

STATE OF MICHIGAN
COURT OF APPEALS

DAIMLERCHRYSLER CORPORATION,

Plaintiff/Counter Defendant-
Appellee,

UNPUBLISHED
October 24, 2006

v

ERNEST PORTER III,

Defendant/Counter Plaintiff-
Appellant.

No. 270112
Oakland Circuit Court
LC No. 2006-072763-AA

Before: Cavanagh, P.J., Bandstra and Owens, JJ.

PER CURIAM.

Defendant appeals as of right from a circuit court order granting plaintiff's motion for summary disposition and vacating an arbitration award. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff, an at-will employee, was terminated for falsifying his time records. Pursuant to plaintiff's employee dispute resolution process (EDRP), defendant protested his termination and eventually took the matter to arbitration. The arbitrator found that defendant had been subjected to disparate treatment and that plaintiff had terminated defendant's employment without just cause. The circuit court determined that the arbitrator exceeded his authority by ignoring controlling principles of law and vacated the award.

The trial court's ruling on a motion for summary disposition is reviewed de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). A trial court's decision to enforce, vacate, or modify an arbitration award is also reviewed de novo on appeal. *Tokar v Albery*, 258 Mich App 350, 352; 671 NW2d 139 (2003).

The circuit court may vacate an arbitration award if the arbitrator exceeded his powers. MCR 3.602(J)(1)(c). An arbitrator exceeds his powers whenever he acts beyond the material terms of the contract from which his authority is derived, or in contravention of controlling principles of law. *Dohanyos v Detrex Corp (After Remand)*, 217 Mich App 171, 176; 550 NW2d 608 (1996). To be reviewable, the legal error must have been so material or substantial as to have governed the award, and but for which the award would have been substantially different. *Rembert v Ryan's Family Steak Houses, Inc*, 235 Mich App 118, 165; 596 NW2d 208 (1999). In addition, the error must appear on the face of the award. *Smith v Motorland Ins Co*, 135 Mich

App 33, 40; 352 NW2d 335 (1984). The court cannot engage in contract interpretation, which is an issue for the arbitrator to determine, or review the arbitrator's factual findings. *Konal v Forlini*, 235 Mich App 69, 74-75; 596 NW2d 630 (1999).

The EDRP defines the scope of the arbitrator's authority. It provides in part: "The Arbitrator's authority is limited to deciding whether the challenged personnel decision or action was (1) lawful under applicable federal, state and local law or (2) consistent with the Company's "at will" employment policy."

"It is a settled tenet of Michigan law that employment contracts for an indefinite term produce a presumption of employment at will absent distinguishing features to the contrary." *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 383; 563 NW2d 23 (1997). The presumption may be rebutted by evidence of a contractual provision for a definite term of employment or a provision prohibiting termination without just cause; such a provision may be express or implied. *Id.*; *Rood v Gen Dynamics Corp*, 444 Mich 107, 117; 507 NW2d 591 (1993). "As recognized in *Toussaint [v Blue Cross & Blue Shield of Michigan]*, 408 Mich 579; 292 NW2d 880 (1980)], however, employer policies and procedures may also become a legally enforceable part of an employment relationship if such policies and procedures instill 'legitimate expectations' of 'job security, i.e., just cause for termination, in employees. *Rood, supra* at 117-118 (emphasis in original). In other words, the policy statements must be "reasonably capable of being interpreted as promises of just-cause employment." *Id.* at 140.

The arbitrator found that defendant did not have a contract for a definite term or a promise from plaintiff to terminate only for cause. Further, while recognizing that defendant's employment was at will, the arbitrator nonetheless concluded that, under *Toussaint*, the EDRP policy, which was designed to promote "a fair . . . method to resolve employment disputes," gave defendant a right to oppose termination on the ground that it was not supported by just cause. However, "[a] promise of fairness, without more, is too vague" to create a legitimate expectation of just-cause employment. *Rood, supra* at 141. Further, a *Toussaint* claim is limited to policies and procedures that create a legitimate expectation of just-cause termination. The EDRP expressly stated, "It is the policy of Chrysler that all employment relationships are at will and may be terminated by Chrysler or by the employee at any time, with or without cause. This EDRP does not change this policy." Such a specific disclaimer cannot create a legitimate expectation of just-cause employment as a matter of law. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 170-171; 579 NW2d 906 (1998); *Nieves v Bell Industries, Inc*, 204 Mich App 459, 464; 517 NW2d 235 (1994).

The Michigan Civil Rights Act (CRA), MCL 37.2101 *et seq.*, protects employees against discriminatory employment practices. Specifically, an employer is prohibited from taking any adverse employment action against an employee on the basis of the employee's race, religion, color, national origin, age, sex, height, weight and marital status. MCL 37.2202(1). A prima facie case of discrimination in violation of the CRA can be made out by showing that an employee is a member of a class entitled to protection under the act and that, for the same or similar conduct, the employee was treated differently than similarly situated employees outside that class. *Betty v Brooks & Perkins*, 446 Mich 270, 281; 521 NW2d 518 (1994); *Duranceau v Alpena Power Co*, 250 Mich App 179, 181-182; 646 NW2d 872 (2002). The employee's protected classification must be a factor in the allegedly discriminatory decision. *Duranceau, supra*; *Plieth v St Raymond Church*, 210 Mich App 568, 573-574; 534 NW2d 164 (1995).

The arbitrator noted that defendant had “confirmed that in the matter of his termination, he was not the recipient of racial, gender or any other kind of unlawful discrimination,” and found that the case did not involve discrimination of any kind, yet he determined that defendant’s termination resulted from disparate treatment. While defendant was apparently treated differently than another employee for a similar violation of company policy, there is no disparate treatment under the CRA, and thus no unlawful discrimination, when the factor motivating the employer’s decision is something other than the employee’s protected status. *Plieth, supra*.

For these reasons, the arbitrator’s decision on its face was contrary to controlling principles of law and the trial court did not err in vacating the award.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Richard A. Bandstra
/s/ Donald S. Owens