STATE OF MICHIGAN

COURT OF APPEALS

H. JOHN BATES,

Plaintiff-Appellee

v

JOHNSON & HIGGINS of MICHIGAN, INC., STEPHEN M. STUART, JOHN M. GUSSENHOVEN, Jointly and Severally,

Defendants-Appellants.

UNPUBLISHED
December 16, 1997

No. 179300
Wayne Circuit Court
LC No. 92-212753-NZ

Before: Corrigan, P.J., and J.B. Sullivan* and T.G. Hicks,** J.J.

PER CURIAM.

Defendants appeal as of right the judgment of the Wayne Circuit Court following a jury trial on plaintiff's claims of wrongful discharge and age discrimination. The court denied defendants' motions for judgment notwithstanding the verdict and new trial, but granted the motion for remittitur reducing the $1,164,040 verdict to $480,000. We affirm.

Plaintiff joined Johnson & Higgins of Michigan (J & H) in 1977 at the age of thirty-nine, began working as a senior property loss control consultant in 1979, and held that position until he was terminated in 1991. Plaintiff was promoted to assistant vice-president in 1986, but in 1988, when he questioned why he was not being paid at the same level as the other employees, was told that he was not a good employee despite having received good reviews for years. At the time of his termination, he was advised that his position was being eliminated and that his performance had nothing to do with the termination. Plaintiff applied for other positions at J & H but was not hired.

Defendants first claim that the trial court erred in denying their motions for directed verdict and judgment notwithstanding the verdict as to plaintiff's claims of oral contract, legitimate expectation and age discrimination. We disagree. In reviewing a motion for a directed verdict, this Court views the testimony and legitimate inferences therefrom in a light most

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

favorable to the nonmoving party. *Alar v Mercy Memorial Hospital*, 208 Mich App 518, 524; 529 NW2d 318 (1995). Directed verdicts are appropriate only when no factual question exists upon which reasonable minds could differ. Similarly, if the evidence is such that reasonable minds could differ, then judgment notwithstanding the verdict is improper. *Id.*

There are two alternative theories of enforceability that may support a claim of wrongful discharge in Michigan. *Rood v General Dynamics Corp,* 444 Mich 107, 118; 507 NW2d 591 (1993). See also, *Lytle v Malady,* 456 Mich 1, 54 n 1; 566 NW2d 582 (1997) (Opinion by Boyle, J.), rehrg grtd ___ Mich ___; ___ NW2d ___ (1997). The first theory is grounded solely on contract principles relative to the employment setting ("contract theory"), and the second theory is grounded solely on public policy considerations ("legitimate expectations theory"). *Rood, supra; Lytle, supra.*

As to the contract theory, the Supreme Court has stated that oral statements for job security must be clear and unequivocal to overcome the presumption of employment at will. *Rood, supra,* 119. To determine whether there was mutual assent to a contract, an objective test is used which considers all relevant circumstances by which the parties manifested their intent, and asks whether a reasonable person could have interpreted the words or conduct in the manner alleged. *Id.*

Viewing the evidence in a light most favorable to plaintiff, he engaged in pre-employment negotiations regarding job security, was assured both in his job interview and in a subsequent address to employees a few years later that there would be no lay-offs, was applying for a singular executive position as a security specialist, and was never given any material, either at the time of hiring or subsequently, indicating that his employment was at will. Reasonable jurors could find that plaintiff's evidence of an oral contract overcame the presumption of employment at will. *Rood, supra;* see also, *Rowe v Montgomery Ward,* 437 Mich 627; 473 NW2d 268 (1991); *Toussaint v Blue Cross & Blue Shield of Michigan,* 408 Mich 579; 292 NW2d 880 (1980); *Barnell v Taubman,* 203 Mich App 110; 512 NW2d 13 (1993). Moreover, contrary to defendants' claim which is supported primarily by unpublished opinions of this Court, the Supreme Court and this Court have rejected oral contract claims based on "as long as…" statements only when there is no objective support for them such as pre-employment negotiations regarding security. See, e.g., *Rowe, supra; Barber v SMH (US), Inc,* 202 Mich App 366; 509 NW2d 791 (1993).

Even if plaintiff's evidence of an oral contract did not overcome the presumption of employment at will, we conclude that plaintiff established a just cause contract on the public policy-based legitimate expectations theory of *Toussaint*. *Rood, supra,* 117-118. In all claims brought under the legitimate expectations theory, if the employer policy statements and procedures concerning employee discharge are capable of two reasonable interpretations, i.e. either being interpreted as promises of just cause employment or not, the issue is for the jury. *Id.,* 137-141.

