STATE OF MICHIGAN

COURT OF APPEALS

JAMES KAMMERER,

Plaintiff-Appellant,

v

MEADOWBROOK, INC., d/b/a
MEADOWBROOK INSURANCE GROUP,

Defendant-Appellee.

UNPUBLISHED

No. 183261
Oakland Circuit Court
LC No. 94-484708-CK

Before: McDonald, P.J., and White and P.J. Conlin,* JJ.

WHITE, J. (dissenting).

I respectfully dissent. My disagreement with the majority stems largely from the procedural history of this case.

The relevant count of plaintiff's complaint alleged that during the course of pre-employment negotiations, defendant promised plaintiff that he would not be terminated except for good cause related to plaintiff's performance, that plaintiff accepted defendant's express promise of continued employment absent good cause for termination and began to work for defendant in reliance on that promise, and that defendant breached that promise.

Three weeks after plaintiff filed his complaint, defendant moved for summary disposition under MCR 2.116(C)(10), in lieu of filing an answer. Regarding the relevant count of plaintiff's complaint, defendant's motion argued solely that plaintiff was precluded as a matter of law from asserting that he was subject to a just-cause employment contract because an employer may unilaterally change its written policy from just-cause to at-will, provided that employees are given reasonable notice of the policy change, citing *In Re Certified Question (Bankey v Storer Broadcasting Co)*, 432 Mich 438; 443 NW2d 112 (1989).[1] Defendant argued, and it is undisputed, that plaintiff signed an acknowledgment of receipt of defendant's March 1991 Employee Benefits Manual on May 14, 1991. Defendant attached a copy of the signed acknowledgment form to its motion:

I, the undersigned employee of Meadowbrook, Inc., hereby acknowledge the following:

1. I have received a copy of the Employee Benefits Manual of Meadowbrook, Inc.;

2. I understand that the Employee Benefits Manual reflects the current employment benefits and polices of Meadowbrook, Inc., and that it replaces and supersedes any prior Benefits Books or Office Manuals; and

3. I understand that the employment benefits can be changed by the company at anytime.

4. I understand that the Employee Benefits Manual is the property of Meadowbrook, Inc., and shall be returned to the Personnel Manager prior to termination of employment.

Defendant also attached to its motion one page of the 1991 manual, which states, among other things: "The statements contained in this Handbook do not limit the right of either the Company or the employee to terminate the employee's employment or compensation, with or without cause, at any time." Just above that paragraph, the handbook states:

> As a guideline, [this handbook] is not intended to become expressly or implicitly a part of any agreement or contract of employment. . .

Defendant did not argue in its brief in support of summary disposition that the statements defendant allegedly made to plaintiff were insufficient to create an employment contract terminable only for just cause. Defendant's brief stated:

> Plaintiff's Complaint alleges that he had a just-cause employment contract predicated upon pre-employment negotiations. (P's Complaint, ¶¶ 8 & 9). Even if Plaintiff did have a just-cause employment contract prior to May 14, 1991, under well established law, Plaintiff became an employee at will when he signed for Meadowbrook's March , 1991, employment manual. Accordingly, Meadowbrook is entitled to judgment as a matter of law with respect to Plaintiff's breach of just-cause contract claim.

The pertinent portion of plaintiff's brief in response to defendant's motion for summary disposition began by stating:

> In his affidavit, KAMMERER states:
>
> "In response to my specific inquiries about job security and stability, I was promised job security." The promise was made by[] the owner of MEADOWBROOK. Paragraph 4, page 2.
>
> The affidavit recounts <u>further</u> discussion of an express nature about job security for KAMMERER:

> MEADOWBROOK was described as a stable and secure employer that was concerned with maintaining a family close-knit philosophy. I was told the emphasis of the company was on close employee-employer relationships. The founder of MEADOWBROOK, Mr. Segal, was still active in the business. In 1988, the current President, Bob Engle, was with MEAOWBROOK eleven or twelve {11-12} years. I was told that even the President of SIRS who I was to be hired to replace left his employment voluntarily after eight {8} years to move back to his home state of Virginia. I was told by Mr. Segal that if I went with MEADOWBROOK than [sic] I could [sic] forward to retiring from MEADOWBROOK. Paragraph 4, page 2. [Underlining added.]

