IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

PHILIP GROH, Appellant, v. MASON COUNTY FOREST PRODUCTS, LLC, a Washington Limited Liability Company; and PHILIP JOHNSON; Respondents.	No. 40573-3-II UNPUBLISHED OPINION

Penoyar, C.J. — Philip Groh appeals the summary judgment dismissal of his age discrimination claim against Mason County Forest Products, LLC, (MCFP) and Philip Johnson. Groh argues that MCFP and Johnson failed to establish that there was no issue of material fact relating to its nondiscriminatory reason for Groh's layoff. We affirm.

FACTS

MCFP is a limited liability company specializing in the manufacture, production, and sale of forest products. Johnson, who was born in 1948, is the president, chief operating officer, and an owner of MCFP and its parent company, Long Bell Ventures, LLC, d/b/a Lewis County Forest Products (LCFP). MCFP owns and operates a large log mill and a lumber mill[1] in Shelton. LCFP owns a lumber mill in Winlock.

In January 2005, Johnson and Richard "Jim" Woodfin hired Groh, who was then 56 years old, as an at-will employee for LCFP. Groh worked as a planer supervisor for the swing shift at the Winlock lumber mill.

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[1] The lumber mill is also referred to as the "stud mill" throughout the record.

In 2006, the domestic lumber market and economy began to experience financial difficulties. In response, MCFP downsized, restructured its company, and shifted its focus from the domestic lumber market to the international lumber market. In November 2005, the Winlock and Shelton mills employed 391 people. By December 2009, the Winlock mill had been shut down and only 133 employees worked for the Shelton mill. Of the 28 layoffs that occurred at the Shelton lumber mill, only 7 employees were over the age of 40. Approximately 40 percent of the Shelton lumber mill's current employees are over 40 years old.

In August 2006, the Winlock mill shut down.[2] That month, Johnson transferred Groh to the Shelton lumber mill, where Groh took the position of planer supervisor. Johnson provided Groh with meals and a room at the Little Creek Casino for six months.[3] After six months, once Groh had been officially transferred to the Shelton location, he received a pay raise but was no longer provided with lodging and a meal stipend.[4] In November 2006, Groh was promoted to stud mill supervisor for the day shift at the Shelton lumber mill. At the time of Groh's promotion, the Shelton mill went from having both a swing and day shift to just a day shift because of financial difficulties.

Johnson laid off Groh on July 25, 2008. Johnson did not consult Greggrey Duncan, the Shelton lumber mill's plant manager and Groh's direct supervisor, before laying off Groh.[5] Groh

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[2] The Winlock mill closure was expected to be temporary; however, the mill remains closed.

[3] Groh lived two hours from the Shelton lumber mill, in St. Helens, Oregon, at the time of his transfer.

[4] Groh received payment for first month's rent and a deposit to lease an apartment in Shelton.

[5] Duncan was on vacation when Groh was laid off.

filed an unemployment claim and marked that he had separated for "lack of work." Clerk's Papers (CP) at 39.

Daniel Poppe, born on December 17, 1984, began working at LCFP in July 2004, and transferred to the Shelton lumber mill in August 2006. In 2007, when Poppe held the position of "lead man," the mill sent him to a three-day computer training in Sun River, Oregon.[6] CP at 173. Poppe also received training from the computer technicians upon his transfer to MCFP and took an Excel® course when he was in school. Before Groh's lay off, Poppe was a shipping supervisor. Groh's position was "absorbed" by Dennis Baker; Duncan; and, primarily, Poppe.[7] CP at 33. Poppe also absorbed a number of the previous responsibilities of the former "lead man" in the Shelton lumber mill.

Groh filed a complaint in Mason County Superior Court, alleging that MCFP and Johnson discriminated against him because of his age, a violation of the Washington Law Against Discrimination, chapter 49.60 RCW.

Duncan testified at his deposition that he was surprised that Groh was laid off because "as far as I was concerned, he was doing a good job." CP at 33. Johnson told Duncan that he laid off Groh because the company was "downsizing" and "cutting that position out." CP at 33.

