STATE OF MICHIGAN

COURT OF APPEALS

VIRGINIA A. REINHARDT, personal representative of the Estate of HARVEY M. REINHARDT, Deceased,

Plaintiff-Appellant,

v

FISCHER-FLACK, INC.,

Defendant-Appellee.

UNPUBLISHED
February 7, 1997

No. 180678
Saginaw Circuit Court
LC No. 93-056526-CL

Before: Young, P.J., and Corrigan and M.J. Callahan,* JJ.

PER CURIAM.

Plaintiff[1] appeals as of right from an order granting defendant summary disposition pursuant to MCR 2.116(C)(10). Plaintiff was discharged five days before his 50th birthday, and subsequently filed this suit, alleging wrongful discharge and age discrimination. On appeal, plaintiff contends that genuine issues of material fact remain such that dismissal of his complaint was improper. We affirm.

This Court reviews a trial court's grant of summary disposition de novo. *Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 86; 520 NW2d 633 (1994). A motion pursuant to MCR 2.116(C)(10) tests the factual basis underlying the plaintiff's claim. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). In reviewing a (C)(10) motion, a court considers pleadings, affidavits, depositions, admissions, and any evidence in favor of the nonmoving party, granting that party the benefit of any reasonable doubt. *Id.* Summary disposition is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Mitchell v Dahlberg*, 215 Mich App 718, 725; 547 NW2d 74 (1996).

I

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

Regarding his *Toussaint*[2] claim, plaintiff contends that because he was given oral assurances regarding job security, there was an express agreement that discharge would be for cause only. Employment contracts for an indefinite period are presumed to be terminable at will by either party. *Rood v General Dynamics Corp*, 444 Mich 107, 116; 507 NW2d 501 (1993). The presumption can be overcome only by proof of an express or implied-in-fact promise that clearly establishes that employment was guaranteed for a definite period or that the employee could only be discharged for cause. *Id*. at 117; *Rowe v Montgomery Ward*, 437 Mich 627, 636-637; 473 NW2d 268 (1991).

To avoid the statute of frauds bar, a contractual claim based on oral representations can succeed only if the statements clearly and unequivocally establish that the employer intended to be bound. *Rowe, supra*, 437 Mich at 639, 645. The language "must clearly permit a construction which would support the asserted meaning." *Id*. at 641. To determine whether such statements establish this obligation, this Court looks at all the relevant surrounding circumstances, including all writings, oral statements, and other conduct by which the parties manifested their intent.

Plaintiff first alleges that in 1972, during an interview for an hourly position, he was given oral assurances of job security. In his deposition, plaintiff testified that he asked the supervisor how long the job would last, and plaintiff alleges that the supervisor told him that he would have a job as long as he was a good employee and that if he didn't "do anything wrong," he would "never get dismissed." An objective reading of this language indicates that the supervisor's statement related only to the hourly position for which plaintiff was interviewing, and was simply a general "expression of an optimistic hope of a long relationship.'" *Rowe, supra*, 437 Mich at 640. Moreover, these statements are strikingly similar to language which the Supreme Court has rejected as proof of a contractual promise. Compare *Rood, supra*, 444 Mich at 123; *Rowe, supra*, 437 Mich at 645. Hence, this language is insufficient to create a contractual obligation that the employer would discharge for cause only.

Plaintiff also contends that language in a 1973 employee handbook established that the employer could only terminate for cause. In his deposition, plaintiff testified that he never received a handbook in all his years working for defendant. Yet, he relies on the following language in the 1973 handbook. Under the heading "Discharge without notice," the manual states that "employees will be discharged without notice for serious disciplinary actions including but not limited to intoxication, theft or any serious misconduct which may jeopardize the image and position of the company." Subsequent handbooks in 1985 and 1990 disclaimed any contractual relationship with employees, and defendant's personnel employees testified by affidavit that all employees were issued a copy of these handbooks.

