S T A T E   O F   M I C H I G A N

C O U R T   O F   A P P E A L S

JANIS R. MILLS, Plaintiff-Appellant,	UNPUBLISHED June 4, 2015
v	No. 319282 Macomb Circuit Court
ST. JOHN HEALTH, Defendant-Appellee.	LC No. 2011-005486-CD

Before: RIORDAN, P.J., and JANSEN and FORT HOOD, JJ.

PER CURIAM.

Plaintiffs filed this class action lawsuit against defendant, St. John Health.[1] Plaintiffs' three-count complaint alleges claims for age discrimination, breach of contract, and promissory estoppel/unjust enrichment. The claims are related to defendant's decision to eliminate Long Term Salary Continuation Banks ("Long Term Banks"). The trial court granted defendant's motions[2] for summary disposition pursuant to MCR 2.116(C)(10). Plaintiffs now appeal as of right. We affirm.

The plaintiff class consists of approximately 277 current and former employees of defendant, St. John Health. In February 1990, when plaintiffs were actually employed by Detroit-Macomb Hospital Corporation ("DMHC"), DMHC restructured its paid benefits policy. The existing personal and sick time programs were to be eliminated and the new program was to become effective February 1, 1990. Under the new program, coined the "Benefit Time Program," employees would accrue one benefit day a month during an annual 12-month period. Pursuant to this new program, on February 1, 1990, the employees were allowed to "carry forward up to ten (10) days from existing personal time and sick time banks." These days would be placed in a "Benefit Day Bank" (a/k/a, "Benefit Time Bank"), and would be available for

[1] Although Janis R. Mills is the only named plaintiff in this class action, the trial court granted certification of the class in an order dated May 4, 2012, and the parties and trial court generally use the plural form "plaintiffs." Therefore, we will also adopt this convention.

[2] Defendant filed three motions for summary disposition, one for each count of plaintiffs' complaint. The trial court issued one order disposing of all three motions.

immediate use. All sick time in excess of the hours credited to the Benefit Time Bank would be placed in a Long Term Bank. The hours in the Long Term Bank would "be frozen and only available for use in the event an employee ha[d] exhausted all short-term disability insurance benefits." Defendant maintains that there was never any agreement that the Long Term Bank hours would be paid out at the time of retirement or resignation. By contrast, plaintiffs contend that employees could "cash-out" the Long Term Bank hours when they left the hospital. In any event, individuals who began working at DMHC after February 1, 1990, were never eligible and did not have Long Term Banks.

In 1997, DMHC became affiliated with defendant through a merger. In 1999, defendant implemented a program known as SmarTime. As part of this program, employees were allowed to carry forward Benefit Time Bank hours into the new SmarTime program. With respect to the Long Term Banks, correspondence sent to employees from defendant reiterated that "these hours may be accessed during a period of illness in the event an employee has exhausted all short term disability." In June 2008, the decision was made to eliminate Long Term Banks, effective January 1, 2009. Between June and December 31, 2008, the Long Term Banks would continue according to their then-existing guidelines. According to defendant, the Long Term Banks were eliminated as part of a system-wide cost saving measure taken to ensure continued viability of the organization.

On December 29, 2011, plaintiff Janis Mills filed a class action complaint in which it was alleged that defendant's termination of the Long Term Banks constituted age discrimination in violation of the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq.* (Count I). The complaint also sought damages for breach of contract (Court II), and promissory estoppel/unjust enrichment (Count III). The complaint factually averred that the Long Term Banks could (1) provide compensation for an unpaid sick day, (2) replace income during a medical leave of absence, or (3) be cashed out at resignation or retirement.

During discovery, plaintiffs produced a preliminary report from their expert, Nitin Paranjpe, PhD. In this report, Dr. Paranjpe stated that he was retained to "statistically analyze the age disparities if any, between employees who did have long term salary continuation banks and employees who did not have long term salary continuation banks (hereinafter called long term banks)." "Age" in the statistical analyses was measured at December 31, 2008, the effective date of the elimination of the Long Term Banks. Dr. Paranjpe was directed to specifically "examine whether the employees with long term banks were on average older than the employees who did not have long term banks." With respect to DMHC employees within the St. John system, Dr. Paranjpe concluded that "[t]he average age of those who had long term banks was 54.45 and those employees who did not have long term banks at the St. John Hospital system was 49.77." Dr. Paranjpe was not asked to determine if age discrimination was the cause of any age disparity. Dr. Paranjpe was not asked to conduct an analysis to determine if having a long term bank, or not, was related to any variable other than age. He was merely asked to determine "a simple question," namely, "[a]t a certain point in time, what's the average age of people with long term salary continuation banks versus those without."

