STATE OF MICHIGAN

COURT OF APPEALS

JAMES BROW AND SHARON BROW,

Plaintiffs-Appellants,

v

ZENITH DATA SYSTEMS CORP., GROUPE BULL, DONALD DESROCHERS, and STEVEN O'BRIEN,

Defendants-Appellees.

UNPUBLISHED
June 5, 1998

No. 202842
Berrien Circuit Court
LC No. 94-003660 NI

Before: Markey, P.J., and Griffin and Whitbeck, JJ.

PER CURIAM.

Plaintiff James Brow (plaintiff) and his wife, Sharon Brow[1] appeal as of right from an order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10) and dismissing plaintiff's wrongful discharge and age discrimination claims. We affirm.

I

In 1958, plaintiff was hired by Heath Corporation, the predecessor entity to codefendant Zenith Data Systems Corporation (ZDS). In 1989, ZDS was acquired by codefendant Groupe Bull. Until his termination in 1991, plaintiff was the manager in charge of the publications department at ZDS' Hilltop Road facility in St. Joseph.

In 1991, due to an alleged economic downturn, codefendant Donald Desrochers, newly-appointed vice-president of operations for ZDS, began outsourcing nonstrategic work operations and implementing cost-saving measures, including two rounds of reduction in force at the St. Joseph facility. Codefendant Steven O'Brien, manager of facilities, publications, and industrial engineering, was authorized to recommend the employees who would be discharged. The majority of the functions of the publications department were to be outsourced. Of the forty employees reporting to O'Brien, twelve employees, including plaintiff, were terminated as part of the fall 1991 round of reduction in force. Overall, in 1991, over 160 salaried employees from different departments left the Hilltop facility as the

result of voluntary and involuntary workforce reductions. Plaintiff was fifty-three years old when he was discharged.

Following his dismissal, plaintiff filed suit against defendants, alleging wrongful discharge, age discrimination violative of the Michigan Civil Rights Act, MCL 37.2202 *et seq*.; MSA 3.548(202) *et seq*., tortious interference with a contractual expectancy, and loss of consortium. Plaintiff subsequently stipulated to dismissal with prejudice of the tortious interference with a contractual expectancy count, and the trial court granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(10) on plaintiffs' wrongful discharge, age discrimination, and derivative loss of consortium claims. In the present appeal, plaintiff challenges as erroneous the trial court's decision and order granting summary disposition in favor of defendants.

This Court reviews a trial court's determination regarding motions for summary disposition de novo. *Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim. *Porter v Royal Oak*, 214 Mich App 478, 484; 542 NW2d 905 (1995). In deciding such a motion, the trial court must consider the pleadings, depositions, affidavits, admissions, and other documentary evidence, MCR 2.116(G)(5), and must give the nonmoving party the benefit of every reasonable doubt. *Id*. Although the court should be liberal in finding genuine issues of material fact, summary disposition is appropriate when the party opposing the motion fails to provide evidence to establish a material factual dispute. *Id*.

II

In Michigan, employment contracts for an indefinite duration are presumptively terminable at will. *Rood v General Dynamics Corp*, 444 Mich 107, 116; 507 NW2d 591 (1993). There are two alternative theories of enforceability, however, that may support a claim of wrongful discharge. *Id.* at 118. The first theory, grounded solely on traditional contract principles, allows an employee to overcome the presumption of employment at will by presenting clear and unequivocal proof of either an explicit or implied-in-fact promise of employment for a definite term or forbidding discharge absent just cause. *Id*. at 117-118. See also *Rowe v Montgomery Ward* & Co, Inc, 437 Mich 627, 639-641; 473 NW2d 268 (1991); *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579; 292 NW2d 880 (1980). In deciding whether the requisite mutual assent exists, an objective standard is used, "focusing on how a reasonable person in the position of the promisee would have interpreted the promisor's statements or conduct." *Rood, supra* at 119.

