STATE OF MICHIGAN

COURT OF APPEALS

KAY VAN DORSTEN,

Plaintiff-Appellant,

v

RONALD LANTZ, SANDRA BOLAND, and CALHOUN COUNTY GUARDIAN, INC.,

Defendants-Appellees.

UNPUBLISHED
October 5, 1999

No. 205024
Calhoun Circuit Court
LC No. 95-002314 NZ

Before: Talbot, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) in this action in which plaintiff alleged breach of an employment contract and race and age discrimination. We affirm.

In 1979, Calhoun County hired plaintiff to work in its bookkeeping department. Later that same year, defendant Calhoun County Guardian, Inc. (hereinafter defendant), a non-profit organization separate from Calhoun County, formed to provide certain services the county no longer planned to provide. Calhoun County offered plaintiff the option of either continuing her employment with the county or transferring to the newly formed agency. Plaintiff chose to transfer to the agency.

According to plaintiff, at a November 1979 staff meeting, Fred Mangan, defendant's president, responded to employee inquiries about job security with assurance that, if an employee transferred, he or she would continue to enjoy whatever job security he or she previously enjoyed under the collective bargaining agreement the union had negotiated. Plaintiff was unable to recall the precise language utilized in the collective bargaining agreement, but agreed that although the county did not have a "just cause" employment policy, that under "union policy" the county could not terminate an employee who was appropriately performing his or her job duties. Plaintiff also alleged that Mangan assured her that "she would have a job as long as she did her work." Plaintiff acknowledged that no one ever told her that defendant could discharge her only for just cause, and further acknowledged that she never saw a

rule or policy prohibiting discharge absent just cause. Plaintiff also acknowledged that management was free to determine unilaterally whether she "was doing her job."

Between November 1983 and December 1992, plaintiff received ten favorable performance evaluations However, the evaluations warned plaintiff that she needed to improve her negative attitude, and plaintiff acknowledged that management repeatedly warned her to improve her attitude. Following an incident in January 1995 in which plaintiff was heard talking to a social worker in a "loud and disgusted tone of voice," defendant's director, Ronald Lantz, informed plaintiff that her treatment of the social worker, when viewed against her history of performance evaluations, warranted discharge.

Plaintiff first claims that the trial court erred in determining that plaintiff was not protected by a just-cause employment contract. Whether the facts as presented resulted in the formation of a contract is an issue of law that is reviewed de novo. *Bracco v Michigan Technological University*, 231 Mich App 578, 585; 588 NW2d 467 (1998).

In Michigan, there is a presumption that employment contracts are terminable at will by either party. *Clement-Rowe v Michigan Health Care Corp*, 212 Mich App 503, 505; 538 NW2d 20 (1995); *Coleman-Nichols v Tixon Corp*, 203 Mich App 645, 656; 513 NW2d 441 (1994). However, this presumption may be overcome by proof of an express contract or written language, or (2) an employee's legitimate expectations grounded in the employer's policies or procedures. *Rood v General Dynamics Corp*, 444 Mich 107, 117-118; 507 NW2d 591 (1993). There is no dispute that the union contract provided for neither "at-will" no "just cause" employment. Hence, plaintiff's argument is based on the first subcategory; that is, she claims she received express oral promises that she would not be terminated without just cause.

Just-cause employment may be found only where "the oral statements of job security were clear and convincing" or "clear and unequivocal." *Bracco, supra* at 596. It is not sufficient that an employee have a *subjective* expectation of just-cause employment. Rather, there must be mutual assent to a just-cause provision under an objective standard, looking at the express words of the parties and their visible acts, and the oral statements of job security must be clear and unequivocal. *Id.* at 601. To ascertain where there was mutual assent to a just-cause provision expressed in clear and unequivocal oral statements of job security, testimony of the person who originally interviewed the plaintiff is critical. *Id.*

Here, the only evidence of an express oral contract is plaintiff's allegations that (1) defendant's president responded to employee concerns about job security with assurances that the employees would continue to enjoy the same job security they previously enjoyed under the union's collective bargaining agreement,[1] and (2) defendant's president assured her that "she would have a job as long as she did her work." Plaintiff presented no documentary or testimonial evidence to support her allegation that an express oral contract existed, and did not provide any explanation why such evidence could not be presented. Even when the evidence is viewed in a light most favorable to plaintiff, plaintiff failed to meet her burden of showing either mutual assent to a just-cause provision or clear and unequivocal statements of job security.

