STATE OF MICHIGAN

COURT OF APPEALS

DOUGLAS BROWN, JACK HOSMER, BILL NAGY, AND DONALD PRIEST,

Plaintiffs-Appellants,

v

VAN BUREN PUBLIC SCHOOLS,

Defendant-Appellee

UNPUBLISHED
January 11, 2024

No. 364148
Wayne Circuit Court
LC No. 22-003540-CZ

Before: BOONSTRA, P.J., and O'BRIEN and SWARTZLE, JJ.

PER CURIAM.

Plaintiffs appeal by right the trial court's order granting defendant's motion for summary disposition and denying plaintiffs' cross-motion for summary disposition. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Plaintiffs are four elderly, retired former employees of defendant. Upon their retirement, plaintiffs all opted to purchase a $50,000 supplemental life insurance policy from the Michigan Education Special Services Association (MESSA) as was provided for in the applicable collective bargaining agreement (CBA) between defendant and plaintiffs' former bargaining unit. The CBA provided, in relevant part:

> 8.4 Group Term Life Insurance
>
> a. Life insurance in the amount of $40,000 with Accidental Death and Dismemberment through June 30, 1984 . . . . In addition, provided the insurance carrier allows, group-rate insurance in the amount of $50,000 with AD&D (and no proof of insurability) will be available at employee expense, provided 75% of the qualified group members choose this coverage. Members retiring after the 1990-91 school year will be eligible for the same coverage. Coverage shall be provided

each administrator[1] and fully paid for by the Board for the duration of this contract.

b. If the rules of the insurance will allow, the administrator may purchase additional life insurance at his own expense.

Each year, until 2020, defendant paid the premium for the policies, and plaintiffs reimbursed defendant for those payments.

In August of 2020, defendant informed plaintiffs by letter than their MESSA life insurance policies had been terminated "[b]ecause of the recent decision of a district bargaining group to seek insurance from another carrier" and that defendant had "attempted to find a comparable product with our current carrier, but was not successful in doing so." According to defendant, by 2020 all of defendant's bargaining units had negotiated a move to a different insurance carrier, and MESSA had accordingly canceled the supplemental life insurance policies previously offered to retired employees. The parties agree that all other retirees and active employees of defendant were able to purchase new supplemental life insurance policies under the CBA, and that plaintiffs were ineligible to purchase a new policy from the new insurance carrier due to their age.

Plaintiffs filed suit in 2022, alleging one count of age discrimination under the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq*. Plaintiffs alleged that defendant had intentionally discriminated against them on the basis of their age by allowing their supplemental life insurance policies to be canceled without replacement while continuing to offer the benefit to younger retired employees.

In lieu of answering the complaint, defendant moved for summary disposition under MCR 2.116(C)(8) and (10). Defendant argued that it was entitled to summary disposition under MCR 2.116(C)(8) because plaintiffs' claim was barred by MCL 37.2202(2). In the alternative, defendant argued that plaintiffs could not demonstrate a genuine issue of material fact under MCR 2.116(C)(10) regarding defendant's legitimate business reason for allowing plaintiffs' policies to be canceled without replacement. Plaintiffs responded that MCR 37.2022(2) did not bar their claim because the claim did not involve the establishment or implementation of a retirement policy or system; further, plaintiffs argued that defendant's disparate treatment of them was a subterfuge to evade the purposes of ELCRA. Plaintiffs also moved for summary disposition under MCR 2.116(C)(10), arguing that no genuine issue of material fact existed regarding defendant's alleged violation of ELCRA, and that they were therefore entitled to judgment as a matter of law.

