STATE OF MICHIGAN

COURT OF APPEALS

LANCE KORZILIUS,

Plaintiff-Appellant,

v

YELLOW FREIGHT SYSTEM, INC.,

Defendant-Appellee.

UNPUBLISHED
December 20, 1996

No. 187419
Washtenaw County
LC No. 94-2541-CZ

Before: McDonald, P.J., and Murphy and J.D. Payant,* JJ.

PER CURIAM.

Plaintiff Lance Korzilius sued defendant Yellow Freight Systems, Inc., his former employer, alleging claims of age discrimination, handicap discrimination, wrongful discharge based on a theory of legitimate expectation of employment, and retaliatory discharge because of workers' compensation claims. Defendant contended that it had laid off plaintiff legitimately for economic reasons. The trial court granted defendant's motion for summary disposition of all claims based on MCR 2.116(C)(10), finding that there was no genuine issue of material fact and that defendant was entitled to judgment as a matter of law. Plaintiff appeals that decision as of right. We affirm.

Plaintiff's complaint contains four counts, namely (I) age discrimination under the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq*.; MSA 3.548(102) *et seq*., (II) handicap discrimination related to plaintiff's "back injuries" (Complaint, ¶ 16) under the Michigan Handicappers' Civil Rights Act, MCL 37.1101 *et seq*.; MSA 3.550(101) *et seq*., (III) violation of public policy, and (IV) wrongful discharge. As to each count, we find that there is no genuine issue of material fact and defendant is entitled to judgment as a matter of law.

Regarding count I, the Elliott-Larsen Civil Rights Act provides in part that an employer shall not discharge or otherwise discriminate against an employee on the basis of age. MCL 37.2202; MSA 3.548(202). To prevail on such a claim, at a minimum, plaintiff must show that "(1) he was a member of the protected class; (2) he was discharged; (3) he was qualified for the position; and (4) he was

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

replaced by a younger person." *Matras v Amoco Oil Co,* 424 Mich 675, 683; 385 NW2d 586 (1986).

Plaintiff's age discrimination claim fails for at least two reasons. First, plaintiff was not discharged; he was laid off. Plaintiff expressly admits this in his complaint. Second, he was not replaced by a younger person; instead his position was eliminated. Plaintiff expressly admits this as well in his complaint. "Evidence that a competent older employee was terminated and a younger employee was retained, standing alone, is insufficient to establish a prima facie case when the employer reduces his work force because of economic necessity." *Featherly v Teledyne*, 194 Mich App 352, 359; 486 NW2d 361 (1992). Accordingly, the trial court appropriately granted defendant summary disposition regarding plaintiff's age discrimination claim.

Turning to count II, the Michigan Handicappers' Civil Rights Act provides that an employer shall not discharge or otherwise discriminate against an employee on the basis of a handicap. MCL 37.1202; MSA 3.550(202). The act defines "handicap" as a "determinable physical or mental characteristic of an individual or a history of the characteristic which may result from disease, injury, congenital condition of birth, or functional disorder, if the characteristic: "substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual's ability to perform the duties of a particular job or position...." MCL 37.1103; MSA 3.550(103). To prevail, plaintiff must show the following:

> (1) he is handicapped; (2) his handicap is unrelated to his ability to perform his job; (3) he was discharged; and (4) there is some evidence that the employer acted with discriminatory intent. [*Brown v Sprint*, 891 F Supp 396 (ED Mich, 1995).]

Plaintiff's handicap discrimination claim fails for at least two reasons. First, as stated previously, plaintiff was not discharged. Second, there is no evidence that defendant acted with discriminatory intent. The decision to lay off plaintiff rested solely with Clayton Osbourn, defendant's regional manager. Osbourn testified the layoff was undertaken solely as a cost-cutting measure because of declining business and falling revenue. Plaintiff himself admitted that defendant had been experiencing an economic downturn. The decision to lay off plaintiff as opposed to Bobby Carmack was based on legitimate economic reasons in that Carmack's sales were significantly higher than plaintiff's and, unlike plaintiff, Carmack also had responsibility overseeing terminal operations. Osbourn specifically denied any knowledge of plaintiff's workers' compensation claim history, his handicap parking sticker, or discussions of his susceptibility to injury. Plaintiff did not offer any evidence to rebut Osbourn's testimony on these points.