A fair reading of the 1973 language indicates that it is a *nonexclusive* list of bases to terminate employees without notice. Even if plaintiff had read the manual, the language does not support plaintiff's claim that the employer agreed to discharge its employees for cause only. See *Rood, supra*, 444 Mich at 136-137, 142; compare also *Rasch v City of East Jordan*, 141 Mich App 336, 345; 367 NW2d 856 (1985) (knowledge of the policy manual and its application to plaintiff is required).[3]

Next, plaintiff relies on branch manager Ray Daenzer's deposition testimony that he did not *think* that people would be fired for no reason at all. However, Mr. Daenzer also admits that he was

never instructed that employees must be fired for a reason. A statement of informal policy is insufficient to support an interpretation that discharge was for cause only. *Rood, supra*, 444 Mich at 126. Further, there is no indication that Mr. Daenzer made these statements to plaintiff or that plaintiff was aware of any informal policy.

Finally, plaintiff relies on the affidavit of a former co-worker, Cynthia Castanier.[4] Ms. Castanier claims that it was her *impression* that employees would be terminated for cause only, and that she never saw the 1990 handbook. However, her affidavit does not identify who told her this, nor does it establish that defendant had a just cause discharge policy. As such, her affidavit is insufficient to create a factual issue that the employer's policy was to discharge for cause only. *Gonyea v Motor Parts Federal Credit Union*, 192 Mich App 74, 83-84; 480 NW2d 297 (1991) (statements of coworkers, who are not management representatives, do not create a genuine issue of fact regarding the existence of just cause employment).

II

Next, plaintiff argues that he has asserted a valid age discrimination claim. Specifically, plaintiff claims that because two younger people were retained in his department when he was laid off is evidence of disparate treatment. To present a prima facie case of disparate treatment, plaintiff must show: (1) that he was within the protected class and discharged or demoted; (2) that he was qualified for the position at the time of the discharge or demotion; and (3) that he was replaced by a substantially younger person. *Matras v Amoco Oil Co*, 424 Mich 675, 683; 385 NW2d 586 (1986). Since plaintiff's employer eliminated his position after reorganization, plaintiff is not required to establish that he was replaced. Instead, plaintiff must show that age was a determining factor in the employer's decision to discharge him. *Id*. at 684.

We hold that summary disposition was properly granted because plaintiff cannot establish that age was a determining factor in his discharge. Of the five employees laid off near the time that plaintiff was, three were under the age of forty. Defendant's CEO, Robert Tiderington, has explained that after acquiring a new computer system, defendant decided to reorganize and simply did not need three buyers. Tiderington explained that plaintiff was chosen for layoff due to his marginal performance. Thomas Zumer, defendant's chief operating officer, had been informed that plaintiff slept on the job. In fact, defendant's supervisor and two coworkers had observed separate instances of plaintiff sleeping on the job.

Plaintiff contends that defendant's proferred reasons are not true because he had been continually given promotions and raises and because he was never disciplined for sleeping on the job. Aside from these conclusory assertions, plaintiff has not pointed to any evidence which calls defendant's reasons into question, or more importantly creates a factual issue regarding whether age was a determining factor in his discharge. Instead, defendant relies primarily on the fact that younger individuals were retained as buyers. Evidence that a competent older employee was terminated and a younger employee was retained, is insufficient standing alone to establish a prima facie case in the context of a work force reduction. Cf. *Matras, supra*, 424 Mich at 683-684.

Affirmed.

/s/ Robert P. Young, Jr.
/s/ Maura D. Corrigan
/s/ Michael J. Callahan

[1] Harvey Reinhardt died in 1994, and his wife and personal representative Virginia Reinhardt, was substituted as the plaintiff in this action. In this opinion, however, the term "plaintiff" refers to Harvey Reinhardt.

[2] *Toussaint v Blue Cross and Blue Shield of Michigan*, 408 Mich 579; 292 NW2d 880 (1980).

[3] Plaintiff primarily alleges an express contractual basis for his *Toussaint* claim. Plaintiff also suggests that the evidence would support a claim that he had a "legitimate expectation" of just cause employment. We disagree. A nonexclusive list of rules of behavior that could lead to disciplinary action or discharge, reserves the employer's right to discharge an employee at will. *Rood*, *supra*, 444 Mich at142.

[4] Ms. Castenier has also brought a wrongful discharge action against defendant, and is represented by plaintiff's counsel.