STATE OF MICHIGAN

COURT OF APPEALS

ALEX G. CAMPBELL and GERALDINE C. CAMPBELL,

Plaintiffs-Appellants-Cross-Appellees,

v

MICHIGAN MILLERS INSURANCE COMPANY, RICHARD A. SCOTT, and CHARLES RHODEA,

Defendants-Appellees-Cross-Appellants.

UNPUBLISHED
August 3, 1999

No. 205492
Wayne Circuit Court
LC No. 96-637642 NO

Before: Markey, P.J., and McDonald and Fitzgerald, JJ.

PER CURIAM.

Plaintiffs[1] appeal as of right from an order granting summary disposition in favor of defendants in this wrongful discharge action brought under the Elliott-Larsen Civil Rights Act, MCL 37.2202(1)(a); MSA 3.548(202)(1)(a) (hereinafter "ELCRA"). Defendants appeal as of right from this same order denying their motion for sanctions. We affirm.

Plaintiff argues that the trial court improperly granted defendants' motion for summary disposition on his age discrimination claim because he presented sufficient evidence to create a genuine issue of material fact that he was replaced by a younger employee and that defendants' proffered reason for discharging him was a pretext. We disagree.

This Court reviews de novo an order granting summary disposition. *Weisman v US Blades, Inc*, 217 Mich App 565, 566; 552 NW2d 484 (1996). Defendants brought their motion for summary disposition under MCR 2.116(C)(10). A motion for summary disposition brought under MCR 2.116(C)(10), based on the lack of a genuine issue of material fact, tests whether there is factual support for the claim. *WB Cenac Med Svc, PC v Mich Phys Mut Liability Co*, 174 Mich App 676, 681; 436 NW2d 430 (1989). In ruling on the motion, the trial court must consider the affidavits, pleadings, depositions, admissions and other documentary evidence submitted by the parties. *Id.* The opposing party must show that a genuine issue of material fact exists. *Id.* The opposing party may not

rest upon mere allegations or denials in the pleadings but must, by affidavit or other documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Id.* Should the opposing party fail to make such a showing, summary disposition is appropriate. *Id.*

Plaintiff's claim of age discrimination is based upon the ELCRA, MCL 37.2101 *et seq*.; MSA 3.548 (101) *et seq*., which prohibits employers from discriminating against a person on the basis of age.

> The act states in pertinent part:
>
> (1) An employer shall not:
>
> (a) . . . discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of . . . age. . . . [MCL 37.2202; MSA 3.548 (202).]

Michigan courts have utilized the "shifting burden" analysis set forth in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973), to analyze claims alleging unlawful age discrimination. *Meagher v Wayne State University*, 222 Mich App 700, 710; 565 NW2d 401 (1997).

> Under the *McDonnell Douglas* approach, the threshold inquiry is whether the plaintiff established a prima facie case of discrimination. "Prima facie case" in this context does not mean that the plaintiff produced sufficient evidence to allow the case to go to a jury, but rather that the plaintiff produced enough evidence to create a rebuttable presumption of age discrimination. When the plaintiff's claim is based on discharge from employment, the plaintiff establishes a prima facie case by showing (1) the plaintiff is a member of a protected class, (2) the plaintiff was discharged, (3) the plaintiff was qualified for the position, and (4) the plaintiff was replaced by a younger person. [*Id.* at 710-711, citing *Matras v Amoco Oil Co*, 424 Mich 675, 683; 385 NW2d 586 (1986).]

In the present case, plaintiff was replaced by an individual who is eleven months younger than he. This insignificant difference between the ages of plaintiff and the employee hired to replace him defeats plaintiff's prima facie case. *O'Connor v Consolidated Coin Caterers Corp*, 517 US 308, 312-313; 116 S Ct 1307; 134 L Ed 2d 433 (1996).[2] The eleven month separation between plaintiff's and his replacement's ages can in no way be said to be "substantial" or "sufficient." For purposes of unlawful age discrimination, plaintiff and his replacement were substantially the *same* age, rather than of substantially *different* ages. *Id.* See also *Featherly v Teledyne Ind, Inc*, 194 Mich App 352, 361-362; 486 NW2d 361 (1992). Since plaintiff failed to establish a prima facie case of unlawful age discrimination, summary disposition for defendants was proper. *Meagher, supra* at 710-711.

