STATE OF MICHIGAN

COURT OF APPEALS

THOMAS O'HENLEY and LINDA ANNE O'HENLEY, Plaintiffs-Appellants, v TERRA INTERNATIONAL, INC. and GEORGE F. HACKMAN, Defendants-Appellees.	UNPUBLISHED February 6, 2001 No. 217681 Huron Circuit Court LC No. 98-000385-NZ

Before: Fitzgerald, P.J., and Holbrook, Jr., and McDonald, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(8) and (C)(10). We affirm in part and reverse in part.

This case involves plaintiff Thomas O'Henley's claim that he was demoted and discharged without just cause and that he was discriminated against because of his age. Plaintiffs argue that the trial court erred in dismissing their various legal claims pursuant to MCR 2.116(C)(8) and (C)(10). We review a trial court's decision to grant or deny summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

> MCR 2.116(C)(8) permits summary disposition when the opposing party has failed to state a claim upon which relief can be granted. A motion under this subsection determines whether the opposing party's pleadings allege a prima facie case. The court must accept as true all well-pleaded facts. . . . A motion pursuant to MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claim. MCR 2.116(C)(10) permits summary disposition when, except for the amount of damages, there is no genuine issue concerning any material fact and the moving party is entitled to damages as a matter of law. A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the opposing party and grant the benefit of any reasonable doubt to the opposing party. [*Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994).]

Plaintiffs first argue that the trial court erred in dismissing Mr. O'Henley's age discrimination claim against defendant George F. Hackman, a former supervisor at defendant Terra International, Inc. While we agree that summary disposition should not have been granted under subsection (C)(8), we conclude that it was properly granted under subsection (C)(10).

After reviewing the parties' briefs, it appears that they are in agreement that Hackman was acting as an agent of Terra at the time he demoted Mr. O'Henley. Because Hackman was acting as an agent of Terra at this particular time, he was an "employer" under the Civil Rights Act (CRA), MCL 37.2201 *et seq.*; MSA 3.548(201) *et seq*. MCL 37.2101(a); MSA 3.548(101)(a).[1] As such, Mr. O'Henley could file a separate age discrimination claim against Hackman for demoting him. *Jenkins v Southeastern Michigan Chapter, American Red Cross*, 141 Mich App 785, 799-800; 369 NW2d 223 (1985).

However, reversal is not warranted because the trial court also dismissed this claim under subsection (C)(10). Because plaintiffs fail to argue on appeal the merits of that ruling, the issue is abandoned. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). In any event, we conclude that the trial court did not err in dismissing this claim under subsection (C)(10). There was no evidence that Mr. O'Henley was demoted because of his age. MCL 37.2202(1)(a); MSA 3.548(202)(1)(a).

Plaintiffs also argue that the trial court erred in determining that they failed to establish an age discrimination claim against Terra. Again, however, plaintiffs fail to argue the merits of that ruling. Consequently, this issue is deemed abandoned. *Prince*, *supra* at 197. Further, as with the previous claim of age discrimination, the record is devoid of evidence that age was a motivating factor in Terra's decision not to retain Mr. O'Henley when the company's workforce was reduced. MCL 37.2202(1)(a); MSA 3.548(202)(1)(a).

Next, plaintiffs argue that the trial court erred in determining that they failed to establish a wrongful demotion/discharge claim against Terra, because they produced evidence of contractual just-cause employment. We agree.

An employee who has an employment contract for an indefinite term, like Mr. O'Henley in this case, is presumed to have at-will employment. *Rood v General Dynamics Corp*, 444 Mich 107, 116; 507 NW2d 591 (1993). However, there are three ways that an employee can overcome this presumption: (1) proof of a contractual provision for a definite period of time or a provision forbidding discharge absent just cause; (2) an express agreement, either written or oral, of just-cause employment; or (3) a contractual provision, implied at law, where an employer's policies and procedures instill a legitimate expectation of just-cause employment. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 164; 579 NW2d 906 (1998). Plaintiffs' argument relies on the second of these.