On May 30, 2013, defendant filed three separate motions (corresponding with the counts in the complaint) seeking summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). The trial court granted summary disposition to defendant on all three counts of plaintiffs' complaint.

With respect to plaintiffs' disparate impact claim, the court concluded that plaintiffs failed to establish a prima facie case of age discrimination. The court found that the statistical evidence generated by Dr. Paranjpe was insufficient to establish a genuine issue of material fact. The court similarly found that there was no genuine issue of material fact regarding the breach of contract claim. The court concluded that there was no evidence "of a written contract to pay out or otherwise compensate employees for their Long Term Banks upon resignation or retirement." Finally, the court granted defendant's motion to summarily dismiss plaintiffs' claims for promissory estoppel and unjust enrichment. The court found that the promissory estoppel claim must fail because there was no evidence that defendant promised to compensate plaintiffs for the value of their Long Term Banks upon resignation or retirement. The court also rejected plaintiffs' unjust enrichment claim. Plaintiffs' motion for reconsideration was also denied. This appeal followed.

The trial court granted defendant's motions for summary disposition pursuant to MCR 2.116(C)(10). This Court reviews de novo a trial court's decision on a motion for summary disposition under this court rule. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). A motion for summary disposition under MCR 2.116(C)(10) requires the reviewing court to consider "the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Douglas v Allstate Ins Co*, 492 Mich 241, 256; 821 NW2d 472 (2012). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

We first consider plaintiffs' age discrimination claim. The ELCRA precludes an employer from discriminating against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of, among other things, age. MCL 37.2202. In employment discrimination cases arising under the ELCRA, the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 134; 666 NW2d 186 (2003). If the plaintiff is successful in proving the prima facie case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the employment action. *Id*. Should the defendant carry this burden, the plaintiff must then prove by a preponderance of the evidence that the legitimate reason offered by the defendant was a pretext for discrimination. *Id*.

With respect to the evidentiary requirements in a discrimination case, to establish a prima facie case of age discrimination under the ELCRA, a plaintiff may resort to two theories: (1) disparate treatment, and (2) disparate impact. *Meagher v Wayne State Univ*, 222 Mich App 700, 708-709; 565 NW2d 401 (1997). In this case, plaintiffs relied on a disparate impact theory of discrimination. Disparate impact requires a showing that an otherwise facially neutral employment policy has a discriminatory effect on members of a protected class. *Id.* That is, it must be shown that a facially neutral employment practice burdens a protected class of persons more harshly than others for reasons not justified by legitimate business considerations. *Moses Inc v SEMCOG*, 270 Mich App 401, 409; 716 NW2d 278 (2006); *Smith v Goodwill Indus of West Mich, Inc*, 243 Mich App 438, 450-451; 622 NW2d 337 (2000).

In disparate impact cases, the plaintiffs bear the burden of "offering statistical evidence of a kind and degree sufficient to show that the practice in question" has a disparate impact on the protected group. *Abbott v Federal Forge*, 912 F2d 867, 872 (CA 6, 1990).[3] Implicit in this requirement is a showing that the employment practice was applied to both sets of employees and that, statistically, the protected class was more harshly impacted than others. The analysis in *Carpenter v Boeing Co*, 456 F3d 1183 (CA 10, 2006), is instructive in this regard. In *Carpenter*, a class action suit, the plaintiffs argued that the employer's overtime policy disparately impacted female employees. The court in *Carpenter* explained that "[t]he court compares the gender composition of those who are subject to the challenged employment practice with the gender composition of those enjoying the benefit for which the practice selects." *Id.* at 1193. In examining the type of statistical evidence sufficient to support a disparate impact claim, the court in *Carpenter* explained that the "statistics must, however, relate to the proper population." *Id.* at 1196. By way of example, the court noted that "when the claim is disparate impact in hiring, the statistics should be based on data with respect to persons qualified for the job" and that this same requirement would apply to other employment practices, including "sick leave." *Id*. Specifically, the court noted that "the essential requirement is that the data concern those persons subject to the challenged employment practice." *Id.*

In this case, plaintiffs argue that there was sufficient evidence to create a genuine issue of material fact under a disparate impact theory of age discrimination. We disagree. The only evidence offered by plaintiffs in support of their prima facie case was the report and testimony of their statistical expert, Dr. Paranjpe. Dr. Paranjpe calculated that the average age of employees who had Long Terms Banks on December 31, 2008 (Group I), was 54.45 years. He also concluded that the average age of those employees who did not have Long Term Banks on December 31, 2008 (Group II) was 49.77 years old. Plaintiffs, by simply comparing these two age averages, then reasoned that the discontinuation of the Banks more harshly impacted older employees. Plaintiffs' reasoning is inherently flawed.

Necessarily included in Group II were employees hired after February 1990 and consequently never had Long Term Banks.[4] Because employees hiring in after February 1990 were never eligible for Long Term Banks, any cancellation policy related to the Long Term Banks never applied to them and, therefore, had no impact on Group II in any way. Plaintiffs' statistical analysis compared the age of employees who were affected by the policy to those who could never be subjected to the policy. Considering this, plaintiffs' statistical evidence does not show that a facially neutral employment practice more harshly affected older employees than younger employees. In a disparate impact case, the plaintiff is required to present statistical evidence that connects the disparity to the specific employment practice. *Allen v Sears Roebuck*

[3] When analyzing discrimination claims, Michigan courts often look to federal precedent for guidance. *Harrison v Olde Fin Corp*, 225 Mich App 601, 606; 572 NW2d 679 (1997).

[4] In addition to the date of hire, there were other reasons why an employee may not have had a Long Term Bank on December 31, 2008, including that they were not eligible to create one in February 1990 because they did not have more than 10 hours of sick time or they had previously exhausted their Long Term Bank.

& Co, 803 F Supp 2d 690, 696 (ED Mich 2011). The evidence on which plaintiffs rely simply establishes the average age of two distinct groups at a given point in time. Plaintiffs' statistical evidence does not establish a prima facie case of disparate impact discrimination because the evidence does not show that the two groups were impacted differently by the subject policy. The significant difference between the two groups plaintiffs elected to juxtapose makes a statistical comparison between them insufficient to prove discrimination. The employees who were affected by the elimination of the Long Term Banks were so impacted, not because of their age, but because of the mere fact that they were employed with the hospital before February 1990 and possessed Long Term Banks. Indeed, everyone within that group, regardless of their age, was impacted by the policy. "[A] completely neutral practice will always have a disparate impact on some group, and discrimination need not always be inferred from such consequences." *Farmington Ed Ass'n v Farmington Sch Dist*, 133 Mich App 566, 575; 351 NW2d 242 (1984). Because plaintiffs failed to prove a prima facie case of discrimination under a disparate impact theory, the trial court did not err when it granted defendant's motion for summary disposition.

Next, we consider the viability of plaintiffs' breach of contract claim. In Count II of plaintiffs' complaint, it is simply alleged that defendant breached a contractual agreement to pay out the value of the Long Term Bank hours. The trial court found that there was no factual support for plaintiffs' position that a contractual agreement existed to pay out the Long Term Banks. In addition, the court commented that plaintiffs' breach of contract claim failed because plaintiffs did not have a vested right to derive a benefit from the Long Term Banks. After reviewing the record, we conclude that the trial court did not err when it granted summary disposition on the breach of contract claim.

Neither party truly disputes the fact that an employer may unilaterally make changes to employment polices to adapt to changing business climates. See *In re Certified Question*, 432 Mich 438, 456; 443 NW2d 112 (1989). However, plaintiffs argue that the parties entered into a unilateral contract[5] whereby defendant agreed to pay out the value of the Long Term Bank hours. Plaintiffs assert that defendant's policies set forth the offer to pay out the Long Term Banks and that such offer was accepted by plaintiffs when they continued to work. In response, defendant

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[5] A unilateral contract has been defined as follows:

> A unilateral contract is one in which the promisor does not receive a promise in return as consideration. 1 Restatement Contracts, §§ 12, 52, pp 10–12, 58–59. In simplest terms, a typical employment contract can be described as a unilateral contract in which the employer promises to pay an employee wages in return for the employee's work. In essence, the employer's promise constitutes the terms of the employment agreement; the employee's action or forbearance in reliance upon the employer's promise constitutes sufficient consideration to make the promise legally binding. In such circumstances, there is no contractual requirement that the promisee do more than perform the act upon which the promise is predicated in order to legally obligate the promisor." [*Sniecinski*, 469 Mich at 138 n 9, quoting *In re Certified Question,* 432 Mich at 446.]

contends that no such promise was made and, moreover, plaintiffs had no vested right to derive any benefit from the Long Term Banks. The courts in this state have recognized that adoption of an employment policy can constitute an offer that can be accepted by performance, and an action may thereafter arise for breach of that contract. In *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 530; 473 NW2d 652 (1991), the Court held that a change in a compensation policy that affects vested rights already accrued may give rise to a cause of action in contract. However, it is unnecessary to address whether plaintiffs had a vested interest in the banked hours because the facts do not support plaintiffs' representation that defendant agreed to pay out the Long Term Banks upon an employee's separation from the hospital. It is for this reason that plaintiffs' breach of contract action must fail.

