STATE OF MICHIGAN

COURT OF APPEALS

MARTHA CROFCHECK, JOAN PACE, DINO LINARAS, JAMES BIERBUSSE, FRANK STACHURSKI, BONNIE MEIER, NANCY REYNOLDS, DAVID PIERCE, KEVIN KERIN, MIRCEA MUNTEAN and PATRICE CHAPMAN,

Plaintiffs-Appellants,

and

JUNE BAKER, MADELINE MAZUREK and DAVID WOODFIN,

Plaintiffs,

v

MERIDIAN RETAIL, INC.,

Defendant,

and

KMART CORPORATION,

Defendant-Appellee.

UNPUBLISHED
December 9, 1997

No. 194914
Oakland Circuit Court
LC No. 94-488128

Before: Markey, P.J., and Jansen and White, JJ.

PER CURIAM.

Plaintiffs[1] appeal the circuit court's grant of Kmart's motion for summary disposition in this case alleging age discrimination and conspiracy under the Civil Rights Act (CRA), MCL 37.2101 *et seq.;* MSA 3.548(101) *et seq.*, and wrongful discharge. We affirm.

The facts viewed in a light most favorable to plaintiffs are that plaintiffs were employees of the creative advertising department (CAD) at Kmart's world headquarters in Troy. One of the CAD's principal functions was the creation of Kmart's weekly advertisement circulars, which were distributed throughout the United States and Canada. In October 1993, Kmart announced it would eliminate its CAD department and outsource the department's functions to Meridian Retail, Inc. (Meridian). In December 1993, Kmart eliminated 75 of 83 positions in the CAD, including plaintiffs'.

Pursuant to the outsourcing agreement between Kmart and Meridian, Meridian agreed to interview all Kmart employees that expressed an interest, and agreed to "use its best efforts" to hire as many CAD employees as possible.[2] Meridian interviewed sixty-nine CAD employees and offered positions to 80% of those interviewees who were under age forty-five, and to 35.7% of those interviewees who were age 45 and over.[3]

Kmart asserted below that it outsourced the CAD in order to cut overhead and production expenses, remove the burden and cost of the constant technological upgrades in hardware and software, improve the creative design and photography of the circulars, improve the service and responsiveness of the advertising production and staff to merchants, and shorten the circulars' production time to allow Kmart to more rapidly respond to market trends for improved competitive advantage.

Plaintiffs filed suit against Kmart and Meridian, claiming that the CAD was outsourced in order to terminate older employees, that the two companies conspired to discriminate against older employees, and that Kmart had breached plaintiffs' just-cause employment contracts. Plaintiffs' complaint alleged that defendants organized Meridian exclusively for the purpose of Meridian doing business for and with Kmart, and that Meridian was the mere alter ego of Kmart. The complaint further alleged that at Meridian's suggestion, Kmart offered a "retention bonus" to CAD employees who agreed to remain at Kmart during the transition period between October and December 1993. The bonus was calculated in part based an employee's number of years of service with Kmart, and was payable only to employees who did not go to work for Meridian. The complaint alleged that none of the plaintiffs were offered comparable jobs with Meridian despite being fully qualified, experienced, well-trained and competent in the jobs defendants purportedly sought to fill.[4]

Kmart filed a motion for summary disposition, arguing that the case involves "nothing more that a legitimate business decision by Kmart to eliminate its CAD and outsource its functions to Meridian," and that plaintiffs failed to establish a prima facie case of age discrimination and failed to rebut Kmart's stated legitimate business reasons for terminating plaintiffs' employment. Kmart further argued that plaintiffs' conspiracy claim must fail because Kmart independently determined to eliminate its CAD and outsource to Meridian, and Meridian acted entirely on its own in determining which of the former CAD employees to hire. Additionally, Kmart argued that pursuant to an express at-will provision in its 1988

employee handbook, plaintiffs were at-will employees and their wrongful discharge claims are therefore meritless.

Plaintiffs' response to Kmart's motion for summary disposition argued that Kmart, desiring to rid itself of the financial burden created by a group of older, long-serving employees, approached Meridian to take over the CAD and, together, they arranged that Meridian would end up with most of the younger employees and few of the older ones.

The circuit court, in a thirteen-page opinion and order, granted Kmart's motion, concluding that the evidence did not establish that consideration of plaintiffs' ages had any bearing on the decision to close the CAD and outsource the work to Meridian, and that defendant had shown a legitimate reason for terminating plaintiffs—the elimination of the CAD based on an economically motivated reorganization. The court concluded that because plaintiffs had not proven a case of discrimination or of wrongful discharge, their conspiracy claim also failed.

