STATE OF MICHIGAN

COURT OF APPEALS

EUGENE P. NEPH,

Plaintiff-Appellant,

v

LINDA GRIMSBY and the CITY OF LIVONIA,

Defendants-Appellees.

UNPUBLISHED
December 27, 2002

No. 231674
Wayne Circuit Court
LC No. 99-928835-CL

Before: Smolenski, P.J., and Talbot and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition on plaintiff's wrongful discharge and discrimination claims. We affirm.

I. Facts and Procedural History

Plaintiff was hired as the assistant treasurer for the city of Livonia in December 1998 and terminated in June 1999. This position was a new position created by the Livonia Civil Service Department to replace the position of deputy treasurer. Plaintiff's position as the assistant treasurer was probationary for a period of twelve months. Plaintiff was sixty-nine years of age at the time of his hiring and his termination.

On September 10, 1999, plaintiff filed a complaint alleging that he was discriminated against based on his age and gender. On October 19, 1999, plaintiff filed an amended complaint alleging that defendants terminated him without just cause and that defendants terminated him because of his age and sex in violation of MCL 37.2202(1)(a). On September 18, 2000, defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(10), and argued that plaintiff failed to establish a prima facie case of age and gender discrimination because he was not qualified for the position and he was not replaced by a person not a member of the protected class. Defendants further alleged that plaintiff failed to present any evidence to rebut defendants' nondiscriminatory reasons for plaintiff's termination or establish that plaintiff's discharge was a pretext for discrimination. In response, plaintiff argued that he was qualified for the position based upon his educational background and the fact that he was hired, that defendants' proffered reason for his discharge was pretextual, and that his position could not be terminated during his twelve-month probationary period without just cause.

On November 11, 2000, the trial court granted defendants' motion for summary disposition following oral argument. The trial court ruled that plaintiff was an at-will employee during his twelve-month probationary period and that there was a legitimate reason for plaintiff's discharge.

II. Analysis

A. Standard of Review

The trial court did not specify the subsection of MCR 2.116(C) under which it granted summary disposition, but its reasoning clearly tracked defendants' arguments. Therefore, we assume that it ruled under the subsection cited by defendants in their motion for summary disposition, MCR 2.116(C)(10). *Dimondale v Grable*, 240 Mich App 553, 564; 618 NW2d 23 (2000).

Decisions on motions for summary disposition are reviewed de novo. *Spiek v Dep't of* Transportation, 456 Mich 331, 337; 572 NW2d 201 (1998). Motions brought under MCR 2.116(C)(10) test the factual support of a plaintiff's claim. *Id*. This Court must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted in the light most favorable to the nonmoving party in order to determine whether a genuine issue of material fact exists that would warrant a trial. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). Summary disposition is proper under MCR 2.116(C)(10) if the evidence establishes that there is no genuine issue concerning any material fact. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999).

B. Wrongful Discharge

Plaintiff contends that he could only be discharged for just cause during the twelve-month probationary period. In *Lytle v Malady*, 458 Mich 153, 163-164; 579 NW2d 906 (1998), our Supreme Court set forth the applicable law regarding claims of wrongful discharge:

> Generally, and under Michigan law by presumption, employment relationships are terminable at the will of either party. *Lynas v Maxwell Farms*, 279 Mich 684, 687; 273 NW 315 (1937). However, the presumption of employment at will can be rebutted so that contractual obligations and limitations are imposed on an employer's right to terminate employment. *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579; 292 NW2d 880 (1980). See also *Edwards v Whirlpool Corp*, 678 F Supp 1284, 1291 (WD Mich, 1987). The presumption of employment at will is overcome with proof of either a contract provision for a definite term of employment, or one that forbids discharge absent just cause. *Rood v General Dynamics Corp*, 444 Mich 107, 117; 507 NW2d 591 (1993). Courts have recognized the following three ways by which a plaintiff can prove such contractual terms: (1) proof of "a contractual provision for a definite term of employment or a provision forbidding discharge absent just cause"; (2) an express agreement, either written or oral, regarding job security that is clear and unequivocal; or (3) a contractual provision, implied at law, where an employer's policies and procedures instill a "legitimate expectation" of job security in the employee. [Footnotes omitted.]

