STATE OF MICHIGAN

COURT OF APPEALS

WALTER T. STACEY,

Plaintiff-Appellant,

v

PROVIDENCE HOSPITAL,

Defendant-Appellee.

UNPUBLISHED
November 4, 1997

No. 197099
Oakland Circuit Court
LC No. 95-504060-CK

Before: Corrigan, C.J., and Griffin and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals from the trial court's order granting summary disposition on his breach of contract claims. We reverse and remand for further proceedings in accordance with this opinion.

Although the trial court did not indicate the basis for its ruling, it is apparent that the motion for summary disposition was granted pursuant to MCR 2.116(C)(10). We review a trial court's determination of a motion for summary disposition pursuant to MCR 2.116(C)(10) de novo. *Paul v Lee*, 455 Mich 204, 210; ___ NW2d ___ (1997). When reviewing a motion for summary disposition pursuant to MCR 2.116(C)(10), we review all relevant documentary evidence and determine whether a genuine issue of material fact exists. *Id*. All reasonable inferences are drawn in the nonmovant's favor, giving that party the benefit of any reasonable doubt. *Id*.

Plaintiff first argues that genuine issues of fact exist regarding whether his just-cause employment contract was breached by defendant when plaintiff's position was chosen for elimination. Specifically, plaintiff claims that genuine issues remain regarding whether the reasons given by defendant for eliminating plaintiff's position were a pretext. We agree. Normally, a bona fide reduction in force is a legitimate defense to a wrongful discharge claim. *McDonald v Stroh Brewery Co*, 191 Mich App 601, 608-609; 478 NW2d 669 (1991). The Supreme Court recently reiterated that a workforce reduction for economic reasons constitutes termination for "just cause." *Lytle v Malady*, 456 Mich 1, 20; 566 NW2d 582 (1997). There is an exception to this rule, however. An employee whose position was terminated as part of an alleged plan to reduce the workforce may maintain a cause of action for

breach of contract if he challenges the economic reason for the reduction in force with supporting evidence. *Id*. at 21; *Ewers v Stroh Brewery Co*, 178 Mich App 371; 443 NW2d 504 (1989).

In this case, plaintiff offered evidence to challenge that an economic reduction in force was the true reason that his position was eliminated. The evidence established that numerous employees were added to defendant's financial departments after his termination; that his duties were not eliminated, but were undertaken by other employees; that defendant created two new reimbursement analyst positions that had the same classification, title, job code and pay grade as plaintiff's position; that he was informed that other positions were eliminated as a means of terminating the persons who held them; that defendant did not follow its own procedure in eliminating his particular position; and that his supervisor had requested that he resign several months before choosing his position for elimination. The evidence presented supports plaintiff's claim that his position was not chosen for financial reasons, but in order to eliminate him personally from defendant's employ. In particular, the testimony that defendant's financial departments grew after plaintiff's position was eliminated casts doubt on the claim that economic downsizing motivated the elimination of his position. The evidence presented also supports the inference that plaintiff's job duties were essential to defendant, as they continued to be part of defendant's operation. Defendant countered plaintiff's evidence by claiming that plaintiff's position was not necessary because his duties were absorbed by other positions; that the newly created positions were different than the position plaintiff had held; and that plaintiff's supervisor had never asked him to resign. However, we find that the conflicting evidence and testimony establishes a question of fact as to whether plaintiff's position was chosen for elimination in order to meet budgetary goals or in order to terminate plaintiff specifically. Where a question of fact is present, summary disposition is inappropriate.

Plaintiff next argues that questions of fact were presented with regard to whether defendant breached his contract by failing to follow its own reassignment and preferential treatment policies.[1] We agree. "[W]ritten statements by an employer of its personnel policies and procedures can give rise to contractual rights." *King v Michigan Consolidated Gas Co*, 177 Mich App 531, 536; 442 NW2d 714 (1989). In this case, defendant's policies with regard to job reassignment and preferential placement were in writing and were part of plaintiff's contract. Defendant does not contest that these policies applied to plaintiff. While plaintiff was placed on reassignment and preferential treatment status, he applied for numerous available positions. Testimony that he met the minimum qualifications for several of these positions was presented. The testimony and evidence showed that plaintiff should have been allowed to interview for positions that were comparable or lower grade and should have been at least considered for higher grade positions if he was minimally qualified. Plaintiff was not interviewed for any of the positions for which he applied. Moreover, the testimony and evidence was conflicting with regard to whether he was even considered for any of the positions for which he applied. Also, we note that defendant argues that plaintiff was considered, but was rejected because of past performance deficiencies. Rejection on this basis is arguably a violation of defendant's policies that provide for preferential placement in a new job when the employee has a satisfactory work record. By presenting evidence that he was not treated in accordance with the language of these policies, plaintiff has created

questions of fact regarding whether defendant breached its contractual obligations to plaintiff. See *Foehr v Republic Automotive Parts, Inc*, 212 Mich App 663, 665; 538 NW2d 420 (1995).

Reversed and remanded. We do not retain jurisdiction.

/s/ Maura D. Corrigan
/s/ Richard A. Griffin
/s/ Joel P. Hoekstra

[1] We note that plaintiff's complaint failed to allege this specific theory of recovery. Nevertheless, during discovery both parties pursued this additional claim. Indeed, in its motion for summary disposition, defendant addressed the issue and requested summary disposition on it. Because we conclude that there are genuine issues of material fact in this regard, upon remand plaintiff should be allowed to amend his complaint to formally raise this theory of breach of contract as provided by MCR 2.118(A)(2).