

STATE OF MICHIGAN
COURT OF APPEALS

SAMUEL SCHULTZ II,

Plaintiff-Appellant/Cross-Appellee,

V

MERCY HEALTH SERVICES,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED

August 21, 2003

No. 236771

Oakland Circuit Court

LC No. 99-019522-CK

Before: Wilder, P.J., and Fitzgerald and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right following a jury verdict and entry of a judgment of no cause of action in this breach of employment contract case. Defendant cross-appeals the trial court's denial of its motions for summary disposition and a directed verdict. We affirm the judgment of no cause of action.

Plaintiff was employed by defendant as the Vice President and Chief Information Officer of defendant's information systems division. Plaintiff's employment contract provided that he could be terminated without cause at any time. Further, pursuant to defendant's policies, a discharged executive could not receive severance pay if he failed to substantially perform the duties reasonably assigned or if he engaged in gross negligence, fraud, or dishonesty or violated a significant policy of defendant. Defendant terminated plaintiff's employment and initially classified the termination as one without cause. Subsequently, defendant discovered that plaintiff had a business relationship with The Epsilon Group, a consulting group that performed contracted services on behalf of defendant, which defendant considered to be fraudulent or dishonest as it concerned plaintiff's professional obligations to defendant. Defendant thereafter concluded that plaintiff's business relationship with The Epsilon Group was a conflict of interest and not in defendant's best interests, and, accordingly, refused to pay any severance to plaintiff on the basis that just cause for his termination existed. Plaintiff then filed this breach of contract action, asserting his entitlement to severance pay. Defendant claimed as an affirmative defense that plaintiff was not entitled to severance pay because plaintiff had engaged in fraudulent or dishonest activities constituting a conflict of interest.

Plaintiff's sole claim on appeal is that the trial court erred by admitting into evidence the evidence of his alleged misconduct, not discovered by defendant until after it had terminated

plaintiff, in support of defendant's claim that plaintiff was not entitled to severance pay because just cause for plaintiff's termination existed. Whether the after-acquired evidence rule applies to this case presents a legal question, which we review de novo. *Smith v Union Charter Twp (On Rehearing)*, 227 Mich App 358, 363; 575 NW2d 290 (1998).

Plaintiff's contention, that after-acquired evidence of misconduct is not admissible to support a claim that an employee was terminated from employment with cause, is without merit. The after-acquired evidence rule is equitable in nature, *Grow v W A Thomas Co*, 236 Mich App 696, 710; 601 NW2d 426 (1999), and is

usually applied in a situation involving termination or another adverse employment action to ensure that an employee does not benefit from the employee's own misconduct or misrepresentation. The rationale of the cases applying the rule is that a plaintiff who was not entitled to the employment in the first place cannot claim economic damages for the loss of it. *Id.*

"Evidence of employee misconduct occurring before termination is admissible as substantive evidence even if the former employer did not know of the misconduct until after the termination. Just cause may include facts and circumstances existing at termination but not known to the employer." *Bradley v Philip Morris, Inc*, 194 Mich App 44, 48; 486 NW2d 48 (1991), *aff'd* after remand 444 Mich 634 (1994).

Applying this relevant case law to the facts of this case, we find that the trial court correctly determined that evidence discovered by defendant after plaintiff's termination that concerned plaintiff's behaviors during his employment with defendant, in particular his business relationship with The Epsilon Group, was admissible for the purpose of determining whether plaintiff engaged in fraudulent or dishonest activities justifying termination for cause. Under the contract, plaintiff's entitlement to severance pay was linked to the absence of any factors supporting termination for cause. The fact that defendant was not aware of the factors supporting just cause termination when plaintiff was terminated does not entitle plaintiff to receive severance pay by default.

Plaintiff's reliance on *Horn v Dep't of Corrections*, 216 Mich App 58; 548 NW2d 660 (1996), for the proposition that the evidence was inadmissible, is misplaced. *Horn, supra* at 67-68, simply emphasizes that an employer cannot use the discovery of after-acquired evidence that would have justified termination to avoid the consequences of the employer's misconduct in terminating the employee for wrongful or discriminatory reasons. Rather, the employer who terminates an employee for wrongful or discriminatory reasons must compensate the employee for back pay owed as the result of the unlawful termination. In this case, plaintiff makes no assertion that his termination was unlawful. Accordingly, the trial court did not err in admitting the after-acquired evidence as substantive evidence of plaintiff's misconduct.

In light of our disposition of plaintiff's claim on appeal, we need not address the arguments raised in defendant's cross-appeal. *Adams v Outdoor Advertising, Inc v City of Holland*, 234 Mich App 681, 699; 600 NW2d 339 (1999), *aff'd* 463 Mich 675 (2001); *Becker v Halliday*, 218 Mich App 576, 580; 554 NW2d 67 (1996).

Affirmed. Defendant's cross-appeal is dismissed as moot.

/s/ Kurtis T. Wilder
/s/ E. Thomas Fitzgerald
/s/ Brian K. Zahra