2013 IL App (3d) 120739-U

Order filed May 23, 2013

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2013

GERALD C. VILLIGER,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
Plaintiff-Appellant,	)	Peoria County, Illinois,
	)	
v.	)	Appeal No. 3-12-0739
	)	Circuit No. 10-L-50
CATERPILLAR, INC., a Delaware	)	
corporation,	)	Honorable
	)	David J. Dubicki,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE CARTER delivered the judgment of the court.
Presiding Justice Wright and Justice Lytton concurred in the judgment.

ORDER

¶ 1 *Held:* In a case in which the plaintiff brought suit against his former employer for age discrimination and promissory estoppel relating to his voluntary retirement and the later offering of a separation incentive plan by the employer, the plaintiff could not prove all of the elements necessary to establish either claim. The appellate court, therefore, affirmed the trial court's grant of summary judgment for the employer.

¶ 2 Plaintiff, Gerald Villiger, brought suit against defendant, Caterpillar, Inc., for age discrimination and promissory estoppel relating to his unforced scheduled retirement from

Caterpillar and a voluntary separation incentive plan that was offered shortly thereafter to all qualified employees. Caterpillar filed a motion for summary judgment, which the trial court granted after a hearing. Villiger appeals. We affirm the trial court's judgment.

¶ 3 FACTS

¶ 4 Villiger worked for Caterpillar for over thirty-five years and voluntarily retired in July 2008, at the age of 62, with full retirement benefits. His retirement was planned in advance. In June 2008, about a month before his scheduled retirement, Villiger learned at a plant meeting that Caterpillar was moving the engine production work that was done at the plant in Mossville, Illinois, where Villiger worked, to a plant in Texas. The transfer of production was scheduled to be completed in December 2009. Based upon his prior experience, Villager believed that Caterpillar would offer a voluntary separation incentive agreement (separation agreement or separation plan) to the employees at the Mossville plant. Villiger knew that Caterpillar had done so in the past and had heard Caterpillar representatives state numerous times at previous quarterly plant meetings throughout the years that a voluntary separation agreement would be offered if Caterpillar was going to reduce the workforce at the Mossville plant.

¶ 5 Villiger considered revoking his retirement election and went to the human resources department to discuss the matter. He spoke to Linda Goines. Goines told Villiger that she had no knowledge of whether Caterpillar was working on or planning a separation agreement. When Villiger responded that he believed that a separation agreement would be offered, Goines reiterated that she thought such an agreement was highly unlikely because it was too costly for Caterpillar.

¶ 6 Based upon his conversation with Goines, Villiger decided to go forward with his

scheduled retirement and retired in July 2008. Caterpillar offered a voluntary separation agreement later that year in December 2008, for which Villiger would have qualified. Since he was already retired, Villiger could not participate in the separation agreement and missed out on approximately $81,000 in additional compensation. The separation agreement was offered equally to all qualified employees, including those that were both younger and older than Villiger.

¶ 7 Villiger later brought the instant action against Caterpillar for age discrimination and promissory estoppel. Caterpillar filed a motion for summary judgment on both claims, and a hearing was held on the motion. At the time of the hearing, the trial court had before it the various pleadings of the parties and numerous supporting documents, including the deposition of Villiger and the affidavit of Goines. Of relevance to this appeal, in addition to the information set forth above, Villiger testified in his deposition that he did not believe Goines lied to him when they spoke in June 2008. Goines stated in her affidavit that at the time of her meeting with Villiger, she was not aware of any plans by Caterpillar to offer a separation agreement and that she found out about the agreement at the same time as all of the other employees in December 2008. At the conclusion of the hearing, the trial court granted summary judgment for Caterpillar on both claims. Villiger appealed.

¶ 8 ANALYSIS

¶ 9 On appeal, Villiger argues first that the trial court erred in granting summary judgment for Caterpillar on his age-discrimination claim. Villiger asserts that summary judgment should not have been granted because genuine issues of material fact exist as to whether: (1) Villiger has identified any similarly-situated employees who were treated differently; (2) Goines had

knowledge of the separation plan when she met with Villiger; (3) Goines lied to or misled Villiger in that meeting; and (4) Caterpillar had discriminatory intent. Villiger asks, therefore, that we reverse the trial court's grant of summary judgment for Caterpillar on his age-discrimination claim and that we remand this case for further proceedings. Caterpillar argues that the trial court's ruling was proper and should be affirmed. Caterpillar asserts that summary judgment was properly granted in its favor because Villiger cannot establish a *prima facie* case of age discrimination in employment in that he cannot show that Caterpillar took adverse action against him or that it did so because of his age.