---

[1] The CRA defines "employer" as meaning "a person who has 1 or more employees, and includes an agent of that person." MCL 37.2201(a); MSA 3.548(201)(a).

The basic requirement of contract formation is that the parties mutually assent to be bound. *Rood*, *supra* at 118. In deciding whether there was evidence of mutual assent to a contract, courts use an objective test and analyze the expressed words of the parties and their visible acts and ask whether a reasonable juror could interpret the words or conduct in the manner that is alleged. *Id.* at 119. In making this inquiry, courts analyze all the relevant circumstances surrounding the transaction, including all writings, oral statements, and other conduct by which the parties manifested their intent. *Id.* Oral assurances of just-cause employment must be clear and unequivocal to overcome the presumption of at-will employment. *Id.*

In the instant case, plaintiffs presented evidence that a manager of Terra told Mr. O'Henley and other employees during pre-employment negotiations, that Terra "just wouldn't walk in and fire somebody" and that it "had to have a reason to fire somebody or demote them." There was also evidence that the manager stated that Terra had a process to discharge an employee that was contained in a company policy manual. Although the manager did not distribute the company policy manual at that particular time, he told them where it was located should they wish to review it.

When analyzing all the relevant circumstances surrounding the transaction in this case, we believe that a reasonable juror could interpret the manager's statements as a promise of a just-cause employment relationship. Further, Mr. O'Henley contended that he interpreted these statements as an intention to create a just-cause employment relationship. As such, when viewing all the facts and reasonable inferences in a light most favorable to plaintiffs, we believe a reasonable juror could conclude that there was mutual assent to a just-cause employment relationship. *Id.* at 119.

Terra argues that even if plaintiffs produced such evidence, an employer can unilaterally revoke a prior express agreement of just-cause employment by adopting an at-will policy. We disagree. In *Bullock v Automobile Club of Michigan*, 432 Mich 472, 482; 444 NW2d 114 (1989), our Supreme Court held that an employer cannot unilaterally revoke a prior express agreement of just-cause employment by adopting an at-will policy. Rather, such actions may only be construed as an "offer to modify" the contrary terms of a prior express agreement. See *Farrell v Automobile Club of Michigan (On Remand)*, 187 Mich App 220, 228; 466 NW2d 298 (1991). An employee does not accept the offer to modify merely because the employee continues to work for the employer. *Id.* It is for a trier of fact to determine, by examining the surrounding facts and circumstances, whether the employee accepted the offer to modify and thus modified the prior express agreement. *Id.* Consistent with *Farrell*, because Terra's adoption of employee manuals and handbooks that contained at-will disclaimers may only be construed as an offer to modify, it was for a trier of fact to determine whether Mr. O'Henley accepted the offer and thus modified the prior express agreement. *Id.* Accordingly, we conclude that the trial court erred in granting summary disposition in favor of Terra pursuant to MCR 2.116(C)(10) regarding plaintiffs' wrongful demotion/discharge claim.

Finally, plaintiffs argue that the trial court erred in ruling that plaintiff Linda O'Henley failed to state a claim for loss of consortium. We disagree for two reasons. First, plaintiffs' complaint did not include a count alleging a separate cause of action for this claim. *Eide v*

Kelsey-Hayes Co, 431 Mich 26, 37; 427 NW2d 488 (1988). Rather, plaintiffs merely subsumed this claim within the age discrimination claims in Count II of the first amended complaint. Second, Mrs. O'Henley did not request damages for loss of society and companionship. *Id.* at 29. Instead, she simply requested damages for emotional distress and loss of income. We therefore conclude that the trial court correctly granted summary disposition for defendants pursuant to MCR 2.116(C)(8) on this claim.

Affirmed in part and reversed in part.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Gary R. McDonald