

STATE OF MICHIGAN
COURT OF APPEALS

FRANK VETTESE and CHARMAINE
VETTESE,

UNPUBLISHED
August 21, 2001

Plaintiffs-Appellants,

v

No. 222508
Oakland Circuit Court
LC No. 98-009943-CZ

JACOBSON STORES, INC. and DAVID
LINCOLN,

Defendants-Appellees.

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

PER CURIAM.

Plaintiff Frank Vettese¹ appeals as of right from the trial court's order dismissing his age discrimination and retaliation claims under MCR 2.116(C)(10). We affirm.

Plaintiff first contends that the trial court erred in dismissing his age discrimination claim under MCR 2.116(C)(10). We review de novo a trial court's summary disposition ruling. A (C)(10) motion tests the factual support of a claim. The court reviewing a (C)(10) motion considers in the light most favorable to the nonmoving party the pleadings, affidavits and other relevant evidence filed in the action to determine whether the documentary evidence shows a genuine issue of any material fact to warrant trial, or whether the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999).

To establish a prima facie case of age discrimination, a plaintiff must prove by a preponderance of the evidence that (1) he is a member of a protected class, (2) he suffered an adverse employment action, including demotion, (3) he was qualified for the position, and (4) he was demoted under circumstances that give rise to an inference of unlawful discrimination. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 172-173, 177; 579 NW2d 906 (1998); *Town v Michigan Bell Telephone Co*, 455 Mich 688, 695; 568 NW2d 64 (1997).

¹ Plaintiff's wife, Charmaine Vettese, has filed a derivative claim for loss of consortium. As used in this opinion, the term "plaintiff" refers solely to Frank Vettese.

Once the plaintiff has established a prima facie case, a presumption of discrimination arises and the burden shifts to the defendant to dispel this presumption by articulating a legitimate, nondiscriminatory reason for the plaintiff's adverse employment action. *Lytle, supra* at 173. When the defendant produces such evidence, the burden of proof returns to the plaintiff who must show "that there was a triable issue that the employer's proffered reasons were not true reasons, but were a mere pretext for discrimination." *Id.* at 174. "[I]n the context of 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." *Id.* at 176.

We conclude that plaintiff failed to establish a prima facie case of age discrimination. In particular, plaintiff failed to prove that he was qualified for the assistant store manager position. "An employee is qualified if he was performing his job at a level that met the employer's legitimate expectations." *Town, supra* at 699. Even viewing the evidence in the light most favorable to plaintiff, we find that plaintiff did not establish the existence of a material factual dispute regarding his qualification for the position from which defendants demoted him.

Plaintiff undisputedly had problems getting along with another assistant store manager (ASM). Several meetings occurred attempting to resolve the conflict. The store's general manager testified that plaintiff's and the other ASM's failures to work together harmoniously and plaintiff's otherwise uneven behavior created concern among management and associate level employees. Defendants also submitted evidence that two sales associates had complained of plaintiff's abrasive management style, which reflected plaintiff's difficulty establishing professional relationships. These episodes necessitated intervention and counseling by the store's human resources director. Defendants further submitted evidence that plaintiff lacked suitable communication skills for the ASM position.

To demonstrate his qualification, plaintiff relies on his receipt of an April 1998 positive performance appraisal and \$3,000 pay increase. As the trial court noted, however, the evaluation is a one-page *self* appraisal. Even the self appraisal lists plaintiff's weaknesses, including an inability to communicate effectively with senior executives and a need to foster better coworker relationships. Furthermore, the April 1998 appraisal predated plaintiff's May and June 1998 conflicts with his coworkers. Beyond the April 1998 self appraisal and the accompanying pay increase, no other relevant evidence supports plaintiff's claim of a good performance evaluation or tends to establish that he performed his job well enough to rule out the possibility that defendants demoted him because of his inadequate job performance. *Id.*

Plaintiff also failed to present sufficient evidence that defendants demoted him under circumstances giving rise to an inference of unlawful discrimination. Contrary to plaintiff's suggestion, the mere fact that defendants replaced him with a younger person is insufficient to establish a prima facie case. See *Elie v Sears, Roebuck & Co*, 150 Mich App 137, 141; 387 NW2d 842 (1985). Moreover, we note that at the time of plaintiff's demotion defendant also discharged three other employees younger than plaintiff. Consequently, we conclude that plaintiff has failed to prove a prima facie case of age discrimination.

Even if we assumed that plaintiff established a prima facie case, we would find that defendants articulated legitimate and nondiscriminatory reasons for demoting him. As indicated

above, plaintiff undisputedly had a dysfunctional relationship with another management team member, who was discharged, and problems with two sales associates. Other evidence indicated that plaintiff lacked the ASM position's requisite communication skills. Defendants also submitted evidence that the Birmingham store had financial troubles that spurred management to take steps, including revamping the management team, to improve the store's financial future.

Plaintiff has proffered no evidence tending to suggest that defendants' legitimate reasons were merely pretexts for discrimination. While plaintiff relies on the affidavits of two of his former coworkers, who essentially indicate that plaintiff was a good employee and that defendants' reasons for demoting him were suspect, this evidence raises no triable issue that plaintiff's age constituted a motivating factor underlying defendants' decision to demote him. *Lytle, supra* at 174, 176. Simply casting suspicion on defendants' proffered legitimate reasons does not raise a genuine issue of material fact that age was a motivating factor underlying the decision to demote plaintiff, *Irvin v Airco Carbide*, 837 F2d 724, 726 (CA 6, 1987), nor do the beliefs of one or two employees that plaintiff was a good worker raise a triable issue of age discrimination. *Grano v Dep't of Development of City of Columbus*, 699 F2d 836, 837 (CA 6, 1983) ("The ultimate issue . . . is whether the [employer's] subjective criteria were used to disguise discriminatory action"). Accordingly, we conclude that the trial court properly granted defendants summary disposition of plaintiff's age discrimination claim.

Plaintiff next argues that the trial court erred in granting defendants summary disposition of his retaliation claim. The Worker's Disability Compensation Act (WDCA), MCL 418.301(11) provides in relevant part as follows:

A person shall not discharge an employee or in any manner discriminate against an employee *because the employee filed a complaint or instituted or caused to be instituted a proceeding under this act* or because of the exercise by the employee on behalf of himself or herself or others of a right afforded by this act. [Emphasis added.]

To establish a retaliatory discharge claim, the plaintiff must prove that (1) he was engaged in a protected activity, (2) the defendant knew of the protected activity, (3) the defendant acted adversely to plaintiff, and (4) the protected activity caused the adverse employment activity. *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997). The plaintiff must prove that he was demoted because he exercised his rights under the WDCA and that this activity was a significant factor in his employer's adverse employment decision. *Taylor v General Motors Corp*, 826 F2d 452, 456 (CA 6, 1987); *Polk v Yellow Freight System, Inc*, 801 F2d 190, 198 (CA 6, 1986).

Plaintiff suffered a back injury while working in June 1998. Defendants demoted plaintiff in August 1998, but plaintiff did not file a worker's compensation claim until October 29, 1998. Because plaintiff did not file a worker's compensation claim before his demotion, he cannot establish a claim for retaliatory discharge. Contrary to plaintiff's suggestion, the Employer's Basic Report of Injury (a Form 100 accident report) filed by his employer is not equivalent to a *claim* for benefits. Moreover, a retaliatory discharge claim premised on an employer's anticipation of a future claim does not state a cause of action. *Griffey v Prestige*

Stamping, Inc., 189 Mich App 665, 668; 473 NW2d 790 (1991). We therefore conclude that the trial court correctly granted defendants summary disposition of plaintiff's retaliation claim.

Affirmed.

/s/ Hilda R. Gage
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey