

STATE OF MICHIGAN
COURT OF APPEALS

DEBORAH A. KEENA,

Plaintiff-Appellee/
Cross-Appellant,

UNPUBLISHED
October 21, 1997

v

No. 178331
LC No. 93-066917-NZ

CITY BANK & TRUST COMPANY, N.A.,

Defendant-Appellant/
Cross-Appellee.

Before: Hood, P.J., and McDonald and Young, JJ.

PER CURIAM.

Plaintiff filed this suit after defendant terminated her employment for allegedly falsifying timecards. Plaintiff claimed that defendant breached a contract of employment by failing to follow its progressive discipline policy. The jury found for plaintiff and awarded damages. Defendant appeals as of right and plaintiff cross-appeals from that verdict. We reverse.¹

Defendant argues that the trial court erred in denying its motion for a directed verdict. We agree. In reviewing defendant's motion for a directed verdict, we examine the evidence in a light most favorable to plaintiff, granting plaintiff every reasonable inference, and resolving any evidentiary conflicts in her favor. *Garabedian v William Beaumont Hosp*, 208 Mich App 473, 475; 528 NW2d 809 (1995).

The sole issue tried below was whether the Corrective Action Policy (the CAP) should have been applied by defendant in deciding the appropriateness of plaintiff's discipline. The CAP states, in relevant part:

Each instance of misconduct or substandard behavior must be evaluated individually. To maintain consistency throughout the organization, corrective action steps have been established. *In all cases, the manager and the supervisor will work with the Director of Human Resources to determine the applicability of the steps listed in this policy.* At any step in the corrective action process, the Human Resources

Director has the authority to recommend suspension of the employee with pay, if the incident warrants further investigation.

In the event of serious misconduct such as theft, embezzlement, fraud, falsifying bank records, unreported absence, fighting on the job, drinking on the job, arbitrarily not performing one's job function, sabotage or refusal to follow directions from supervisors, the manager must contact the Director of Human Resources promptly, as immediate release my result. (Please note that this list is illustrative of the type of behaviors that will not be permitted and is not intended to be all inclusive.) [Emphasis added.]

In effect, the CAP reserves to defendant the discretion to determine "in all cases" the applicability of progressive discipline. The evidence presented at trial showed that the personnel designated in the CAP reviewed plaintiff's personnel matter and decided that termination, not progressive discipline, was appropriate. It is not for the courts or the jury to second-guess that decision. *Thomas v John Deere Corp*, 205 Mich App 91, 95; 517 NW2d 265 (1994). While a simple admonishment may have salvaged plaintiff's employment with defendant, it is not our role to make that decision. We find the following statements from *Thomas, supra* at 95, to be particularly instructive:

We are not saying that there was just cause to terminate plaintiff's employment. We are only saying that the particular employment contract alleged by plaintiff does not give our courts authority to second-guess defendant's determination.

Plaintiff's efforts to distinguish *Thomas* are unavailing. While the plaintiff in *Thomas* was given an improvement program and plaintiff in the instant case was not, the basic principle remains the same: when the employer, as here, reserves sole discretion in determining the justice of its own decision, the courts will not intervene. Moreover, we agree with the Court in *Thomas* that decision-making such as that required by the CAP actually protects employees from such risks that "truly at-will employees face, such as being fired rashly in a fit of pique, and being fired only because of a personality conflict with an immediate supervisor that does not affect job performance." *Id.* at 95, n 1.

Consequently, because defendant, through the CAP, reserved sole discretion to determine appropriate discipline for plaintiff's alleged misconduct, we conclude that the trial court should have directed a verdict in favor of defendant. In light of our resolution of the directed verdict issue, we need not reach or address defendant's remaining issues on appeal, or plaintiff's sole evidentiary issue raised on cross-appeal.

Reversed.

/s/ Harold Hood
/s/ Gary R. McDonald
/s/ Robert P. Young, Jr.

¹ This case was initially heard by a panel of this Court that issued an opinion affirming the judgment. Because one of the panel members had not had an opportunity to review the dissent prior to his death,

the prior opinion was vacated by the panel on its own motion by an order dated May 12, 1997. Accordingly, the case was reargued before this panel.