

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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JOEL D. COLLIAU,

Plaintiff-Appellant,

v

ACE CONTROLS, INC.,

Defendant-Appellee.

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UNPUBLISHED

June 18, 1996

No. 176177

LC No. 93-453942-CZ

Before: Neff, P.J., and Jansen and G. C. Steeh,\* JJ.

PER CURIAM.

Plaintiff appeals as of right from an order of the circuit court granting summary disposition to defendant under MCR 2.116(C)(10), on the basis that plaintiff failed to produce facts sufficient to create a jury question on the issues of just cause employment and age discrimination. We affirm in part and reverse and remand in part.

I

Plaintiff worked for defendant, a primarily family owned business, for approximately twenty-six years. During his tenure with defendant, plaintiff eventually rose to the highest managerial position in the company. Plaintiff was in his mid- to late-forties when fired by defendant.

Plaintiff admits that he never signed a contract of employment with defendant, but points to various statements made over the years by defendant's owner, William Chorkey, and his family, and to the employee handbook issued by defendant, to support his claim of just cause employment.

II

We first examine plaintiff's claim that the trial court erred in failing to find that he could only be fired for a just cause. We find no error in the trial court's ruling.

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\* Circuit judge, sitting on the Court of Appeals by assignment.

A

This Court reviews de novo the trial court's order under MCR 2.116(C)(10). *Michigan Mutual Ins Co v Dowell*, 204 Mich App 81, 85-86; 514 NW2d 185 (1994). When conducting this review, we examine the entire record in a light most favorable to the nonmoving party to determine whether a record could be developed that would leave open an issue on which reasonable minds could differ. *Id.* Summary disposition is proper where no genuine issue of material fact exists, and the moving party is entitled to a judgment as a matter of law. *Id.*

B

Employment for an indefinite period of time is presumed to be terminable at will. *Rood v General Dynamics Corp*, 444 Mich 107, 116; 507 NW2d 591 (1993). To overcome this presumption, an employee must present sufficient proof of either (1) a contractual provision setting forth a definite term of employment, or (2) a contractual provision forbidding discharge absent just cause. *Id.* at 117. Two theories exist regarding the creation and enforceability of these contractual terms. The first relies on principles of contract law, and the second, relying on public policy, looks to an employee's legitimate expectations created by the employer. *Id.* at 118.

In order for just cause employment to be found on contractual principles, plaintiff must demonstrate that both parties intended to be bound. *Id.* at 119. Thus, oral statements relied on by a party must be clear and unequivocal to overcome the presumption of at will employment. *Id.* This Court follows an objective theory of assent. We examine the express words and visible actions of the employer to determine whether a reasonable person in the employee's position would be justified in believing a contract existed. *Id.*

Determining whether an employee has a legitimate expectation of just-cause employment is a two-step process. *Id.* at 138-139. First, it must be determined whether the employer made a promise to the employee, and if so, what was promised. The statements relied on must be specific; the more indefinite a statement is, the less likely it is that a promise will be found. The next step is to determine whether the promise is reasonably capable of instilling in the employee a legitimate expectation of just-cause employment. Only policies and procedures related to employee termination are capable of creating such an expectation. *Id.*

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Plaintiff relies on a number of statements made by the Chorkeys throughout the years to support his allegation that a contractual provision for just-cause employment was created. On our review of the record, however, we are convinced that none of these statements was sufficiently clear and unambiguous to support a finding that a contractual term was created.

The only statement that, if it were as plaintiff claimed, could create a fact issue, is the one in which plaintiff claims William Chorkey informed him that his job was secure in response to plaintiff's

questions regarding the employment of Chorkey's son, Bill. Plaintiff's deposition testimony, however, belies his assertion that such a concrete statement was made. Plaintiff described the discussion in the following manner:

Mr. and Mrs. Chorkey sat in my office and explained to me that it was their intent to provide an orderly transition of ownership of the company to their children who would subsequently act as board of directors leaving the day-to-day management of the company to the professional managers who were performing their jobs at that time.

\* \* \*

Again, this conversation [led] me to believe that as long as the jobs were being done satisfactorily and meeting the expectations [sic] that employment would continue.

Without question, this conversation does not support plaintiff's position. Even if the discussion occurred as plaintiff claims, the Chorkeys merely indicated their plans for the future. Nowhere within that statement do the Chorkeys state that defendant will not be fired, or will be fired for cause only. We do not dispute that plaintiff may have received the impression from this conversation that his job was secure, but the subjective intent of the parties is irrelevant to the issue presented.