In the instant case, plaintiff has not provided proof of a contractual provision for a definite term of employment or a provision forbidding discharge absent just cause. Thus, we will review the second and third means of proving just-cause employment.

1. Legitimate Expectation

In *Lytle, supra*, the Court set forth a two-part inquiry necessary to evaluate legitimate expectations claims. "The first step is to decide 'what, if anything, the employer has promised,' and the second requires a determination of whether that promise is 'reasonably capable of instilling a legitimate expectation of just-cause employment. . . .'" *Id*. at 164-165, quoting *Rood, supra* at 138-139. In reviewing legitimate expectations claims, the focus is on the employer's policies and provisions.

In this case, plaintiff has not pointed to a policy or procedure that would give rise to a legitimate expectations claim. In his brief on appeal, plaintiff argues that it was his legitimate expectation at the time of undertaking his employment that his employment was to run for a period of at least twelve months; however, this broad statement does not encompass any procedure or policy of the city of Livonia. Further, this Court has held that the mere existence of or successful completion of a probationary period does not give rise to a legitimate expectation of a just cause employment contract. *Kostello v Rockwell Int'l Corp*, 189 Mich App 241, 245; 472 NW2d 71 (1991).

2. Express Agreement

Under this theory, courts must look for a clear and unequivocal express agreement, written or oral, regarding job security. In the instant case, plaintiff contends that he had a twelve-month probationary period to learn the position of assistant treasurer. Plaintiff argues that because he was a probationary employee, he was not an at-will employee and he could only be discharged for just cause. Defendants rely on an announcement for the assistant treasurer position set forth by the Civil Service Department in the city of Livonia. Under the announcement, the probationary period is described, and states, "Appointees must satisfactorily complete a one-year probationary period before the appointment will be considered permanent."

In evaluating assurances, written or oral, the Michigan Supreme Court instructed that all relevant circumstances should be considered, including other written and oral statements and other conduct manifesting intent. *Lytle, supra* at 171. The Court further instructed that verbal assurances must be clear and unequivocal. *Id*. In *Lytle*, the Court found that the plaintiff's alleged assurances were neither clear nor unequivocal, where there were no specific statements regarding duration of employment or grounds for termination and there was no indication of an actual negotiation or an intent to contract for permanent or just-cause employment. *Id*. at 171-172.

In the instant case, plaintiff merely expressed his belief that he was not an at-will employee during the twelve-month probationary period. Plaintiff states that it was emphasized at his interview that there would be a twelve-month probationary period during which plaintiff would learn the functions of the business. We find that this statement is insufficient to create a triable issue with respect to whether plaintiff had just-cause employment. Plaintiff's mere expectation, coupled with the statement that there would be a twelve-month probationary period,

does not clearly and unequivocally create the assurance of plaintiff's employment for a twelve-month period of time. Here, as in *Lytle*, plaintiff alleges no specific statements with regard to duration of employment or grounds for termination. Additionally, there was no indication of an actual negotiation or an intent to contract for permanent or just-cause employment. Therefore, we hold that plaintiff has failed to present a triable issue of fact regarding his wrongful discharge claim, and the trial court properly granted summary disposition in favor of defendants.

C. Discrimination Claims

Plaintiff also argues that he was discriminated against by defendants on the bases of age and sex in violation of MCL 37.2202(1), which provides, in relevant part:

> 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.

1. Age Discrimination

While direct evidence may be used to prove unlawful discrimination, it is difficult in many cases, as in this case, to locate direct proof of impermissible bias. *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001). Where a plaintiff is unable to present direct evidence of age discrimination, the framework originally enunciated in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973),[1] must be utilized. *Id*.

McDonnell Douglas established the principle that a plaintiff must first establish a prima facie case of discrimination. *Hazle, supra* at 463. A plaintiff is required to present evidence of the following elements in order to establish a prima facie case of discrimination: (1) the plaintiff must belong to a protected class; (2) the plaintiff suffered an adverse employment action; (3) the plaintiff was qualified for the position; and (4) the position was given to another person under circumstances that give rise to an inference of unlawful discrimination. *Id*.

