STATE OF MICHIGAN

COURT OF APPEALS

FRANK LOVETT,

Plaintiff-Appellant,

v

PPG INDUSTRIES, INC.,

Defendant-Appellee,

and

THOMAS KERR,

Defendant.

UNPUBLISHED
August 5, 2004

No. 245954
Oakland Circuit Court
LC No. 2001-036283-CL

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

PER CURIAM.

In this action alleging age discrimination under the Michigan Civil Rights Act, MCL 37.2101 *et seq.*, plaintiff appeals as of right from an order granting defendant PPG Industries, Inc.'s (PPG) motion for summary disposition under MCR 2.116(C)(10). We affirm.

We review de novo a circuit court's decision with regard to a motion for summary disposition. *Trost v Buckstop Lure Co*, 249 Mich App 580, 583; 644 NW2d 54 (2002). A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Lewis v LeGrow*, 258 Mich App 175, 192; 670 NW2d 675 (2003). In reviewing a motion under MCR 2.116(C)(10), this Court "'must consider the available pleadings, affidavits, depositions, and other documentary evidence in a light most favorable to the nonmoving party and determine whether the moving party was entitled to judgment as a matter of law.'" *Michigan Ed Employees Mut Ins Co v Turow*, 242 Mich App 112, 114; 617 NW2d 725 (2000), quoting *Unisys Corp v Comm'r of Ins*, 236 Mich App 686, 689; 601 NW2d 155 (1999).

A claim of disparate treatment can be proven by either direct or circumstantial evidence of intentional discrimination. *Bachman v Swan Harbour Associates*, 252 Mich App 400, 432; 653 NW2d 415 (2002), quoting *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539-540; 620 NW2d 836 (2001). Direct evidence of discrimination is evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich

124, 133; 666 NW2d 186 (2003); *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001).

Plaintiff first argues he presented sufficient direct evidence of intentional discrimination to withstand summary disposition. We disagree.

Defendant, Thomas Kerr's inquiries concerning plaintiff's retirement plans do not constitute direct evidence of discrimination. As the court in *Colosi v Electri-Flex Co*, 965 F2d 500, 502 (CA 7, 1992), observed, "a company has a legitimate interest in learning its employees' plans for the future, and it would be absurd to deter such inquiries by treating them as evidence of unlawful conduct." Further, Kerr's vague statement to plaintiff that his "ship had come in" and announcement that plaintiff was retiring, which Kerr explained were made in an attempt to present plaintiff's termination in the best light, also did not constitute evidence of direct discrimination, because such evidence does not require a conclusion that unlawful discrimination was at least a motivating factor in plaintiff's termination. *Sniecinski, supra*.

To establish a prima facie case of age discrimination through indirect evidence, a plaintiff is required to prove by a preponderance of the evidence that (1) he was a member of the protected class; (2) he suffered an adverse employment action; (3) he was qualified for the position; but (4) he was discharged under circumstances that give rise to an inference of unlawful discrimination. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 172-173; 579 NW2d 906 (1998). Once a plaintiff has sufficiently established a prima facie case, a presumption of discrimination arises. The burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the plaintiff's termination to overcome and dispose of this presumption. *Id*. at 173.

In late 2000, three positions, including plaintiff's were eliminated in plaintiff's division, the Automotive Glass SBU. Plaintiff's supervisor at the time, Greg Benckart, selected plaintiff's position for elimination because it was expendable. Plaintiff's previous duties were distributed among several employees. The persons holding the two other eliminated positions, Dana Coyne (DOB 5/15/63) and Marshal Decker (DOB 4/30/42), were transferred to other jobs within PPG.

The Automotive Glass SBU was in the process of reorganizing at about the same time as PPG's executive committee issued its directive to the Automotive Glass SBU to reduce costs. In connection with this reorganization, several new positions were created within the sales and marketing groups. Specifically, a new global account manager and five new sales manager positions were created. The sales manager positions were filled by current PPG employees, all of which were younger than plaintiff. The global account manager position was filled by Mr. Barrouillet, who unlike plaintiff, was a French national and had a technical background and an MBA. PPG planned for Barrouillet to return to France and take over responsibility for European account. Plaintiff apparently was never seriously considered for these new positions because Kerr did not believe he was a good fit for them. Specifically, in regard to the sales manager positions, Kerr claimed plaintiff was not comfortable talking price or negotiating with customers. As to the global account manager position, Kerr claimed that an MBA was required, and that Barrouillet was overall better-qualified for the position. Plaintiff however felt that he was qualified for these positions and claims he would have applied for them had he been given the opportunity to do so.

Assuming, without deciding, that this evidence establishes a prima facie case of age discrimination, we nonetheless conclude that summary disposition was appropriate because plaintiff failed to present any evidence on the ultimate question whether age was a determining factor in PPG's decision to terminate plaintiff. As explained by Justice Brickley in *Town v Michigan Bell Telephone Co*, 455 Mich 688, 702-703; 568 NW2d 64 (1997):

> A layoff in the context of an overall workforce reduction provides a nondiscriminatory explanation for the plaintiff's discharge. This puts the plaintiff's case in the same posture as it would be after the employer articulates *any* legitimate nondiscriminatory explanation in response to the plaintiff's prima facie case. Once the employer offers such an explanation, the presumption of the prima facie case—that the employee's discharge was discriminatory—evaporates and is no longer relevant. The plaintiff can no longer rely on the inference of discrimination in the prima facie case, and the evidence must be evaluated in light of the rational inferences it will support. The question is whether the plaintiff presented sufficient evidence, taken in a favorable light, to find that age discrimination was a determining factor in the decision to discharge the plaintiff.

Here, there is no evidence from which a rational jury could find that age was a factor in the decision to terminate plaintiff. Plaintiff argues his not being considered for newly created positions, along with the mentioned comments by his supervisor, is sufficient evidence of age discrimination. However, plaintiff admits that he does not possess an MBA and that he does not have experience in negotiating price with customers. Plaintiff does not contend that the persons filling these positions lack such qualifications. Without considering the presumption of the "prima facie case—that the employee's discharge was discriminatory," *Town, supra*, PPG's transfer of employees younger than plaintiff into the positions only reflects the reality that plaintiff is older than most of PPG's workforce. No evidence exists to determine whether age was a factor in the decision to discharge the plaintiff.

Moreover, comments made by plaintiff's supervisor concerning retirement do not raise an inference that age was unlawfully considered when filling the newly created positions. As mentioned, it would be absurd to deter a company from learning of its employees' plans for the future by treating such inquiries as evidence of unlawful conduct. *Colosi, supra*. Thus, there is no evidence that plaintiff's age was the reason he was terminated from PPG's employ. Accordingly, the trial court's grant of summary disposition to PPG was proper.

Affirmed.

/s/ Brian K. Zahra
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder