

STATE OF MICHIGAN
COURT OF APPEALS

WILLIAM C. KLAASEN,

Plaintiff-Appellant,

v

TOWNSHIP OF ST. CLAIR and TOWNSHIP OF
ST. CLAIR SUPERVISOR,

Defendants-Appellees.

UNPUBLISHED

September 21, 2006

No. 261190

St. Clair County Circuit Court

LC No. 02-001467-CK

Before: Cavanagh, P.J., and Markey and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting directed verdict in defendant's¹ favor on plaintiff's claim of wrongful discharge in violation of public policy. We affirm. Plaintiff also appeals a previously issued order granting partial summary disposition on his claim that defendant wrongfully terminated his employment as building code official without just cause. We reverse.

Plaintiff first argues on appeal that the trial court erroneously dismissed his claim of wrongful termination after concluding that he was not defendant's code official, but an at-will employee. After review de novo of the dismissal decision, we agree. See *Williams v AAA Michigan*, 250 Mich App 249, 257; 646 NW2d 476 (2002).

Plaintiff worked for defendant as a building inspector for about fourteen years. It is uncontested that plaintiff did not have an employment contract that contained a "provision for a definite term of employment or a provision forbidding discharge absent just cause." *Rood v Gen Dynamics Corp*, 444 Mich 107, 117; 507 NW2d 591 (1993). Therefore, any claimed employment contract is "presumptively terminable at the will of either party for any reason or no reason at all." *Id.* at 116. However, plaintiff claims that he could only be terminated for just cause because defendant adopted the Building Officials and Code Administrators (BOCA) National Building Code and plaintiff was the building "code official."

¹ We refer to St. Clair Township as "defendant" because the issues on appeal relate to this defendant.

The BOCA code relied on by defendant in support of its motion for summary dismissal was the 1996 building code which provided, in relevant part:

104.1 Code official: The department of building inspection is hereby created and the executive official in charge thereof shall be known as the code official.²

104.2 Appointment: The code official shall be appointed by the chief appointing authority of the jurisdiction; and the code official shall not be removed from office except for cause and after full opportunity to be heard on specific and relevant charges by and before the appointing authority. [The BOCA National Building Code, 1996 Edition, p 1.]

Defendant argued in its motion that in 1989, plaintiff was only appointed by the Board of Trustees as defendant's building inspector, not its "code official." Defendant relied on the July 3, 1989, Board minutes in support of its assertion which indicated as follows: "Clerk Skonieczny made a motion to appoint William C. Klaassen as St. Clair Township Building Inspector. Supported by Treasurer Wiley. Motion carried." Defendant admitted in its motion that "[a]s the Township building inspector, Klaassen was required to review construction plans, issue building permits, perform all necessary building inspections, including the final inspection, sign and issue a certificate of occupancy where applicable." But, defendant argued, relying on this Court's holding in *Savage v Township of Lyon*, unpublished opinion per curiam of the Court of Appeals, issued November 1, 2002 (Docket No. 230312), merely performing some of the same duties as a "code official" did not cause plaintiff to become defendant's "code official."

In response to defendant's motion for summary dismissal, plaintiff argued that for fourteen years he was defendant's only building official—the sole person in charge of enforcing defendant's building code. In fact, he was a certified and registered building official, building inspector, and plan reviewer as was disclosed to the State of Michigan in compliance with MCL 338.2312. Plaintiff further argued that, contrary to this Court's decision in *Savage, supra*, the BOCA code does not mandate that one be "formally" appointed as the "code official." To the contrary, plaintiff argued, it provides that, "regardless of what you call the person in charge of the building department, upon being appointed to carry out those duties, that person becomes the 'code official.'" The trial court agreed with defendant, finding *Savage, supra*, persuasive and holding that, because plaintiff failed to submit evidence of formal appointment, he could not be considered defendant's "code official" and, thus, was not entitled to benefit from the BOCA code's just cause provision. After review of the evidence presented in a light most favorable to plaintiff, we conclude that plaintiff established, at least, that a genuine issue of material fact