When the Long Term Banks were created in 1990, the policy documents specifically provided for the creation of Benefit Time Banks (a/k/a Benefit Day Banks) and Long Term Banks. With respect to Long Term Banks, the policy provided that these hours would be "frozen and only available for use in the event an employee has exhausted all short term disability insurance benefits." There was no promise to pay out the value of these Long Term Banks upon retirement or resignation. When the SmarTime policy was introduced in 1998, defendant reiterated its policy that Long Term Bank hours could be "accessed during a period of illness in the event an employee has exhausted all short term disability" and that the Long Term Bank hours were not part of the SmarTime program. Again, no promise was made for payout of the cash value of Long Term Bank hours.

Other evidence was presented to support a finding that there was no contractual agreement to pay out the Long Term Banks. Defendant's Manager of Worklife Services, Kano Dennis, averred in his affidavit that, to his knowledge, no employee had received any payout of the Long Term Bank at retirement or resignation. Class representative, Janis Mills, acknowledged that Long Term Banks were different from regular benefit time. She also conceded that she was not personally aware of anyone who had received a payout for Long Term Bank hours upon resignation or retirement.

Plaintiffs rely on a series of Standing Orders to support their claim that defendant is contractually obligated to pay out the value of the Long Term Bank hours. However, a review of those documents does not support plaintiffs' assertions. Indeed, as the trial court found, plaintiffs "ignore the clear distinction which the Standing Orders draw between 'benefit day bank' and the 'long-term salary continuation bank [i.e. Long Term Bank].' " For example, the Standing Order dated February 1, 1990, entitled "Benefit Days," indicates that its purpose was "to describe the rules for accrual and usage of *benefit days*." (Emphasis added.) The memo continues on to describe how "benefit days" would be accrued, i.e., "on a monthly basis at a rate of one day per month." The document specifically references and distinguishes between "benefit day banks" and "long-term salary continuation banks [Long Term Banks]." Further, the Standing Order reiterated the policy that Long Term Bank hours would be frozen and "only available for use in the event an employee has exhausted all insured short-term disability benefits."

Plaintiffs specifically rely on the provision of the Standing Orders that provides: "Employees who resign voluntarily with proper notice and one year of service, will receive payment for all *banked benefit days* in excess of five (5), at 70% of the current hourly rate."[6] Plaintiffs reason that the phrase "banked benefit days" must refer to any and all banked hours. However, because the documents specifically reference "benefit days" and discuss "accrual" of those days, it is clear that these Standing Orders when addressing the payout of "banked *benefit days*" were not referring to Long Term Bank hours, because Long Term Banks were frozen at the time of their creation and could not be added to over time. As the trial court found, "[p]ursuant to the plain and unambiguous terms of these standing orders, a payout for an employee's benefit day banks was possible, a payout for an employee's Long Term Bank was not."

Plaintiffs also rely on an excerpt from a 1986 Detroit-Macomb Hospital Corporation Employee Handbook that provided:

> Employees who have been employed for one year or more and resign with proper notice, retire, or die, will receive terminal benefit payoff. All earned and unused vacation and all vacation accrued form the last benefit anniversary date will be paid off. Also, unused salary continuation for illness benefits up to a maximum of 120 hours will be paid off.

However, this handbook was dated prior to the creation of Long Term Bank hours. Thus, we do not agree that this provision created a contractual obligation to pay out Long Term Banks when Long Term Banks did not even exist at the time this Handbook was drafted.

Based upon the foregoing, we conclude that there is no genuine issue of material fact regarding whether defendant contractually agreed to pay out the value of Long Term Banks at the time of an employee's retirement or resignation.[7]

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[6] Standing Orders nearly identical to the one issued in February 1990, were again issued on March 16, 1992, June 6, 1994, and June 11, 1998.

