STATE OF MICHIGAN

COURT OF APPEALS

JOHN F. SIRVINSKIS,

Plaintiff-Appellant,

v

ROSS ROY, INC.,

Defendant-Appellee.

UNPUBLISHED
March 21, 1997

No. 186655
Oakland Circuit Court
LC No. 94-479932

Before: Wahls, P.J., and Hood and Jansen, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition to defendant on plaintiff's age discrimination claim. We affirm.

Plaintiff began working for defendant agency in 1979 and remained employed with defendant until August 1982, when he left defendant's employ because of a better opportunity. In 1986, plaintiff's new employer merged with defendant and plaintiff accepted an offer to return to the agency. Plaintiff held various positions with the agency and, for the last five years of his employment, he held the position of associate creative director for the Chrysler Mopar Service and Chrysler Fleet Group.

In March 1992, plaintiff was given his annual performance evaluation and it was above average in most areas. Plaintiff, however, was advised that he needed to give his employees a freer rein. In March 1993, Mike Labiak, plaintiff's immediate supervisor, again conducted plaintiff's routine performance evaluation. Out of a possible seven point scale, he awarded plaintiff a four for leadership and people management. A four represented "meets requirements in most areas" and is the average mark. When plaintiff questioned Labiak about his rating, he was told that he supervised his employees too much and needed to give his employees more credit. Plaintiff testified that he believed that he needed to supervise his employees more than usual because his employees were given lots of small jobs and if he did not constantly supervise, he would not stay on budget and meet deadlines. He further indicated that he became involved with his subordinate's work so that they could spend more time being

creative and less time dealing with administrative details. He testified that, after his 1993 evaluation, he attempted to supervise less.

In November 1993, Gary Wolfson became the Executive Vice President and Chief Creative Officer for the agency. Wolfson claimed that he was instructed to implement a reduction of the workforce and to restructure communications in order to improve the overall creative production of the agency. In February 1994, plaintiff's group, the Mopar group, was combined with the training group. The combination of the two groups made it possible for defendant to eliminate a management position. As a result, plaintiff was terminated. He was fifty-six years old. Wolfson averred that plaintiff was chosen for termination because he was the less effective manager.

Steven Sarris, a younger associate creative director from the training group, became co-creative director of the new group and continued to perform his own duties plus those of plaintiff. The new group, which consisted of the art directors and copywriters from both of the previous groups, had thirteen employees. Plaintiff speculated that the group hired new personnel after he was terminated. Sarris, however, averred that the newly combined group did not add any additional personnel and that the only new employee was hired to replace a senior art director who resigned after the reorganization.

Plaintiff filed suit against defendant, alleging that he was fired because of age discrimination. Defendant moved for summary disposition, arguing that plaintiff failed to establish a prima facie case of age discrimination and that he was replaced by a younger worker. Defendant further argued that the agency underwent a work force reduction, and plaintiff was terminated because the consolidation of two groups allowed for the elimination of one manager and plaintiff was the less effective manager. The trial court granted summary disposition in favor of defendant, finding that plaintiff had failed to establish a prima facie case of age discrimination.

We first consider plaintiff's claim that summary disposition was premature because discovery had not been completed. While plaintiff is correct that summary disposition under MCR 2.116(C)(10) ordinarily should not be granted before discovery is complete, it is proper before discovery is complete if further discovery does not stand a reasonable chance of uncovering factual support for the opposing party's position. *Hasselbach v TG Canton, Inc*, 209 Mich App 475, 481-482; 531 NW2d 715 (1994). In the instant case, the hearing for summary disposition occurred three weeks prior to the discovery cut-off. Plaintiff, however, does not disclose what evidence could have been discovered by plaintiff in those three weeks to create a genuine issue of material fact to save his age discrimination claim. Accordingly, we conclude that it was not premature for the trial court to grant summary disposition. Plaintiff also requests that we discuss the merits of this case, and we will do so.

Plaintiff claims that defendant was not entitled to summary disposition on plaintiff's age discrimination claim. We disagree. We review an order granting summary disposition de novo. *Plieth v St Raymond Church*, 210 Mich App 568, 571; 534 NW2d 164 (1995). A motion for summary disposition may be granted pursuant to MCR 2.116(C)(10) when, except with regard to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id*. Giving the benefit of reasonable doubt to the nonmovant, the trial

court must determine whether a record might be developed that would leave open an issue upon which reasonable minds might differ. *Id.*

Plaintiff's claim of age discrimination is based upon the Civil Rights Act, which provides in relevant part, that an employer shall not:

> (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 . . . age. [MCL 37.2202; MSA 3.548 (202).]

The burden of proof in an age discrimination case is allocated as follows: (1) the plaintiff has the burden of proving a prima facie case of discrimination by a preponderance of the evidence; (2) if the plaintiff is successful in proving a prima facie case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its actions; and (3) the plaintiff then has the burden of proving by a preponderance of the evidence that the legitimate reason offered by the defendant was merely a pretext. *Plieth, supra* at 571-572; *Barnell v Taubman Co, Inc*, 203 Mich App 110, 120; 512 NW2d 13 (1993).

An age discrimination claim can be based on two theories: (1) disparate treatment, which requires a showing of either a pattern of intentional discrimination against protected employees, e.g., employees aged forty to seventy years, or against an individual plaintiff; or (2) disparate impact, which requires a showing that an otherwise facially neutral employment policy has a discriminatory effect on members of a protected class. *Farmington Ed Ass'n* v *Farmington School Dist*, 133 Mich App 566; 351 NW2d 242 (1984). In this case, plaintiff relies on the disparate treatment theory.

