STATE OF MICHIGAN

COURT OF APPEALS

FREDERICK M. LAURENS,

Plaintiff-Appellant,

v

CITY OF SOUTHFIELD,

Defendant-Appellee.

UNPUBLISHED
August 27, 1996

No. 181615
LC No. 92-445043

Before: Smolenski, P.J., and Holbrook, Jr., and F. D. Brouillette,* JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court's order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendant in this wrongful termination action. We affirm.

Plaintiff, who is approximately sixty years old, was employed as a plumbing inspector for defendant, a municipal corporation, from January 4, 1991, to September 4, 1992. Before accepting employment with defendant, plaintiff was a journeyman plumber. During his interview, plaintiff informed defendant's representatives that he did not want the plumbing inspector job if they were seeking a master plumber, as he did not wish to take the master's certification examination. Defendant's representatives replied, "oh, no, no, you got the job." They did not inform plaintiff that the position was temporary. Plaintiff assumed that he had been hired as a permanent, full-time plumbing inspector.

After his interview and after beginning to work with defendant, plaintiff learned that defendant was required to post the job of permanent plumbing inspector and interview other applicants. Furthermore, defendant was seeking a certified master plumber for the position. Plaintiff was assured, however, that he had a good chance of obtaining the permanent position once defendant complied with posting requirements. Plaintiff attempted to pass the master's exam, but failed. Defendant then terminated plaintiff, and hired a younger, master-certified plumber to fill the permanent position.

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

Plaintiff then filed the instant suit, in which he brought claims for breach of employment contract, promissory estoppel, age discrimination, and violation of due process. Defendant's motion for summary disposition as to all of plaintiff's claims was granted. This appeal followed.

A motion for summary disposition brought pursuant to MCR 2.116(C)(10) tests the factual support for a claim, giving the benefit of any reasonable doubt to the nonmoving party to determine whether a record might be developed which would leave open an issue upon which reasonable minds could differ. *Jackhill Oil Co v Powell Productions, Inc*, 210 Mich App 114, 117; 532 NW2d 866 (1995). When reviewing a motion for summary disposition, this Court considers the pleadings, depositions, affidavits, admissions and other documentary evidence available to it. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). This Court reviews the grant of summary disposition de novo. *Jackhill*, *supra* at 117.

I

Plaintiff first argues that the trial court improperly granted defendant's motion for summary disposition on his breach of employment contract claim because he established a genuine issue of material fact whether he had a just-cause employment contract. We disagree.

Generally, oral contracts of employment for an indefinite term are terminable at will. *Manning v Hazel Park*, 202 Mich App 685, 692; 509 NW2d 874 (1993). The presumption of at-will employment may be overcome by proof of an express contract for a definite term or by a provision forbidding discharge without just cause. *Rood v General Dynamics Corp*, 444 Mich 107, 117; 507 NW2d 591 (1993). Such restrictions may become part of the contract by express agreement or as the result of the employee's legitimate expectations grounded in the employer's policies or procedures. *Id.*. at 117-118. These standards apply to public employment relationships, as well as private ones. *Manning*, *supra*. When a plaintiff relies on policy statements contained in an employee handbook to establish his legitimate expectation of just-cause employment, the trial court must initially determine whether such statements are reasonably capable of being interpreted as promises of just-cause employment. *Rood*, *supra*. Accordingly, such statements must be clear and unequivocal to overcome the at-will presumption. *Rowe v Montgomery Ward Co*, 437 Mich 627, 645 (Riley, J), 662 (Boyle, J); 473 NW2d 268 (1991).

Reviewing the record and resolving all reasonable doubts in plaintiff's favor, we are unable to find that defendant's statements were reasonably capable of instilling a legitimate expectation of just-cause employment in plaintiff. It is uncontested that plaintiff received both the 1987 Building Officials and Code Administrators Plumbing Code ("1987 BOCA Code") and Southfield Ordinance 1251 to assist him in performing his duties. While section P-109.2 of the 1987 BOCA Code does provide that plumbing inspectors may be removed only "for cause and after full opportunity [to be heard] has been granted," it explicitly states that it is a sample safety code that a municipality may adopt by reference by ordinance. Furthermore, the 1987 BOCA Code clearly provides that it sets forth minimum plumbing safety requirements, and not the terms and conditions of plaintiff's employment. Moreover, even if the Code led plaintiff to believe that he had a just-cause employment contract, an employer's policy to act

or refrain from acting in a specified way *if* the employer chooses is not a promise at all. *Rood, supra* at 139.

Perhaps most importantly, defendant never adopted section P-109.2. Instead, defendant adopted Southfield Ordinance 1251 as its plumbing safety code, which, in section 8.454, clearly deleted the 1987 BOCA Code's section P-109.2. An employer may unilaterally change a written discharge-for-cause policy to an employment-at-will policy, provided that the employer gives affected employees reasonable notice of the change. *In Re Certified Question (Bankey v Storer Broadcasting Co)*, 432 Mich 438, 441; 443 NW2d 112 (1989). Even if defendant had adopted the 1987 BOCA Code to define the terms and conditions of its plumbing inspectors' employment, defendant clearly changed its just-cause policy by promulgating Ordinance 1251. Plaintiff had reasonable notice of this change. Therefore, plaintiff had no legitimate expectation of just-cause employment based on defendant's statements of policy. Because plaintiff presented no other compelling evidence that he was clearly promised just-cause employment, we affirm the trial court's grant of summary disposition in defendant's favor as to plaintiff's claim for wrongful discharge.