and argued that there is a clear line between wrongful discharge claims predicated on oral or written express agreements for just-cause employment and wrongful discharge claims predicated on the policy manual/legitimate expectations leg of *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579; 292 NW2d 880 (1980); that the case defendant relied on in its motion, *Bankey*, recognized the two distinct types of claims, but because only the latter was involved factually, did not address the express agreement prong, and that the rules and cases concerning the legitimate expectations prong of *Toussaint* are inapplicable here because the employment manual changed by defendant in 1991 "has nothing to do with his express promise." Plaintiff's brief did not address the issue whether defendant's alleged statements were sufficient as a matter of law to create a genuine issue whether an oral express contract to terminate only for just cause was created, as defendant had not raised this issue in its brief.

At the hearing on defendant's motion, in addition to addressing the issue upon which defendant's motion was based -- the 1991 policy manual -- defense counsel asserted that the "only two factual allegations" plaintiff makes—that defendant's owner allegedly told plaintiff that defendant was a stable and secure employer and that plaintiff could look forward to retiring from defendant—were untrue, and assuming they were true "[t]hose words don't make a just-cause contract." Counsel argued that *Rowe* required clear language and an intent on both sides to be bound by the language in order to raise a question of fact.

Plaintiff's counsel's oral argument addressed the distinction between the two theories of recovery in employment law, one being implied contract based on reasonable expectations derived from written policy manuals, and the second being express contract based on express promises. Counsel asserted that plaintiff alleged the latter, an express contract, and relied on the complaint and plaintiff's affidavit, claiming both provided adequate support for the allegation. Counsel then addressed the distinction between the two types of cases in the case law, asserting that plaintiff negotiated for and secured an express oral promise of job security, and that this was stated in his affidavit. Counsel also addressed the language of the signoff acknowledgment sheet signed by plaintiff in 1991, asserting that it did not modify the express contract. Counsel asserted that discovery had not even begun and summary disposition would be premature. Counsel repeated several times that job security was important to plaintiff and that he expressly secured a promise of job security, "and we stated that by Affidavit and we

state that in our Complaint." Counsel referred to the statements regarding the former president and plaintiff's retiring from defendant, described in plaintiff's affidavit, as additional information or statements supporting the promise of job security. The court granted defendant's motion without elaboration.

I

Viewing the case in the context of this procedural history, I conclude that the circuit court erred in granting summary disposition.[2]

A

Summary disposition should not have been granted on the grounds asserted in defendant's written motion. In *Bullock v Automobile Club of Michigan*, 432 Mich 472, 482-483; 444 NW2d 114 (1989), the Supreme Court distinguished between a promise implied in law arising from the employer's creation of legitimate expectations and an oral contract which can be formed on the basis of an express promise of job security or a promise implied in fact and, referring to *Bankey*, stated:

> In *In re Certified Question, Bankey v Storer Broadcasting*, we have today said that the obligation recognized by the policy manual leg of Toussaint does not preclude employers from amending employment manuals. *In re Certified Question* does not, however, do more than establish that discharge-for-cause policy provisions may be modified on the basis of "reasonable notice of the change . . . uniformly given to affected employees," issues which the defendant's affidavit understandably does not address. **It does not establish that amendments to employment manuals must be construed to be modifications of a distinct, express, or implied-in-fact contract.**
>
> It is true, as the defendant contends, that indefinite hirings have been considered to be terminable at will. However, as recognized by both the *Toussaint* majority and dissent, this rule, properly conceived, has never been more than one of construction. Bullock has alleged an oral contract of employment containing a discharge-for-cause provision and the defendant's affidavits do not rebut that allegation. This allegation sets forth a claim under the holding in *Toussaint* that the express promise of the employer *apart* from the employment manual may create a jury-submissible issue.
>
> . . . . as to plaintiff's allegation of an *oral* promise, plaintiff's pleadings, which must be deemed as true, allege a breach of discharge-for-cause employment under *Toussaint*. **The employment manuals submitted by the defendant, to the extent that they do not constitute unilateral modification of the policy basis of plaintiff's claim, must be seen on this record as an offer to modify the discharge-for-cause provision of Bullock's alleged express contract and to not entitle the defendant to summary disposition.**