The trial court held a hearing on the parties' cross-motions for summary disposition. At the hearing, defendant argued that the language of the CBA provided that supplemental life insurance policies were only available if the insurer allowed their purchase. Counsel for defendant further stated that "because of actuarial realities and the cost of insuring [plaintiffs]," defendant had been unable to find another insurer to issue replacement policies. Defendant argued that

[1] The CBA's use of "administrator" refers to employees of defendant, as the bargaining unit consisted of the administrative staff of public schools in the Van Buren School District.

plaintiffs' claim involved the establishment or implementation of a retirement plan and that it was therefore barred by MCL 37.2022(2). Defendant also argued that plaintiffs had failed to establish a prima facie case of discrimination or to rebut defendant's legitimate business reasons for its actions. Plaintiffs responded that MCL 37.2202(2) did not apply to their claim under ELCRA, because it did not involve the establishment of a retirement plan or policy, but rather the discriminatory administration of a retirement benefit. Further, plaintiffs argued that MCL 37.2202(2) should not be interpreted as providing a broad exemption from ELCRA for retirement plans and policies. Plaintiffs also argued that they had established both disparate treatment and disparate impact. In the alternative, plaintiffs argued that they had established at least a prima facie case of age discrimination under ELCRA.

Following the hearing, the trial court issued a written opinion granting defendant's motion and denying plaintiffs' motion. The trial court held that plaintiffs' claim was barred by MCL 37.2202(2) because "the availability of the [life insurance] benefit is part of Defendant's retirement system" and plaintiffs had presented no evidence of subterfuge. The trial court declined to address the parties' remaining arguments "regarding the merits of Plaintiffs' ELCRA claim." This appeal followed.

II. STANDARD OF REVIEW

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Charter Twp of Pittsfield v Washtenaw Co Treas*, 338 Mich App 440, 448; 980 NW2d 119 (2021). A motion brought under MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the basis of the pleadings alone. *Dalley v Dykema Gossett PLLC*, 287 Mich App 296, 304-305; 788 NW2d 679 (2010). When reviewing a request for summary disposition under MCR 2.116(C)(8), the court must accept all well-pleaded factual allegations as true and construe them in the light most favorable to the moving party. *Id.* Summary disposition under MCR 2.116(C)(8) should not be granted unless the claim is "so clearly unenforceable as a matter of law that no factual development could possibly justify a right to recovery." *Id.* at 305 (citation omitted). In an action based on a written contract, the contract is considered part of the pleadings for the purposes of MCR 2.116(C)(8). *Laurel Woods Apts v Roumayah*, 274 Mich App 631, 635; 734 NW2d 217 (2007).

We review de novo issues of statutory interpretation. See *Twp of Fraser v Haney*, 509 Mich 18, 23; 983 NW2d 309 (2022).

III. ANALYSIS

Plaintiffs argue that the trial court erred by granting defendant's motion under MCR 2.116(C)(8) on the basis that their claim was barred by MCL 37.2022(2). We disagree.

ELCRA prohibits an employer from discriminating against employees or prospective employees based on their age with respect to "employment, compensation, or a term, condition, or privilege of employment." MCL 37.2202(1)(a). However, MCL 37.2022(2) provides that "[MCL 37.2202] does not prohibit the establishment or implementation of a bona fide retirement policy or system that is not a subterfuge to evade the purposes of [MCL 37.2022]." This Court first interpreted this statutory provision in *Klammer v Dept of Transp*, 141 Mich App 253, 259;

367 NW2d 78 (1985), and held that "retirement policies and systems which apply uniformly and contain provisions for pension or other economic systems to protect the worker economically on retirement" are exempt from claims under ELCRA. Later, in *Zoppi v Chrysler Corp*, 206 Mich App 172, 177; 502 NW2d 378 (1994), overruled in part on other grounds, *Zanni v Medaphis Physician Servs Corp*, 240 Mich App 472; 612 NW2d 845 (2000), this Court held that a retirement policy may be bona fide even if it a benefit is not granted uniformly to all employees, such as a benefit plan that requires the worker to be invited to participate in it. This Court in *Zoppi* held that "[a]retirement policy is bona fide if it exists and pays benefits." *Id.*

