STATE OF MICHIGAN

COURT OF APPEALS

LAURENCE J. FOSTER and SANDRA L. FOSTER,

Plaintiffs-Appellants,

v

FORD MOTOR COMPANY and DIANE H. SONNECKEN,

Defendants-Appellees.

UNPUBLISHED
July 18, 1997

No. 194695
Wayne Circuit Court
LC No. 95-521935-CZ

Before: Doctoroff, P.J., and MacKenzie and Griffin, JJ.

PER CURIAM.

Plaintiffs appeal as of right a lower court order granting summary disposition in favor of defendants. We affirm.

Plaintiff Laurence Foster (plaintiff) was employed by defendant Ford Motor Company for approximately twenty-nine years before he was fired, pursuant to the recommendation of defendant Diane Sonnecken, the employee relations official at the Ford facility. Defendant Ford stated that it terminated plaintiff because of his admitted attempt to steal two items from the facility where he worked. Plaintiffs filed this suit alleging breach of contract, age discrimination, and loss of consortium. Following the close of discovery, defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(10), which was granted by the circuit court.

The trial court's decision to grant summary disposition under MCR 2.116(C)(10) is reviewed de novo. *Wright v Restaurant Concept Management, Inc*, 210 Mich App 105, 107; 532 NW2d 889 (1995). The motion may be granted if there is no genuine issue with regard to any material fact, other than damages, and the moving party is entitled to judgment as a matter of law. *Featherly v Teledyne Industries, Inc*, 194 Mich App 352, 357; 486 NW2d 361 (1992). A court should consider affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties in the light most favorable to the party opposing the motion. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

Plaintiffs argue that summary disposition was improper because they allegedly established that plaintiff Laurence Foster's contract required just cause for termination and just cause had not been shown. Plaintiffs rely on unpublished decisions of the Federal District Court. However, because plaintiff's contract was for an indefinite term, it is presumptively terminable at-will. *Rood v General Dynamics Corp*, 444 Mich 107, 116; 507 NW2d 591 (1993). Additionally, this Court has already held that the involved contract language creates at-will employment. *Stopczynski v Ford Motor Co*, 200 Mich App 190, 193; 503 NW2d 912 (1993); *Schiapani v Ford Motor Co*, 102 Mich App 606, 610-611; 302 NW2d 307 (1981). To overcome the presumption of at-will employment, a party must prove a contract for a definite term, which is not applicable here, or "a provision forbidding discharge absent just cause." *Rood*, *supra* at 117.

Plaintiffs assert that defendant Ford's Employee Relations Administration Manual (ERAM) is such a provision. The ERAM does contain language that limits the bases upon which a decision to discharge may be grounded. However, we conclude that *Stopczynski*, *supra* at 194-195, is controlling. In *Stopczynski*, the plaintiff tried to rely on the Industrial Relations Administration Manual (IRAM), the predecessor of the ERAM, to establish that defendant could only discharge employees for just cause. *Id.* at 194. This Court rejected that claim, noting that none of the employee manuals plaintiff submitted contained for-cause language, and that the IRAM contained internal guidelines for supervisors that should be not considered in determining the plaintiff's employment status. *Id.* at 194-195. Thus, although the IRAM contained "mandatory language that the procedures [governing employee discipline] must be employed before an employee can be discharged," *id.* at 194, the Court quoted *Biggs v Hilton Hotel Corp*, 194 Mich App 239; 486 NW2d 61 (1992), for the proposition that employers may provide systematic guidelines for employee discipline without altering the at-will status of its employees. *Stopczynski*, *supra* at 194-195. Accordingly, this Court "conclude[d] that by simply adopting disciplinary procedures applicable to salaried employees such as plaintiff, defendant did not alter the at-will relationship created when plaintiff signed the employment contract." *Id*. at 195.

Plaintiffs assert that the IRAM did not contain for-cause provisions and that the ERAM does. Reading *Stopczynski* in context, however, we conclude that the IRAM was assumed to have sufficient language to create for-cause employment if it was applicable. If the Court in *Stopczynski* did not proceed on that assumption, its discussion of *Biggs* would be superfluous. We conclude that the ERAM, like the IRAM, is an internal disciplinary policy that should not be construed as having modified the presumptively at-will employment contract.

Additionally, we note that the ERAM leaves the determination whether there is sufficient evidence to initiate disciplinary action to the supervisor and the reviewing personnel. It is thus comparable to the employer policies mentioned in *Thomas v John Deere Corp*, 205 Mich App 91, 95; 517 NW2d 265 (1994), where this Court held that because the employer had reserved the authority to determine when cause existed for dismissal, the plaintiff could not maintain a cause of action grounded on second-guessing the employer's determination. *Id*. at 95. The *Thomas* Court emphasized that an employment contract is a contract that the parties can modify from the extremes of for-cause and at-will, but that this Court should not misconstrue a partial limitation on the employer's discretion into a legally binding agreement that any decision to dismiss an employee must be sufficiently grounded on

facts that a reviewing court would consider adequate. *Id*. at 93-95. Therefore, we conclude that, at most, plaintiffs can establish partial limitations of defendants' authority that do not create a legally cognizable claim of just-cause employment.