> The determination of the effect of these manuals on Bullock's allegations must await further discovery and perhaps trial. We do not, at this point, know basic facts such as who made the alleged promises to Bullock and under what circumstances the promises were made. Nor do we know whether the policy manuals referenced in the Cruise affidavit constituted an offer of modification, and, if so, whether there is a genuine issue of fact as to whether Bullock accepted the offer. Finally, we do not know at this point whether the alleged promise of "a lifetime job as long as he did not steal" was either intended by the defendant or understood by Bullock in the literal sense which disturbs the dissent.
>
> In sum, **to the extent that plaintiff relies on policy manuals as the basis for his claim,** *In re Certified Question* provides the guidelines for resolution on remand as to whether unilateral change in the policy manuals would be effective. **However, defendant's assertion of a change in policy manuals does not, on this record, establish that there is no genuine issue of material fact as to whether the plaintiff had an enforceable contract containing a limitation on discharge. The defendant is not entitled to judgment as a matter of law.** [*Bullock*, 432 Mich At 483-485. Citations omitted and emphasis added.]

As is the instant case, *Bullock* involved a 2.116(C)(10) motion filed before the defendant's answer and any meaningful discovery took place.[3] 432 Mich at 474.

Subsequent to *Bullock*, the Supreme Court reaffirmed that two separate analyses apply to express oral and written agreements as opposed to legitimate expectations claims based on employer policies in *Rowe v Montgomery Ward & Co*, 437 Mich 627, 651; 473 NW2d 268 (1991)("If plaintiff had a prior express contract to be discharged only for cause, her assent would be required to modify the agreement."), and this Court has more recently done so as well in *Barnell v Taubman Co*, 203 Mich App 110, 116; 512 NW2d 13 (1994):

> There are two alternative theories that may support a claim of wrongful discharge. The first theory is grounded in contract principles. The contract theory is shown by the existence of an express agreement, oral or written. *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579, 598; 292 NW2d 880 (1980). The second theory is termed the legitimate expectations theory and is based on the employee's legitimate expectations of continued employment absent just cause for termination arising out of the employer's policies and procedures. *Id.*

Barnell, like the instant case, was an appeal from a grant of summary disposition to the defendant employer under MCR 2.116(C)(10). The plaintiff alleged an express just-cause contract formed during the recruitment process. After the plaintiff began working with the defendant, the defendant distributed a memorandum stating that all employment was strictly at will. The plaintiff did not sign the acknowledgment form that accompanied the memorandum, but acknowledged receiving the memorandum. Approximately one year after the memorandum was distributed, the defendant

terminated the plaintiff's employment without prior notice, saying to the plaintiff merely that "things weren't working out." *Id.* at 114. The circuit court granted summary disposition to the defendant under MCR 2.116(C)(10).

On appeal, this Court concluded that plaintiff alleged sufficient evidence from which reasonable minds could find that a reasonable promisee would interpret the statements as a promise forbidding termination absent just cause, and went on to address whether the employer could unilaterally change the nature of the employment relationship with the later memorandum providing for employment at-will. *Id.* at118. The Court found determinative the fact that the plaintiff did not sign the acknowledgment form, because it "evidenced an intent not to assent to the modification of the express agreement that discharge would be only for cause," further noting that "there are no other acts of the parties, including written and spoken words, that indicate that plaintiff assented to modify the express agreement." *Id*. at 119.

In the instant case, plaintiff argues that the acknowledgment form that he signed merely acknowledged that he had received a copy of the 1991 Employee Benefits Manual and was not a sign-off on an at-will disclaimer. Plaintiff further argues that it is a question of fact whether the oral express agreement was subsequently modified by an acceptance by plaintiff of an offer to modify the agreement.

