THE *TOUSSAINT* EXCEPTION TO EMPLOYMENT-AT- WILL: DOES IT STILL EXIST?

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A series of recent Michigan decisions, read individually or as a group, represent what must be considered as a serious change in judicial policy toward employment-at-will, or more accurately towards exceptions to that concept. Leadership on the Supreme Court of Michigan has been seized by a sentiment much more sympathetic to the need for flexibility in management options. Although instrumental in helping to create the so-called "handbook exception" in its now-famous case of *Toussaint v. Blue Cross and Blue Shield of Michigan*that court's recent decisions can be read to so limit or narrow *Toussaint's* applicability as to make it of little value, if not obsolete. All that remains of that case's former vigor is a group of ringing dissents and concurrences by the author of the majority opinion in *Toussaint.* His words provide some comfort, but small sustenance to future Michigan plaintiff'employees, but may yet prove persuasive in other jurisdictions which have embraced the rationale of the *Toussaint* rulings. There are legitimate legal reasons, in addition to valid policy arguments, to believe that other jurisdictions may not follow the court's new direction. Specifically, rather than expressly overruling *Toussaint,* the court has arguably misconstrued its own rulings and in the process overlooked or confused important distinctions in contract law principles.

This paper will attempt to characterize what is now a confusing state of affairs in Michigan employment-at-will policy. It will also explore the questions of why this seemingly obvious change in policy was not met more directly, and finally will attempt to draw larger implications of the new policy for employer-employee relations in Michigan and elsewhere.

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[1]408 Mich. 578, 292 N.W.2d 880 (1980).

The two most significant reccnt cases are *In re Certified Question iBankey* v. *Storer Broadcasting Co.)'* decided in 1989 and *Row** v. *Montgomery Ward Co.* from 1991.[1] *Certified Question* is probably the more significant case from a practical standpoint (because of the simplicity of its holding) while *Rowe* should emerge as symbolically more important In *Certified Question* the court established, consistent with language in *Toussaint.* that although policy statements in employee manuals may create legitimate expectations of continued employment, those policies may be unilaterally changed in subsequent documents. This holding legitimized the wide-spread use of disclaimers which had come mio use after *Toussaint* to reestablish the employment-at-will relationship. Their use as a practical tool for negating the cliect of "for cause' language in policy statements was thus established. *Ro*e.* on the other hand, can be read as a retteat from some of the other implications of *Toussauit,* namely that, standing alone, oral statements of longterm commitment may create limitations on the ability of the employer to terminate at WflL Justice Levin, in his *Certified Question* dissent, asserted that changes in policy manual language would have no effect upon express oral agreement*,* but *Rowe* can be read ^and Levin so reads it) as contrary to this assertion. We turn now to an analysis of the *Rowe* decision to ascertain the current status of the law in Michigan.

BACKGROUND

It ts often necessary to ‘read between the lines* to disccrn a given court’s uneasiness about a previous decision. Such is not the case with the Michigan Supreme Court's most reccnt examination of iu position in *Toussaint.* The majority decision in *Rowe* v. *Montgomery Ward* began with the statement that "[¡In *[Toussaint* J this court joined the forefront of a nationwide <u>experiment</u> in which, under varying theories, courts extended job security to nonunionized employees."[5] The use of the term "experiment' alerts the

[2]432 Mich 438. 443 N.W2d 112 (1989)

[3]437 Mich. 627. 473 N WÜ 268 (1991) Three other «ibna-nm* opmow ccramim* *Tpmsmuu* »«ft loued by the court m 1995 !>** »ere *Schott* ► Monqonvry BWd A Co.. 4J7 Mich 83. 46§ N.WÜ 445 which ruled that emploma could no longer miuttain * cauae of KMon alter njncij an employer dadamxr. *McCin v, J* »War *Thampx* USA Inc.,* 4J7 Sfch 109. 469 N W 2 d 284. »txre ihe ccurt mco^naed boru Ode econunac need as put *<u>ruiy</u>* for linn*, and ÍJumu *. *Auto Out* Xiuumiu* /inociaiKw. 437 Mich 521. 473 N.W 2d 652. in which the court ruled lh«! an employer'» modiiiciiion of ill pobexi uxceaafully precluded plaintiffi actiom for breach ol imp lied contract *irá* uti|uai ennchmeni baaed on "V^nurate cqxciaijom.'