¶ 10 The purpose of summary judgment is not to try a question of fact, but to determine if one exists. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 42-43 (2004). Summary judgment should be granted only where the pleadings, depositions, admissions, and affidavits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and that the moving party is clearly entitled to a judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2010); *Adams*, 211 Ill. 2d at 43. Summary judgment should not be granted if the material facts are in dispute or if the material facts are not in dispute but reasonable persons might draw different inferences from the undisputed facts. *Adams*, 211 Ill. 2d at 43. Although summary judgment is to be encouraged as an expeditious manner of disposing of a lawsuit, it is a drastic measure and should be allowed only when the right of the moving party is clear and free from doubt. *Id*. In appeals from summary judgment rulings, the standard of review is *de novo*. *Id*. A trial court's grant of summary judgment may be affirmed on any basis supported by the record. *Illinois State Bar Ass'n Mutual Insurance Co. v. Coregis Insurance Co.*, 355 Ill. App. 3d 156, 163 (2004).

¶ 11 Pursuant to the Illinois Human Rights Act (Act), it is unlawful for an employer to discriminate against an employee on the basis of age. 775 ILCS 5/2-102(A) (West 2010). In analyzing a claim of employment discrimination under the Act, Illinois courts apply a three-part analysis. *Zaderaka v. Illinois Human Rights Comm'n*, 131 Ill. 2d 172, 178 (1989); *Anderson v. Chief Legal Counsel, Illinois Department of Human Rights*, 334 Ill. App. 3d 630, 634 (2002). First, the plaintiff must establish by a preponderance of the evidence a *prima facie* case of employment discrimination. *Zaderaka*, 131 Ill. 2d at 178-79. If the plaintiff does so, a rebuttable presumption arises that the employer unlawfully discriminated against the plaintiff. *Id*. at 179. Second, to rebut that presumption, the employer must articulate, but not prove, a legitimate, nondiscriminatory reason for its decision or action. *Id*. at 179. If the employer satisfies his burden of production, the presumption of unlawful discrimination drops away. *Id*. at 179. Third, if a nondiscriminatory reason has been offered and the presumption has been rebutted, plaintiff must prove by a preponderance of the evidence that the employer's articulated reason was not its true reason, but was instead a pretext for unlawful discrimination. *Id*. at 179. Regardless of the shifting of the burden of production, the ultimate burden of persuading the trier of fact that the employer engaged in unlawful discrimination remains with the plaintiff at all times. See *Id*. at 179.

¶ 12 To establish a *prima facie* case of age discrimination in employment based upon disparate treatment, as alleged in the present case, the plaintiff must prove by a preponderance of the evidence that: (1) he is a member of the protected class in that he is least 40 years old and works for an employer to whom the Act applies; (2) his work performance was satisfactory; (3) the employer took adverse action against him, despite his satisfactory work performance; and (4) a

similarly-situated employee, who was not a member of the protected class, was not subjected to the same adverse action. *Owens v. Department of Human Rights*, 356 Ill. App. 3d 46, 52 (2005). In a case brought under a disparate-treatment theory, the ultimate factual inquiry is whether the employer intentionally discriminated against the plaintiff (*Zaderaka*, 131 Ill. 2d at 179) and the improper discriminatory purpose must be shown to be the "but-for" reason for the employer's treatment of the plaintiff (See *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 176-80 (2009)). An employer's intent to discriminate may be proven with direct evidence, such as a specific admission by the employer, or with circumstantial evidence, such as suspicious comments by the employer, suspicious timing as to the events in question, or more favorable treatment of similarly-situated employees who are not in the protected class. See *Troupe v. May Department Stores Co.*, 20 F.3d 734, 736 (7th Cir. 1994). In short, in a circumstantial-evidence case, the plaintiff must establish "a constellation of events that raises a suspicion of discrimination–enough so to require the employer to explain his conduct." *Henn v. National Geographic Society*, 819 F.2d 824, 828 (7th Cir. 1987).

¶ 13 In the present case, after having reviewed the record, we find that Villiger is unable to prove two of the elements necessary to establish a *prima facie* case of age discrimination in employment. First, Villiger cannot establish that Caterpillar took adverse action against him. The record before us makes it abundantly clear that Villiger's decision to retire was a voluntary one. There is no evidence to suggest that Villiger was tricked or misled. The evidence presented indicates that Goines told Villiger the truth about her knowledge of any separation plan that would be offered and that Villiger made the decision to retire with full knowledge that a major change was going to happen at the Mossville plant in the very near future, that a separation

agreement had been offered in similar situations in the past, and that Caterpillar representatives had made numerous statements over the years that a separation agreement would be offered if Caterpillar planned to reduce the workforce at the plant. Rather than showing adverse action, the facts of the present case show nothing more than an incident of unfortunate timing by Villiger as to his retirement decision.