² The commentary to this section provides: "The executive official in charge of the building department is named the 'code official' by this section. In actuality, the person who is in charge of the department may hold a different title, such as building commissioner, building inspector, construction official, etc. For the purpose of the code, on being appointed, the person becomes the 'code official.'" [The BOCA National Building Code, Commentary Vol I, 1996 Edition, p 1-3.]

existed as to whether he was defendant's BOCA code official. See *Hazle v Ford Motor Co*, 464 Mich 456, 461; 628 NW2d 515 (2001).

Defendant does not deny that it adopted the BOCA National Building Code at issue. We interpret such code using the rules of statutory construction, which includes considering and giving effect to the plain and ordinary meaning of its language. See *Gora v Ferndale*, 456 Mich 704, 711; 576 NW2d 141 (1998). At issue in this case is whether plaintiff was defendant's "code official."

As indicated above, under section 104.1 of the BOCA code, the "executive official in charge" is considered the code official. The BOCA code's definition of "code official" is "[t]he officer or other designated authority charged with the administration and enforcement of this code, or a duly authorized representative."³ See The BOCA National Building Code, 1996 Edition, p 10. The commentary to section 104.1 further clarifies that the person who is in charge of the department may not necessarily be titled the "code official" but, nonetheless, for purposes of the code, the person is considered the "code official" after the appointment. With regard to the appointment, section 104.2 merely states that the code official "shall be appointed by the chief appointing authority of the jurisdiction." Section 104.3 of the 1996 BOCA code also provides that the code official can appoint other persons as necessary to administer the code, as authorized by the appointing authority. And, under section 105, the duties and powers of the code official include, generally, enforcement of the code, receipt of applications for permits, associated inspections, and issuance of permits.

It is undisputed that plaintiff was not appointed, by specific title, to the position of "code official." However, he was appointed "St. Clair Township Building Inspector." It is also undisputed that plaintiff was the only building official performing services for defendant's department of building inspection for fourteen years. Thus, it appears from the evidence presented that plaintiff was the only person who was administering and enforcing the BOCA code on defendant's behalf for several years. It appears, then, that there is at least a question of fact as to whether plaintiff was considered "the executive official in charge," or "the officer or other designated authority charged with the administration and enforcement of this code." See The BOCA National Building Code, 1996 Edition, p 10; The BOCA National Building Code, § 104.1, Commentary Vol I, 1996 Edition, pp 1-3. The BOCA code clearly provides that it is not the title "code official" that is dispositive; rather, the person in charge of the building department can hold another title and still be considered the "code official" for purposes of the code. See *id.* Here, as the only person in the department of building inspection, it is a question of fact as to whether plaintiff was the "code official" for purposes of the BOCA code.

We reject the trial court's reliance on the unpublished holding of *Savage, supra*. As the trial court correctly noted, it is not binding precedent. See MCR 7.215(C)(1). But, more importantly, the factual background is distinguishable because in that case the plaintiff was not "appointed" to any position, he was merely offered a job. In the present case, plaintiff was duly appointed to the position of "St. Clair Township Building Inspector" at the July 3, 1989, Board meeting following the proper motions. To what other type of "formal" appointment process

³ Because the BOCA code specifically defines "code official," it must be applied as expressly defined. See *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 136; 545 NW2d 642 (1996).

defendant refers to as a requirement is unknown. In any event, in the present case, plaintiff established a question of fact exists as to whether he was the “code official” for purposes of the code and, thus, could not “be removed from office except for cause and after full opportunity to be heard on specific and relevant charges by and before the appointing authority.” See The BOCA National Building Code, § 104.2, 1996 Edition, p 1. Therefore, the trial court’s summary dismissal of both plaintiff’s wrongful discharge claim and violation of 42 USC § 1983 claim after concluding that “there is no factual basis to conclude that he was a ‘code official’ entitled to the status of a ‘just cause’ employee under the BOCA Code,” is reversed.

