STATE OF MICHIGAN

COURT OF APPEALS

ROBERT WAGNER,

Plaintiff-Appellant,

v

RGIS INVENTORY SPECIALIST, RAY NICHOLSON, individually, and as Trustee and/or personal representative of the ESTAT OF WILLIAM NICHOLSON, and the ESTATE OF WILLIAM NICHOLSON,

Defendant-Appellees.

UNPUBLISHED
June 13, 1997

No. 189085
Oakland Circuit Court
91-415173-NZ

Before: Smolenski, P.J., and Michael J. Kelly and J.R. Weber*, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition pursuant to MCR 2.116(C)(10) to defendants on plaintiff's claims of age discrimination and wrongful discharge in violation of a just-cause employment contract. We affirm in part and reverse in part.

Plaintiff argues that summary disposition of his age discrimination claim was improper because he established a prima facie case under *Barnell v Taubman Co, Inc*, 203 Mich App 110, 120-121; 512 NW2d 13 (1993), which requires that an employee prove he was a member of a protected class, that he was discharged, that he was qualified for the position, and that he was replaced by a younger worker. We disagree. Although plaintiff was fifty-four at the time of his discharge, was qualified for the job and was terminated, there was no evidence that he was replaced by a younger worker. Plaintiff has not demonstrated or offered any evidence of a causal connection between his termination in 1988 and the fact that in 1991 three younger individuals took over new positions within the company that incorporated some of his former responsibilities. The new positions were necessitated by a hierarchical restructuring of the company after the death of one of the owners. Therefore, there is no evidence that plaintiff was replaced by a younger worker or workers. Thus, he did not set forth a prima facie case of age discrimination.

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

Moreover, plaintiff did not offer any evidence from which a reasonable jury could have concluded that his age was a significant factor in his discharge. Evidence that age was a factor is crucial to the success of the claim and must be offered in order for the case to proceed to the jury. *Id.* Plaintiff simply testified at his deposition that he *felt* he was a victim of age discrimination because he believed that William Nicholson was attracted to younger people. Plaintiff's bare assertion that he felt he was a victim of age discrimination is not sufficient to allow a case to proceed to a jury. *Bouwman v Chrysler Corp,* 114 Mich App 670, 682; 319 NW2d 621 (1982). Because plaintiff did not offer any evidence that could lead a reasonable jury to determine that age was a factor, summary disposition of plaintiff's age discrimination claim was appropriate. *Coleman-Nichols v Tixon Corp,* 203 Mich App 645, 650; 513 NW2d 441 (1994).

Next, plaintiff claims that the trial court should not have granted summary disposition on his claim of wrongful discharge in violation of a just-cause contract. We agree.

"Oral contracts of employment for an indefinite term are presumed to be terminable at the will of either party." *Snell v UACC Midwest, Inc,* 194 Mich App 511, 512; 487 NW2d 772 (1992); see also *Rood v General Dynamics Corp,* 444 Mich 107, 116-117; 507 NW2d 591 (1993). There are two ways to overcome the "at-will" presumption and establish a just-cause employment relationship. *Rood, supra* at 118. First, if there is an express agreement to the contrary, the "at-will" presumption is overcome. *Snell, supra.* Such an agreement may become part of the employment contract as a result of explicit promises or promises implied in fact. *Nieves v Bell Industries, Inc,* 204 Mich App 459, 462; 517 NW2d 235 (1994). Second, if the employer has established policies or procedures giving rise to "legitimate expectations of continued employment absent 'just-cause' for termination," the presumption of "at will" employment is overcome. *Snell, supra* at 512-513; see also *Toussaint v Blue Cross & Blue Shield of Michigan,* 408 Mich 579; 292 NW2d 880 (1980). "To infer that an employment contract provides for termination only for just cause, the employee must have an objective expectation of continued employment, not merely a subjective one." *Snell, supra* at 512-513.

When determining if a just cause contract based on oral assurances has been created, this Court should focus on whether a reasonable person would have interpreted the alleged oral statements as promises of job security. In *Rood v General Dynamics Corp,* 444 Mich 107,116-117; 507 NW2d 591 (1993) and *Rowe v Montgomery Ward & Co,* 437 Mich 627; 473 NW2d 268 (1991), the Court discussed the requirements for establishing express contractual liability based on oral statements. We believe that whether the oral statements of job security made in this case were clear and unequivocal sufficient to overcome the presumption of employment at will is a fact question.

While plaintiff presented no writings evidencing a just cause contract, he testified as to oral statements, dating back to 1970 when he was recruited for the job:

> One of my concerns at that time was that the company was very small and it didn't appear to me that they needed a controller because of the size of the company and some of the financial history that I was afforded the opportunity to see. So I was concerned very much of making a career move to a place where I

really didn't know whether the position was, you know, was a real position or was something that was going to bear fruition.

So my concerns at that time expressed, I know to Bill and we played golf one Sunday. And we sat at a table in Ray's family room and I expressed those concerns. And Bill said, "Hey, this what we want, too, that this company is going to grow and you're going to be part of it and grow with us."

Q. So when Bill said you're going to be part of it an grow with this, that was your understanding that you had a permanent position with RGIS?

A. Yes.

Q. Was it your understanding that regardless of your job performance or regardless of your actions you were promised a permanent position with RGIS?

A. No.

Q. What did you have to do to keep this permanent position with RGIS?

A. I'd have to be honest, loyalty, have personal integrity and abilities to perform that positions that I was assigned to. [Plaintiff's deposition, pp 46-47.]

* * *

Q. Did you consider that a contract?

A. Yes. [Plaintiff's deposition, p 48.]

Plaintiff testified that those terms never changed (plaintiff's deposition, p 48).

In response to defendant's motion for summary disposition, plaintiff also filed an affidavit to the effect that Mr. William Nicholson specifically told him that he "would remain employed with RGIS so long as I was honest, loyal, had personal integrity, and performed my assigned job."

These statements, construed favorably to plaintiff, would justify a trier of fact finding more than a mere generalized expression of plaintiff's hope for the future and would be sufficient to establish a just cause contract. In *Coleman-Nichols v Tixon Corp*, 203 Mich App 654; 513 NW2d 441 (1994), the oral statements relied on by the plaintiff were merely a generalized expression of hope for the future which did not clearly permit a construction that the employer intended to establish a just clause employment contract. c*f. Rice v ISI Manufacturing Inc*, 207 Mich App 634; 525 NW2d 533 (1995).

Plaintiff applied for an executive position similar to the plaintiff in *Barnell v Taubman Co, Inc*, 203 Mich App 110; 512 NW2d 13 (1993). Plaintiff also testified that while other managers were required to sign at will employment contracts, he was told that policy did not

apply to him, that he was like "family" and had a close personal relationship with his employer that was unique in the company. The trier of fact should determine whether these oral representations amounted to mere statements of "optimistic hope" or were the result of a negotiated transaction for a unique executive position which carried with it a promise of employment amounting to a just cause contract.

As to plaintiff's claim that he had a legitimate expectation of just-cause employment based on the policies and practices of the company, because a legitimate expectations claim rests on the dissemination of a promise that can lead to the legitimate expectation of just-cause employment, the lack of evidence of dissemination of the alleged just-cause policy is fatal to the claim.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ Michael J. Kelly
/s/ John R. Weber