I agree with plaintiff that viewing the facts in a light most favorable to plaintiff, defendant did not establish that there is no genuine issue of material fact or that as a matter of law plaintiff agreed to modify an express oral agreement and/or accept an at-will disclaimer. The Employee Benefits Manual acknowledgment form stated that the 1991 manual superseded other manuals and handbooks, not that it superseded express oral or written agreements. Further, language preceding the at-will language contained inside the manual states that the 1991 Manual "is not intended to become expressly or implicitly a part of any agreement or contract of employment." The 1991 Manual thus does not foreclose the co-existence of separate pre-existing agreements or employment contracts by its own terms. Where there is an express contract, the employee's assent is required to modify the agreement, and the assent must be manifest by words and deeds. *Barnell, supra* at 118-120. Whether plaintiff accepted an offer to modify the alleged express oral agreement by signing the 1991 Employee Benefits Manual acknowledgment form must be determined from the facts and circumstances, and is a question for the factfinder. *Farrell v Automobile Club of Michigan*, 187 Mich App 220, 225-228; 466 NW2d 298 (1990).

B

Regarding the issue upon which the majority affirms, the asserted lack of a genuine issue regarding the existence of an express oral contract for just-cause employment, I conclude that given the procedural history of the case, and the record, it is unfair to conclude that plaintiff will be unable to provide factual support for his claim. Plaintiff's complaint clearly alleged an express promise for just-cause employment. Plaintiff's affidavit stated that he was concerned about job security and that in response to specific inquiries about job security he was promised job security. On the face of the affidavit, it is unclear whether the promise of job security is a conclusion drawn by plaintiff based on the

specific representations that the former president left by his own choice after eight years, and that plaintiff could look forward to retiring from defendant, or whether the assertion of a promise is based on a specific promise of job security in response to specific questions regarding the subject matter, the statements regarding the former president and retirement being merely additional statements. Plaintiff's brief and oral argument in the circuit court seem to place the latter interpretation on the affidavit. While I agree that had the issue been properly raised, briefed and explored below, a vague reference to job security would not suffice under *Rowe*, here plaintiff was not asked to explain what was meant by "specific inquiries regarding job security and stability" or his assertion that he was "promised job security." Plaintiff's affidavit was framed in the context that he was challenging the argument that his asserted just-cause contract was modified by the 1991 manual. It was not framed in the context of a challenge to the existence of a promise of just-cause employment. Thus, the generality of his assertions regarding job security should not be the basis for dismissing his case.

Under these circumstances, and given that plaintiff's complaint alleged a promise of just-cause employment, and defendant presented no affidavits or documentary evidence rebutting plaintiff's allegations, I would remand to allow defendant to properly raise the issue, and plaintiff to properly respond to the issue, whether defendant's alleged statements and promises were clear and unequivocal and would permit a reasonable juror to find that a reasonable promisee would interpret the statements as a promise of termination only for just cause. *Barnell,* 203 Mich App at 116.

/s/ Helene N. White

[1] Defendant also cited *Ledl v Quick-Pick Food Stores, Inc*, 133 Mich App 583; 349 NW2d 529 (1984), for the proposition that an employee who was required to sign a memorandum containing the employer's new policy, 7 ½years after being hired, got sufficient notice. However, *Ledl* was decided pre-*Bullock* and the other cases discussed *infra*. Defendant lastly cited *Scholz v Montgomery Ward*, 437 Mich 83; 468 NW2d 845 (1991), for the proposition that an employee who signs for an employment manual which indicates that the employee is employed at-will may not bring a cause of action for breach of a just-cause employment contract. In *Scholz*, unlike the instant case, the employee sign-off sheet at issue itself stated that the employee had read, understood and agreed that her employment could be terminated at any time with or without cause. *Id.* at 87. In the instant case, the acknowledgment form that plaintiff signed acknowledging receipt of the 1991 Employee Benefits Manual had no such language, as discussed *infra*.

[2] The circuit court's ruling does not provide insight into its reasoning.

[3] Although the majority states that plaintiff failed to raise in the trial court the issue of the motion being granted prematurely, my review of the record leads me to conclude that plaintiff asserted that defendant's motion was premature several times. Plaintiff's answer to defendant's motion states in paragraph one that defendant had filed its motion at the beginning of the case and when the parties had taken no discovery. At the hearing on defendant's motion, plaintiff's counsel stated: ". . . there's been virtually no discovery taken in this case, no depositions, it's only a month old." Plaintiff's counsel later

stated: "Discovery is not completed in this case, obviously we have not begun it yet." Counsel also stated "I think it's premature in this case to grant a motion for summary disposition…". Additionally, plaintiff's brief in response to defendant's motion stated in a footnote, "In Bullock, as in the case at bar, no discovery was taken . . ."