will have an opportunity to respond at a Disciplinary Review Conference. . . .

Plaintiff received sufficient due process in this case. The University gave plaintiff the opportunity to be heard in a DRC, but she declined it. Plaintiff did attend meetings with her supervisors. The University was not bound to give the same due process as a court. Plaintiff received the due process described in *Loudermill*: she received oral notice of the charges against her from Braman, she received an explanation of the University’s evidence, and she had an opportunity to present her version of the policy regarding personal checks in the meetings with her superiors.

In *Garner, supra*, this Court determined that a posttermination hearing is required when a public employer grants only a pretermination hearing under *Loudermill*. *Garner*, 185 Mich App at 761-762. Plaintiff attended a grievance hearing. Also, the lower court held a hearing on the University’s motion for summary disposition. Plaintiff thus received a full posttermination hearing as called for under *Garner*.

Given our resolution of the above issues, we need not address plaintiff’s final argument that the Court of Claims judge should be disqualified from presiding over the case on remand. Moreover, plaintiff did not raise this issue below; thus, it is not preserved for review on appeal.

Burgess v Clark, ___ Mich App ___; ___ NW2d ___ (Docket No. 171335, issued February 20, 1996).

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Maura D. Corrigan

/s/ Chad C. Schmucker