Viewing the evidence in the light most favorable to plaintiff, the employees were told in the late 1970s that there would be no lay-offs just as there had been none in the Depression, the longevity of the employees was used as a sales tool with clients, and a personnel manager in finance and human resources at J & H from 1969 to 1992 testified that the company never terminated anyone unless it was

for performance. Plaintiff was aware of the company's policies based on the representations of defendant's agents and on J & H's practice. Following plaintiff's proofs, numerous management personnel testified that J & H's employees were not terminated unless there was a reason. At the very least, there was a question of fact making both directed verdict and JNOV improper.

Defendants claim that the permanent elimination of plaintiff's position for economic reasons constituted just cause under *Toussaint*. A reduction in work force (RIF) for economic reasons constitutes termination for just cause. *Lytle, supra,* 20 (Opinion by Riley, J.), citing *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 114; 469 NW2d 284 (1991). Layoffs that are conducted must be bona fide, that is business conditions must have necessitated the RIF. *Lytle, supra,* 21. Where a defendant 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. *Id.* See also, *Lytle, supra*, 49-51 (Opinion by Cavanagh, J.)

In *Lytle*, the plaintiff presented documentation to contest the defendant's economic motivation in discharging her. However, the evidence was not part of the record, and related to a different time period. More importantly, the plaintiff not only admitted that the defendant had been conducting an RIF prior to her discharge, but also failed to present evidence which would give rise to a jury question. *Id.*, 23-24. In contrast, plaintiff in the instant case challenged defendants' economic necessity defense with evidence that the profits of both J & H and the parent company increased in the period prior to his termination, that no salaries or bonuses were reduced and that some compensation plans actually increased. The question was therefore a jury question.

We also conclude that plaintiff presented sufficient evidence to raise a jury question regarding his age discrimination claim. *Lytle, supra,* 26-30; *Featherly v Teledyne* 194 Mich App 352, 358-359; 486 NW2d 361 (1992). In all actions involving claims of discrimination, there must always be evidence upon which reasonable minds could conclude that discrimination was the true motive for the employer's adverse conduct. *Lytle, supra,* 38. The plaintiff need not show that age was *the* determining factor, but that it was *a* determining factor. *Id.*, 41.

Here, plaintiff presented evidence that he was a member of a protected class, was discharged, was qualified for two subsequently open PLC consultant positions, that he was replaced by a younger person, and that age was a determining factor in the decision to terminate plaintiff. The three terminated PLC consultants, of which plaintiff was one, were fifty-eight, fifty-three (plaintiff), and forty-three, whereas the two PLC consultants retained were forty and twenty-six. Moreover, plaintiff presented evidence of a pattern and practice of age discrimination including age-related comments made by management, the existence of the "Elephants Club" for former managers replaced by younger people, and the fact that the director of J & H in Detroit did not want anyone over forty working in departments which were money makers. It was for the jury to determine if that evidence was a sufficient challenge to defendants' evidence.

In a footnote, defendants claim the trial court erred in failing to give reasons for denying the motion for JNOV. However, defendants failed to raise the claim in the statement of issues presented. MCR 7.212(C)(4); *Meagher v McNeely & Lincoln,* 212 Mich App 154, 156; 536 NW2d 851 (1995). Nor did defendants include this issue in the relief requested section of their brief. MCR 7.212(B)(8). Finally, at the hearing on the motion, defendants did not raise the issue, apparently being satisfied at having succeeded on their motion for remittitur. In any event, our conclusion that the trial court did not err in denying defendants' motion for JNOV is based on our review of the entire record.

Defendants next claim the trial court erred in denying the motion for a new trial based on the court's refusal to give a jury instruction on the defense of bona fide economic reason, and the court's erroneous admission of plaintiff's exhibit No. 202 and age-related comments relating to other employees. The grant or denial of a motion for a new trial is within the trial court's discretion and will not be disturbed on appeal absent a clear abuse of discretion. *Wilson v General Motors Corp,* 183 Mich App 21, 36; 454 NW2d 405 (1990).

Defendants claim that the trial court abused its discretion by refusing to give a supplemental jury instruction which was based in part on *McDonald v Stroh Brewery Co,* 191 Mich App 601, 608-609; 478 NW2d 669 (1991), and which explained that an economic reason constitutes just cause but does not have to rise to the level of a necessity. When the standard instructions do not properly cover an area and the matter is supported by the evidence, a trial court is required to give requested supplemental instructions if they properly inform the jury of the applicable law. *Koester v Novi,* 213 Mich App 653, 664; 540 NW2d 765 (1995).

In *McCart, supra,* 114-115, the Court concluded that the plaintiff had failed to raise a question of fact "regarding the validity of the defendant's proofs that adverse business conditions existed and that the elimination of plaintiff's position was *necessitated* by those conditions" (emphasis added). Moreover, as noted *supra,* in *Lytle,* Justice Riley cited *McCart* in reiterating that business conditions must have *necessitated* the RIF (emphasis added). However, Justice Riley also notes not only the "complete discretion" of a defendant corporation to discharge for economic reasons lest that employer be forced to go into bankruptcy, *id.,* 20, but also the Court's reluctance "to second-guess employers' decisions regarding day-to-day management operations." *Id.,* 24 and 24, n 25.

