STATE OF MICHIGAN

COURT OF APPEALS

MARCEL A. DEFEVER

Plaintiff-Appellant,

v

SPRING MEADOWS COUNTRY CLUB, INC., THOMAS L. BOLLINGER, DON ELLIS, LEROY JOHNSON, DOUGLAS C. HIBBS, ROBERT L. COLE, JASON HARNESS, MILTON R. SCHEFFLER, RUSSELL C. WATSON, FRANK WHITE, and JEFFREY BLACKETT,

Defendants-Appellees.

UNPUBLISHED
May 30, 1997

No. 192100
Genesee Circuit Court
LC No. 93-021774

Before: White, P.J., and Cavanagh and J.B. Bruff,* JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition to defendants pursuant to MCR 2.116(C)(10) on his claims for age discrimination, wrongful discharge, tortious interference with a just-cause contract, and defamation. We affirm in part, reverse in part, and remand for further proceedings.

On appeal, an order granting or denying summary disposition is reviewed de novo. A motion for summary disposition may be granted pursuant to MCR 2.116(C)(10) when, except as 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. Giving the benefit of reasonable doubt to the nonmovant, the trial court must determine whether a record might be developed that would leave open an issue upon which reasonable minds might differ. *Plieth v St Raymond Church*, 210 Mich App 568, 571; 534 NW2d 164 (1995).

* Circuit judge, sitting on the Court of Appeals by assignment.

I

Plaintiff claims that the trial court erred in granting defendants' motion for summary disposition on his age discrimination claim. We agree.

The burden of proof in an age discrimination case is allocated as follows: (1) the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination; (2) if the plaintiff is successfully proving a prima facie case, the burden shifts to the defendant to establish a legitimate, nondiscriminatory reason for its actions; and (3) the plaintiff then has the burden of proving by a preponderance of the evidence that the legitimate reason offered by the defendant was merely a pretext. *Barnell v Taubman Co, Inc*, 203 Mich App 110, 120; 512 NW2d 13 (1993).

Plaintiff alleges that he was intentionally discriminated against. In order to establish a prima facie case of age discrimination under the intentional discrimination theory, a plaintiff must show that (1) he was a member of a protected class, (2) he was discharged, (3) he was qualified for the position, and (4) he was replaced by a younger person. *Id*. Intentional discrimination may be established with circumstantial or statistical evidence, as "an employer is rarely so blatant as to announce its illegal motives." *Lytle v Malady*, 209 Mich App 179, 185; 530 NW2d 135 (1995), lv gtd 451 Mich 920 (1996).

The facts viewed in a light most favorable to plaintiff are that defendant Spring Meadows hired plaintiff as grounds keeper in 1970, and promoted him the next year to Greens Superintendent. Plaintiff performed very well and was highly regarded. Plaintiff never received any warnings or disciplinary action. As Greens Superintendent, plaintiff was responsible for maintaining the entire golf course and clubhouse, supervising up to twelve employees, mowing, keeping up the sand traps, changing cups, carpentry and, occasionally, repairing golf carts.

Around 1989, according to deposition testimony of board member Jason Harness, the board recognized that if something were to happen to plaintiff, or if he were to leave for any reason, it had no ready replacement. In April 1990, the Club hired thirty-year-old Jeffrey Blackett as assistant Greens Superintendent. Blackett challenged plaintiff's authority and knowledge and verbally criticized plaintiff's skills to plaintiff, other staff, and board members. On December 3, 1991, in a letter to the membership stating that "the golf gods [had] smiled upon Spring Meadows" and that the club had "had a very successful year," the Board announced that it was placing Blackett in plaintiff's position of Greens Superintendent, and that plaintiff would be classified as Maintenance Superintendent, a newly created year-round position. Blackett's salary was increased $4,000 at the time. Effective November 1, 1992, plaintiff was laid off. On March 31, 1993, defendants sent plaintiff a letter telling him to return to work on April 5, 1993. In response, plaintiff's doctor wrote the golf club that plaintiff was unable to return to work.

In their motion for summary disposition, defendants asserted that because there was a personality conflict between Blackett and plaintiff, the board decided to create a new position of Maintenance Superintendent. Defendants argued that the existence of these two positions would both

decrease the need for interaction between Blackett and plaintiff and lessen the workload of the Greens Superintendent. Defendants maintained that plaintiff's removal from the Greens Superintendent position and placement in the Maintenance Superintendent position was not a demotion, but a lateral transfer, and that the Board promoted Blackett to the Greens Superintendent position because of Blackett's formal education and higher skill in golf course maintenance.[1] As to plaintiff's lay-off effective November 1, 1992, defendants contended that it was due to lack of work and because the clubhouse was scheduled to undergo renovation, which reduced the necessity of having a Maintenance Superintendent.