[4]432 Mich 435. 459. *43 N.Wid 112.121 u Note 2. Fw a full ducuawn of the use w»d ii!ectiveoe*» *oi* drtdaimcn » Chaguo. tWiwanon *of riu DucUimtr ai an Efftcnvt* Um>u *to Dtfint d* Ertfioymini lUUtuinihir-* 17 Hot L Rev 365 (1939\

[5]437 Mich ai 631 (arphiRi added).

perceptive reader to the fact that something may be awry in the legal laboratory of employee relations That inference was quickly supported when the coun expressed its concern that "the theory remains troubling because of those instances in which application of contract law is a transparent invitation to the fact finder to decide not what the contract' was, but what fairness' requires.*

Subsequently, the coun expressed reluctance to abandon altogether the theory, simply because courts have had trouble applying it consistently. However, within the context of *Rtfwt* the majority went to great lengths to distinguish the current fads from those in *Toussami'* and along the way so nanowed the circumstances under which *Toussami* would be applicable that one wonders, in legal truth, what *a* left. One of the dissenting justices had little doubt about what remains of *Toussaint* in characterizing *ROH** as a "virtual overruling" of that decision.'

Though *Toussami* a well-known and widely cited for the proposition that employee handbooks as statements of company policy may become binding on employers as a part of the contract, the decision is somewhat more complex than casual observers may have appreciated. The holding in *Toussaint* actually had "two prong?" of analysis.® The bolding provided that a "just cause" for discharge clause could become a part of the contract either by express agreement, oral or written, or through legitimate expectations created by written policy statements contained m employee manuals or the like.'

Differences over application and interplay of the two tests seemed to be at the heart of the battle between the majority and dissenting positions in *Rowe*. Indeed. Justice Levin who authored the *Toussami* decision accused the majority of misstating the issue m *Rowe* which led to asking the wrong question and reaching a wrong decision.[11] The misstatement, according to Levin, resulted from a combination of the two prongs which had been cited as separate and independent grounds for making an exception to the employment-at-wül doctrine in *Toussaint*,[u]

ROWE ANALYSIS

In order to frame the context of the debate and assess its effect on *Toussamti* continuing vitality, it is necessary to examine the rather simple fad

[6] *Id.*

[7] *See infrtext accompanying* note 25.

[8] 437 Mich. At 308.

[9] SEE FOR A DISCUSSION OF THE TWO PRONGS, LUCE, ROWE V. MONTGOMERY WARD: CURTAILING FORMATION OF JUST CAUSE EMPLOYMENT CONTRACTS, DET. C. OF L. REV., 119 (1992), 143-148.

[10] 292 N.W.2D AT 885.

[11] 437 MICH. AT 676.

[12] ID. AT 679.

situation in *Rowe*. Plaintiff *Rowe* applied for a sales position with Montgomery Ward in 1976. At the time of hiring, she was told that she would have a job with the company "as long as she achieved her sales quota."[13] This was corroborated in court by a Mr. Vernon Harryman, manager of the appliance department, who said "at Ward's... that's the way we used to hire people."[14] She also signed a set of rules prescribing certain kinds of conduct which could result in dismissal. Subsequently, beginning in 1982 a series of employee handbooks was introduced with language which was consistent with the right of the employer to fire at will. The plaintiff refused to sign an attached statement each time a new version was introduced. She was finally dismissed for leaving work on one occasion without punching out on the time clock. This was not one of the original justifications for dismissal and she filed a suit for wrongful discharge based on the statements of Mr. Harryman which she alleged created a contract which could be terminated only for just cause.

That an agent of Montgomery Ward made the statement of "commitment" to the plaintiff was uncontradicted; in fact it was fully corroborated by Harryman. The issue is the effect of that statement on the employer/employee relationship. The parties, and more importantly components of the court, differed essentially on the significance of the words.

For its part the majority, rather than spending much time on *Toussaint* seemed more inclined to return to a much earlier case *Lynas* v. *Maxwell Farms*[15] which it said *Toussaint* had expanded.[16] And it is here that their contraction of *Toussaint* began. The court stated the issue as "whether defendant employer's oral statements and written policy statements directed at plaintiff may be interpreted to permit a promise implied in fact not to terminate except for cause."[17] The plaintiffs allegations were found insufficient to meet this standard. According to dissenting Justice Levin, this statement of the issue is a misapplication of *Toussaint* in that the decision recognized two separate bases for finding an exception to employment-at-will, one based on express oral statements and a second based on reasonable expectations from policy statements in manuals.[1]*

In reply, the majority asserted that Levin's reading was inaccurate, and that his dissent was evidence of a wish to broaden *Toussaint's* application .[w] Justice Boyle, in a concurring opinion, asserted that the oral contract claim in *Toussaint* was dependent upon the support provided in the policy manual. He

[13]*Id.* at 632. In *Toussaint* the plaintiff was told he would be with the company "as long as I did my job." 408 Mich. 578, 292 N.W. 2d 880. 884

[14]*Id.*

[15]279 Mich. 684, 273 N.W. 315 (1937).

