

STATE OF MICHIGAN
COURT OF APPEALS

BRUCE KETCHUM,

Plaintiff-Appellant,

v

EAST LANSING MERIDIAN WATER & SEWER
AUTHORITY,

Defendant-Appellee.

UNPUBLISHED

April 21, 2000

No. 209938

Ingham Circuit Court

LC No. 96-083728-NZ

Before: Bandstra, C.J., and Cavanagh and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition of plaintiff's age discrimination and breach of contract claims pursuant to MCR 2.116(C)(8) and (C)(10). We affirm.

Plaintiff was hired by defendant in March 1993 and promoted to the position of maintenance mechanic supervisor in 1986. In 1990, plaintiff's job description was amended to require that he obtain an "F-2 license," which involved special certification in the area of water treatment. Plaintiff's supervisor, Michael St. Bernard, began to conduct annual reviews of plaintiff's job performance in the early 1990s. The 1993 evaluation indicated plaintiff had difficulty dealing with coworkers. Plaintiff's 1994 evaluation stated that plaintiff's work was "minimally acceptable" and that improvement was necessary. It also indicated plaintiff had not developed a written maintenance program or obtained water treatment certification as required. In 1995, plaintiff's job performance was rated poor or below average in most areas. Plaintiff was warned that failure to develop a written maintenance plan, to improve project planning and completion and to obtain the F-2 license may result in a change of job status. On July 18, 1995, following plaintiff's failure to satisfactorily complete a work order, plaintiff was demoted to the position of maintenance mechanic. He was over forty years old at the time of the demotion. A thirty-four-year-old employee was hired to fill plaintiff's former supervisor position.

Plaintiff filed suit, alleging he was demoted based on his age in violation of the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, and alleging the demotion constituted a breach of his employment contract. Defendant brought a motion for summary disposition,

arguing plaintiff's age discrimination claim failed because plaintiff was demoted as a result of unsatisfactory job performance, not because of his age. Defendant also argued plaintiff's breach of contract claim failed because plaintiff's failure to complete required job functions and failure to obtain required licensing provided just cause for demotion. The trial court granted summary disposition, ruling plaintiff failed to state a valid claim of age discrimination and that there was no issue of material fact regarding either claim.

On appeal, plaintiff contends that the trial court erred in granting summary disposition because there is sufficient evidence to establish a prima facie case of age discrimination and there are genuine issues of fact as to whether defendant had just cause to demote plaintiff. We disagree. We review a trial court's grant or denial of a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Id.*; *Radtko v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). A court must consider the affidavits, pleadings, depositions, admissions or any other documentary evidence submitted in a light most favorable to the nonmoving party in deciding whether a genuine issue of material fact exists. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999); *Rollert v Dep't of Civil Service*, 228 Mich App 534, 536; 579 NW2d 118 (1998).

Section 202 of the ELCRA, MCL 37.2202; MSA 3.548(202), prohibits discrimination based on age with respect to employment decisions and provides, in part:

(1) An employer shall not do any of the following:

(a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.

To establish a prima facie case of age discrimination, the plaintiff must show: (1) he is a member of the protected class, (2) he was demoted, (3) he was qualified for the position, and (4) he was replaced by a younger person. *Hall v McRea Corp*, 238 Mich App 361, 370; 605 NW2d 354 (1999), citing *Lytle v Malady (On Rehearing)*, 458 Mich 153, 172-173; 579 NW2d 906 (1998). Assuming the plaintiff establishes a prima facie case, the burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment decision. *Id.* If the defendant satisfies that burden, the presumption raised by the prima facie case is rebutted and the burden shifts back to the plaintiff to show that the defendant's proffered reasons were merely a pretext for discrimination. *Id.* The plaintiff must show that a discriminatory animus was a motivating factor for the adverse employment action. *Id.* at 371.