Plaintiff attached excerpts of his deposition testimony to his response to defendants' motion for summary disposition. At deposition, plaintiff testified that when he was removed from his Greens Superintendent position and made Maintenance Superintendent, he no longer supervised any employees or had a budget. As Greens Superintendent, he previously had supervised from six to twelve persons and had had a budget of over $200,000. When plaintiff was made Maintenance Superintendent, his office was moved from the maintenance building to the basement; his phone was taken away; defendants stopped paying his dues to the Michigan Association of Golf Course Superintendents and a number of other associations, and stopped paying for him to attend seminars, workshops, and meetings he formerly had attended as Greens Superintendent. Plaintiff testified that Board members regularly played golf with Blackett but never invited plaintiff to play golf with them. Plaintiff also stated that, since 1989, his salary had remained at the same level, while others were given increases. Moreover, one year[2] he was the only person not to receive a bonus, although the younger employees received bonuses. Plaintiff testified that he was largely excluded from the search process for the assistant Greens Superintendent, that he was not allowed to enter names of candidates or participate in screening the candidates, and that he was told that the wording of the ad had to be approved by, and all resumes had to go through, the Board president, White. Plaintiff also testified that after he was made Maintenance Superintendent his supervisor expressed no interest in his work and that he was shunned by Board members. Plaintiff testified that defendants gave him "the unquestionable signal" that they wanted to get rid of him, ostensibly by making him so tired of the job that he would quit.

Plaintiff was not required to submit direct evidence of age discrimination to establish that defendant's articulated reasons for his demotion and lay-off were pretextual. A plaintiff can establish that the employer's stated legitimate, nondiscriminatory reasons are mere pretexts by showing: 1) that the reasons had no basis in fact; 2) that, if they have basis in fact, by showing that they were not the actual factors motivating the employment decision; or 3) that, if they were the factors, they were jointly insufficient to justify the decision. *Dubey v Stroh Brewery Co*, 185 Mich App 561, 565-566; 462 NW2d 758 (1990).

We conclude that plaintiff presented evidence sufficient to survive defendants' motion that defendants' alleged legitimate reasons for the adverse employment actions, i.e., that plaintiff was not demoted but laterally transferred, and that plaintiff was later laid off due to lack of work, were pretextual. A reasonable fact-finder could conclude that the terms and conditions of plaintiff's employment worsened considerably when he was removed from the Greens Superintendent position, replaced with the younger Blackett, and made Maintenance Superintendent, and that such constituted a

demotion and not a lateral transfer. The "substantial equivalent" of the position from which a claimant is discriminatorily discharged must give him virtually identical promotion opportunities, compensation, job responsibilities, working conditions, and status. *Jenkins v Southeastern Michigan Chapter, American Red Cross*, 141 Mich App 785, 797; 369 NW2d 223 (1985). Although plaintiff's pay was not reduced, plaintiff presented ample evidence that his job responsibilities significantly changed and decreased when he was made Maintenance Superintendent, that his working conditions worsened considerably, and that his status was significantly reduced.

Plaintiff also presented sufficient evidence to raise a genuine issue of fact regarding whether Blackett was better qualified than plaintiff to be Greens Superintendent. Although Blackett apparently had an Associate Degree in turf grass management, plaintiff had more than twenty years' experience as Greens Superintendent, had taken numerous courses at Michigan State University in turf grass, had attended annual seminars in that area from 1970 until 1993, and was a member of the Michigan Turf Association of Superintendents, The Southern and Michigan and Border Cities Superintendents Association, Michigan Farm Bureau, among others. In addition, plaintiff presented evidence below that threw into question Blackett's work experience before coming to Spring Meadows.[3]

Plaintiff also presented sufficient evidence to raise a genuine issue of fact whether his subsequent lay-off was due to lack of work. Plaintiff testified that there was plenty of work to do at that time, including his regular maintenance work of repairing golf carts, painting and cleaning up, and that there was additional work surrounding the construction job. Moreover, plaintiff's lay-off notice came less than a year after defendant Spring Meadows had announced in writing that it had had a "very successful" 1991 and had distributed bonuses in December 1991 along with a memo which stated that 1991 was one of the club's most successful years. A reasonable fact-finder could, under these circumstances, conclude that "lack of work" was not the true reason for plaintiff's lay off.