[16]437 Mich, at 637.

[17]*Id.* at 636 (emphasis added).

[18]*See supra* text accompanying Note 12.

[19]437 Mich, at 631.

cited language from the decision that *"Toussaint's* case is, if anything, stronger because he was handed a manual of Blue Cross personal policies which reinforced the oral assurance of job security."[20] This is the same reasoning used by the majority to distinguish the *Rowe* facts. As will be discussed, they went to great lengths to demonstrate these distinctions and show lack of supporting "objective" evidence for the oral promise.[21] Dissenting Justice Canavaugh, however, pointed out that in *Toussaint* there was an additional set of facts from the case of *Ebling* v. *Masco Corp.*[71] which had been joined for purposes of appeal. In *Ebling* there had been no policy manual. And yet, the court found a promise of continual employment based on an oral statement nearly identical to that made to *Toussaint.* He asserted that this Court, while dividing four to three in *Toussaint*'s favor, held unanimously that *Ebling* had produced sufficient evidence of a just-cause contract ' to justify submission to the jury.'"[23]

So, the question presented to the reader of the *Rowe* decision is whether one is dealing with a disagreement over the application of the *Toussaint* ruling or whether the majority has intentionally reconfigured the *Toussaint* test so as to make it considerably more difficult for a plaintiff to demonstrate an exception to the established rule of employment-at-will. Either way, plaintiffs must now contend with *Toussaint,* as modified by *Rowe,* whether or not it amounts to an overruling. The next step is to discern the conditions under which the *Rowe* majority will now be willing to find for the plaintiff.

After restating the issue (whether the oral statements and written policy statements revealed a "for cause" contract), the court spoke generally to assure readers of the opinion that it was not abandoning the exception altogether.[24] The court will still recognize a submissible jury issue based on words and conduct of the parties even when the employee's only consideration is work performed in response to a unilateral offer. In addition, the presumption favoring employment-at-will is still a "rule of construction" rather than a substantive rule.[23] In order to determine whether there was mutual assent to the just-cause provision, the court will apply an "objective test" including the parties' words and visible acts. Orally grounded cases must be based on more than "optimistic hope" of a long-term relationship.[26]

The court then turned to the facts of *Toussaint* to evaluate the oral statements in *Rowe.* According to the court, both plaintiffs in *Toussaint*

[20]*Id.* at 665 note 6.

[21] *See infra* text accompanying note 25.

22408 Mich. 579, 292 N.W.2d 880 (1980).

[23]437 Mich 627, 721.

[24]*Id.* at 638.

[25]*Id*

[26]*Id*

specifically negotiated about job security and *Toussaint* was handed a policy manual in response to his inquiries. *Rowe* merely "stumbled in" off the street and statements relating to job security were gratuitous. The words used (the 'as long as" statement), although bearing a resemblance to the language used in *Toussaint*, lacked objective evidence to support it. Since *Rowe* did not negotiate prior to her employment, there was no objective evidence to show that the parties minds met on the subject of continued employment. In *Toussaint* and *Ebling* each plaintiff had applied for an "executive position," whereas *Rowe* applied for one of several open slots as a departmental sales position, therefore making it unlikely the "the contract terms were negotiable." The manual provided to *Toussaint* (but not *Ebling)* offered objective support to the oral statements.[27]

The court then rejected supervisor Harryman's testimony as insufficient to support the alleged agreement, because his words were "couched in general terms" which were vague and more like a policy.[28] Indeed, in addition to corroborating the promise, he seems to assert that the company's "policy" was to hire for long-term. Here the court again referred to the earlier *Lynas* decision, as supported by *Toussaint* and *Ebling*, and made the following curious statement:

an employee who seeks to establish from conduct a promise implied in fact must meet a higher standard than an employer who relies on express language."[29]

This seems a glaring non sequitur when made in the context of discussing the statement reported by *Rowe* and confirmed by Harryman.[30] The plaintiff relied on, if anything, express statements of commitment and would seem entitled to the lower standard implied here by the court. The court continued: Logic compels the conclusion that where parties expressly negotiate with offers and counteroffers, it is more reasonable to anticipate mutual assent. Conversely, there is less chance that the parties desired or intended the result prayed for where as here, conduct and oral statements are claimed to create a promise of job security implied in fact.[31] To what conduct are they referring and why implied-in-fact? It again seems that the court's real concern was the lack of negotiations (Le. words

[27] *Id.* at 643.