Plaintiffs also allege plaintiff was told by defendants' representatives that he was not an at-will employee. For oral statements to establish for-cause employment, such statements "must be clear and unequivocal to overcome the presumption of employment at will." *Rowe v Montgomery Ward & Co, Inc*, 437 Mich 627, 645; 473 NW2d 268 (1991). The only record evidence of any oral promise comes from plaintiff's affidavit, where he states, "During my employment, I was made aware of documents contained in the Employee Relations Administration Manual, and understood that those would govern the terms and conditions of my employment." This general allegation is insufficient to show "clear and unequivocal" conduct by defendant that it wanted to abrogate the presumption of at-will employment. We, therefore, affirm the trial court's finding that no genuine issue of material fact existed as to whether plaintiff was an employee entitled to for-cause protection and that summary disposition was appropriate.

In any event, even if plaintiff had enjoyed a for-cause employment contract, we agree with the trial court that plaintiff has failed to show the existence of a genuine issue of material fact regarding whether defendant breached such a contract in terminating plaintiff. The ERAM relied on by plaintiff lists theft of company property as an example of employee misconduct. Plaintiff's attempted theft of two items, as well as his initial denial of any knowledge, provided sufficient grounds to allow defendant to terminate his employment. Therefore, plaintiff's breach of contract claim was properly dismissed. See *Stopczynski, supra* at 196.

Plaintiffs next argue the trial court erred in dismissing their age discrimination claim against defendants. The Elliott-Larsen Civil Rights Act, MCL 37.2202(1)(a); MSA 3.548(202)(1)(a), prohibits an employer from discriminating against an employee because of, inter alia, the employee's age. If a plaintiff can make out a prima facie case of discrimination, "the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its actions." *Barnell v Taubman Co, Inc*, 203 Mich App 110, 120; 512 NW2d 13 (1993). If the defendant comes forward with a legitimate, nondiscriminatory reason, the burden shifts back onto the plaintiff to prove by a preponderance of the evidence that the reason offered was merely a pretext. *Id*. A plaintiff does not have to show that age was the only reason for the discharge, or even the main reason, "but it must be one of the reasons that made a difference in determining whether to discharge a person." *Id*. at 121.

Defendants admitted for purposes of their motion that plaintiffs could make out a prima facie case of discrimination but offered plaintiff's attempted theft as their legitimate, nondiscriminatory reason for discharging him. The burden was therefore on plaintiffs to establish that defendant's nondiscriminatory explanation for terminating plaintiff, his attempted theft, was a pretext for age discrimination.

Plaintiff primarily relies on his affidavit, which alleges that two younger employees in the same division as him scrapped parts that should not have been scrapped to make it appear they were properly controlling inventory, and that they were improperly accepting counterfeit parts from dealers,

costing Ford hundreds of thousands of dollars. The affidavit alleges this behavior continued for years and, despite Ford receiving documentation from plaintiff that this was occurring, neither of the younger men were ever disciplined.

Even assuming the allegations in plaintiff's affidavit are true, plaintiffs have not established disparate treatment of similarly situated individuals. Plaintiffs must establish that the two younger employees engaged in conduct of "comparable seriousness." *Lanear v Safeway Grocery*, 843 F2d 298, 301 (CA 8, 1988). Plaintiffs do not allege that the two younger employees admitted trying to steal company property, after first denying their role, and then refused to provide a written statement about the incident. Nor do plaintiffs' allegations establish loss of company property in the same sense that plaintiff admitted trying to take company property. The two younger employees might have acted in a way that cost Ford considerable amounts of money, but the audit report quoted by plaintiffs identifies procedural problems in the system, not illegal actions by employees, as the problem. At most, the two younger employees took advantage of inadequate procedures and supervision to make their performance appear better than it was. There is no evidence they stole or attempted to steal company property, nor is there evidence they were uncooperative in any investigation or audit. Their conduct is simply not comparable to plaintiff's admitted theft and failure to cooperate.

As no rational juror could find the two younger men were similarly situated to plaintiff because they did not engage in conduct of comparable seriousness, plaintiffs have failed to overcome the presumption that plaintiff was discharged for the stated reason of attempting to steal company property. Without evidence that defendant used the attempted theft as a pretext to fire plaintiff because of his age, plaintiff's age discrimination claim was properly dismissed.

While not raised, we note that plaintiff Sandra Foster's loss of consortium claim was wholly derivative of plaintiff's claims against defendants, and the trial court properly dismissed that claim, as well.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Barbara B. MacKenzie
/s/ Richard Allen Griffin