In sum, plaintiff presented evidence from which a reasonable fact-finder could conclude that defendants' articulated reasons for removing him from his Greens Superintendent and later laying him off were pretexts, that age was one of the determining factors in defendants' adverse employment actions, and that defendants' actions were taken in an effort to get plaintiff to quit or force him out. We therefore reverse the circuit court's grant of summary disposition of plaintiff's age discrimination claim and remand for further proceedings.

II

Plaintiff next complains that the trial court should not have granted summary disposition on his wrongful discharge or "tortious interference with a just-cause contract" claims. We disagree. 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). The presumption may be overcome if there is an express agreement to the contrary. *Snell v UACC Midwest, Inc*, 194 Mich App 511, 512; 487 NW2d 772 (1992). Here, plaintiff claims that a just-cause contract was created based on the express oral representations of board members that he was

doing a good job; that he should stay with the club; that the board wanted him to stay a long time; and that he could have a job until retirement.

In order for oral statements to overcome the presumption of employment at will, they must be clear and unequivocal statements of job security. *Rowe v Montgomery Ward & Co*, 437 Mich 627, 645; 473 NW2d 268 (1991). In addition, the parties must "mutually assent to be bound" by the alleged contract. *Rood, supra* at 118-119. Here, none of the alleged oral statements were made during discussions about job security but rather, were made when commending plaintiff's performance or explaining why he would not receive a raise in a particular year. In *Rood*, the Court held that similar statements did not create a just-cause contract because they were not made during discussions about job security in relation to forming a contract. *Id*. at 123-124; see also *Barber v SMH (US), Inc*, 202 Mich App 366, 371; 509 NW2d 791 (1993). Moreover, statements that plaintiff was doing a good job and that his employers hoped he would stay are statements of optimism, not contractual undertakings. See *Rowe*, *supra* at 642-643; see also *Rood*, *supra* at 135. Because the statements made to plaintiff over the years did not clearly or unequivocally establish a just-cause contract, and there is no evidence that the parties mutually assented to such a contract, summary disposition was appropriate.

III

Finally, plaintiff asserts that the trial court erred in granting summary disposition on his defamation claim against defendant Blackett. The trial court held that the statute of limitations on the claim expired prior to plaintiff's filing suit. The statute of limitations for a defamation action is one year. MCL 600.5805(7); MSA 27A.5805(7). Plaintiff testified that Blackett made defamatory statements about him over a three-year period when Blackett was his assistant. Blackett began his job as plaintiff's assistant in April 1990. On January 1, 1992 plaintiff ceased being the Greens Superintendent, and Blackett was no longer his assistant. Because Blackett was not plaintiff's assistant for three years, but rather only for twenty-one months, the testimony that the statements were made during the three years that Blackett was the assistant must be disregarded.

Plaintiff continually represented that Blackett was his assistant at the time that the defamatory remarks were made. Moreover, the nature of the remarks themselves indicate that they were made when plaintiff was still managing the greens, laying tile, and buying and spraying chemicals. Plaintiff did not have those responsibilities after January 1, 1992. In addition, plaintiff alleged that he overheard some of the defamatory statements when he was in his office in the maintenance building. Plaintiff did not have an office in the maintenance building after January 1, 1992. Therefore, viewing all of the evidence in a light most favorable to plaintiff and drawing inferences therefrom, we cannot conclude that plaintiff established that any defamatory remarks were made after January 1, 1992. That being the latest date, the statute of limitations ran on January 1, 1993. Because suit was not filed until May 10, 1993, summary disposition on the grounds that the statute of limitations had expired prior to the filing of the suit was appropriate.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Helene N. White
/s/ Mark J. Cavanagh
/s/ John B. Bruff

[1] In reference to Blackett's skills being superior to plaintiff's, defendants argued below that the board decided to hire an Assistant Greens Superintendent "because it was believed that Plaintiff's supervisory responsibilities were becoming 'too heavy' and, as a result, there were increased complaints by the members as to the quality of the course." In support of this argument, defendants cited only to the deposition of Jason Harness. We have reviewed the excerpts of Harness' deposition defendants attached to their motion and found no reference to member complaints about the golf course.

[2] Although plaintiff testified at deposition that he believed that year was 1989, in response to defendants' motion, plaintiff argued that the year was 1991, and attached a document to that effect.

[3] Plaintiff attached Blackett's resume to his response to defendants' motion for summary disposition. Blackett stated in his resume that he had worked at five golf clubs, including Wabeek Country Club in 1985. Plaintiff argued that he had attempted to obtain Blackett's former employment records, but that Blackett refused to sign authorizations. Nonetheless, plaintiff was able to obtain a letter from Wabeek Country Club, which was appended to his response to defendants' motion, and stated that the club had neither personnel records nor any personal recollections of a Jeff Blackett.