The second theory, grounded in public policy considerations, recognizes that 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 in the work force as a whole. *Rood, supra* at 117-118; *Toussaint, supra*. In all wrongful discharge claims brought under the legitimate expectations theory of *Toussaint, supra,* the court is required to "examine employer policy statements, concerning employee discharge, if any, to determine, as a threshold matter, whether such policies are reasonably capable of being interpreted as promises of just-cause employment." *Rood, supra* at 140.

In the instant case, plaintiff's claims of just-cause employment under either theory were not sufficiently supported to withstand defendants' motion for summary disposition. Plaintiff initially argues that just-cause employment was contractually implied by the following oral statements allegedly made to him by past personnel directors, executives, and managers during the course of his employment: (1) upon being hired in 1958, that he would have the opportunity to make his association with the company his life's work; (2) that he could work for the company as long as he wanted; (3) praise of his good employment record and a prediction that he would be around the company for a long time; (4) a statement regarding his potential earnings at the age of sixty-five under the employee savings plan; (5) a conversation urging him to decline another offer of employment, stating that if he were to stay with defendant company he could be pretty secure in his retirement; and (6) statements from other retiring company managers that he, too, could look forward to retiring from the company in his early to mid-sixties.

It is well-established that a mere subjective expectation on the part of the employee is insufficient to create a jury question as to whether an employment contract may be terminated only for just cause. *Grow v General Products, Inc*, 184 Mich App 379, 382; 457 NW2d 167 (1990). Any orally grounded contractual obligation for permanent employment "must be based on *more than* an expression of an optimistic hope of a long relationship." *Rowe, supra* at 640, quoting from *Carpenter v American Excelsior Co*, 650 F Supp 933, 936, n 6 (ED Mich, 1987) (emphasis in original). A general statement concerning job security, "without further discourse about causes for termination, is insufficient to establish an employer's intent to create a just-cause contract." *Coleman-Nichols v Tixon Corp*, 203 Mich App 645, 656; 513 NW2d 441 (1994). Statements that good performance will be rewarded likewise do not, standing alone, imply a restriction on the presumptive employment-at-will term. See, e.g., *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 551; 473 NW2d 652 (1991); *Biggs v Hilton Hotel Corp*, 194 Mich App 239, 242-243; 486 NW2d 61 (1992); *Grow, supra; Dzierwa v Michigan Oil Co*, 152 Mich App 281, 285-286; 393 NW2d 610 (1986).

The oral statements of just-cause employment cited by plaintiff in the instant case are analogous to those generalized statements found to be inadequate and equivocal in *Rood, supra* at 134-135, and *Grow, supra* at 382. Like the statements rejected as a basis for a just-cause claim in these cases, the statements herein cannot reasonably be interpreted as promises of termination only for cause. None of these statements clearly and unequivocally establishes mutual assent or, from an objective standpoint, justifies the conclusion that a reasonable employee in plaintiff's position would interpret the statements as promising termination only for cause. *Id.* We therefore conclude that the alleged verbal assurances set forth above do not create a material issue of fact as to whether plaintiff was a just-cause employee. *Porter, supra*.

Plaintiff also alleges that legitimate expectations of just-cause employment emanate from the Staff Reduction Guidelines ("SRG"), which provide in pertinent part:

I. Selection Criteria

A. All employees (exempt and nonexempt) affected by a reduction-in-force will be selected primarily upon skills and ability, performance and length of Zenith Data Systems service.

B. Management will make every effort to place employees within their work group, department or division, giving placement preference to employees with the longest length of service who are fully qualified to perform the jobs remaining in the group.

C. Employees displaced will be considered for placement in the other functions, facilities and/or divisions of the company in the following manner:

1. Such employees will be considered for placement in open jobs within the same geographic area. Selection for these jobs will be based upon skills and ability, performance and length of service.

II. When the Staff Reduction list is available, Human Resources will have the responsibility for obtaining the necessary background information and qualifications of each affected employee. The lists of available employees will be reviewed with each senior manager to assure consistency with the criteria set forth in these guidelines and to determine whether any of the listed employees have the qualifications to fill existing openings or whether they may be better qualified than existing personnel.

* * * *

IV. Nothing contained in the above is intended to limit a manager's normal authority to take appropriate action (including termination) where an employee's performance is not satisfactory. In such cases, a manager will have to substantiate a history of unsatisfactory performance.