¶ 14 Second, Villiger cannot establish that Caterpillar acted with discriminatory intent. Villiger has presented no evidence that Caterpillar made any admissions of discrimination, that Caterpillar made any type of suspicious comments pertaining to the matter in question, or that Caterpillar treated similarly-situated, younger employees differently. To the contrary, the record before us indicates that the separation agreement was offered to all qualified employees equally, regardless of whether they were younger or older than Villiger, and that all of the employees involved, including Goines, found out about the separation agreement at the same time, when it was announced in December 2008. The only evidence that Villiger offers as circumstantial evidence of discriminatory intent is the relatively short time span between when Villiger spoke to Goines (and subsequently retired) and when the separation agreement was first announced. In our opinion, under the facts of the present case, that timing is not sufficient to create an inference of age discrimination.

¶ 15 Because Villiger cannot establish a *prima facie* case of age discrimination, his claim must be rejected. See *Owens*, 356 Ill. App. 3d at 52. We need not examine Caterpillar's explanation for any alleged disparate treatment since such an inquiry is unwarranted when the plaintiff fails to meet his initial burden. See *Zaderaka*, 131 Ill. 2d at 179. We conclude, therefore, that summary judgment was properly granted for Caterpillar on Villiger's age-discrimination claim. See 735

ILCS 5/2-1005(c) (West 2010); *Adams*, 211 Ill. 2d at 43.

¶ 16 Villiger argues next on appeal that the trial court erred in granting summary judgment for Caterpillar on his promissory-estoppel claim. Villiger asserts that summary judgment should not have been granted because he proved all of the elements necessary to establish a claim of promissory estoppel or, at the very least, to establish a genuine issue of material fact as to the elements that were in dispute. Villiger asks, therefore, that we reverse the trial court's grant of summary judgment for Caterpillar on his promissory-estoppel claim and that we remand this case for further proceedings. Caterpillar argues that the trial court's ruling was proper and should be affirmed. Caterpillar asserts that summary judgment was properly granted in its favor because Villiger cannot prove all of the elements of promissory estoppel in that he cannot establish that Goines or Caterpillar made an unambiguous promise to him or that he justifiably relied on that promise. As noted above, our standard of review for a grant of summary judgment is *de novo*. See *Adams*, 211 Ill. 2d at 43.

¶ 17 Promissory estoppel is a common law doctrine under which a person who relies on a promise to his detriment may obtain damages or equitable relief from the person that made the promise, despite the absence of a mutual agreement between the parties. *Newton Tractor Sales, Inc. v. Kubota Tractor Corp.*, 233 Ill. 2d 46, 51-56 (2009). To prevail on a claim of promissory estoppel, the plaintiff must prove by a preponderance of the evidence that: (1) defendant made an unambiguous promise to him; (2) he relied on that promise; (3) his reliance was expected and foreseeable by the defendant; and (4) he relied on the promise to his detriment. *Newton Tractor Sales, Inc.*, 233 Ill. 2d at 51; Restatement (Second) of Contracts § 90(1) (1981). Although promissory estoppel claims may be based upon promises of future action (*Derby Meadows*

Utility Co. v. Inter-Continental Real Estate, 202 Ill. App. 3d 345, 359-61 (1990)), they may not be based upon statements of opinion, prophecy, or prediction, which do not constitute an unambiguous promise (*Stringer Construction Co. v. Chicago Housing Authority*, 206 Ill. App. 3d 250, 260 (1990)).

¶ 18 Upon reviewing the record in the instant case, we find that the plaintiff cannot establish all of the elements necessary for a claim of promissory estoppel. Most notably, plaintiff cannot establish that Goines or Caterpillar made an unambiguous promise to him. Plaintiff's own testimony shows that at best, Goines was providing plaintiff with only a prediction of whether Caterpillar would offer a separation plan, not an unambiguous promise. See *Stringer*, 206 Ill. App. 3d at 260. In addition, based on plaintiff's prior knowledge and experience, plaintiff could not reasonably rely on Goines's prediction. Indeed, it appears from plaintiff's own testimony, that plaintiff did not believe Goines's prediction and was certain that it was incorrect. Because it is clear based upon the record that plaintiff cannot establish all of the elements of promissory estoppel, summary judgment was properly granted for Caterpillar on that claim. See 735 ILCS 5/2-1005(c) (West 2010); *Adams*, 211 Ill. 2d at 43.

¶ 19 CONCLUSION

¶ 20 For the foregoing reasons, we affirm the judgment of the circuit court of Peoria County.

¶ 21 Affirmed.