STATE OF MICHIGAN

COURT OF APPEALS

ROBERT LEAN,

Plaintiff-Appellant,

v

UPPER PENINSULA POWER COMPANY,

Defendant-Appellee.

UNPUBLISHED
October 28, 1997

No. 201594
Houghton Circuit Court
LC No. 96-009708-CZ

Before: Murphy, P.J., and Hood and Bandstra, JJ.

PER CURIAM.

Defendant was granted summary disposition pursuant to MCR 2.116(C)(10) on plaintiff's age and handicap discrimination claims. Plaintiff appeals as of right. We affirm.

Plaintiff was fifty-nine years of age and had a heart condition at the time he was forced to accept the terms of defendant's voluntary early retirement program (VERP). If he had not accepted the terms, he would have been involuntarily terminated because his position was eliminated. Plaintiff filed suit for age discrimination pursuant to the Civil Rights Act, MCL 37.2101 *et seq*.; MSA 3.548(101) *et seq*., and for handicap discrimination pursuant to the Michigan Handicappers Civil Rights Act, MCL 37.1101 *et seq*.; MSA 3.550(101) *et seq*. The trial court held that plaintiff failed to submit sufficient evidence to create an issue of material fact to survive summary disposition. We review the grant of summary disposition de novo. *Plieth v St Raymond Church*, 210 Mich App 568, 571; 534 NW2d 164 (1995).

Plaintiff first argues that the trial court erred in determining that there was no genuine issue of material fact regarding pretext. Defendant offered that in order to meet corporate, strategic and competitive goals to reduce costs, it took steps to reduce its workforce. It identified and eliminated certain positions, which it deemed under-utilized or unnecessary. During implementation of this plan in 1994, eight employees over the age of fifty-five elected to accept the VERP, including plaintiff. Seventeen employees, ranging in age from twenty-four to fifty-four, were involuntarily terminated. None of the employees were replaced. Because the employer articulated a legitimate, non-discriminatory reason for its actions in eliminating plaintiff's position, plaintiff was required to submit evidence sufficient

to support a finding that the employer's reason was a pretext *and* that the true reason was discriminatory. *Lytle v Malady*, 456 Mich 1, 36; 566 NW2d 582 (1997) (emphasis added). Plaintiff did not do so.

Plaintiff presented evidence that one of defendant's vice presidents had made a statement to the effect that individuals, as opposed to positions, were targeted when the adverse employment decisions were made. Plaintiff argues that this statement indicates a discriminatory policy. We disagree. The statement was not age related nor did it refer directly to plaintiff. "[I]solated and ambiguous comments 'are too abstract, in addition to being irrelevant and prejudicial, to support a finding of age discrimination'." *Phelps v Yale Security*, 986 F2d 1020, 1025 (CA 6, 1993). See also *Leichihman v Pickwick International*, 814 F2d 1263 (CA 8, 1987) and *Morales v Dain, Kalman & Quail, Inc*, 467 F Supp 1031 (Minn, 1979).

Plaintiff also claimed that pretext should be inferred because other, available cost-saving options, such as decreasing officer salaries and reducing the dividends paid to shareholders, were not utilized. Plaintiff offered evidence that some of defendant's officers received increases in compensation and that dividends rose while defendant claimed cost cutting was necessary. The officer compensation statistics that plaintiff submitted, however, took into account only defendant's top three officers. Defendant provided uncontradicted testimony that total officer compensation decreased from $951,276 in 1992 to $574,396 in 1995. The soundness of defendant's business judgment may not be questioned as a means of showing pretext. *Meagher v Wayne State University*, 222 Mich App 700, 712; 565 NW2d 401 (1997), lv pending. Officer compensation and dividend policy are within the purview of management's business judgment. Thus, whether the RIF could have been avoided in this case by reducing expenses elsewhere is irrelevant.

Plaintiff also failed to produce any evidence to support his contention that age discrimination was the true reason for the adverse employment decision. Therefore, it was not error for the trial court to grant summary disposition. *Lytle, supra* at 36. Plaintiff argues that defendant's failure to offer him the position from which his supervisor retired in 1992 was evidence of age discrimination. We disagree. There was no evidence that plaintiff was qualified for the supervisor's position or that he even sought the position. It is disingenuous for plaintiff to argue that age discrimination had to be a motivating factor in the elimination of his position because he was not gratuitously offered a promotion two years prior to that time.

Plaintiff also argues that the trial court improperly drew inferences in favor of defendant. Defendant presented evidence that the average age of its workforce increased from 1992 to 1997. The trial court noted that this evidence suggested there was no conspiracy to eliminate older workers. Plaintiff argues that the trial court should have made an inference in favor of him, the nonmoving party, that a hiring freeze and seniority-related union layoffs should have resulted in an even higher average age. This argument is without merit. Plaintiff did not suggest or argue to the trial court that such an inference should be made. Moreover, the information presented below does not support an inference that the average age of the workforce should have been even higher.

Summary disposition was also proper on the handicap discrimination claim because plaintiff offered insufficient evidence. He presented evidence that he was aware of three other employees who alleged that they had been discriminated against on the basis of "health problems". Two of three filed civil rights claims. There was no evidence that defendant had discriminated against these other individuals. In fact, neither of the two who filed claims were terminated or forced to retire. Rather they were placed on sick leave or worker's compensation. The mere allegations of these other workers regarding their own employment are not sufficient to satisfy plaintiff's burden. Plaintiff needed to offer evidence that *he* was discharged because of *his* handicap. *Hall v Hackley Hospital,* 210 Mich App 48, 53-54; 532 NW2d 893 (1995); MCL 37.1202; MSA 3.550(202). The evidence that two other employees complained is also not evidence of a pattern of discrimination where twenty-four other positions were eliminated at the same time plaintiff's was. The only other evidence offered was that defendant was concerned with cutting insurance premiums and issued a vision statement in 1994 that indicated the company had controlled the "rising cost of employee benefits" and in "many areas significantly reduced these benefit costs". The evidence that defendant was concerned about cost cutting does not support that plaintiff was discharged because of his heart condition. There was no evidence that handicapped persons were impacted or singled out in order to cut costs.

Affirmed. Defendant being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ William B. Murphy
/s/ Harold Hood
/s/ Richard A. Bandstra