The procedures outlined in paragraphs I and II of the SRG cannot reasonably be construed as promising termination only for just cause. Contrary to plaintiff's contention, the SRG do not provide that reductions in force must follow strict seniority, hence giving rise to legitimate expectations of continued employment on his part. An objective interpretation of the SRG reflects a policy that seniority is but one factor, in addition to job performance and skills and ability, to be weighed by the management *in its discretion* while making reduction-in-force decisions.[2] Moreover, although paragraph IV of the SRG might arguably be interpreted as implying a just-cause relationship during periods of normal economic conditions, it does not, by its own terms, apply under the present circumstances where a bona fide reduction in force is in effect. (See discussion, infra.) We therefore conclude that the SRG do not create legitimate expectations of just-cause employment sufficient to overcome the presumption of employment at will.

In any event, even if plaintiff in the instant case had established that he had a legitimate expectation of just-cause employment pursuant to either oral assurances or the written SRG, his

wrongful discharge claim nonetheless would not survive defendants' motion for summary disposition. Discharge due to a reduction in force for bona fide economic reasons constitutes termination for "just cause" under *Toussaint, supra*. *Lytle v Malady*, 456 Mich 1, 20; 566 NW2d 582 (1997) (opinion by Riley, J.); *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 114; 469 NW2d 284 (1991).[3]

In support of their motion for summary disposition, defendants have presented evidence that plaintiff was terminated as part of an economically motivated reduction in force. According to defendants' proofs, ZDS began experiencing an economic downturn in 1990 as a result of losing a government contract. In February 1991, the chief financial officer of ZDS assigned codefendant Desrochers the task of reducing the operations budget by approximately $2.6 million. Desrouchers identified that the outsourcing of nonstrategic work functions would have to be accomplished. As a result, a round of reduction in force was implemented in March 1991, resulting in the layoff of eighty-seven salaried employees. As of October 1991, business conditions had not improved and a second round of reduction in force was implemented, resulting in the layoff of seventy-three salaried employees, including plaintiff. Defendants aver that plaintiff's position was eliminated as a result of a consolidation of job functions, and another individual was chosen to assimilate three activities previously performed by plaintiff, another employee, and himself.

When, as in the instant case, an employer asserts work-force reduction in defense of its decision to discharge an employee,

> that employee, to establish a genuine issue of material fact that the employer's decision was not bona fide, may not merely rely on unsubstantiated allegations or denials in the pleadings, but, rather, must come forward with admissible evidence, affidavits, or other evidentiary materials, demonstrating the existence of a factual dispute. [*Lytle, supra* at 21.]

See also, *McCart, supra* at 115.

In the instant case, plaintiff participated in the spring 1991 reduction in force as a management decision maker and admitted in his deposition that if costs were not cut, ZDS was "going to fold up." Plaintiff's general, subjective denial that the reductions in force in 1991 were economically driven is insufficient to create a genuine issue of material fact as to the bona fides of defendants' economic status and measures taken to address that situation. Compare, *Ewers v Stroh Brewery Co*, 178 Mich App 371; 443 NW2d 504 (1989) (in which the plaintiff produced deposition and documentary evidence showing that the defendant employer was experiencing substantial economic growth and operating at a substantial profit before and after his discharge).

We therefore conclude that defendants' decision to conduct a reduction in force for bona fide economic reasons constituted "just cause" under *Toussaint, supra*. *Lytle, supra*; *McCart, supra*. The trial court properly granted summary disposition in favor of defendants as to plaintiff's claim of wrongful discharge.

