STATE OF MICHIGAN

COURT OF APPEALS

ROBERT DREGER,

Plaintiff-Appellee,

v

JOSEPH LEPERA and AUTOMATION SERVICE EQUIPMENT,

Defendant-Appellants.

UNPUBLISHED
August 20, 1996

No. 173554
LC No. 92-005753-CK

Before: Murphy, P.J., and Reilly , and C.W. Simon, Jr.*, JJ

PER CURIAM.

Plaintiff brought this action for breach of employment contract and age discrimination against his former employer, Automation Service Equipment, (ASE) and its president, Joseph LaPera. Defendants appeal by leave granted the circuit court order denying their motion for summary disposition of plaintiff's claims pursuant to MCR 2.116(C)(10). We affirm in part, reverse in part and remand.

Defendants argue that the trial court improperly denied their motion for summary disposition as to the breach of employment contract because plaintiff's employment was at will, as is stated in the employee handbook. Plaintiff argues that there was a genuine issue of material fact about whether he had a legitimate expectation of just cause employment. Plaintiff relies on the deposition testimony of LaPera to show that in 1992, ASE had a policy and practice to terminate employees only for good cause and that LaPera told plaintiff that plaintiff had to have good cause or good reason to fire someone.

The first step in analyzing a "legitimate expectations" claim is to determine what express or implied promise, if any, the employer has made. *Rood v General Dynamics Corp*, 444 Mich 107, 138; 507 NW2d 591 (1993). In *Rood*, the Court quoted the definition of "promise" found in the Second Restatement of Contracts, § 2(1) as follows: "'a manifestation of intention to act or refrain from acting in a *specified way*, so made as to justify a promisee in understanding that a commitment has been made.'" *Id.* at 138-139. The second step of the analysis of a legitimate expectations claim is "whether

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

the promise was reasonably capable of instilling a legitimate expectation of just-cause employment in the employer's employees." *Id*

In this case, plaintiff has not come forward with evidence that would support either an express or an implied promise having been made by ASE. There was no promise of just cause employment in the employee manual. To the contrary, the policy manual specifically informed the employees that their employment was terminable at will and that the nature of the employment could only be "altered or amended in writing by the President" of ASE. Plaintiff testified at his deposition that he was aware of the employment at will provision in the manual. The fact that the "policy and practice" in 1992 was to terminate employees only for good cause and plaintiff had been instructed to act in accordance with that practice does not indicate that ASE made a commitment to its employees to terminate only for just cause. An employer does not obligate itself to its employees simply by its practice to terminate for just cause. See *Rood, supra* at 139, ("[A]n employer's policy to act or refrain from acting in a specified way *if* the employer chooses is not a promise at all.") To hold otherwise would require an employer to regularly fire some employees without cause in order to preserve its right to do so in the future. *Id.* at 139.

Furthermore, plaintiff has not disputed the genuineness of the economic necessity that constitutes just cause for his termination. *Clement-Rowe v Mich Health Care Corp*, 212 Mich App 503, 506; 538 NW2d 20 (1995), citing *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 114; 469 NW2d 284 (1991). In the absence of proof disputing the economic necessity rationale, we need not address whether defendants "must demonstrate economic reasons not only for the elimination of a just-cause employee's position, but for the termination of the employee as an individual as well." *Id.* at 115-116. For these reasons, the trial court's order denying defendants' motion for summary disposition of this claim is reversed.

Defendants also contend that the trial court erred when it denied their motion for summary disposition of plaintiff's age discrimination claim. We disagree.

In April, 1992, LaPera replaced plaintiff, who was sixty-one years old, as manufacturing manager with Richard Belleperche, who was thirty-one years old. Plaintiff testified that LaPera told him that he had a choice to either stay on as manufacturing manager or go into sales as sales manager. LaPera had been performing the duties of sales manager himself. Even though LaPera was in the process of downsizing the company significantly, he decided to fill the position of sales manager to relieve himself of some of his responsibilities and because he was "looking for a job for [plaintiff]." The position's responsibilities were uncertain; LaPera testified that he was "really trying to formulate in my own mind what the job would entail." Plaintiff asked LaPera what LaPera wanted plaintiff to do. LaPera said that he wanted plaintiff to take the sales manager position.[1] Other than making recommendations for changes within the sales department and discussing some of these ideas with LaPera and two department heads, plaintiff never actually performed sales manager duties, but rather was acting as a "lame duck manufacturing manager" until he was terminated in July. According to LaPera, by June or July, 1992, "things had gotten worse, and I just couldn't justify that position." With

only four people in sales, LaPera testified, a sales manager was not needed and he could handle the responsibilities himself.