We also disagree that the Chorkeys' actions clearly indicated a just-cause employment contract. The mere fact that defendant was the highest ranking non-family member in the company cannot, as a matter of law, support such a finding. Unfortunately, just the opposite conclusion is probably true. Additionally, following our review of the record, we found no other visible actions that could be construed as an objective assent by the Chorkey's to a just-cause employment contract.

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We also conclude that plaintiff failed to allege sufficient facts to support a finding of a legitimate expectation of just-cause employment. First, the mere fact that, as a manager, plaintiff only fired employees for cause does not in any way indicate a promise on defendant's part to follow that practice. Plaintiff does not allege that he followed his firing policy at the behest of defendant. To the contrary, he states that it was his policy to fire for cause only.

Also, plaintiff cannot rely in any way on defendant's employment application because, admittedly, plaintiff was never asked to, nor did he, complete such an application.

Finally, plaintiff relies on certain provisions in defendant's employee handbook to support his legitimate expectation claim. We have thoroughly reviewed this allegation and conclude that none of the provisions relied on by plaintiff would support a legitimate expectation of just-cause employment. Only one of the provisions relied on by plaintiff relates to employee termination, and that provision speaks only to probationary employees. Plaintiff does not claim to be a probationary employee. Accordingly, the handbook could not instill a legitimate expectation of just-cause employment. *Rood, supra* at 139.

Plaintiff failed, as a matter of law, to sustain his burden of proving that a just-cause employment relationship existed. Therefore, the trial court properly granted summary disposition to defendant with regard to that claim.

### III

Plaintiff next claims that the trial court erred in granting summary disposition on his age discrimination claim. MCL 37.2202; MSA 3.548(202). We agree.

In order to succeed on this issue, plaintiff has the initial burden of setting forth a prima facie case of age discrimination. *Manning v Hazel Park*, 202 Mich App 685, 696; 509 NW2d 874 (1993). Once plaintiff meets that burden, defendant must then articulate a nondiscriminatory reason for its actions. *Id.* If defendant satisfies that burden, plaintiff then must prove that the legitimate reason offered by defendant was merely a pretext. *Id.*

A prima facie case of age discrimination is established by either proving intentional discrimination or disparate treatment. *Id.* To prove intentional age discrimination, plaintiff must show (1) he was a member of a protected class, (2) he was discharged, (3) he was qualified for the position, and (4) he was replaced by a younger person. *Id.* at 697. A person over forty years of age is a member of the protected class. *Lilly v BTM Corp*, 958 F2d 746, 752 (CA 6, 1992).

To make out a prima facie case of disparate treatment, plaintiff must show he was a member of a protected class and that he was treated differently than persons of a different class for the same or similar conduct. *Manning, supra*.

The trial court based its decision to grant defendant's motion on the fact that "[i]t's well established that simply replacing an employee with a younger one does not, in and of itself, indicate age discrimination and that something more is needed to support the claim." While this statement of the law is correct with regard to establishing a prima facie case of disparate treatment, such reasoning cannot overcome plaintiff's prima facie case of intentional discrimination.

On the record below, we conclude that plaintiff presented a prima facie case of age discrimination, and thus, the court's summary disposition ruling was improper. Plaintiff was over forty years old, and thus was a member of the protected class. Plaintiff was discharged. Plaintiff was qualified for either position he lost; he was general manager for approximately four years and manager of manufacturing and engineering for approximately three years. And finally, regardless of which of the two individuals is considered to have replaced plaintiff, it is clear that both were younger than he.

Accordingly, we conclude that the trial court improperly granted summary disposition to defendant with regard to plaintiff's age discrimination claim. Our ruling today only reflects the fact that plaintiff established a prima facie case of age discrimination, which is just the first of a three-step process. We express no opinion on the merits of plaintiff's claim.

The trial court's ruling granting summary disposition on plaintiff's just-cause employment contract is affirmed. The court's ruling with regard to plaintiff's age discrimination claim is reversed. This matter is remanded for proceedings consistent with this opinion.

Affirmed in part, reversed and remanded in part. We do not retain jurisdiction.

/s/ Janet T. Neff

/s/ Kathleen Jansen

/s/ George C. Steeh, III