STATE OF MICHIGAN

COURT OF APPEALS

HARLEY BARSTOW and MARGARET BARSTOW, Plaintiffs-Appellants,	UNPUBLISHED March 11, 1997
v	No. 186184 Calhoun Circuit Court LC No. 94-001958
MARSHALL AREA CHAMBER OF COMMERCE, Defendant-Appellee.	

Before: Reilly, P.J., and MacKenzie and B. K. Zahra*, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). Plaintiffs' complaint alleged breach of a just cause employment contract, violation of the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq*.; MSA 3.548(101) *et seq*., violation of the Handicappers' Civil Rights Act, MCL 37.1101 *et seq*., MSA 3.550(101) *et seq*., and loss of consortium. We affirm.

We agree with the trial court that no genuine issue of material fact existed regarding Barstow's breach of employment contract claim. Plaintiffs presented no meaningful evidence that the parties agreed that Barstow's employment would be for a definite term, and hence was presumptively terminable only for just cause. *Toussaint v Blue Cross & Blue Shield of Michigan,* 408 Mich 597, 611; 292 NW2d 880 (1980). Rather, the evidence merely showed that Barstow hoped he would continue to be employed by defendant until his 65th birthday. Further, plaintiffs failed to establish that Barstow's employment contract was either an express or an implied for -cause contract. Defendant's personnel policy manual clearly indicated that all employees of defendant were at will employees. Generally, when an employment contract expressly provides for employment at will, a plaintiff cannot maintain an action based on a prior oral agreement for just cause employment. See *Nieves v Bell Industries, Inc,* 204 Mich App 459, 464; 517 NW2d 235 (1994). While Barstow did not have a

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

written employment contract, he was aware of defendant's personnel policy. Plaintiffs also rely on certain oral statements made by defendant's agents to establish a just cause relationship. Oral statements of job security must be clear and unequivocal to overcome the presumption of employment at will. *Rowe v Montgomery Ward & Co*, 437 Mich 627, 645; 473 NW2d 268 (1991) (opinion of Riley, J.); *Rood v General Dynamics Corp,* 444 Mich 107, 119; 507 NW2d 591 (1993). See also *Coleman-Nichols v Tixon Corp,* 203 Mich App 645, 656; 513 NW2d 441 (1994). The statements plaintiffs rely on indicate that, two years after Barstow was hired, two of defendant's agents stated that they "understood" or "interpreted" the plaintiff's employment to be for cause. These belated statements are not sufficiently clear and unequivocal to create a question of fact concerning the nature of Barstow's employment contract. The trial court did not err in granting summary disposition in favor of defendant.

Nor did the trial court err in granting defendant's motion for summary disposition with respect to plaintiffs' age discrimination claim. In general, a prima facie case of age discrimination requires a showing that (1) the plaintiff was a member of a protected class and was discharged, (2) the plaintiff was qualified for the position at the time of the discharge; and (3) age was a determining factor in the decision to discharge the plaintiff. *Matras v Amoco Oil Co,* 424 Mich 675; 530 NW2d 135 (1995). If the plaintiff is successful, the burden then shifts to the defendant to articulate a legitimate, non-discriminatory reason for its action. The plaintiff must then show by a preponderance of the evidence that a legitimate reason offered by the defendant is merely pretextual. *Barnell v Taubman Co, Inc*, 203 Mich App 110, 120; 512 NW2d 13 (1993). In this case, defendant rebutted plaintiffs' prima facie case by presenting evidence that Barstow was terminated due to unsatisfactory job performance. Plaintiffs subsequently failed to set forth facts from which a rational trier of fact could infer that defendant's proffered non-discriminatory reason for terminating Barstow was mere pretext. Accordingly, summary disposition pursuant to MCR 2.116(C)(10) was proper.

Plaintiffs also failed to set forth a prima facie case of handicap discrimination. In order to establish a prima facie case under the Handicappers' Civil Rights Act, MCL 37.1101 *et seq*.; MSA 3.550(101) *et seq*., a plaintiff must show that (1) the plaintiff is "handicapped" as defined by the HCRA, (2) the handicap is unrelated to the plaintiff's ability to perform the duties of a particular job, and (3) the plaintiff has been discriminated against in one of the ways set forth in the statute. *Hall v Hackley Hospital*, 210 Mich App 48, 53-54; 532 NW2d 893 (1995); *Merillat v Michigan State University*, 207 Mich App 240, 245; 523 NW2d 802 (1994). MCL 37.1202; MSA 3.550(202) provides, in pertinent part, that an employer may not:

> (b) Discharge or otherwise discriminate against an individual with respect to compensation or the terms, conditions, or privileges of employment, because of a handicap that is unrelated to the individual's ability to perform the duties of a particular job or position.

Once a plaintiff succeeds in establishing a prima facie case, the burden shifts to the employer to show a legitimate, non-discriminatory reason for its action. If the employer rebuts the plaintiff's prima facie case, the burden shifts back to the plaintiff, who then has to show that the employer's reasons

constituted pretext for discrimination. *Crittenden v Chrysler Corp,* 178 Mich App 324, 331; 443 NW2d 412 (1989). Under the HCRA, a "handicap" is defined as:

> (i) A determinable physical or mental characteristic of an individual, 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 or substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual's qualifications for employment or promotion.
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> (iii) Being regarded as having a determinable physical or mental characteristic described in subparagraph (i).
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> [MCL 37.1103(e); MSA 3.550(103)(e); see also *Koester v Novi*, 213 Mich App 653, 661; 540 NW2d 765 (1995).]

In this case, plaintiffs failed to present facts suggesting that Barstow's health problems "substantially limit[ed] 1 of more of [his] major life activities," or that defendant regarded him as having such a condition. In essence, plaintiffs presented only evidence that board members were concerned for Barstow's health. Because there was no evidence presented which would suggest that Barstow was dismissed from his position due to any handicap, summary disposition pursuant to MCR 2.116(C)(10) was proper.

Affirmed. Defendant being the prevailing party, it may tax costs pursuant to MCR 7.219.

/s/ Maureen Pulte Reilly
/s/ Barbara B. MacKenzie
/s/ Brian K. Zahra