

STATE OF MICHIGAN
COURT OF APPEALS

ANTHONY H. STACK,

Plaintiff-Appellant,

v

K-MART CORPORATION,

Defendant-Appellee.

UNPUBLISHED
November 8, 1996

No. 175096
LC No. 89-375632
AFTER REMAND

Before: Michael J. Kelly, P.J., and Hoekstra and E.A. Quinnell,* JJ.

PER CURIAM.

Plaintiff appeals as of right an order of the Oakland Circuit Court granting summary disposition in favor of defendant. The trial court determined that no genuine issue of material fact existed with regard to plaintiff's claim that he was entitled to a bonus and stock options from defendant relative to his employment with defendant. We affirm.

Plaintiff was employed by defendant from 1963 to 1983. His employment was terminated in 1983, after the FBI investigated him for taking kickbacks from a supplier. Plaintiff was convicted in federal court of mail fraud and interstate transportation of security taken by fraud. These convictions were later reversed on the ground that depriving an employer of intangible rights did not constitute a federal offense. *United States v Stack*, 853 F2d 436 (CA 6, 1988).

Following the reversal of his federal convictions, plaintiff filed suit against defendant alleging wrongful discharge and that defendant breached a contract with plaintiff by refusing to pay him a bonus for his last year of employment and refusing to allow him to exercise his stock options. Defendant moved for summary disposition, and the trial court dismissed both claims.

On appeal, this Court affirmed the dismissal of plaintiff's wrongful discharge claim, but determined that summary disposition with respect to plaintiff's claim involving the bonus and the stock

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

options had been improperly granted for failing to exhaust administrative remedies. *Stack v K Mart Corp*, unpublished opinion per curiam of the Court of Appeals, issued 04/12/93 (Docket No. 131642).

Defendant then moved for summary disposition of plaintiff's stock option and bonus claim pursuant to MCR 2.116(C)(10), arguing that no genuine issue of material fact remained, and the trial court again granted defendant's motion.

On appeal, plaintiff contends that summary disposition was improperly granted on his claim for breach of contract because a question of fact existed as to whether plaintiff was contractually entitled to exercise his stock options and receive a bonus. We disagree.

Turning first to the stock options, provision 5(B)(v) of defendant's Incentive Stock Option Plan stated as follows:

Notwithstanding anything contained herein to the contrary, if it is determined by the [Compensation and Incentives] Committee (either before or after cessation of employment of an optionee) that fraud, dishonesty, or similar acts were committed by an optionee at any time while such optionee was in the employ of the Company or a Subsidiary, all options and all rights with respect to all options granted to such optionee shall immediately terminate and be null and void.

The Plan also stated that all determinations by the Compensation and Incentives Committee "shall be final and binding upon all persons." In the stock option agreements signed by plaintiff, he agreed to "comply with and be bound by all the terms and conditions contained in the Plan." Following defendant's internal investigation into the allegations that plaintiff accepted kickbacks, defendant's Compensation and Incentives Committee terminated all of defendant's stock options, and declared them null and void. Implicit in the termination of plaintiff's stock options was a finding that plaintiff had engaged in "fraud, dishonesty, or similar acts." Plaintiff claims that defendant's findings were incorrect, and that depriving him of his stock options on this basis constituted breach of contract. However, the proper question is not whether defendant's determinations as to plaintiff's misconduct were correct, but whether defendant could deny him stock options based upon its determination that plaintiff engaged in improper conduct. *Tobin v General Motors*, 17 Mich App 475, 482-483; 169 NW2d 644 (1969).

Because plaintiff agreed to be bound by all determinations of defendant's Compensation and Incentives Committee, his claim must fail. With regard to lawful matters affecting employment, employers and employees are free to bind themselves as they wish. *Thomas v John Deere Corp*, 205 Mich App 91, 94; 517 NW2d 265 (1994). In *Thomas*, this Court affirmed a grant of summary disposition in an employer's favor where an employee alleged that his dismissal was a breach of his employment contract. In rejecting the employee's arguments, this Court recognized that an employer may reserve for itself sole authority to decide by committee whether termination of an employee is justified. *Id.* at 95. This Court, without evaluating whether it believed that just cause for termination actually existed, concluded that because the employer had reserved for itself the authority to determine whether just cause existed for termination, and had made such a determination in the manner provided in

the contract, the employee's claim of breach of contract was without merit. *Id.* See also *Loftis v GT Products, Inc*, 167 Mich App 787, 793; 423 NW2d 358 (1988).

In the instant case, plaintiff voluntarily entered into agreements which gave defendant's Compensation and Incentives Committee the discretionary power to determine whether to deny plaintiff stock options based on "fraud, dishonesty, or similar acts." The agreements at issue being lawful, plaintiff was bound to abide by the decision of the Committee. Accordingly, the trial court properly upheld defendant's termination of plaintiff's stock options, and properly granted defendant's motion for summary disposition on the issue.

Plaintiff next contends that the trial court erred in determining that no genuine issue of material fact existed with regard to plaintiff's entitlement to bonus pay. In deciding this issue, the trial court found that "there is no contract or policy in force here which requires Defendant to pay Plaintiff a bonus." (emphasis in original.) We agree.

Under MCL 408.471(e); MSA 17.277(1)(e), a bonus constitutes a "fringe benefit." Pursuant to MCL 408.473; MSA 17.277(3), any fringe benefits shall be paid "in accordance with the terms set forth in the written contract or policy." Although plaintiff received a bonus every year he worked for defendant, he admitted that there was no written policy regarding bonus pay. The letter upon which plaintiff relies clearly indicates that the awarding of bonus pay, if any, is left to the discretion of defendant. Thus, defendant's decision not to award a bonus is not actionable. See *Siporin v Adler*, 364 Mich 549, 551-553; 111 NW2d 848 (1961). Because there was no contractual provision requiring defendant to pay plaintiff a bonus, summary disposition in favor of defendant was also properly granted on this issue as well.

Affirmed.

/s/ Michael J. Kelly

/s/ Joel P. Hoekstra