

STATE OF MICHIGAN
COURT OF APPEALS

DEWITT OBERT,

Plaintiff-Appellant,

v

ALBION COLLEGE,

Defendant-Appellee.

UNPUBLISHED
December 5, 1997

No. 197918
Calhoun Circuit Court
LC No. 95-002065 CZ

Before: Griffin, P.J., and Wahls and Gribbs, JJ.

PER CURIAM.

This case arises out of the termination of plaintiff Dewitt Obert's employment by defendant Albion College. Plaintiff filed his complaint alleging age discrimination in violation of the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.* Defendant filed a motion for summary disposition under MCR 2.116(C)(10), which the trial court granted. Plaintiff now appeals as of right. We affirm.

Plaintiff was employed by defendant for approximately thirty-two years as a grounds supervisor and was fifty-five years old at the time of his termination. Plaintiff's supervisor averred that he had had concerns about plaintiff's job performance and had expressed those concerns to plaintiff on several occasions. Shortly before plaintiff was terminated, the supervisor and defendant's director of human resources met with plaintiff and requested that he: (1) obtain training in communication, supervision, and discipline, (2) agree to respect the authority of his supervisors, (3) agree to cease involving hourly employees in his disputes with management, and (4) agree to work with his supervisors to resolve his disputes with management. Plaintiff refused to obtain training and refused to comply with the other requirements as well. Plaintiff was asked to reconsider his position and was told that if he refused he would be terminated. Nonetheless, plaintiff refused to obtain training and to cooperate. Consequently, plaintiff was terminated.

Plaintiff first argues that the trial court erred in granting summary disposition based on his failure to establish a *prima facie* case of age discrimination. We review a trial court's grant of summary disposition *de novo*. *Barnell v Taubman Co, Inc*, 203 Mich App 110, 115; 512 NW2d 13 (1993).

We review the record in the same manner as the trial court to determine whether the movant was entitled to judgment as a matter of law. *Phillips v Deihm*, 213 Mich App 389, 398; 541 NW2d 566 (1995).

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Barnell, supra* at 115. We consider the pleadings, affidavits, depositions, admissions and other documentary evidence available. *Id.* The moving party must specifically identify those issues for which it believes there is no genuine disputed fact, and, in opposing the motion, the nonmoving party may not rely on mere allegations or denials in its pleadings, but must set forth specific facts through affidavits or other permitted evidence to demonstrate that there exists a genuine issue for trial. MCR 2.116(G)(4); *Roberson v Occupational Health Centers of America, Inc.*, 220 Mich App 322, 324-325; 559 NW2d 86 (1996), lv pending. Giving the benefit of reasonable doubt to the nonmovant, we determine whether a record might be developed which will leave open an issue upon which reasonable minds could differ. *Barnell, supra* at 115.

In an age discrimination case, the plaintiff has the burden of proving a prima facie case of discrimination by a preponderance of the evidence. *Id.* at 120. A prima facie case of age discrimination can be made by proving either intentional discrimination or disparate treatment. *Id.* Plaintiff in this case alleges only intentional discrimination. To establish a prima facie case of age discrimination based on intentional discrimination, plaintiff must show that (1) he was a member of a protected class, (2) he was discharged, (3) he was qualified for the position, and (4) he was replaced by a younger person. *Id.*

In *Grant v Michigan Osteopathic Medical Center, Inc.*, 172 Mich App 536; 432 NW2d 313 (1988), another panel of this Court found that the plaintiff failed to establish a prima facie case of age discrimination because she could not show that she was qualified for her job. *Id.* at 539. The defendant in *Grant* required that all employees in the plaintiff's position become certified by a set date in order to keep their jobs. *Id.* at 537-538. Although the plaintiff took some classes toward her certification, she failed to complete the training by the required date and was discharged. *Id.* at 538-539. The panel in *Grant* granted summary disposition because the plaintiff failed to establish a prima facie case, and, in the alternative, because the defendant had shown a legitimate, nondiscriminatory reason for her discharge and the plaintiff had failed to present any evidence to rebut the reason given. *Id.* at 539-540.

