STATE OF MICHIGAN

COURT OF APPEALS

WILL ROGERS,

Plaintiff-Appellee/
Cross-Appellant,

v

DAVID POWERS and PURINA MILLS, INC.,

Defendants-Appellants/
Cross-Appellees,

and

MARTIN SMILEY and JAMES MILLER,

Defendants-Appellees.

UNPUBLISHED
August 29, 1997

No. 183073
Ingham Circuit Court
LC No. 93-073732-CK

Before: Fitzgerald, P.J., and MacKenzie and Taylor, JJ.

PER CURIAM.

Plaintiff, an African-American, was discharged from his employment with defendant Purina Mills and brought this action claiming racial discrimination under the civil rights act, MCL 37.2101 *et seq*.; MSA 3.548(101) *et seq*., and breach of a just-cause employment contract. Following a bench trial, he was awarded $359,602 in lost future wages, $48,168 in lost past wages, $10,000 for mental distress and anxiety, $33,478.37 in attorney fees and costs, and $21,789.58 in mediation sanctions. Defendants Purina Mills and David Powers, Purina's production manager at the Lansing Plant at the time plaintiff was terminated, appeal as of right. Plaintiff cross-appeals that portion of the trial court's judgment denying plaintiff prejudgment interest on the future wages award, as well as its order granting summary disposition in favor of defendants James Miller and Martin Smiley, who at different times had supervised plaintiff. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

Defendants Purina and Powers first argue that the trial court erred denying their motion for summary disposition on plaintiff's wrongful discharge claim. We disagree. While plaintiff's employment application contained express at-will language, the printed handbook in effect at the time of plaintiff's employment also contained language suggesting a for-cause relationship. Powers admitted that he told his employees that he would only terminate their employment for cause. The October 1991 handbook that purportedly memorialized policies that were in effect while plaintiff worked at Purina also stated in part that "after you have completed your probationary period, your employment will not be terminated except for cause or as defined elsewhere in this handbook." A question of fact therefore remained regarding the true nature of plaintiff's employment relationship with Purina, and the trial court did not abuse its discretion in denying defendants' motion. *Dalton v Herbruck Egg Sales Corp*, 164 Mich App 543, 547; 417 NW2d 496 (1987).

Defendants next argue that the trial court erred in denying their motion for directed verdict after plaintiff's proofs had been completed. Again, we disagree. If a just-cause contract is established, the burden of proof shifts to the defendant to show that it had just cause to terminate an employee. *Rasch v East Jordan*, 141 Mich App 336, 340-341; 367 NW2d 856 (1985). Here, plaintiff made a prima facie case that he had a just-cause contract with Purina, so that defendants bore the burden of establishing just cause for plaintiff's discharge. Under these circumstances, the trial court did not err in denying defendants' motion for a directed verdict.

Defendants also contend that the trial court erred in finding at the conclusion of the trial that plaintiff had a just-cause employment contract with Purina. Again, we disagree. We review a trial court's findings of fact for clear error. *Giordano v Markovitz*, 209 Mich App 676, 679; 531 NW2d 815 (1995). Although the employment application completed by plaintiff contained express at-will language, the employee handbook and testimony of several witnesses supported the conclusion that there was a just-cause, rather than at-will, employment relationship. The trial court did not clearly err in finding that a just-cause employment relationship existed. Defendants' reliance on *Stopczynski v Ford Motor Co*, 200 Mich App 190, 193-196; 503 NW2d 912 (1993), is not persuasive. *Stopczynski* is distinguishable because that opinion addresses the specific effect of the adoption of a disciplinary procedure rather than the overall employee relationship relied upon by the trial court in this case.

Defendants claim that, even if the employment relationship required some type of cause to fire plaintiff, Purina's supervisory personnel had sole discretion to determine what qualified as cause supporting discharge, citing *Thomas v John Deere Corp*, 205 Mich App 91; 517 NW2d 265 (1994). This claim is also without merit. The passage in *Thomas* relied on by defendants is dicta, and, in any event, our Supreme Court has stated that a promise to terminate only for cause would be illusory if the employer were permitted to be the sole judge of the propriety of the discharge. *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579, 621; 292 NW2d 880 (1980).

Defendants further argue that even if plaintiff had a just-cause employment contract with Purina, the trial court erred in determining that plaintiff was fired without just cause. Again, we disagree. Although plaintiff violated the rules of conduct on two occasions by failing to notify his supervisor before his absence from work, the record demonstrates that other employees violated similar work rules and

were not disciplined. An employer who only selectively enforces rules or policies may not rely on a violation of those rules to support a decision to terminate. *Toussaint, supra,* 408 Mich 621. Consequently, the trial court did not clearly err in finding that plaintiff was terminated without cause.

Next, defendants contend that the trial court clearly erred in finding that plaintiff was the subject of racial discrimination. This claim is also without merit. The record supports the trial court's conclusion that plaintiff was treated differently than similarly situated white employees. Further, some evidence suggested that Purina's supervisory personnel stated an intention to fire plaintiff and the only other African-American employee at the plant. We conclude that the trial court's finding was not clearly erroneous.

Defendants next argue that the trial court erred in awarding plaintiff $359,602 in future wages based on the finding that plaintiff would have remained employed with Purina until retirement. The decision to award future wages rests in the sound discretion of the trial court. *Riethmiller v Blue Cross & Blue Shield of Michigan,* 151 Mich App 188; 390 NW2d 227 (1986); *Ritchie v Michigan Consolidated Gas Co,* 163 Mich App 358; 413 NW2d 796 (1987). An abuse of discretion will only be found if an unprejudiced person, upon considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. *Medbury v Walsh,* 190 Mich App 554, 557; 476 NW2d 470 (1991). We find no abuse of discretion on the facts of this case.

