

STATE OF MICHIGAN
COURT OF APPEALS

EUGENE MANERA,

Plaintiff-Appellant,

v

MOELLER MANUFACTURING COMPANY,
INC.,

Defendant-Appellee.

UNPUBLISHED

March 6, 1998

No. 185532

Wayne Circuit Court

LC No. 94-400811-NZ

Before: Holbrook, Jr., P.J., and White and R.J. Danhof*, JJ.

PER CURIAM.

In this employment matter, plaintiff appeals as of right from the trial court's orders which granted summary disposition to defendant of plaintiff's age discrimination claim pursuant to MCR 2.116(C)(7), and of plaintiff's breach of contract claim pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff first argues that the trial court erred in finding that his claim of age discrimination under the Elliott-Larsen Civil Rights Act (CRA), MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, was time-barred under the act's three-year period of limitation. Plaintiff argues that a genuine issue of material fact existed whether plaintiff's status at the time he was fired in 1992 was that of an employee—and therefore entitled to protection under the CRA—or merely an independent contractor—and therefore not entitled to protection. We find no merit to plaintiff's argument.

Plaintiff had been fired from defendant's employ on November 27, 1989, but was rehired on December 1st as an "independent sales representative." We find no merit to plaintiff's claim that the conditions of his employment after he was rehired were the same as the conditions of his employment as defendant's eastern region sales and engineering representative. After December 1, 1989, plaintiff no longer received a salary, benefits, or expenses from defendant but instead worked strictly for commission. Defendant did not control how plaintiff performed his work on a daily basis, but only directly controlled the price, discount, and delivery terms of its products, as would any manufacturer. Perhaps most telling, plaintiff no longer worked exclusively for defendant after December 1, 1989, but

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

eventually represented four other manufacturers. Thus, we conclude that plaintiff's age discrimination claim—which was filed in January 1994—was time-barred under the CRA's three-year period of limitation because plaintiff was no longer an "employee" of defendant's after November 27, 1989. Accordingly, summary disposition was properly granted pursuant to MCR 2.116(C)(7).-

Plaintiff also argues that the trial court erred in granting summary disposition of his breach of contract claim because a genuine issue of material fact existed whether defendant's representative had made assertions to plaintiff that formed either an oral contract under which plaintiff could be fired only for just cause or instilled in plaintiff a legitimate expectation that he could be fired only for just cause. We find no merit to this claim.

Plaintiff's deposition testimony does not establish that defendant's representative made clear and unequivocal statements so as to overcome the presumption that plaintiff was employed at-will or that established plaintiff's objective expectation of continued employment absent just cause to fire him. *Rowe v Montgomery Ward & Co, Inc*, 437 Mich 627, 645; 473 NW2d 268 (1991); *Snell v UACC Midwest, Inc*, 194 Mich App 511, 512-513; 487 NW2d 772 (1992). Statements made by defendant's representative to plaintiff that if plaintiff brought in business like the business he had generated for his former employer he would be with defendant for "a long time" were merely expressions of the representative's optimism about plaintiff's future performance. *Biggs v Hilton Hotel Corp*, 194 Mich App 239, 242-243; 486 NW2d 61 (1992). Plaintiff's deposition testimony does not establish that during pre-hire negotiations he articulated concerns and received assurances that he could be terminated only for just cause. Nor does the testimony establish that defendant's alleged statements regarding job security and longevity were made in the context of just-cause employment. *Barber v SMH (US), Inc*, 202 Mich App 366, 370-371; 509 NW2d 791 (1993). We further find that the trial court properly excluded plaintiff's affidavit offered in support of his opposition to defendant's second motion for partial summary disposition because the affidavit contradicted the intelligent, clear, and unequivocal answers plaintiff gave at his deposition. *Palazzola v Karmazin Products Corp*, 223 Mich App 141, 155; 565 NW2d 868 (1997). Accordingly, we conclude that the trial court did not err in granting defendant's second motion for partial summary disposition because plaintiff failed to establish that a genuine issue of material fact existed whether plaintiff and defendant had a just-cause contract or whether plaintiff had a legitimate expectation of just-cause employment. *Rowe, supra* at 645; *Barber, supra* at 371; *Biggs, supra* at 242-243; *Snell, supra* at 512-513.

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ Helene N. White

/s/ Robert J. Danhof