Here, plaintiff refused to take the training required by his employer. In addition, plaintiff refused to cooperate with management. Under these circumstances, plaintiff could not show that he was qualified for his position. Plaintiff gives two different explanations for his actions. First, he argues that he didn't need any training. Second, he argues that the training was not available. These arguments are irrelevant. The question whether training is desirable for a particular employee is not a question for the courts or an employee; it is for the employer to decide. Plaintiff's flat refusal to take training or cooperate with management rendered the availability of training irrelevant.¹ Because plaintiff failed to present any evidence creating a genuine issue of material fact on this issue, summary disposition was properly granted.

Alternatively, summary disposition was proper because plaintiff failed to present any evidence to rebut defendant's articulated, nondiscriminatory reason for his discharge. In age discrimination cases, if a prima facie case is established, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its actions. If the defendant does so, the plaintiff then has the burden of proving by a preponderance of the evidence that the reason is merely a pretext. *Barnell, supra* at 120.

Plaintiff argued that defendant's articulated reason for his termination was a pretext for its desire to replace him with a younger employee working for less pay. Defendant, however, presented evidence that although plaintiff's replacement was younger, his starting salary was comparable to plaintiff's salary at the time of plaintiff's termination. Plaintiff failed to rebut this evidence. Because plaintiff did not present any evidence creating a genuine issue of material fact on this issue, summary disposition was also appropriate on this basis.

Defendant next argues that the trial court erred by making findings of fact in granting summary disposition. We recognize that the trial court may not make factual findings about disputed issues or weigh credibility in deciding a motion for summary disposition. *Barnell, supra* at 115. Here, however, the only facts recognized by the trial court were that: (1) plaintiff was informed that he must participate in training, (2) plaintiff refused such training, even after being informed that his refusal would result in termination,² and (3) plaintiff was terminated. These facts were undisputed; plaintiff admitted each of them in his deposition. Thus, the trial court did not make any findings of fact. Instead, it simply recognized these undisputed facts.

Plaintiff argues, however, that the trial court made implicit findings of fact about the necessity and existence of training for plaintiff. As discussed above, these issues were irrelevant. In any event, the trial court did not make any such findings. The trial court merely noted that defendant could reasonably require training of its employees. We find no error.

Finally, plaintiff argues that the trial court erred in granting defendant's motion for summary disposition before plaintiff had completed discovery. Summary disposition may be granted before discovery is complete if further discovery does not stand a reasonable chance of uncovering factual support for the opposing party's position. *Hasselbach v TG Canton, Inc*, 209 Mich App 475, 482; 531 NW2d 715 (1995). We agree with the trial court that plaintiff's discovery requests could not have uncovered factual support for his position.

During discovery, plaintiff sought, among other things: (1) the name and salary of the person who replaced him, (2) financial data of the college, and (3) the personnel files of other employees. Plaintiff argued that the name and salary of the person who replaced him and the financial data of the college would help support his position that the college replaced him because it was having financial difficulties and wanted to pay a younger person less money. However, as discussed above, defendant supplied the name and salary of the person who replaced plaintiff and the replacement's starting salary was comparable to plaintiff's salary at the time he was terminated. Therefore, the financial data of the college was irrelevant.

Plaintiff also argued that the personnel files of other employees would help support his position that he did not require training. However, as discussed above, the question whether an employer's decision to require training was justified is irrelevant; an employer may require training as it deems appropriate. Consequently, the trial court did not err in finding that the additional requested discovery would not uncover factual support for plaintiff's position, and summary disposition was properly granted.

We also note that summary disposition would have been properly granted on an alternative ground not discussed by the trial court. Plaintiff acknowledges that defendant required him to do more than simply attend training. Defendant also required plaintiff to (1) agree to respect the authority of his supervisors, (2) agree to cease involving hourly employees in his disputes with management, and (3) agree to work with his supervisors to resolve his disputes with management. Defendant produced an affidavit indicating that plaintiff refused to comply with any of these requirements. Plaintiff has not rebutted this evidence. Thus, even if genuine issues of material fact remained regarding training, no genuine issues remained regarding these other, clearly legitimate requirements.

Affirmed.

/s/ Richard Allen Griffin

/s/ Myron H. Wahls

/s/ Roman S. Gibbs

¹ A different question would be presented if plaintiff had agreed to take training, but had been fired when no appropriate training could be found.

² Plaintiff argues that there was no evidence that he "refused to take the available training." However, in his deposition, plaintiff acknowledged that he refused the training. Plaintiff indicated that he refused because he felt his performance was adequate, not because training was unavailable. As noted above, the actual availability of such training is essentially irrelevant.