Plaintiffs argue that MCL 37.2022(2) does not bar their claim for age discrimination because it does not involve the "establishment or implementation" of a retirement policy, but rather involves the discriminatory administration of a retirement benefit. We find this to be a distinction without a difference. In *Zoppi*, the employer denied the plaintiff access to an early retirement program because of his age. *Id.* at 173. That benefit was one that required employees to apply for the program and meet certain criteria, including age, in order to receive it. *Id.* This Court, while it found that the plaintiff had not demonstrated that he was a member of a protected class,[2] also found that the "defendant's early retirement program was valid as a bona fide retirement policy under MCL 37.2202(2)." In this case, plaintiffs alleged in their complaint that they were denied the voluntary purchase of supplemental life insurance as a retirement benefit because of their age. This benefit required the employees to choose to receive the benefit and meet certain conditions in order to receive it. We conclude that the benefit at issue here is similar enough to the benefit at issue in *Zoppi* that its holding applies.

Additionally, based on the pleadings alone, see MCR 2.116(C)(8), plaintiffs did not allege that defendant's retirement plan or policy was not bona fide, or allege that the plan or policy was a subterfuge to evade ELCRA age discrimination claims. MCL 37.2022(2). Plaintiffs' complaint referred to section 8.4 of the CBA and alleged that that provision allowed "retirees to opt for the optional life insurance benefit." Moreover, plaintiffs alleged that they had received benefits under that retirement policy until 2020, and that other retirees continued to receive it. Therefore, viewing plaintiffs' pleadings alone and taking all of their factual allegations as true, *Dalley*, 287 Mich App at 304-305, plaintiffs themselves have alleged that defendant's retirement policy is bona fide and pays benefits. *Zoppi*, 206 Mich App at 177.

Further, the CBA's language shows that the purchase of supplemental life insurance by a retiree was dependent on several conditions being met, including that the insurance carrier chosen under the CBA allowed the issuance of such a policy. Plaintiffs' complaint does not allege that the conditions in the CBA for the provision of this benefit, or any actions by defendant, were a subterfuge designed to evade age discrimination claims under ELCRA. In fact, plaintiffs' complaint itself notes that defendant informed plaintiffs that the new insurance carrier would not issue supplemental life insurance policies to plaintiffs and that defendant could therefore not offer plaintiffs the benefit that had been offered to other employees. The mere fact that the benefit was

[2] This portion of *Zoppi*'s holding was later overturned. See *Zanni v Medaphis Physician Servs Corp*, 240 Mich App 472; 612 NW2d 845 (2000).

not applied uniformly to every retiree, or that every retiree who applies for the benefit is not granted it, does not indicate that the benefit was not bona fide or constituted a subterfuge. See *Zoppi*, 206 Mich App at 177 (finding that the definition of a bona fide retirement policy need not include uniform application to all employees; the fact that "workers must be invited to participate" in the defendant's plan was not dispositive).[3]

Accordingly, we hold that the trial court did not err by granting defendant's motion for summary disposition under MCR 2.116(C)(8). Because we affirm the trial court on this ground, and because the trial court itself did not reach the merits of plaintiffs' ELCRA claim under a (C)(10) analysis, we do not consider the parties' additional arguments concerning disparate treatment, disparate impact, or the establishment of a prima facie case for age discrimination.

Affirmed.

/s/ Mark T. Boonstra
/s/ Colleen A. O'Brien
/s/ Brock A. Swartzle

[3] Plaintiffs argue that the trial court's interpretation of MCL 37.2202(2) creates a conflict between ELCRA and the federal Age Discrimination in Employment Act (ADEA), 29 USC 621 *et seq*. This Court has noted differences in the ADEA and ELCRA, and has declined to read standards or from the ADEA into ELCRA that the Legislature did not see fit to include. See *Zanni*, 240 Mich App at 476-477. Simply put, the ADEA and ELCRA are not identical, and we are not required to read language from the ADEA into MCL 37.2202(2).