Once a plaintiff has sufficiently demonstrated that a prima facie case exists, a presumption of discrimination arises. *Id*. However, the mere fact that a plaintiff has established a prima facie case of discrimination does not preclude summary disposition in favor of the defendant because the establishment of a prima facie case only creates a rebuttable presumption that discrimination exists. *Id*. at 463-464. At that point, the defendant may articulate a legitimate, nondiscriminatory reason for its employment decision in an effort to rebut the presumption created by the plaintiff's prima facie case. *Id*. at 464.

Defendants do not dispute that plaintiff is a member of a protected class regarding his age or that he suffered an adverse employment action because he was sixty-nine years of age at the

[1] The *McDonnell Douglas* framework applies to racial, age, and gender discrimination cases brought under the Civil Rights Act. *Hazle, supra* at 462-463.

time of his termination. Defendants contest the third and fourth elements of the *McDonnell Douglas* framework, and contend that plaintiff failed to demonstrate that he was qualified for the position or that he was replaced by a person not a member of the protected class. If a prima facie case of discrimination has not been established, summary disposition is proper. *Smith v Goodwill Inds*, 243 Mich App 438, 450; 622 NW2d 337 (2000).

Defendants argue that plaintiff was not replaced by a younger person as required under *McDonnell Douglas* because his duties were absorbed by other employees, citing *Lytle, supra* at 178 n 27. However, this footnote related to work force reduction cases, where an employee is discharged because his position was eliminated. In this case, plaintiff's position was not eliminated; plaintiff was merely discharged.

It is arguable whether plaintiff was replaced. A new person was not immediately hired for the position, and plaintiff's duties were distributed amongst the existing staff. But, while plaintiff's position was still open, it had not been filled at the time of Grimsby's deposition, eight months after plaintiff's termination.[2] Even if we were to determine that plaintiff had been replaced, we find that plaintiff failed to meet the third prong of the *McDonnell Douglas* test, that he was qualified for the position, and thus summary disposition was proper.

"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). Therefore, plaintiff's previous education and work experience, and the mere fact that he was hired are irrelevant to this determination. Although plaintiff expressed his disagreement with his probationary reports, he asserted at one point that Grimsby's initial evaluation regarding the examples of deficiencies was correct, but indicated the reason for this was that he received inadequate training. Plaintiff admitted that it was true that he continued to fail to perform essential functions of the assistant treasurer position, but indicated his belief that he should not be held accountable for the responsibilities removed by Grimsby in order for plaintiff to learn the job. However, the only evidence that plaintiff presented that he adequately performed his job was his own opinion. When the burden of proof at trial would rest on the nonmoving party, the nonmovant must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996); Thus, plaintiff failed to establish that he was qualified for his position, particularly in light of the multiple unsatisfactory evaluations and plaintiff's admissions regarding them.

Furthermore, even if plaintiff had established a prima facie case of age discrimination, summary disposition in favor of defendants was still proper. The burden would have shifted to defendants to articulate a legitimate, nondiscriminatory reason for the employment decision in an effort to rebut the presumption created by plaintiff's prima facie case. *Hazle, supra* at 464. Plaintiff does not dispute that defendants have raised a nondiscriminatory reason for plaintiff's discharge. Once a defendant has produced such evidence, even if later refuted or disbelieved, the presumption of discrimination dissipates, and the burden of proof switches back to the plaintiff, who must establish by a preponderance of admissible direct or circumstantial evidence that there

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[2] There is not indication in the record if plaintiff's position was subsequently filled.

was a triable issue that the defendant's proffered reasons were merely pretextual. *Lytle*, *supra* at 174.

Plaintiff may establish that defendants' articulated legitimate, nondiscriminatory reason was pretextual in one of three ways: (1) by showing that the reason had no basis in fact; (2) if the reason had a basis in fact, by showing that it was not the actual factor motivating the decision; or (3) if it was a factor, by showing that it was insufficient to justify the decision. *Feick v Monroe Co*, 229 Mich App 335, 343; 582 NW2d 207 (1998).

Plaintiff argues that none of the criticisms leveled against him were true and contends that defendants' proffered reason for his discharge was pretextual. Plaintiff further contends that "the determination as to whether the non-discriminatory excuse for [his] termination is other than pretextual is a decision that has to be made by the jury as opposed to the court." Finally, plaintiff argues that there is sufficient evidence to warrant the progression of this case to trial because he disagreed with Grimsby's evaluations and he was critical of the ephemeral training he received. Defendants argue that there was a basis in fact for plaintiff's termination, relying on plaintiff's poor performance evaluations. Defendants further contend that plaintiff's disagreement with the assessment of his performance does not render the reason for his discharge a pretext for discrimination.