III

Plaintiff further alleges that defendants discriminated against him on the basis of age in contravention of the Michigan Civil Rights Act, *supra*.[4] In general, in order to establish a prima facie case of age discrimination, an employee must show that he was (1) a member of a protected class, (2) subject to an adverse employment action, (3) qualified for the position, and (4) others, similarly situated and outside the protected class, were unaffected by the employer's adverse conduct. *Town v Michigan Bell Telephone Co*, 455 Mich 688, 695; 568 NW2d 64 (1997) (opinion of Brickley, J.); *Lytle, supra* at 28-29; *Matras v Amoco Oil Co*, 424 Mich 675, 683; 385 NW2d 586 (1986). If the employee establishes a prima facie case, a presumption of discrimination arises and the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for the discharge. *Town, supra* at 695-696. Once the employer meets that burden, the presumption of discrimination evaporates and the burden of production shifts back to the employee to establish that the employer's nondiscriminatory reason was not the true reason for the discharge and that the employee's age was a motivating factor in the employer's decision. *Id.* at 696-697.

However, where, as in the present case, there is a reduction in force due to economic reasons, a heightened standard of proof is utilized. The plaintiff must present "sufficient evidence on the ultimate question – whether age was a determining factor in the decision to discharge the older protected employee." *Matras, supra* at 684. As explained by Justice Brickley in *Town, supra* at 702-703:

> A layoff in the context of an overall workforce reduction provides a nondiscriminatory explanation for the plaintiff's discharge. This puts the plaintiff's case in the same posture as it would be after the employer articulates *any* legitimate nondiscriminatory explanation in response to the plaintiff's prima facie case. Once the employer offers such an explanation, the presumption of the prima facie case – that the employee's discharge was discriminatory – evaporates and is no longer relevant. The plaintiff can no longer rely on the inference of discrimination in the prima facie case, and the evidence must be evaluated in light of the rational inferences it will support.
>
> The question is whether the plaintiff presented sufficient evidence, taken in a favorable light, to find that age discrimination was a determining factor in the decision to discharge the plaintiff. [Emphasis in original.]

Plaintiff in the instant case produced evidence establishing a prima facie case. He is in the protected class, suffered adverse employment action, was qualified because he retained the position for many years, and younger employees who were similarly situated were retained. *Lytle, supra*. However, defendant has evaporated the presumption of discrimination by producing evidence of an economically induced reduction in force, a nondiscriminatory reason for the discharge. *Town, supra* at 702-703. Thus, the decisive question is whether a genuine issue of material fact exists as to whether age discrimination was a determining factor in plaintiff's discharge. *Id*. We conclude that plaintiff's evidence in this regard is insufficient to overcome defendants' motion for summary disposition.

Plaintiff's claim of age discrimination is based on allegations that (1) another employee, Ken Piltz, eleven years younger than plaintiff, replaced him, (2) plaintiff was qualified for Piltz's job, (3)

plaintiff's length of service was discounted, and (4) codefendant O'Brien allegedly told plaintiff that "the personnel department told me I'm getting rid of all the old timers."

Evidence that a competent older employee was terminated, and a younger employee was retained, is insufficient standing alone to raise an issue of fact that age was a determining factor in termination when the employer reduces his work force for economic reasons. *Matras, supra* at 684; *Haas v Montgomery Ward & Co*, 812 F2d 1015, 1016 (CA 6, 1987); *Nixon v Celotex Corp*, 693 F Supp 547, 554 (WD Mich, 1988). Plaintiff has not adequately countered defendants' proofs that his position was consolidated and Piltz was chosen to assimilate activities previously performed by plaintiff and another employee, in addition to his own. This redistribution of duties does not infer discriminatory animus. See, e.g., *Lilley v BTM Corp*, 958 F2d 746, 752 (CA 6, 1992); *Barnes v GenCorp, Inc*, 896 F2d 1457, 1465 (CA 6, 1990).

