STATE OF MICHIGAN

COURT OF APPEALS

ROBERT H. KERNS,

Plaintiff-Appellant,

v

DURA MECHANICAL COMPONENTS, INC.,

Defendant-Appellee.

UNPUBLISHED
December 5, 1997

No. 198393
Antrim Circuit Court
LC No. 95-006678 NZ

Before: Griffin, P.J., and Wahls and Gribbs, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition in favor of defendant. We affirm.

Plaintiff first argues that the trial court erred in granting defendant's motion for summary disposition as to his wrongful discharge claim. We disagree.

A trial court's decision to grant a motion for summary disposition is reviewed de novo. *Pinckney Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). A motion for summary disposition pursuant to MCR 2.116(C)(10) may be granted when, except with regard to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* Giving the benefit of reasonable doubt to the nonmoving party, the trial court must determine whether a record might be developed that would leave open an issue upon which reasonable minds might differ. *Id.* The adverse party, however, may not rest upon mere allegations or denials, but must set forth specific facts to show that there is a genuine issue for trial. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). Before summary disposition may be granted, the trial court must be satisfied that, because of some deficiency that cannot be overcome, it is impossible for the claim to be supported at trial. *SSC Associates v General Retirement System*, 192 Mich App 360, 365; 480 NW2d 275 (1991).

Employment contracts for an indefinite duration are presumed to be terminable at the will of either party for any reason or no reason at all. *Rood v General Dynamics Corp*, 444 Mich 107, 116;

507 NW2d 591 (1993). A party can overcome the presumption of at-will employment by

presenting sufficient proof of a provision forbidding discharge absent just cause. *Rood, supra* at 117, citing *Rowe v Montgomery Ward & Co*, 437 Mich 627, 636-637; 473 NW2d 268 (1991). Such a provision may become part of the employment relationship through either (1) an express or implied-in-fact contract or (2) as the result of legitimate expectations of job security instilled by the policies and procedures of the employer. *Rood, supra* at 117-118, citing *Rowe, supra* at 668 (Boyle, J., concurring), and *Toussaint v Blue Cross & Blue Shield*, 408 Mich 579, 615; 292 NW2d 880 (1980). Contractual liability requires the mutual assent of the parties. *Rood, supra* at 118. The "legitimate expectations" theory, on the other hand, is not based on contract law, but is based solely on considerations of public policy. *Rood, supra* at 118.

On appeal, plaintiff seems to confuse the contract and legitimate expectations theories of just-cause employment. It is clear that plaintiff relies on oral statements made to him by defendant's predecessor to support his claim that he could only be discharged for good cause. We do not believe that such statements, when made to an individual employee, can be the basis of a "legitimate expectations" claim. See *Rood, supra* at 138, n 31. Thus, we construe plaintiff's argument as an assertion of an implied contract of just-cause employment. Plaintiff argues that employees of defendant's predecessor, Wickes Manufacturing, promised him secure employment for at least ten years. Plaintiff contends that such promises constituted an agreement for a contract of employment terminable only for cause. Defendant does not rebut plaintiff's assertions regarding the alleged promises made by Wickes' employees. Instead, defendant argues that it is not bound by any such promises, and that there is no evidence that defendant ever made any such promises independently.

While we believe that the alleged oral promises made by Wickes' employees might be sufficient to establish a just cause employment contract between plaintiff and Wickes, plaintiff has provided no basis for enforcing such promises against defendant. We decline to enforce one employer's oral promises against a subsequent employer in the absence of any evidence that the new employer assented to those promises. See *Parker v Diamond Crystal Salt Co*, 683 F Supp 168, 172 (WD Mich, 1988). We recognize that, under some circumstances, a successor corporation may assume the liabilities of its predecessor. See *Conrad v Rofin-Sinar, Inc*, 762 F Supp 167, 170-171 (ED Mich, 1991). However, we do not believe that, in the case of an oral employment contract, a successor corporation should be held liable for obligations of its predecessor when it was not aware, nor had reason to be aware, of those obligations. See *Stevens v McLouth Steel Products Corp*, 433 Mich 365, 371-379; 446 N.W.2d 95 (1989).[1] Plaintiff does not point to any evidence which would allow a reasonable trier of fact to conclude that defendant had notice of the oral agreement between Wickes and plaintiff. Under these circumstances, the trial court did not err in granting summary disposition for defendant on this issue.[2]

To the extent that plaintiff does raise a "legitimate expectations" theory of just-cause employment, we find that it is without merit. To create a legitimate expectation of just-cause employment, an employer's policy statement must be reasonably capable of being interpreted as promise to discharge only for cause. *Rood, supra* at 140. A promise is a manifestation of intention to act or refrain from acting in a specified way. *Id.* at 138-139. Only promises regarding policies and procedures reasonably related to employee termination are capable of instilling a legitimate expectation

of discharge only for cause. *Id.* at 139. Giving plaintiff the

benefit of the doubt, the only statements of policy made by defendant in the instant case were (1) the employee handbook issued by defendant, which apparently contained essentially the same provisions as a handbook provided by Wickes Manufacturing, and (2) the oral statement made to Wickes' employees by defendant's president, assuring them that the policies and procedures in place at Wickes Manufacturing would continued unchanged under defendant's ownership.