We find that plaintiff's statements that he disagreed with Grimsby's assessments, combined with his opinion that his training was insufficient, does not demonstrate that defendants' proffered reason for plaintiff's discharge was a pretext for discrimination. In *Meagher v Wayne State University*, 222 Mich App 700, 715; 565 NW2d 401 (1997), this Court determined that the plaintiff did not rebut the defendant's legitimate, nondiscriminatory reason for the discharge where the plaintiff did not offer any evidence, other than her personal opinion that her supervisor had age animosity and the fact that her permanent replacement was younger, to support her claim that she was discharged based on her age. Here, plaintiff also asserts that he disagreed with Grimsby's assessments in the probationary reports and that his training was inadequate. Further, plaintiff agreed that Grimsby's assessments were true to some extent. Plaintiff testified at his deposition that Grimsby's examples of deficiencies were accurate based on the training that he had received, although he contended his training was inadequate. Additionally, plaintiff testified that it was true that he continued to fail to perform the essential functions of the assistant treasurer position, and later contended that some of his duties were removed so that he could learn the position. Therefore, such evidence demonstrates that the probationary reports had at least some basis in fact; yet, plaintiff has failed to demonstrate that this was not the motivating factor in his termination.

Plaintiff also points to an incident where Grimsby allegedly called him something like "stupid old man," although plaintiff did not recall the exact context or statement. In *Krohn v Sedgwick James of Michigan, Inc*, 244 Mich App 289, 298; 624 NW2d 212 (2001), this Court set forth a list of factors to determine whether stray remarks are probative of an employer's discriminatory motivation: (1) whether the proffered comment was made by an agent of the employer involved in the termination decision; (2) whether the statements made related to the

decision making process; (3) whether the statements were vague, ambiguous, or isolated remarks; and (4) whether the statements or comments were proximate in time to the termination.[3]

Here, plaintiff contends that the comment was made by Grimsby. Although it is true that Grimsby was a decisionmaker involved in plaintiff's discharge, plaintiff did not know what exact words were used in the statement. Additionally, plaintiff recalled hearing the comment only once, and there was no indication in the transcript that the comment correlated to any particular date. Thus, we believe the comment was an isolated, ambiguous comment not "reflective of discriminatory bias." *Krohn*, *supra* at 292.

2. Gender Discrimination

This Court adopted a version of the *McDonnell Douglas* framework that should be utilized in gender-based reverse discrimination claims regarding a plaintiff's discharge. Unless there is direct evidence of discrimination based on sex, a plaintiff in a reverse discrimination case may establish a prima facie claim of gender discrimination with regard to his discharge by showing (1) background circumstances supporting the suspicion that the defendant is the unusual employer who discriminates against men; (2) that the plaintiff was qualified for the position; (3) that the plaintiff was discharged despite his being qualified for the position; and (4) that a female employee of similar qualifications was treated differently. See *Allen v Comprehensive Health Services*, 222 Mich App 426, 433; 564 NW2d 914 (1997) (describing a reverse discrimination plaintiff's prima facie claim of gender discrimination in a failure to promote case).

In this case, even if we were to assume that plaintiff provided evidence that he was qualified for the position and that he was discharged despite his qualifications, we find that plaintiff provided no background circumstances to support a suspicion that the city of Livonia was the unusual employer who discriminates against men, and provided no instances where a female employee of similar qualifications was treated differently. Instead, plaintiff relies on his conclusory statements that he was the only male in the department and that he felt Grimsby was more understanding with the female employees. Without concrete evidence or specific examples relating to the alleged sex discrimination, we conclude that plaintiff has failed to present a prima facie case of reverse discrimination based on his gender, and the trial court properly granted defendants' motion for summary disposition.

Affirmed.

/s/ Michael R. Smolenski
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder

[3] Although the Court in *Krohn* utilized these factors to determine the relevancy and admissibility of a stray comment in proving an employer's bias, we find this analysis helpful in determining whether the comment could create a genuine factual dispute.