Meridian is not a party to this appeal, having been dismissed with prejudice after entering into a confidential settlement with plaintiffs.[5]

I

In ruling on a motion for summary disposition, the test is whether the kind of record that might be developed, giving the benefit of any reasonable doubt to the nonmoving party, would leave open an issue on which reasonable minds might differ. *Linebaugh v Berdish*, 144 Mich App 750, 754; 376 NW2d 400 (1985).

Six of the eleven remaining plaintiffs appeal the circuit court's dismissal of their wrongful discharge claims, which were premised on two theories: that statements by Kmart's agents created implied contracts of employment, and that Kmart's policy statements and employment application created legitimate expectations that plaintiffs could be terminated only for cause.

Oral contracts of employment for an indefinite term are presumed to be terminable at the will of either party. *Rood v General Dynamics Corp*, 444 Mich 107, 116-117; 507 NW2d 591 (1993); *Snell v UACC Midwest, Inc*, 194 Mich App 511, 512; 487 NW2d 772 (1992). The presumption of at-will employment may be overcome if there is an express agreement to the contrary. *Snell, supra* at 512. Oral promises may become part of the contract as a result of explicit promises or promises implied in fact. *Nieves v Bell Industries, Inc*, 204 Mich App 459, 462; 517 NW2d 235 (1994). Similarly, if the employer has established policies or procedures giving rise to a legitimate expectation of continued employment absent just-cause for termination, the presumption of at-will employment is overcome. *Id.* See also *Toussaint v Blue Cross and Blue Shield*, 408 Mich 579; 292 NW2d 880 (1980). Oral statements of job security must be clear and unequivocal to overcome the presumption of at-will employment. *Rowe v Montgomery Ward*, 437 Mich 627, 645; 437 NW2d 268 (1991). In addition, the parties must mutually assent to be bound by the alleged contract. *Rood, supra* at 118-119.

The statements plaintiffs rely on were either not clear and unequivocal or did not demonstrate a clear intention to create a contract to terminate only for cause, i.e., were not made

during discussions of plaintiffs' job security *in relation to formulating a just cause contract.* See *Rood, supra* at 123-124; *Coleman-Nichols v Tixon Corp,* 203 Mich App 645, 656; 513 NW2d 441 (1994); *Barber v SMH(US) Inc,* 202 Mich App 366, 371; 509 NW2d 791 (1993). Thus, summary disposition of these claims was appropriate.

Plaintiffs argue that several of defendant's policy handbooks and Kmart's employment application contain language that specifies when an employee can be terminated, thus instilling a legitimate expectation that employees could be terminated only for cause. However, it is undisputed that in 1988 Kmart distributed a handbook that contained an at-will disclaimer. Assuming that Kmart's earlier policy handbooks did establish just-cause employment, under the legitimate expectations theory, the unilateral modification of the employer's policies from just-cause to at-will employment is effective if the employer uniformly provides reasonable notice of the change to its affected employees. *Bullock v Automobile Club of Michigan,* 432 Mich 472, 482; 444 NW2d 114 (1989); *Foehr v Republic Auto,* 212 Mich App 663, 669; 538 NW2d 420 (1995). Because plaintiffs in the instant case do not argue that they were not provided reasonable notice of the change to at-will employment, we conclude that defendant's 1988 handbook became effective and plaintiffs' legitimate expectations claims must fail. *Id. Bullock, supra* at 482.

The circuit court properly dismissed plaintiffs' wrongful discharge claims.

II

In order to establish a prima facie case of age discrimination, a plaintiff must show that he or she is a member of a protected group, was subjected to an adverse employment action, was qualified for the particular position, and was replaced by a younger person. *Matras v Amoco Oil Co,* 424 Mich 675, 683; 385 NW2d 586 (1986); *Featherly v Teledyne Industries,* 194 Mich App 352, 358; 486 NW2d 361 (1992). However, in reduction-in-force (RIF) cases, a plaintiff need not show that he or she was replaced by a younger person, because that situation would not necessarily obtain where positions are eliminated, but must show that age was a determining factor in his or her selection for termination as part of the RIF. *Matras, supra* at 683-684; *Foehr, supra* at 671.

The CRA prohibits two or more persons, or "a person," from conspiring to "aid, abet, incite, compel, or coerce a person to engage in a violation" of the CRA; or "attempt directly or indirectly to commit an act prohibited" by the CRA. MCL 37.2701; MSA 3.548(701). A civil conspiracy is a combination of two or more persons by concerted action to accomplish an unlawful purpose. *Temborius v Slatkin,* 157 Mich App 587, 599-600; 403 NW2d 821 (1986). The gravamen is not the conspiracy itself, but the act causing the damage, since conspiracy, standing alone, without commission of acts causing damage, is not actionable. *Cousineau v Ford Motor Co,* 140 Mich App 19, 37; 363 NW2d 721 (1985). Although a joint action may be maintained against the participants in a civil conspiracy, all of them need not be joined and the action may be brought against only one. *Hanover Fire Ins Co v Furkas,* 267 Mich 14, 21; 255 NW 381 (1934). Proof of a conspiracy may be established by circumstantial evidence and may be based on inference. *Temborius, supra* at 600. The plaintiff bears the burden of producing evidence from which a jury may reasonably infer the joint

assent of the minds of two or more persons to the prosecution of the unlawful purpose. *Rencsok v Rencsok,* 46 Mich App 250, 252; 207 NW2d 910 (1973).