Hence, even if we agreed that the trial court erred in failing to give the requested instructions because the standard jury instructions do not contain an instruction on the issue concerning economic reasons and the matter was supported by the evidence in this case, we will not reverse as a result of an erroneous jury charge unless the failure to do so would be inconsistent with substantial justice. *Winiemko v Valenti,* 203 Mich App 411, 418; 513 NW2d 181 (1994).

In *Johnson v Corbet,* 423 Mich 304, 326-327; 377 NW2d 713 (1985), the Court modified the automatic reversal rule set forth in *Javis v Ypsilanti Bd of Ed,* 393 Mich 689, 702-703; 227 NW2d 543 (1975), which stated that prejudice is presumed when the trial court fails to give accurate, applicable, requested standard jury instructions. The *Corbet* Court held that the harmless error standard, MCR 2.613(A), was "once again the applicable standard for appellate review of instructional

errors . . .” 423 Mich 326. The Court added that the appellate court should not reverse unless it concludes that “noncompliance with the rule resulted in such unfair prejudice to the complaining party that the failure to vacate the jury verdict would be ‘inconsistent with substantial justice’.” *Id.*, 327. The Court concluded, “Upon a review of *the whole record*, particularly in light of defense counsel’s scathing denunciation of Corbet’s and Selden’s credibility. . [in closing arguments], we are unable to say that the trial court’s refusal to give SJI2d 5.03 . . .[was] ‘inconsistent with substantial justice’.” *Id.*, 332; (emphasis added).

Here, notwithstanding defense testimony that the company had downsized, was being “squeezed on revenue,” and that plaintiff’s position was eliminated because revenues were not keeping up with expenses, there was strong evidence which the jury believed indicating that defendants’ proffered economic reason was a pretext. It cannot be said that the result would have been different if the trial court had given the proposed supplementary instructions.

Defendants next claim that the trial court abused its discretion in admitting plaintiff’s exhibit No. 202 during plaintiff’s redirect testimony and then denying defendants the opportunity to cross-examine plaintiff regarding the exhibit. The decision whether to admit evidence is within the trial court’s discretion and will not be disturbed on appeal absent an abuse of that discretion. *Price v Long Realty, Inc*, 199 Mich App 461, 466; 502 NW2d 337 (1993). Error in the admission or exclusion of evidence is not ground for a new trial unless failure to take this action would be inconsistent with substantial justice. *Temple v Kelel Distributing Co, Inc*, 183 Mich App 326, 330; 454 NW2d 610 (1990).

In this case, the trial court ruled that No. 202 was admissible because it was defendant’s own document. Without condoning the production of documents on the eve of trial, we find no abuse of discretion in admitting exhibit No. 202 which was “equally within the control of defendant and should have been anticipated as a basic part of plaintiff’s case.” *Farrell v Auto Club of Mich*, 155 Mich App 378, 389; 399 NW2d 531 (1986), *remanded on other grounds*, 433 Mich 913; 448 NW2d 351 (1989).

As to defendants’ claim that the trial court further abused its discretion in denying defendants the opportunity to cross-examine plaintiff regarding exhibit No. 202, we agree. However, defendants were able to blunt any prejudice with the testimony of Thomas Czarnecki who explained that exhibit No. 202 did not refer to the age of the employees but rather to the idea that, while the firm was old, its ideas were up to date. In any event, exhibit No. 202 related only to plaintiff’s age discrimination claim, not to the other bases of the jury’s verdict.

Similarly, the age-related comments to which defendants object related only to plaintiff’s age discrimination claim. Even if the court abused its discretion in the admission of those comments, reversal would be required only as to that claim, not to plaintiff’s claims of a just-cause contract based either on an express oral agreement or on legitimate expectations. See, *Wolff v Automobile Club*, 194 Mich App 6, 13; 486 NW2d 75 (1992).

As with the JNOV, defendants claim that the trial court failed to assign any reasons for the denial of defendants' motion for a new trial. However, the claim similarly was not raised in the hearing on the motion, is not in the issues presented section of defendants' brief, nor is it in the relief requested. In any event, it is not totally accurate that the trial court assigned no reasons for denying a new trial. Admittedly, the court elected without explanation to utilize only the standard jury instructions rather than any supplemental instructions. However, it did assign reasons for the admission of exhibit No. 202 (within the control of defendants and relevant to the age discrimination claim), and for admitting the age-related comments of other employees (relevant to the age discrimination claim).

Finally, plaintiff's claim regarding remittitur is not preserved because plaintiff failed to cross-appeal. *McCardel v Smolen,* 404 Mich 89, 94-95, n 6; 273 NW2d 3 (1978).

Affirmed.

/s/ Maura D. Corrigan
/s/ Joseph B. Sullivan