In response to the trial court’s dismissal of his wrongful termination claim, plaintiff amended his complaint to add a claim of wrongful termination in violation of public policy. He asserted that he was terminated because he was lawfully performing his duties when he did not stop construction on a garage. After defendant’s motion for summary disposition was denied, the matter proceeded to a jury trial. Following the close of plaintiff’s proofs, defendant moved for directed verdict on plaintiff’s wrongful termination claim on the ground that plaintiff failed to establish that a factual question existed as to whether he was terminated for lawfully issuing a permit for a garage.

Defendant argued that, to the contrary, the evidence illustrated that plaintiff was terminated because several issues were handled unprofessionally; he did not return telephone calls; he did not perform building inspections; he had been on probation before; he allowed a foundation to be started on a private road before it was certified, and there were other judgment issues. During plaintiff’s response to defendant’s arguments, the trial court interrupted noting that:

[Plaintiff] is terminated by a number of people on that board with five votes and you haven’t called anybody to show why he was terminated, and this was the reason. What evidence have you presented that that is the reason why he was terminated, the sole reason why he was terminated.

Plaintiff responded that the minutes of the closed session board meeting which occurred for the purpose of discussing plaintiff’s employment future clearly indicate that the issuance of the permit for the garage, which met all applicable codes and ordinances, was a factor considered. And, as long as the termination decision resulted, even in part, from the fact that plaintiff issued that permit, which he was required under the law to do, his termination was wrongful. Defendant countered with the fact that the termination decision was not rendered by the board at the closed session of May 7, 2001; it was rendered at the meeting of May 21, 2001. But, plaintiff replied, the motion for termination that was made expressly relied on the closed session discussion, which included the disputed permit. To which defendant responded that, again, several reasons supported plaintiff is termination, but there was no evidence presented as to which reasons the board members relied upon to fashion their vote to terminate plaintiff’s employment. And, as an at-will employee, plaintiff was not entitled to know the reason.

The trial court agreed with defendant, noting that “the Plaintiff has failed to carry the burden of proof of establishing by a preponderance of evidence that a reason for three out of five individuals who terminated him or his employment had anything to do with the issuance of a building permit, or the result of such action was a violation of any public policy in any state.”

Thus, defendant's motion for directed verdict was granted and the wrongful termination in violation of public policy claim was dismissed.

On appeal, plaintiff argues that he presented proof that he was terminated for doing what he was legally obligated to do—issuing a permit for a structure that complied with the applicable ordinances and codes. But, we agree with the trial court: plaintiff did not present sufficient evidence from which a reasonable jury could conclude that it is more probable than not that plaintiff was terminated for issuing the allegedly disputed permit. See *People v Mateo*, 453 Mich 203, 219; 551 NW2d 891 (1996). Although the minutes of the closed meeting indicate that the issuance of the permit was a topic of discussion, it would be merely speculation to assume that the termination decision was based, even in part, on that reason.

As previously noted, the evidence illustrated that other factors were discussed with regard to plaintiff's employment during the board meetings and, during the closed meeting, as testified to by plaintiff, he clearly explained that the issuance of the disputed permit was proper. In light of the fact that no evidence was presented which would indicate that the board rejected plaintiff's proffered explanation, each board member's termination decision could have been based on any of the other factors under consideration. Or, equally as likely, the termination decision could have been based on a reason that was not discussed in the closed meeting, such as because "it was time for a change," as one board member commented. In short, to conclude that plaintiff was terminated in violation of public policy, the jury would have had to rely solely on conjecture and speculation which is not permissible. Accordingly, the trial court properly granted defendant's motion for directed verdict with regard to this claim.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh

/s/ Jane E. Markey

/s/ Patrick M. Meter