STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM M. PASQUALE,

Plaintiff-Appellant,

v

ALLIED WASTE SERVICES, INC, d/b/a GREAT LAKES WASTE SERVICES,

Defendant-Appellee.

UNPUBLISHED
November 9, 2004

No. 249110
Oakland Circuit Court
LC No. 2002-043532-NZ

Before: Murray, P.J., and Sawyer and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting defendant's motion for summary disposition in this action alleging age discrimination and retaliatory discharge. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating the motion, the trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in a light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

To establish a prima facie case of discrimination, plaintiff must 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; and (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). If a plaintiff establishes a prima facie case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the plaintiff's termination. Once the defendant produces such evidence, the burden of proof shifts back to the plaintiff to show that the proferred reasons were a mere pretext for discrimination. *Id.* at 173-174. Disproof of an employer's articulated reason for an adverse employment decision defeats summary disposition only if the disproof raises a triable issue that discriminatory animus was a motivating factor underlying the adverse employment action. *Id.* at 175.

Plaintiff's sole direct evidence of discriminatory animus is that his district manager asked him his age during lunch and the same manager attempted to convince another individual who was forty-seven years old to remain in defendant's employment because of the limited opportunities for employment outside the company. Isolated or vague remarks made outside the context of the termination are not probative of an employer's discriminatory motive. *Krohn v Sedgwick James of Michigan, Inc*, 244 Mich App 289, 300; 624 NW2d 212 (2001). Here, the remarks do not show any animus. Awareness of an employee's age does not show that age was a factor in a dismissal. Similarly, an observation about difficulties of an older employee finding work is not probative of the speaker's animus.

Plaintiff's poor performance on the job can preclude him from making a prima facie case or rebutting an inference of discrimination. *Lytle, supra.* While plaintiff argues that evidence against him was manufactured because he had not seen it before, plaintiff also concedes that there were areas where his performance was deficient. Plaintiff failed to rebut the reasons given for his termination, and he did not present any evidence that would show that his termination was motivated by discriminatory animus.

A cause of action for retaliatory discharge is based on the principle that some grounds for discharge are so contrary to public policy as to be actionable. *Suchodolski v Michigan Consolidated Gas Co*, 412 Mich 692, 694-695; 316 NW2d 710 (1982). A public policy claim is sustainable only where there is not an applicable statutory prohibition against discharge in retaliation for the conduct at issue. *Dudewicz v Norris-Schmid, Inc*, 443 Mich 68, 80; 503 NW2d 645 (1993). A public policy claim can be found where an employee is discharged because he or she refused to violate the law, or where an employee is discharged for exercising a right conferred by a well-established legislative enactment. *Vagts v Perry Drug Stores, Inc*, 204 Mich App 481, 484; 516 NW2d 102 (1994).

Plaintiff's retaliatory discharge claim is based only on his internal complaints about violations, and thus are not covered by the Whistleblower's Protection Act, MCL 15.361, *et seq*. *Dolan v Continental Airlines/Continental Express*, 454 Mich 373; 563 NW2d 23 (1997). Plaintiff never reported the violations to anyone outside the company. He presented no evidence that could show that his internal complaints were protected by public policy or that he was discharged due to those complaints. The trial court properly granted summary disposition to defendant.

Affirmed.

/s/ Christopher M. Murray
/s/ David H. Sawyer
/s/ Michael R. Smolenski