STATE OF MICHIGAN

COURT OF APPEALS

RONALD STEWART, UNPUBLISHED

Plaintiff-Appellee,

v No. 167599
LC No. 91116970 NI

SUBURBAN MOBILITY AUTHORITY
FOR REGIONAL TRANSPORTATION,
a/k/a SMART, f/k/a SOUTHEASTERN
MICHIGAN TRANSPORTATION AUTHORITY,
a/k/a SEMTA,

Defendant-Appellant.

Before: Taylor, P.J., and Marilyn Kelly and J.R. Cooper,* JJ.

MARILYN KELLY, J. (dissenting).

I respectfully dissent.

I believe that a genuine issue of material fact existed as to whether defendant effectively changed its policy from a just cause policy to one of satisfaction.

I would distinguish this case from *Osborne v Southeastern Michigan Transportation Authority*, unpublished opinion per curiam of the Court of Appeals, issued 7/12/91 (Docket No. 122803). In *Osborne* we found that the February 10, 1986 memorandum unambiguously changed the contract from a just cause contract to a satisfaction contract that rendered it terminable at will. However, the record on which we based the *Osborne* decision was considerably different from the one before us today. Moreover, because it is an unpublished opinion, it is not binding precedent. The February 10, 1986 memo created confusion about plaintiff's status, because it specifically stated only that it cancelled policy No. 12.00.A.2. It did not refer to policy number 3 which set forth the just cause language. Plaintiff's superiors told him that the memorandum did not affect either policy Nos. 3 or 11.

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

They advised him that the new policy was "just another tool" for management to use.

The ambiguous nature of plaintiff's status is further exemplified by a memorandum to him dated February 13, 1989. It stated, in part:

> And, unfortunately, our personnel manual has contained some inconsistencies in language, resulting in confusion about how the policies apply and are to be carried out. There is a need, therefore, to make revisions to eliminate these inconsistencies to ensure that the manual accurately reflects the Authority's actual policies and practices.
>
> To these ends, the attached revisions to Policies 3, 11 and 12 are being issued and are given immediate effect.

This memorandum underscores the confusion of the 1986 policy change. In 1986, defendant had two inconsistent polices in effect at the same time. They were the unrevoked policy No. 3, which provided for just cause employment, and the February 10, 1986 memorandum which provided for satisfaction employment. Under these circumstances, I conclude that a reasonable trier of fact could have reached different conclusions as to whether plaintiff had a legitimate expectation that he could be terminated only for just cause.

The majority mistakenly holds that the 1989 memo is inadmissible, because plaintiff was no longer working for defendant at the time it was generated. It reasons that the terms of the contract are to be determined based upon the circumstances at the time the contract was made. However, the 1989 memorandum does not change those circumstances. Rather, it sheds light on the confusion of plaintiff's employment terms.

Moreover, the majority's reliance on MRE 407 to support their position that the memo is inadmissible is misplaced. MRE 407 states:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. . . .

This Court has repeatedly held that the primary reason for excluding this type of evidence "rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety." *Palmiter v Monroe County Bd of Road Comm'rs*, 149 Mich App 678, 685; 387 NW2d 388 (1986); *Downie v Kent Products, Inc*, 420 Mich 197, 211; 362 NW2d 605 (1984), modified on other grounds 421 Mich 1202 (1985).

In the instant case, the 1989 memorandum is not a measure that would have made the event in question, plaintiff's dismissal, less likely to occur. Furthermore, the 1989 memorandum was not admitted to show negligence or culpable conduct by defendant. Rather, it was admitted to show that an

ambiguity existed regarding the status of defendant's employees in 1986.

I would also emphasize that plaintiff could not be considered an at will employee. The parties agreed that he was either a just cause employee or a satisfaction employee. A satisfaction contract is distinct from an at will contract.[1] A party employed at will can be terminated at any time and for no reason; the employer can do so arbitrarily and capriciously. *Rood v General Dynamics Corp*, 444 Mich 107, 116; 507 NW2d 591 (1993); *Henry v Hospital Credit Union*, 164 Mich App 90, 93; 416 NW2d 338 (1987). Under a satisfaction contract, an employer may discharge an employee as long as he is in good faith dissatisfied with the employee's performance or behavior. *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579, 622-623; 292 NW2d 880 (1980). The employer is the judge of whether the employee's services are satisfactory. *Id.*; *Mitchell v GMAC*, 176 Mich App 23, 32; 439 NW2d 261 (1989).

Other jurisdictions have held that, to justify discharge, this dissatisfaction must be real and not pretend, capricious, mercenary, or the result of a dishonest design. If the employer pretends dissatisfaction and dismisses the employee, the discharge is wrongful. *Pugh v See's Candies, Inc*, 203 Cal App 3d 743, 766 (1988); *Volos, LTD v Sotera*, 286 A2d 101, 109 (Md App, 1972). In determining whether a satisfaction employee was wrongfully discharged, the jury's role is limited. It must decide only whether the employer's dissatisfaction was bona fide. *Id*.

In this case, viewing the evidence in a light most favorable to plaintiff, I would find that a reasonable jury could conclude that plaintiff was constructively discharged. A constructive discharge occurs when an employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation. *Fischhaber v General Motors Corp*, 174 Mich App 450, 454-455; 436 NW2d 386 (1988). A finding of constructive discharge depends on the facts of each case. *Jenkins v Southeastern Michigan Chapter, American Red Cross*, 141 Mich App 785, 796; 369 NW2d 223 (1985).

Plaintiff was told either to accept the new position or resign. The position was a demotion; it substantially reduced his salary. A supervisor informed him that he would be closely scrutinized and terminated for the least mistake. I find no error in the trial court's decision to submit the issue to the jury. I would affirm.

/s/ Marilyn Kelly

[1] Defendant asserts that the only case to address the issue whether an at will contract is equivalent to a satisfaction contract is the *Osborne* opinion. It held that because, Osborne was a satisfaction employee, his employment was terminable at will. However, a different panel of this Court reached the opposite conclusion, holding that a distinction exists between the two types of contracts. *Adkins v Suburban Mobility Authority for Regional Transportation*, unpublished memorandum opinion of the Court of

Appeals, issued 3/10/95 (Docket No. 165636).