When an employer lays off employees for economic reasons, evidence that a competent older employee was terminated and a younger employee was retained, standing alone, is insufficient to establish a prima facie case of age discrimination. *Matras v Amoco Oil Co*, 424 Mich 675, 684; 385 NW2d 586 (1986). However, in this case, which, like *Matras*, is a reduction in force (RIF) case, plaintiff has presented additional evidence to support his claim of age discrimination. We agree with the trial court that LaPera's testimony, as discussed below, indicates that his belief that plaintiff wanted to retire affected LaPera's decision to terminate plaintiff. Because a jury could conclude that this belief was based on plaintiff's age, there was a genuine issue of material fact about whether age was a determining factor in the decision to discharge plaintiff, despite the RIF defense. See *Featherly v Teledyne Industries, Inc*, 194 Mich App 352; 486 NW2d 361 (1995),

When asked at his deposition why plaintiff was terminated, LaPera referred to his belief that plaintiff was ready to retire. LaPera's explanation for this belief concerns plaintiff's statement on the day he was discharged. On that day, plaintiff was called into LaPera's office. LaPera testified that although he could not remember the reason, it was "certainly not" for LaPera to terminate plaintiff. LaPera testified as follows:

> Bob was one of the individuals who had been identified. The majority of the terminations had already taken place. Bob walked into my office, and said I guess this is my turn. I was frankly a little bit shocked. I said I guess so. So he took the burden off of my shoulder, because I didn't know quite how to do that again, because of personal feelings. But as afar as when I made the decision, it was the decision I made that day, whatever day he walked into my office.
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> Q. Why did you decide to terminate him?
>
> A. Actually the way he brought it up, I thought he was ready to retire.
>
> Q. Had he ever told you of any retirement plans? Did you discuss that with him?
>
> A. Not really, not really.

A jury could believe that LaPera's stated belief that plaintiff wanted to retire was based on plaintiff's age, rather than on what plaintiff said. The comment "I guess this is my turn," does not on its face suggest a desire to retire and the record does not indicate that LaPera had any other indication from plaintiff that he wanted to retire. Plaintiff could argue that LaPera's testimony that he interpreted the comment as indicating a desire to retire was disingenuous, that the only reason LaPera had for thinking that plaintiff wanted to retire was his age, and that LaPera acted on this preconceived belief that plaintiff was ready to retire when LaPera decided to terminate plaintiff's employment. Thus, LaPera's explanation for terminating plaintiff's employment, "I thought he was ready to retire," supports plaintiff's claim that age was a determining factor in the decision to terminate plaintiff's employment. See *Hawley*

v Dresser Industries, 958 F2d 720, 723 (CA6, 1992) (the jury could have inferred consideration of the plaintiff's age in the decision to fire him when his boss testified that, "based on a conversation he had with the plaintiff, he thought that the plaintiff was so close to retirement that he would not mind being terminated.")

Because plaintiff has presented evidence creating a genuine issue of material fact as to whether age was a determining factor in the decision to discharge plaintiff, the trial court properly denied defendants' motion for summary disposition of this claim.

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

/s/ William B. Murphy
/s/ Maureen Pulte Reilly
/s/ Charles W. Simon, Jr.

[1] Although this testimony suggests that the decision to leave the manufacturing manager position was plaintiff's, LaPera's testimony and defendants' answers to interrogatories indicate that LaPera made the decision to replace plaintiff with Belleperche and that the decision "was discussed with" plaintiff. This suggests that the decision to move plaintiff to the sales manager position had already been made at the time it was discussed with plaintiff.