Groh testified during his deposition that Duncan told him, "Well, it isn't that Phil's mad at you. Poppe's a good kid, and he needs a place for him." CP at 98. Duncan testified that he never heard any conversations about Groh's age.

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[6] Groh never received formal computer training but had "on-the-job training while actually working with the computers." CP at 49.

[7] Baker and Poppe are listed as supervisors in the weeks following Groh's layoff.

Johnson testified during his deposition that LCFP has "lost 20 million dollars over the last two and a half years. Life is difficult." CP at 43. Johnson noted, through his observations of the overall operating results of the plant and grade recovery, that Groh had difficulty adjusting to the export market because he "didn't have the skill set that was really needed, didn't have the grade, size knowledge, the computer skills."[8] CP at 114. Johnson testified that his perception that Groh was struggling with the export business was the reason he chose to lay off Groh.[9] Johnson testified that before he makes a decision to lay off an employee, he may consult someone, but not always.

MCFP and Johnson moved for summary judgment, and the trial court granted the motion. Groh appeals.

ANALYSIS

Groh argues that the trial court erred in granting summary judgment to MCFP and Johnson. Specifically, he asserts that MCFP and Johnson "failed to establish that there is no issue of [material] fact relating to whether there was a nondiscriminatory reason for [Groh's] discharge because there is evidence that his performance was good and that his direct supervisor and the managing partner gave contradictory reasons for his discharge." Appellant's Br. at 22. We disagree.

We review an order of summary judgment de novo. *Hisle v. Todd Pac. Shipyards Corp.*,

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[8] Johnson could not remember discussing Groh's difficulties with anyone, including Duncan.

[9] Duncan testified that the adjustment to the export market was tough for the mill. "It just was a new product to learn. It was something completely different that [sic] we've ever done." CP at 33. Duncan testified, "I wouldn't say [shifting focus to the international lumber market] caused [Groh] any more troubles or any less troubles than anybody else." CP at 33.

151 Wn.2d 853, 860, 93 P.3d 108 (2004). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," demonstrate that there are no genuine issues of material fact, entitling the moving party to judgment as a matter of law. CR 56(c). The nonmoving party may not rely on speculation, argumentative assertions, "or in having its affidavits considered at face value; for after the moving party submits adequate affidavits, the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists." *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

Under the Washington Law Against Discrimination, it is unlawful for an employer to "discharge or bar any person from employment because of age." RCW 49.60.180(2). The employee has the initial burden of presenting a prima facie case of age discrimination. *See Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 363-64, 753 P.2d 517 (1988). To establish a prima facie case of age discrimination in employment, the employee must show that: (1) he was within the statutorily protected age group of employees 40 years of age or older, (2) he was discharged, (3) he was doing satisfactory work, and (4) he was replaced by a significantly younger person. *See* RCW 49.44.090(1); *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 180-82, 23 P.3d 440 (2001), *overruled on other grounds by McClarty v. Totem Elec.*, 157 Wn.2d 214, 137 P.3d 844 (2006); *Grimwood*, 110 Wn.2d at 362. MCFP and Johnson do not dispute that Groh met his initial burden of establishing a prima facie case.

Once the employee sets forth a prima facie case of age discrimination, the burden of production shifts to the employer, who must show a legitimate, nondiscriminatory reason for its conduct. *Hill*, 144 Wn.2d at 180-82. If the employer meets its burden of production, the

employee must then show that the employer's proffered reason was mere pretext for discrimination. *Domingo v. Boeing Employees' Credit Union*, 124 Wn. App. 71, 88, 98 P.3d 1222 (2004). An employee can demonstrate pretext with evidence that: (1) the employer's reasons have no basis in fact, (2) the employer was not actually motivated by the reasons, or (3) the reasons are insufficient to prompt the adverse employment decision. *Domingo*, 124 Wn. App. at 88. To meet this burden, the employee "is not required to produce evidence beyond that already offered to establish a prima facie case" or "direct ('smoking gun') evidence." *Sellsted v. Wash. Mut. Sav. Bank*, 69 Wn. App. 852, 860, 851 P.2d 716 (1993) (quoting *Gavalik v. Cont'l Can Co.*, 812 F.2d 834, 852 (3rd Cir. 1987), *overruled on other grounds by Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 898 P.2d 284 (1995). Various, incompatible reasons for an employee's termination may raise an inference that those reasons are pretextual. *Sellsted*, 69 Wn. App. at 861. A court may grant summary judgment "when the 'record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred.'" *Milligan v. Thompson*, 110 Wn. App. 628, 637, 42 P.3d 418 (2002) (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000)); *Hill*, 144 Wn.2d at 184.