II

Next, plaintiff advances that the trial court incorrectly granted summary disposition as to his claim for promissory estoppel. We disagree.

The elements of promissory estoppel are : (1) a promise; (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee; (3) which in fact produced reliance or forbearance of that nature; and (4) in circumstances such that the promise must be enforced if injustice is to be avoided. *Schmidt v Bretzlaff*, 208 Mich App 376, 378-379; 528 NW2d 760 (1995). The doctrine of promissory estoppel is cautiously applied. *Marrero v McDonnell Douglas Capital Corp*, 200 Mich App 438, 442; 505 NW2d 275 (1993). In a promissory estoppel action, a court must make a threshold inquiry into the circumstances surrounding both the making of the promise and the promisee's reliance as a question of law. *State Bank of Standish v Curry*, 442 Mich 76, 84; 500 NW2d 104 (1993). The existence and scope of a promise, however, are questions of fact, and a determination that a promise exists (or does not exist) will not be overturned unless it is clearly erroneous. *Id.* Finally, the sine qua non of the theory of promissory estoppel is that the promise be clear and definite. *Id.*. at 85.

Viewing the record and resolving all reasonable doubts in favor of plaintiff, we are unable to find clear error in the trial court's determination that defendant did not promise plaintiff he was being hired as a full-time, permanent plumbing inspector. While none of plaintiff's interviewers told him the job was temporary, no one asserted that he was being hired on a permanent basis. Defendant's representatives only told plaintiff "you got the job" when he asked about the master's requirement at his interview, and then told him that once the posting requirements were fulfilled, he would "probably" obtain the permanent, full-time position. We cannot interpret these statements as clear and definite promises of full-time, permanent employment. Furthermore, plaintiff failed to present evidence that he substantially relied on defendant's alleged promises. While he stated that he would not have taken the job if it were

not permanent, acceptance of a position is a necessary incident of taking a job, rather than consideration to support a claim for promissory estoppel. *Marrero, supra*, 200 Mich App 443. Lastly, our failure to enforce defendant's alleged promise would not result in injustice. Although plaintiff claims that he cannot work as a plumber while he is retired from his union, plaintiff may seek employment from other union locals or rescind his retirement. Additionally, plaintiff's continued employment with defendant after his union retirement clearly evidences that he can find employment that is closely related to his field of expertise, notwithstanding his retirement. Accordingly, we affirm the trial court's grant of summary disposition in defendant's favor as to plaintiff's claim for promissory estoppel.

III

Next, plaintiff argues that the trial court improperly granted summary disposition in defendant's favor as to his claim for age discrimination under the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq*. We disagree.

MCL 37.2202; MSA 3.548(202) prohibits discrimination in employment on the basis of age. A plaintiff can establish a prima facie case of age discrimination by showing (1) that he was a member of a protected class and was discharged, (2) he was qualified for the position, and (3) he was replaced by a younger person. *Manning, supra* at 697. Once a plaintiff proves a prima facie case of age discrimination, the burden of production shifts to the defendant to rebut the presumption of disparate treatment by articulating some legitimate, non-discriminatory reason for the adverse employment decision. *Lytle v Malady*, 209 Mich App 179, 186-187; 530 NW2d 135 (1995), lv gtd 451 Mich ___ (1996). Where the defendant meets this burden, the plaintiff must tender specific factual evidence that could lead a reasonable jury to conclude that the defendant's proffered reason is a mere pretext for discrimination. *Id*. at 188.

We are unable to find that plaintiff presented sufficient evidence to raise a genuine issue of material fact regarding defendant's liability for age discrimination. While plaintiff was within the protected class of employees, was discharged, and was replaced by a younger person, plaintiff failed to submit evidence that he was qualified for the position of plumbing inspector, as he was not a master plumber. Because his failure to obtain proper certification rendered him unqualified for the position of plumbing inspector, plaintiff failed to establish a prima facie case of age discrimination. *Grant v Michigan Osteopathic Medical Center, Inc*, 172 Mich App 536, 539-540; 432 NW2d 313 (1988). Moreover, even if plaintiff could establish a prima facie case of age discrimination, defendant successfully advanced a proper reason for plaintiff's adverse treatment, as we regard certification requirements as legitimate, nondiscriminatory employment factors. *Id*. at 540. Accordingly, we affirm the trial court's grant of summary disposition in defendant's favor as to plaintiff's claim for age discrimination.

IV

Lastly, plaintiff claims that he established a genuine issue of material fact whether defendant violated his due process rights when it terminated him. We disagree. A public employee does not have

a property interest in continued employment when his position is held at the will of his superiors and the employee has not been promised termination only for just cause. *Manning*, *supra* at 694. Since plaintiff was an at-will employee, he was not entitled to due process protection prior to his termination. Hence, we affirm the trial court's grant of summary disposition in defendant's favor as to plaintiff's claim for violation of due process.

Affirmed.

/s/ Michael R. Smolenski
/s/ Donald E. Holbrook, Jr.
/s/ Francis D. Brouillette