In the present case, only the third element of a prima facie case, whether plaintiff was qualified for the position from which he was demoted, is at issue. "An employee is qualified if he was performing his job at a level that met the employer's legitimate expectations." *Town v Michigan Bell Telephone Co*, 455 Mich 688, 699; 568 NW2d 64 (1997) (footnote omitted). To establish that he was qualified,

a plaintiff must show he was performing his job in manner that would rule out the possibility that his employer's adverse employment decision was due to inadequate job performance. *Id.* n 22. Here, plaintiff's performance did not meet defendant's legitimate expectations. Plaintiff does not dispute that an F-2 license is a requirement of the maintenance mechanic supervisor position and that he did not obtain that license. Defendant required the licensing because the maintenance mechanic supervisor periodically acts as a plant operator, a position for which an F2 license is required by the state. Despite plaintiff's claim that he was told he did not need the license, each of plaintiff's performance evaluations indicates St. Bernard continually demanded plaintiff obtain the license. Furthermore, it is undisputed that plaintiff failed to establish a written inventory maintenance plan as defendant required. There is also evidence that plaintiff had problems with his subordinates and failed to run the maintenance department efficiently. Plaintiff has failed to establish a genuine issue of material fact regarding his qualification despite those shortcomings. Therefore, we conclude that plaintiff failed to establish a prima facie case of age discrimination.

Moreover, even had plaintiff established a prima facie case, he failed to raise a genuine issue of fact as to whether defendant's proffered reason for his demotion was mere pretext for discrimination. *Hall, supra* at 370. To survive summary disposition, "a plaintiff must prove discrimination with admissible evidence, either direct or circumstantial, sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff." *Lytle, supra* at 176 (footnote omitted). Here, defendant's proffered reasons for demoting plaintiff were plaintiff's unsatisfactory job performance and his failure to obtain necessary licensing. As stated, *supra*, plaintiff does not dispute that he never obtained the required F-2 license and that he did not meet other goals as outlined in his performance evaluations. Plaintiff claims that his demotion was based on defendant's desire to avoid paying additional health care benefits in the event that plaintiff remain employed by defendant for a total of twenty-five years. Plaintiff's job performance evaluations indicate that he was performing at a minimally acceptable rate for several years before his demotion. Furthermore, plaintiff was demoted, not terminated, and he has failed to present evidence as to how his demotion would result in defendant having to pay any lesser amount of health care benefits given that plaintiff was still employed or why defendant would otherwise have financial incentive to demote him. Consequently, even if plaintiff established a prima facie case of discrimination, he has failed to raise a triable issue that defendant's stated reasons for demotion were merely pretext for discriminatory animus. *Lytle, supra* at 175-176; *Hall, supra* at 371.

Plaintiff also contends that the trial court erred in granting summary disposition of his breach of contract claim because there are issues of material fact regarding whether plaintiff was demoted for just cause. It is undisputed plaintiff was a just cause employee of defendant. An employer is free to set standards of job performance and qualification and is free to discharge or demote an employee for failure to adhere to those standards. *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579, 623-624; 292 NW2d 880 (1980). As stated, *supra*, it is undisputed that plaintiff failed to obtain the required F-2 license. Furthermore, plaintiff presented no evidence to dispute the accuracy of his several performance evaluations. Those evaluations stated plaintiff's quality of work had decreased and that he had not developed a written maintenance plan as required. In light of plaintiff's failure to obtain necessary licensing and his increasingly unsatisfactory job performance, there was no genuine issue of

fact as to whether defendant had just cause to demote plaintiff and the trial court properly dismissed plaintiff's breach of contract claim.

Given that both claims were properly dismissed pursuant to MCR 2.116(C)(10), we need not consider defendant's remaining issues challenging the trial court's dismissal of the claims pursuant to MCR 2.116(C)(8).

Affirmed.

/s/ Richard A. Bandstra

/s/ Mark J. Cavanagh

/s/ Brian K. Zahra