

STATE OF MICHIGAN
COURT OF APPEALS

CAROL A. HAMLIN,

Plaintiff-Appellant,

v

FIELDCREST CANNON, INC., a foreign
corporation, and DEBRA KUSOWSKI, jointly and
severally,

Defendants-Appellees.

UNPUBLISHED

March 28, 1997

No. 177387

Saginaw Circuit Court

LC No. 93055035 NZ

Before: Marilyn Kelly, P.J., and MacKenzie and J.R. Ernst,* JJ.

PER CURIAM.

In this wrongful discharge and age discrimination case, plaintiff appeals as of right from a grant of summary disposition for defendants pursuant to MCR 2.116(C)(10). She argues that genuine issues of material fact exist as to whether her employment was terminated or she resigned. We affirm.

Plaintiff worked for defendant Fieldcrest Cannon, Inc (Fieldcrest) as a cashier at the Birch Run Outlet Mall. In early January, 1992, plaintiff called defendant Debra Kusowski and told her that she was resigning effective the end of the month. Defendant Kusowski accepted her resignation. On January 14, 1992, plaintiff called Kusowski to tell her that she had changed her mind and wanted to remain employed at Fieldcrest. Three days later, Kusowski informed plaintiff that, as of February 1, 1992, plaintiff no longer had a job with Fieldcrest, because her position had already been filled.

Plaintiff filed suit claiming wrongful discharge, age discrimination and interference with business relations.¹ Defendants moved for summary disposition. The trial judge dismissed her claims. He held that plaintiff was an at-will employee and could be terminated without just cause. He also found that plaintiff voluntarily resigned from her position and no rational factfinder could conclude that she had been discharged.

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

First, plaintiff argues that the judge erroneously found that she was an at-will employee. We disagree.

Plaintiff's contract is of indefinite duration. Therefore, she is presumptively an at-will employee, terminable without just cause. *Rood v General Dynamics Corp*, 444 Mich 107, 116; 507 NW2d 591 (1993). This presumption can be overcome by proof of a provision forbidding discharge without just cause. *Id.* at 117. Employer policies and procedures may become a legally enforceable part of an employment relationship if they instill legitimate expectations of job security. *Id.* at 117-118.

As evidence of a just cause employment relationship, plaintiff relies on a Fieldcrest benefits summary which states that plaintiff's retirement date is November 1, 2022. We find this insufficient as a matter of law to instill legitimate expectations of just cause employment. It was merely a statement of hope for a long employment relationship. *Schultes v Naylor*, 195 Mich App 640, 644; 491 NW2d 240 (1992).

We disagree with plaintiff's assertion that summary disposition was improper, because it was based on grounds not asserted in defendants' motion. A trial court may grant summary disposition on grounds other than those asserted by the moving party. MCR 2.116(I)(1), *Ruggeri Electrical Contracting Company, Inc v Algonac*, 196 Mich App 12, 18; 492 NW2d 469 (1992).

Next, plaintiff argues that the judge erred in dismissing her wrongful discharge claim after finding that she resigned. Plaintiff asserts that a question of fact exists as to whether she resigned or was fired. We disagree.

In her brief, plaintiff states that she specifically conditioned her resignation on her husband's employment with his company. However, plaintiff's deposition does not indicate that her resignation was conditional. Rather, it establishes that she told defendant Kusowski that she was resigning at the end of January. Kusowski accepted her resignation. Plaintiff cannot create factual issues by making assertions at variance with what she testified to at her deposition. *Downer v Detroit Receiving Hospital*, 191 Mich App 232, 234; 477 NW2d 146 (1991).

By the time plaintiff called to withdraw her resignation, her position had already been filled. Plaintiff was told she could not withdraw her resignation at that point. Even after giving the benefit of reasonable doubt to plaintiff, reasonable minds could not find that Fieldcrest terminated her employment. The trial court correctly dismissed her wrongful discharge claim.

We also find that the judge properly dismissed her age discrimination claim. To establish a prima facie case, the plaintiff must show that (1) she was a member of a protected class; (2) she was discharged; (3) she was qualified for the position; and (4) she was replaced by a younger person. *Wolff v Automobile Club Ins Ass'n*, 194 Mich App 6, 11; 486 NW2d 75 (1992).

As we previously found, the evidence establishes that plaintiff voluntarily resigned and defendants did not seek to replace her until after accepting her resignation. Therefore, plaintiff has failed to establish that she was discharged because of her age.

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

/s/ Marilyn Kelly

/s/ Barbara B. MacKenzie

/s/ J. Richard Ernst

¹ Plaintiff does not challenge the trial judge's dismissal of her tortious interference claim.