Groh relies on *Sellsted*. 69 Wn. App. 852. In *Sellsted*, the employer asserted that it had terminated Sellsted because of a reduction in force and concerns about his work. 69 Wn. App. at 859. The court found that a genuine issue of material fact existed because evidence indicated that (1) only employees within the protected age group were placed on probation for failure to meet

new standards; (2) Sellsted's manager was instructed to specially scrutinize the work of employees within the protected age group; and (3) Sellsted was quickly replaced by a newly-hired individual who had the same job responsibilities he had performed. *Sellsted*, 69 Wn. App. at 861. This case is distinguishable from *Sellsted*.

Here, MCFP and Johnson demonstrated legitimate, nondiscriminatory reasons for laying off Groh: the company was forced to lay off employees, and Groh had difficulty adjusting to the international lumber market. Groh asserts that MCFP and Johnson's stated reason for his layoff was pretext for age discrimination. He contends that there are inconsistencies in Duncan's and Johnson's testimony, that Johnson did not discuss his decision to lay off Groh with Duncan, that Groh did not receive computer training, and that there is no explanation for why Johnson chose to lay off Groh and not Poppe.

Beginning in 2006, MCFP had to downsize, restructure its company, and shift its focus to the international lumber market in response to the financial difficulties posed by the declines in the economy and the domestic lumber market. Between November 2005 and December 2009, the Winlock and Shelton mills went from employing 391 people to 133 people. Duncan testified that he was surprised that Groh was laid off because he was a good worker, but he was told that MCFP had to cut costs. Johnson testified that he chose to lay off Groh, specifically, because he perceived, through his observations of the plant's operating statements, that Groh had difficulty adjusting to the export market.

While various, incompatible reasons for an employee's termination may raise an inference that the employer's stated reason is pretext for discrimination, the testimonies of Johnson and Duncan are not incompatible. Indeed, Johnson's decision was not based solely on Groh's

performance, as MCFP's serious financial difficulties dictated that the company needed to cut costs through layoffs.

Groh asserts that discrimination can be inferred from the fact that he received only on-the-job computer training, while Poppe attended a three-day training and received training from the computer technicians when he held a different position than Groh.[10] But summary judgment is appropriate here because there is abundant and uncontroverted independent evidence that no discrimination occurred. Johnson testified that he does not consistently consult someone before deciding to lay off an employee. The company never filled Groh's position,[11] and different employees at the company, including Poppe, had to absorb Groh's previous duties. While Poppe took over most of Groh's previously performed duties, Poppe has also absorbed a number of the Shelton lumber mill's former "lead man" responsibilities. Duncan testified that he did not have to supervise Groh as closely as Poppe, but he described both individuals as "qualified" and noted that Poppe was in the process of learning new duties. CP at 34. Here, unlike in *Sellsted*, MCFP did not hire new employees, and there is no circumstantial evidence of age discrimination. In fact, of the 28 layoffs at the Shelton lumber mill, only 7 employees were over the age of 40. We conclude that the trial court did not err in granting summary judgment to MCFP and Johnson.

Because the trial court properly granted MCFP and Johnson's motion for summary judgment, we need not address Groh's argument that the trial court improperly denied his motion to allow an additional witness.

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[10] Poppe held the position of "lead man" when he attended the three-day training. CP at 173.

[11] Johnson testified, "When [Groh] was let go, [Duncan] became the shift supervisor. That's all there is to do; there is no manager's job. When we have a general manager, a plant manager, they're there to supervise multiple shifts. There are no more multiple shifts." CP at 43.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Penoyar, C.J.

We concur:

Hunt, J.

Johanson, J.