As an initial matter, we note that defendant's employee handbook contains no more than a "nonexclusive list of common-sense rules of behavior that can lead to disciplinary action or discharge." As such, it cannot be interpreted as a promise of just-cause employment. *Rood, supra* at 142. Plaintiff also argues that the oral statement by defendant's president was a promise to maintain the policy of just-cause employment allegedly in place at Wickes Manufacturing. However, plaintiff has not cited any evidence that would support a finding that Wickes had such a policy. The Wickes' employee manual provided by plaintiff simply does not apply to salaried workers like plaintiff, and cannot be construed as a promise of just cause employment as to salaried employees. Plaintiff's opinion that Wickes had a just-cause employment policy is simply insufficient to raise a genuine issue of material fact. Accordingly, we hold that plaintiff has not set forth specific facts sufficient to raise a genuine issue for trial.

Next, plaintiff argues that the trial court erred in granting defendant's motion as to his handicapper discrimination claim. We disagree.

To establish a prima facie case under the Michigan Handicappers' Civil Rights Act (HCRA), MCL 37.1101 *et seq.*; MSA 3.550(101) *et seq.*, a plaintiff must demonstrate (1) that he has a "handicap" under the definition provided in the HCRA, (2) that the handicap is unrelated to his ability to perform the duties of a particular job, and (3) that he was discriminated against in one of the ways prohibited in the statute. *Tranker v Figgie International Inc*, 221 Mich App 7, 11; 561 NW2d 397 (1997), lv pending. Prior to filing his claim in the instant case, plaintiff successfully and unequivocally asserted in an application for social security disability benefits that, as of the date of his termination, he became unable to work because of a disability. "Disability" is defined under the Social Security Act as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." See *Tranker supra* at 12, quoting 42 USC 423(d)(1)(A).

Under the doctrine of judicial estoppel, a party who has successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding. *Tranker, supra* at 13-14. The underlying purpose of the doctrine of judicial estoppel is not to provide a shortcut method of fact finding, but rather to impede litigants who play "fast and loose" with the judicial system. *Tranker, supra* at 13, citing *Paschke v Retool Industries, supra*, 445 Mich 502, 509; 519 NW2d 441 (1994). Because plaintiff's successful application for disability benefits required a finding that plaintiff was completely unable to engage in gainful work, and because a successful claim under the HCRA would require a finding that plaintiff was physically limited in a way *unrelated* to his ability to work, plaintiff's HCRA claim is precluded under the doctrine of judicial estoppel. *Tranker, supra* at 13-17. Accordingly, we hold that the trial court did not err in granting defendant's motion for summary disposition on this issue.

Finally, plaintiff argues that the trial court erred in granting defendant's motion for summary disposition as to his age discrimination claim brought under the Elliot-Larsen Civil Rights Act, MCL 37.2101 *et seq.;* MSA 3.548(101) *et seq*. We disagree.

In an employment discrimination case alleging discrimination based on age, the plaintiff must present evidence that he was "qualified" for the position sought. See, e.g., *Featherly v Teledyne*, 194 Mich App 352, 358; 486 NW2d 361 (1992). As noted above, prior to filing his claim in the instant case, plaintiff successfully and unequivocally asserted that he was totally disabled. Accordingly, because plaintiff has already sought and received a judicial finding from an Administrative Law Judge that he was completely unable to work, he may not now assert that he was "qualified" to continue working for defendant. See *Tranker, supra* at 13. Because plaintiff cannot make out a prima facie case of age discrimination, see *Featherly, supra* at 358, the trial court did not err in granting defendant's motion for summary disposition as to plaintiff's age discrimination claim. Although the trial court based it decision on a determination that plaintiff had failed to create an issue of fact as to pretext, this Court need not reverse when the right result was reached for the wrong reason. *Howe v Detroit Free Press*, 219 Mich App 150, 158; 555 NW2d 738 (1996), lv pending.

Plaintiff argues that the application of judicial estoppel brings about a harsh result and gives defendant a windfall. We disagree. In his application for Social Security Disability benefits, plaintiff asserted that he became totally disabled on the very day he was discharged. While such a coincidence seems unlikely, plaintiff apparently convinced the Administrative Law Judge of just that. Plaintiff now argues that he was not actually disabled, but that social security law created a presumption of disability based on his "advanced age" and his "multiple medical impairments". Even if this is true,[3] we do not believe that plaintiff is entitled to take advantage of such a presumption to obtain benefits, and then turn around and argue that he suffers no job-related disability. Any worker who is terminated may find herself or himself in a difficult financial situation. However, such a worker's right to collect Social Security Disability benefits is not linked to their ability to find work. In such cases, the only question is whether the worker is totally disabled. See *Tranker, supra* at 15-16. Plaintiff has successfully asserted that he was and continues to be totally disabled, and he is not entitled to now claim otherwise.

Affirmed.

/s/ Richard Allen Griffin
/s/ Myron H. Wahls
/s/ Roman S. Gribbs

[1] We recognize that *Stevens* deals with a different scenario than is present here. However, we believe that the discussion found there regarding "notice" to a successor corporation also applies here.

[2] We note that the trial court found that plaintiff's contract claim was barred by the statute of frauds. We believe the trial court erred in so finding. See *Toussaint, supra* at 612, n 24. However, we need not reverse where the trial court reached the correct result, albeit for the wrong reason. *Howe v Detroit Free Press*, 219 Mich App 150, 158; 555 NW2d 738 (1996), lv pending.

[3] In support of his assertion that he was not, in fact, disabled, plaintiff claims that he told the Administrative Law Judge that he could have continued to work at his old job. However, after his initial claim was denied, plaintiff submitted a signed "request for reconsideration," where he stated in part: "The job of industrial relations manager *is not possible to perform* unless the person doing the work can stand and walk for long periods of time." [Emphasis added.] This statement is clearly inconsistent with plaintiff's claim that he could have continued in his old job.