We conclude that plaintiffs failed to establish that age was a determining factor in Kmart's decision to outsource the CAD to Meridian, and also failed to establish a conspiracy between Kmart and Meridian to discriminate against them on the basis of age.

Regarding plaintiffs' age discrimination claim against Kmart, plaintiffs did not show that the CAD had a greater number of "older" employees than other departments at Kmart. Futher, the comments by Kmart's agents plaintiffs relied on to support their age discrimination claim were either not made by persons involved in the decision to outsource the CAD, were too remote to the outsourcing, or were not shown to have any link to the decision to outsource. Assuming arguendo that plaintiffs did establish a prima facie case of age discrimination, plaintiffs failed to rebut Kmart's articulated legitimate reasons for outsourcing the CAD department. We therefore conclude that plaintiff's age discrimination claim against Kmart was properly dismissed.

Regarding plaintiffs' claim that Kmart and Meridian conspired to discriminate against them, plaintiffs presented evidence that Meridian interviewers made notes during the interviews referring to plaintiffs as "old world" and "older;" that Meridian interviewers gave them perfunctory interviews, did not inquire about their skills and did not tell them what positions they were interviewing for; and that the interviewers made remarks to the effect that Meridian was a "young" company. However, Meridian's liability is not at issue. Plaintiffs did not present sufficient competent evidence to raise a genuine issue regarding whether Kmart influenced or controlled Meridian's hiring tactics and decisions. The evidence fails to establish that Kmart was predisposed to discriminate or did discriminate against plaintiffs on the basis of age. A reasonable juror could not infer from the evidence offered that Kmart and Meridian conspired to discriminate against plaintiffs.[6] *Rencsok, supra*.

We agree with plaintiffs that the circuit court erred in concluding that plaintiff Chapman may not maintain an age discrimination claim because she is under forty and thus not in the protected class. The CRA has no specified range of ages, unlike the Age Discrimination in Employment Act, 29 USC 621 *et seq.*, which protects individuals forty years or older from age-based discrimination. *Simpson v Ernst & Young,* 100 F3d 436 (CA 6, 1996). The error was harmless, however, given that plaintiffs failed to establish that age was a determining factor in defendant's decision to outsource the CAD.

The circuit court properly dismissed plaintiffs' age discrimination and conspiracy claims.

Affirmed.

/s/ Jane E. Markey
/s/ Kathleen Jansen
/s/ Helene N. White

[1] Three of the original plaintiffs, Baker, Mazurek and Woodfin, are not parties to this appeal.

[2] The pertinent provision provided:

> 7. MISCELLANEOUS
>
> (a) As part of the transition of work from Kmart's in-house production department to Contractor, Contractor agrees to interview for possible employment all current employees of Kmart's in-house production department who express an interest in working for Contractor. In addition, Contractor agrees that it will use its best efforts to hire as many of the current Kmart employees as Contractor determines in the exercise of its sole discretion, are qualified to work for Contractor and as Contractor decides may be needed to provide the Creative Print Production Services pursuant to this Agreement.

[3] Plaintiffs attached charts and statistical data to their brief in response to defendant's motion for summary disposition. Defendants did not dispute these figures below.

[4] Plaintiffs' brief in response to defendant's motion for summary disposition stated that four plaintiffs were offered jobs by Meridian (Meier, Reynolds, Kerin and Muntean) and that these four plaintiffs were not pursuing claims against Meridian.

[5] Meridian settled the age discrimination claim against it, which was based on the allegation that Meridian discriminated against older Kmart employees when hiring its new work force. The claims of conspiracy against Meridian were dismissed by plaintiffs with prejudice.

[6] This applies to other evidence plaintiffs presented, including that 1) Kmart did not solicit bids from any entity other than Meridian; 2) Kmart set Meridian up in business to do business exclusively for Kmart; 3) Meridian recommended to Kmart in its initial outsource proposal that Kmart offer CAD employees a "stay bonus" to encourage CAD employees to remain at Kmart during the transition period from October to December 1993 and Kmart implemented a "retention bonus" calculated by number of years of service that was paid only to employees who did not go to work for Meridian. There was no evidence that Meridian was anything other than a separate company set up by non-Kmart employees in the advertising business for the purpose of servicing the Kmart account. Further, establishing a bonus that recognizes years of service and that is payable only to those who do not secure satisfactory employment with the outsource company does not of itself establish a plan to eliminate older employees.