Although plaintiff argues that defendants manipulated the seniority rules set forth in the SRG and discounted his length of service in order to discharge him on the basis of age, these allegations are unsupported by the proofs. As previously noted, an objective reading of the SRG indicates that length of service is not the sole factor to be considered in deciding which employees to retain during a reduction in force. The deposition testimony of defendants, when read in proper context, shows that plaintiff's years of service were considered but found to be offset by his unwillingness to cooperate. According to this unrefuted evidence, Piltz was chosen over plaintiff because he exhibited a broader, more in-depth knowledge of the remaining consolidated job functions, and plaintiff did not exhibit the capacity or willingness to implement the drastic changes that were required to meet the company's goals. Plaintiff does not argue that Piltz, with over fifteen years of experience at ZDS, was unqualified for the position, only that he was more qualified than Piltz. A comparison between two qualified employees, without further evidence as to the veracity of defendants' explanation for its hiring decision, merely raises questions about defendants' business judgment, but does not create an issue of fact regarding discriminatory animus. *Town, supra* at 704. Moreover, plaintiff did not dispute in his deposition testimony that he was uncooperative, and even admitted that it was his goal to stay in the same position in the same department for his entire career. His subsequent affidavit, which contradicts this deposition testimony, is self-serving and cannot create a genuine issue of material fact. *Downer v Detroit Receiving Hosp*, 191 Mich App 232, 233-234; 477 NW2d 146 (1991). Although plaintiff questions the explanation given for his termination, "that there may be a triable question of falsity does not necessarily mean that there is a triable question of discrimination." *Lytle, supra* 37. Under the present circumstances, this Court will neither infer discriminatory animus nor second-guess an employer's hiring decisions. *Town, supra* at 704.[5]

Finally, plaintiff's deposition statement that Steve O'Brien told me, "Hey, the personnel department told me I'm getting rid of the old timers," is hearsay within hearsay, MRE 805, and must be excluded where no foundation has been established to bring each independent hearsay statement within the hearsay exception. *Solomon v Shuell*, 435 Mich 104, 129; 457 NW2d 669 (1990). There is no evidence identifying the person who actually made this remark to O'Brien in the first place, assuming it was actually ever made. In *SCC Associates Ltd Partnership v General Retirement System of the City of Detroit*, 192 Mich App 360, 363-364; 480 NW2d 275 (1991), this Court held that in

opposing a motion for summary disposition, that "[o]pinions, conclusionary denials, unsworn averments, and *inadmissible hearsay* do not satisfy the court rule; disputed fact (or lack of it) must be established by admissible evidence." (Emphasis added). Accordingly, in the absence of record evidence that O'Brien testified directly as to the statement, the comment is not admissible and therefore insufficient to withstand defendants' motion for summary disposition.

We conclude that the trial court properly granted defendants' motion for summary disposition on plaintiff's claim of age discrimination. The evidence does not create a genuine issue of material fact on which reasonable minds could conclude that age was a determining factor in defendants' decision to discharge plaintiff.

Affirmed.

/s/ Jane E. Markey
/s/ Richard Allen Griffin
/s/ William C. Whitbeck

[1] Plaintiff Sharon Brow pleads a derivative claim of loss of consortium.

[2] Plaintiff further argues that at the very least, a question of fact is raised as to whether defendants failed to comply with the procedures set forth in the SRG in their termination of plaintiff. This issue does not fall within the purview of the *Toussaint* doctrine regarding legitimate expectations of just-cause employment (see discussion, supra), but instead invokes traditional breach of contract principles which have been neither pleaded in plaintiff's complaint nor briefed on appeal by plaintiff.

[3] As explained by this Court in *Friske v Jasinski Builders, Inc*., 156 Mich App 468, 472; 402 NW2d 42 (1986):

> [D]ischarge for economic reasons, as determined by and within the complete discretion of the board of directors of defendant corporation, constitutes termination for sufficient cause. To hold otherwise would impose an unworkable economic burden upon employers to stay in business to the point of bankruptcy in order to satisfy employment contracts and related agreements terminable only for good or sufficient cause.

[4] Under the Michigan Civil Rights Act, *supra*,

> (1) An employer shall not do any of the following:
>
> (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of . . . age. [MCL 37.2202; MSA 3.548(202).]

[5] Defendants' undisputed statistical proofs offered in support of their motion for summary disposition indicate that the average age of those involuntarily terminated in O'Brien's group was actually less than the average age of those employed in his group before the fall 1991 reduction in force. Of the forty

employees reporting to O'Brien, twelve employees, including plaintiff, were terminated. The average age of the forty employees was 40.47, while the average age of those laid off was 41.33. Of the twelve employees, two employees, then aged sixty and fifty-seven, volunteered to be included in the reduction in force. Excluding those two employees, the average age of those laid off was 37.90 years.