[28] *Id.* at 645.

[29] *Id.* at 644.

[30] See id. at 643, where the court said "the fact that plaintiff applied for one of several positions militates against the likelihood that the contract terms we negotiable and sureests that company E°!i2i * more likely to govern." (emphasis added) Company policy as explained by Manager Harryman. was to retain people as long as they generated sales

[31] 437 Mich, at 644 citing as authority *Di Bonavtntum* v. *Consolidated Rail* ***Corp., 372 Pa. Super. 420. 539 A.2d 865 (1988)***

from the plaintiff to demonstrate mutuality). But if that was the court's intention, the point could have been made directly and without reference to non-plead causes of action. Viewed as a whole, the references to implied intentions here are simply more evidence that the court now seems to be requiring extra support for the words spoken by Harryman and that the assurances result from an offer and acceptance, bargained for, process. If this is an accurate reading, little is left of either the implied-in-fact exception or express agreements created by reliance on oral statements made by supervisory personnel. The parties in the employment relationship in Michigan are bound now not by a modified *Toussaint* rule, but by a new "objective" standard under *Rowe.*

THE STANDARD

The requirement of "objective support" seems to be at the heart of the new standard. And by this, the court seems to mean that limitations on the employer's right to fire at will should result from negotiated, offer and acceptance conditions in which mutuality of obligation is clear. This is a far cry from *Toussaint*-recognized limitations which could arise from unilateral employer activity and result in implied contract conditions or reasonable expectations of continued employment. One need only read the list of distinctions (real or imagined) which the majority drew between *Toussaint/Ebling* and the *Rowe* facts to discern the new elements which a successful plaintiff must demonstrate. By merging the two prongs of *Toussaint* and engrafting a stiff objective support requirement, the court has virtually assured that employees at *Rowe's* level (and for several levels above) are unlikely to have the "clout" to raise the kinds of issues necessary to demonstrate a "negotiated" contract. Indeed, the bulk of the workforce will be unaware that they can negotiate or that raising such issues is necessary to reinforce statements made during employment interviews or in employment manuals. Practically speaking, all new hires, and most existing employees, are already foreclosed as a result of having read and signed disclaimers, but the court now seems to have rid itself of almost any residual cases similar to those that have plagued the Michigan system in recent years. The law may now be muddled and the question of whether *Toussaint* has been implicitly overruled left unresolved, but the chill which has descended on the ability of an employee to raise *Toussamt-like* cases is a palpable reality.

EXTRA-JURISDICTIONAL IMPLICATIONS

Although Michigan may have arguably capped the foaming beakers of its own employment laboratory, the effects of the decision abroad are less clear. *Toussaint* was an important catalyst and other courts will likely read *Rowe* for guidance in the ongoing evolution of their own employment rules.

But the fact is that that *Toussaint* virus has been abroad for some time and it has developed mutations in other jurisdictions which may be resistant to the *Rowe* cure.[32] Indeed, since the Michigan court provided very little guidance on applying *Toussaint* for nearly a decade, it is far from clear that other jurisdictions should give much credence to the new Michigan ruling at all. A well-reasoned overruling of *Toussaint* might well have been occasion for wholesale reconsideration of costs and benefits associated with the decade-long experiment. However, the highly-suspect decision (legally speaking) in *Rowe* could just as easily be ignored. Indeed, why should any jurisdiction seriously consider adopting a ruling which probably misconstrued its own language and arguably misstated some fairly-well-settled rules of contract law. In all likelihood, there will be a movement in other jurisdictions paralleling the direction of *Rowe*. But this will be more due to the culmination of conservative judicial appointments than to the force of the reasoning evidenced by the Michigan majority on *Rowe*.

[32]For a good discussion of the extent to which *Toussaint* has been followed see Luce at 139 note 104 *supra* at note 9.