[7] To the extent that plaintiffs assert that employees who continued their employment with defendant were entitled to retain the Long Term Bank hours, we disagree. It is well-established that "[a]n employer may unilaterally change its written policy . . . if the employer gives reasonable notice of the policy change." *In re Certified Question*, 432 Mich at 441. While a change in a compensation policy that affects vested rights already accrued may give rise to a cause of action in contract, *Dumas*, 437 Mich at 530, we agree with the trial court that plaintiffs rights to the Long Term Banks had not vested, because at the time defendant removed the Long Term Banks, none of the plaintiffs had satisfied the prerequisites to use the Long Term Bank hours. It is clear that from the time the Long Term Banks were first created, plaintiffs were required to exhaust all of their short-term disability benefits before using their Long Term Bank hours. In addition, defendant's employee handbook provides that benefits and related procedures could be modified, deleted, or terminated, and did not create a contract. Employee handbook policies "will not create enforceable rights when the handbook expressly states that such

Finally, we turn to plaintiffs' equitable claims. In Count III of plaintiffs' complaint, labeled "Promissory Estoppel/Unjust Enrichment," it is alleged that plaintiffs detrimentally relied on defendant's "representations regarding their earnings of Long Term Bank hours." It is further alleged that "defendant would be unjustly enriched if allowed to cancel the Long Term Bank program and keep the value of the banks for itself." We conclude that the trial court properly granted summary disposition of Count III of plaintiffs' complaint because there exists no genuine issue of material fact.

In order to prevail on a claim for promissory estoppel, the following elements must be established: (1) a promise; (2) that the promisor should reasonably expect to induce action or forbearance on the part of the promisee, (3) that in fact induces such action or forbearance, and (4) injustice can be avoided only by performance of the promise. *Zaremba Equip, Inc v Harco Nat'l Co*, 280 Mich App 16, 41; 761 NW2d 151 (2008). In support of this claim, plaintiffs assert that defendant promised to compensate them for the hours in the Long Term Banks at a later time. Plaintiffs also assert that they "reasonably relied on this promise by coming to work each day." As has been addressed above, plaintiffs cannot show that defendant promised to pay out the value of Long Term Bank hours upon resignation or retirement. Thus, plaintiffs have not established the necessary elements of a promissory estoppel claim.[8]

We similarly conclude that plaintiffs failed to present sufficient factual support for their claim of unjust enrichment. "The elements of a claim for unjust enrichment are (1) receipt of a benefit by the defendant from the plaintiff, and (2) an inequity resulting to plaintiff from defendant's retention of the benefit." *Bellevue Ventures, Inc v Morang-Kelly Investment, Inc*, 302 Mich App 59, 64; 836 NW2d 898 (2013), citing *Dumas*, 437 Mich at 546. In support of this theory of liability, plaintiffs, once again, argue that defendant promised to pay out the value of the Long Term Banks, and, in exchange, plaintiffs continued to come to work. According to plaintiffs, by these actions, defendants "gained extra hours of work and avoided paying plaintiffs for the earned time." We conclude that plaintiffs have failed to demonstrate that defendant unjustly benefitted from the change in policy. As previously discussed, defendant never promised to pay out the cash value of the Long Term Banks. Further, plaintiffs were fairly

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provisions are not intended to create an employment contracts." *Lytle v Malady*, 458 Mich 153, 169; 579 NW2d 906 (1998).

[8] We disagree with the dissent's position that a question of fact exists regarding promissory estoppel for plaintiffs' use of their Long Term Bank hours. To support a claim of promissory estoppel, a promise must be definite and clear. *State Bank of Standish v Curry*, 442 Mich 76, 85; 500 NW2d 104 (1993). If there are qualifications and conditions attached to a promise, an action based on breach of that promise cannot be maintained. See *First Security Savings Bank v Aitken*, 226 Mich App 291, 311; 573 NW2d 307 (1997), overruled on other grounds by *Smith v Globe Life Ins Co*, 460 Mich 446, 455-456; 597 NW2d 28 (1999). Again, it is clear that from the time the Long Term Banks were first created that plaintiffs were required to exhaust all of their short-term disability benefits before using their Long Term Bank hours. Thus, we do not agree that plaintiffs have established a definite and clear promise as required by the doctrine of promissory estoppel.

compensated for the hours they worked. Plaintiffs have not shown that the value of the work they performed for defendant exceeded the compensation they received in return.

Affirmed. Defendant, the prevailing party, may tax costs. MCR 7.219.

/s/ Michael J. Riordan
/s/ Karen M. Fort Hood