In short, plaintiff offered no evidence whatever to show that defendant acted with discriminatory intent. Accordingly, plaintiff's claim of pretext regarding economic necessity is no obstacle to summary disposition. Plaintiff cites *Ewers v Stroh Brewery Co,* 178 Mich App 371, 379; 443 NW2d 504 (1989), for the proposition that "[w]here an employer alleges discharge for economic necessity and the employee presents evidence that the economic necessity was pretextual and that he was discharged for another reason," the question is one for the jury. *Ewers*, however, is of no benefit to plaintiff because plaintiff presented no evidence to rebut defendant's claim of economic necessity. Thus, the trial court appropriately granted defendant summary disposition regarding plaintiff's handicap discrimination claim.

Turning to count III, labeled "violation of public policy," plaintiff alleges that "representations made to him created a legitimate expectation that he would not be terminated unless . . . [d]efendant had just cause." As pleaded, this count is not materially different from count IV, wrongful discharge, where plaintiff alleges that defendant breached a contract with plaintiff not to discharge him except for just cause, which contract is based upon plaintiff's legitimate expectations. However, on appeal, plaintiff makes clear that the focus of this claim is that a cause of action lies against defendant for its discharge of him based on his "work comp injury," citing *Sventko v Kroger Co*, 69 Mich App 644; 245 NW2d 151 (1976). Defendant does not dispute plaintiff's interpretation of *Sventko*.

Plaintiff cannot prevail on this claim, however, for the reasons discussed in reference to count II, handicap discrimination. To reiterate briefly, plaintiff offered no evidence to combat Osbourn's testimony that he laid off plaintiff solely for economic reasons and that he had no knowledge of plaintiff's worker's compensation claim history, his susceptibility to injury, or his handicap parking sticker. Accordingly, there is no genuine issue of material fact, and the trial court appropriately granted defendant summary disposition on plaintiff's violation of public policy claim.

Turning to count IV, plaintiff's wrongful discharge claim fails for several reasons. As previously discussed, plaintiff was not discharged; rather, he was laid off, after which he voluntarily resigned. Assuming that plaintiff enjoyed just cause as opposed to at will employment, Osbourn's layoff decision was based on economic necessity, which constitutes just cause. *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 114; 469 NW2d 284 (1991). As the trial court noted, plaintiff bases his alleged legitimate expectation of continued employment on "generalized, vague statements made 25 years ago" that do not equate with the clear and unequivocal statements the law requires. *Rowe v Montgomery Ward & Co*, 437 Mich 627, 645 (Riley, J.); 473 NW2d 268 (1991). These statements fail for the additional reason that they were not made to the work force in general, but to plaintiff personally. *Rood v General Dynamics Corp*, 444 Mich 107, 138; 507 NW2d 591 (1993). Plaintiff also relies on defendant's "progressive disciplinary policy in the employee handbook." However, the existence of a disciplinary system does not establish a just cause contract. *Biggs v Hilton Hotel Corp*, 194 Mich App 239, 241; 486 NW2d 61 (1992). Further, defendant protected itself by placing a disclaimer in the preamble to the handbook policies, including the disciplinary policies, which expressly states, "The existence of these plans does not in any way create a contract for continuation of employment." *Scholz v Montgomery Ward & Co*, 437 Mich 83, 88-90; 468 NW2d 845 (1991).

The trial court appropriately granted defendant summary disposition regarding plaintiff's wrongful discharge claim.

Affirmed.

/s/ Gary R. McDonald
/s/ William B. Murphy
/s/ John D. Payant