So-called "front pay" damage awards are a substitute for reinstatement of employment after an employee has been illegally or wrongfully discharged. See *Stafford v Electronic Data Systems Corp,* 741 F Supp 664, 666 (ED Mich, 1990). Front pay awards are permissible under the civil rights act and in a *Toussaint* case, but ordinarily should not be awarded unless reinstatement is not feasible. *Riethmiller, supra; Ritchie, supra.* In this case, defendants do not argue that reinstatement would be a feasible remedy, and the record makes it clear it would not. After his termination, plaintiff sought reinstatement via Purina's grievance procedure, but the company completely shunned his attempt to exercise that remedy. Moreover, in light of the trial court's finding that the blatantly racist treatment plaintiff was forced to bear at the workplace was both malicious and willfully inflicted, reinstatement is not an appropriate remedy.

Having determined that reinstatement is not a viable remedy in this case, the question becomes whether the trial court abused its discretion in awarding front pay in light of plaintiff's employment prospects and his 28-year future work life. *Riethmiller, supra,* pp 200-201; *Ritchie, supra,* p 374. The trial court concluded that, but for the fact that he is an African-American, plaintiff had a reasonable expectation of remaining in his job at Purina until retirement. The record supports this conclusion. Plaintiff had maintained a long-term employment relationship before he was employed at Purina, working at Purina (in the absence of wilful discrimination) carries a measure of job security in that there is a for-cause employment policy, plaintiff tried to remain employed by Purina after his discharge, he obtained new work once he was terminated and has kept that job, and similarly situated white employees of Purina – including those with a history of job misconduct -- have held long-term employment there. Plaintiff's prospects of obtaining other employment were also taken into account by the trial court. Plaintiff was not awarded one hundred percent of his wages earned at Purina; rather, he

was awarded the difference between the wages he earned at Purina and those earned at his new employment.

The remaining factor to consider is plaintiff's 28-year work life expectancy. While lifetime front pay awards for younger workers may in some instances be overly speculative, such an award may be deemed appropriate where it can be concluded that the plaintiff would have remained in the defendant's employ for the remainder of his working years. *Stafford, supra,* p 789, quoting *Rengers v WCLR Radio Station,* 661 F Supp 649 (ND Ill, 1986). As noted above, the trial court found that to be the case here. Prior case law from this Court also suggests that the award was within the trial court's discretionary power. In *Goins v Ford Motor Co,* 131 Mich App 185; 347 NW2d 184 (1983), for example, the plaintiff worked for Ford for five months before he was fired. A jury found that the plaintiff was wrongfully discharged and awarded him $450,000 as forty years' differential front pay. This Court affirmed, holding that the award was not overly speculative. *Id.*, p 199. Considering the facts of this case and the caselaw of this State, we find no abuse of discretion in the trial court's decision to award front pay or in the amount of the award. We note, however, that even in the absence of a defense request, a trial court in an employment discrimination case is required to instruct a jury on the reduction of an award for future damages to present value or to reduce the award to present value itself. *Howard v Canteen Corp,* 192 Mich App 427, 441; 481 NW2d 718 (1991). Accordingly, we must remand for the limited purpose of allowing the trial court to reduce its award of front pay to present value.

In a related argument, defendants claim that the award of front pay was flawed because plaintiff failed to mitigate his damages when he went to work for a title insurance company at a lower rate of compensation than he received as a "low-level, semi-skilled laborer . . . in a feed mill." However, defendants bore the burden of demonstrating that substantially equivalent employment was available and that plaintiff failed to use reasonable care and due diligence in seeking such employment. *Morris v Clawson Tank Co,* 221 Mich App 280, 287; 561 NW2d 469 (1997); *Burtka v Allied Integrated Diagnostic Services, Inc,* 175 Mich App 777, 780; 438 NW2d 342 (1989). Defendants do not point to any evidence demonstrating that plaintiff failed to mitigate his damages by seeking comparable employment other than his testimony indicating that he intends to continue working for his current employer. This does not demonstrate that equivalent employment was in fact available and that plaintiff chose not to avail himself of the opportunity. Thus, the trial court did not err.

In his cross-appeal, plaintiff argues that the trial court erred in denying prejudgment interest on the future damages award. We agree. Prejudgment interest may be awarded on future damage awards arising out of a Michigan civil rights act claim pursuant to MCL 600.6013(1); MSA 27A.6013(1). *Paultich v Detroit Edison Co,* 208 Mich App 656, 662-663; 528 NW2d 200 (1995). See also *Phinney v Verbrugge,* 222 Mich App 513, 542; 564 NW2d 532 (1997). On remand, therefore, the trial court, after reducing plaintiff's front pay to present value, shall compute and add prejudgment interest as a component of the revised award.

Plaintiff also argues that the trial court erred in granting Smiley's and Miller's motion for summary disposition. We agree. In his complaint, plaintiff alleged racial discrimination against all the

named defendants, including Miller and Smiley, due to their treating plaintiff differently from similarly situated white employees. Standing alone, even without termination, such discrimination would be actionable. *Merillat v Michigan State Univ*, 207 Mich App 240, 247; 523 NW2d 802 (1994). Whether these defendants participated in the decision to terminate plaintiff is not dispositive regarding their potential liability under the civil rights act. Therefore, the trial court erred in granting summary disposition to Miller and Smiley.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Barbara B. MacKenzie