Plaintiff also contends that the trial court improperly granted summary disposition of her claims of race and age discrimination claims on the ground that plaintiff failed to meet her burden of proving that the legitimate reason offered by defendant was merely a pretext for discrimination. We disagree.

Michigan's Civil Rights Act prohibits an employer from discharging an employee because of race or age. MCL 37.2202(1)(a); MSA 3.548(202)(1)(a). The employee has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. If the employee is successful in proving a prima facie case, the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for the discharge. If the employer meets the burden, the employee then has the burden of proving by a preponderance of the evidence that the legitimate reason offered by the employer was merely a pretext for discrimination. *Featherly, supra* at 358.

An employee may establish pretext under a disparate treatment theory by proving: (1) that she is a member of a protected class and (2) that her employer treated her differently than it treated employees outside the protected class for same or similar conduct. *Meagher v Wayne State University*, 222 Mich App 700, 708; 565 NW2d 401 (1997). Alternatively, an employee may show pretext by proving that the reason the employer offered for her discharge (1) had no real basis in fact, (2) did not actually play a role in the decision to discharge the employee, or (3) was insufficient to discharge the employee. *Id*., 712. Even under this alternative route, however, the employee must submit evidence that unlawful discrimination was the employer's true motive in making the decision to discharge her. *Town v Michigan Bell Telephone Co*, 455 Mich 688, 699-700; 568 NW2d 64 (1997).

Plaintiff conceded that *her* race had nothing to do with her discharge, but alleged that defendant treated her differently than it treated the social worker, who is black, because he was not reprimanded for his role in the incident that led to plaintiff's discharge.. However, the record is devoid of facts from which it is possible to conclude that the social worker was similarly situated to plaintiff. Further, plaintiff acknowledged that defendant had repeatedly warned her to improve her attitude and acknowledged that in some respects her attitude was negative. Hence, we find no error in the trial court's finding that plaintiff failed to meet her burden of defendant's reasons for discharging plaintiff were not a pretext for race discrimination.

With regard to the claim for age discrimination, plaintiff contends that the reason offered by defendant for her discharge were a pretext for age discrimination because (1) defendant agency replaced her with a significantly younger worker who had previously suggested that plaintiff retire so that she could have her job, (2) "others" commented that plaintiff had been with the agency since its inception and was "part of the old generation," (3) defendant Boland told plaintiff, "you're almost old enough to be my mother." Even when viewed in a light most favorable to plaintiff, however, this evidence does not demonstrate the existence of a genuine issue of material fact as to whether plaintiff's age played a role in defendant's decision to discharge her. Statements plaintiff claims were made by defendant Boland and "others" are not probative of whether defendant Lantz acted with age based animus. See *Lytle, supra* at175.

Plaintiff also argues that the reason defendants offered for her discharge was a pretext for age discrimination because (1) defendant Lantz joked "at every birthday party" that he had more gray hair than plaintiff even though she was older and (2) defendant Lantz told plaintiff in 1990 that the agency had to change life insurance companies because of her. That defendant Lantz may have joked that he had more gray hair than plaintiff is not probative of whether plaintiff's age played a role in the decision to discharge her. That defendant Lantz may have commented in 1990 that the agency could get cheaper life insurance if plaintiff did not work there is not probative of whether her age played a role in the decision to discharge her five years later. Plaintiff presented no evidence from which a reasonable juror could conclude that her age motivated defendant Lantz to discharge plaintiff.

Affirmed.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey

[1] Plaintiff testified, however, that the union contract provided for neither "at-will" nor "just cause" employment.