Plaintiff claims that he established his prima facie case under the four-part test set forth in *McDonnell Douglas Corp v Green*, 411 US 792, 802; 93 S Ct 1817; 36 L Ed 2d 668 (1973), which requires a plaintiff to show that (1) he was a member of a protected class, (2) he was discharged, (3) he was qualified for the position, and (4) he was replaced by a younger person. See also *Barnell, supra*. Where, however, as here, a plaintiff is discharged as a result of an employer's economically motivated reduction in force, a prima facie case of disparate treatment requires a showing, by plaintiff, that age was a *determining* or a *significant* factor in the employer's decision to discharge or demote the plaintiff. *Matras v Amoco Oil Co*, 424 Mich 675, 683; 385 NW2d 586 (1986); *Plieth, supra*. Age need not be the only reason or the main reason for the discharge, but it must be one of the reasons that made a difference in determining whether to discharge a person. *Plieth, supra* at 121.

We find that plaintiff has not proved a prima facie case of age discrimination. Plaintiff was fifty-six years old when he was discharged and, considering plaintiff's employment evaluations and experience, he was qualified for his position at the agency. There, however, is no evidence that plaintiff was replaced by a younger worker. In fact, he was not replaced, but his position was eliminated when the two departments were consolidated. At that point, the associate creative director of the other group was retained to take over the leadership of the newly combined group. The fact that the retained director was younger does not, standing alone, establish plaintiff's prima facie case. *Matras, supra* at

684; *Featherly v Teledyne Industries, Inc,* 194 Mich App 352, 358; 486 NW2d 361 (1992). Plaintiff simply failed challenge that the younger retained worker was the more effective a manager. Although plaintiff claims that his skills and experience were better than those of the retained employee, he failed to offer any evidence comparing the younger worker's skills, experience, background or qualifications to his own. Unsupported allegations need not be considered by this Court. *Porter v Royal Oak,* 214 Mich App 478; 542 NW2d 905 (1995). A party may not merely announce his or her position and leave it to us to discover and rationalize the basis for the claim. *Goolsby v Detroit*, 419 Mich 651, 655, n 1; 358 NW2d 856 (1984); *In re Toler*, 193 Mich App 474, 477; 484 NW2d 672 (1992).

More importantly, we are not persuaded that plaintiff's age was a *significant* reason in determining whether to discharge him. The only relevant, admissible evidence plaintiff offered to show that age was a factor in his discharge was that the person who terminated him told him to "keep on being a grumpy old man in the performance of your job." Standing alone, the comment does not support plaintiff's claim for age discrimination. *Matras, supra* at 685. Review of the record reveals that this comment was made upon the first meeting of the two men and was made approximately three months prior to his termination. Furthermore, the comment was a descriptive way to identify plaintiff's management style. Moreover, the comment was isolated and ambiguous and such comments do not support age discrimination claims. See *Phelps v Yale Security, Inc*, 986 F2d 1020, 1025 (CA 6, 1993). Accordingly, plaintiff has made no showing that his age was the motivating factor in defendant's decision to terminate him.

We further note that plaintiff also has failed to establish a prima facie case that defendant engaged in a pattern of discharging older employees. Plaintiff was required to present evidence that he was qualified for the position and that there was a pattern of discharges of older employees, whose positions were then filled by younger employees. See *Foehr v Republic Automotive Parts, Inc,* 212 Mich App 663, 671; 538 NW2d 420 (1995). A pattern of discharges of older employees while younger employees were retained could also establish a pattern of discrimination. *Id.* In this case, plaintiff provided no evidence that there was a pattern of discharges based on age. In fact, the evidence on which plaintiff relies tends to indicate a discriminatory hiring policy, which did not affect plaintiff. The only evidence offered by plaintiff was the testimony of a co-employee who stated that many other employees felt they were separated from their employment, either by termination or early retirement, because of age. This testimony alone does not establish a pattern of age-related discharges. See *Bouwman v Chrysler Corp,* 114 Mich App 670, 682; 319 NW2d 621 (1982). Plaintiff also failed to provide any supporting evidence, by way of testimony or affidavits, from the individuals who believed there was discrimination by the agency even though he was provided with a list of names. Plaintiff's allegations, without supporting authority, are insufficient to survive summary disposition. See *Johnson v Wayne Co,* 213 Mich App 143, 149; 540 NW2d 66 (1995).

Even if we conclude that plaintiff met his burden and proved a prima facie case of age discrimination, the burden of production would shift to defendant to rebut the presumption of disparate treatment by articulating, *not proving*, a legitimate, nondiscriminatory reason for the adverse employment decision against plaintiff. In rebuttal, defendant states that it underwent a reduction in force

and plaintiff was terminated because the consolidation of the groups allowed for the termination of one manager and plaintiff was the less effective manager.

Defendant having carried its burden of production, plaintiff was required to prove by a preponderance of the evidence that the defendant's proffered reasons are a mere pretext. We first note that, contrary to plaintiff's assertion, defendant was not required to prove that the reduction in force was motivated by an economic *necessity*. *McDonald v Stroh Brewery Co*, 191 Mich App 601, 608; 478 NW2d 669 (1991). Furthermore, plaintiff failed to offer any evidence, beyond mere speculation and unsupported allegations, that defendant did not undergo a reduction in force. Likewise, he failed to offer any evidence that the associate creator director retained was not the more effective manager. A party has to rebut the legitimate, non-discriminatory reasons with supporting evidence to survive summary disposition. *Singal v General Motors Corp*, 179 Mich App 497, 500; 447 NW2d 152 (1989).

Affirmed. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Myron H. Wahls
/s/ Harold Hood
/s/ Kathleen Janssen