Defendant argues on cross-appeal that plaintiffs' claims were frivolous and the trial court erred in failing to award sanctions. We disagree. This Court will not disturb a trial court's finding that a claim or defense was frivolous unless the finding is clearly erroneous. *Szymanski v Brown*, 221 Mich App

423, 436; 562 NW2d 212 (1997). A decision is clearly erroneous if this Court is left with a definite and firm conviction that a mistake has been made. *Id.*

> An attorney has an affirmative duty to conduct a reasonable inquiry into the factual and legal viability of a pleading before it is signed. The reasonableness of the inquiry is determined by an objective standard and depends on the particular facts and circumstances of the case. In addition, MCR 2.625(A)(2) mandates that a court tax costs, as provided by M.C.L. § 600.2591; M.S.A. § 27A.2591, to reimburse a prevailing party for its costs incurred during the course of frivolous litigation. A claim is frivolous when (1) the party's primary purpose was to harass, embarrass, or injure the prevailing party; (2) the party had no reasonable basis to believe that the underlying facts were true; or (3) the party's position was devoid of arguable legal merit. . . . [*LaRose Market, Inc v Sylvan Ctr, Inc*, 209 Mich App 201, 210; 530 NW2d 505 (1995), citations omitted.]

The circumstances existing at the time a case is filed is of critical importance in determining if a claim has a basis in fact or law. *Meagher, supra* at 727. The trial court dismissed plaintiffs' slander claim on motion for summary disposition and did so in light of what the evidence had revealed up to that point in the litigation. At the hearing on the motion, the court stated that it *now* knew that plaintiff's wife had been listening at the window, and that her *deposition* testimony, obviously taken after the complaint was filed, revealed that she did not hear the comment about the reason for her husband's termination. Thus, we find that it cannot be said that the later discovery of this evidence undoubtedly establishes that plaintiffs' attorney failed to undertake a reasonable inquiry into the factual viability of the pleading. See *Lockhart v Lockhart*, 149 Mich App 10, 14-15; 385 NW2d 709 (1986). Accordingly, we find no clear error with respect to the trial court's decision that this claim was not frivolous.

As to plaintiffs' tortious interference with an economic relationship claim, defendants are correct that plaintiffs were unable to provide support for this claim. However, at the time plaintiffs filed the complaint, they would have been unable to ascertain with certainty what the deposition testimony of plaintiffs' supervisors would reveal, particularly what comments they might make in response to counsel's questioning regarding their motivations for terminating plaintiff's employment. *Meagher, supra* at 727. While it is arguable that plaintiffs' allegations regarding these motivations may not have rested on a good-faith belief in them, we find that such speculation is insufficient to determine that the trial court's ruling denying sanctions was clearly erroneous, particularly in light of the fact that the trial court was in the superior position to make this judgment based on the case presented to it.

Defendants also argue that plaintiffs' claim for unlawful age discrimination was frivolous. We have found that plaintiff failed to establish a prima facie case of age discrimination. However, at the time he filed his complaint, plaintiff alleged that he was a member of a protected class and had been terminated from his position because his supervisor harbored an "invidious discriminatory animus toward older people and plaintiff," which was demonstrated, in part, by the supervisor's ageist comments. Plaintiff also alleged that he was replaced by a younger employee.

Isolated ageist comments are insufficient to establish that age was a motivating factor in the decision to terminate an employee. *Phelps v Yale Security*, 986 F2d 1020, 1025-1026 (CA6, 1993). Moreover, we have found plaintiff's replacement by a man essentially the same age as he defeats his prima facie case. However, considering the circumstances existing at the time the suit was filed, it cannot be said that the trial court's refusal to find plaintiffs' claims frivolous was a clearly erroneous decision. Discovery may have revealed that the supervisor's comments were not isolated, and plaintiff was, in fact, replaced by someone significantly younger than he. The trial court's finding that plaintiffs' claims were not frivolous was not clearly erroneous. *Meagher, supra* at 727; *Szymanski, supra* at 436.[3]

Affirmed.

/s/ Jane E. Markey
/s/ Gary R. McDonald
/s/ E. Thomas Fitzgerald

[1] Plaintiff Geraldine Campbell's claim against defendants is based on loss of consortium. Because this claim is derivative of Alex Campbell's claim, see *Cebulski v City of Belleville*, 156 Mich App 190, 193; 401 NW2d 616 (1987), and plaintiffs raise no issues on appeal relating directly to Geraldine Campbell's claim for loss of consortium, singular references to plaintiff throughout the remainder of this opinion are to Alex Campbell, only.

[2] While federal precedent interpreting the federal Civil Rights Act is not binding in Michigan, this Court has often turned to federal precedent for guidance. *Meagher, supra* at 710.

[3] Plaintiffs also brought a claim for loss of consortium. Since this claim is derivative of plaintiff's claims, and since the decision not to award sanctions to defendants on the underlying claims is not clearly erroneous, neither is the decision not to award sanctions on this claim.