STATE OF MICHIGAN

COURT OF APPEALS

GEORGE MEYERS,

Plaintiff-Appellant,

v

BASF CORPORATION and GARY LAMBERT,

Defendants-Appellees.

UNPUBLISHED
December 4, 1998

No. 201849
Wayne Circuit Court
LC No. 96-623863 NO

Before: Griffin, P.J., and Gage and R. J. Danhof*, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendants' motion for summary disposition in this Elliott-Larsen Civil Rights action (ELCRA) based on age discrimination. MCL 37.2202(1)(a); MSA 3.548(202)(1)(a). We affirm.

This Court reviews de novo an order granting summary disposition. *Weisman v US Blades, Inc*, 217 Mich App 565, 566; 552 NW2d 484 (1996). While defendants brought their motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10), the order granting the motion does not specify under which court rule the motion was granted. However, because the court went beyond the pleadings in deciding defendants' motion, we will review the trial court's grant of summary disposition as if based on MCR 2.116(C)(10). *Espinoza v Thomas*, 189 Mich App 110, 114-115; 472 NW2d 16 (1991). A motion for summary disposition brought under MCR 2.116(C)(10), based on the lack of a genuine issue of material fact, tests whether there is factual support for the claim. *WB Cenac Med Service, PC v Mich Physicians Mut Liability Co*, 174 Mich App 676, 681; 436 NW2d 430 (1989). In ruling on the motion, the trial court must consider the affidavits, pleadings, depositions, admissions and other documentary evidence submitted by the parties. *Id.* The opposing party must show that a genuine issue of material fact exists. *Id.* The opposing party may not rest on mere allegations or denials in the pleadings but must, by affidavit or other documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Id.* Should the opposing party fail to make such a showing, summary disposition is appropriate. *Id.*

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* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

The ELCRA prohibits employers from discriminating against employees on the basis of age. MCL 37.2202(1)(a); MSA 3.548(202)(1)(a). To address a plaintiff's claims of unlawful age discrimination, Michigan courts have utilized the "shifting burden" analysis set forth in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). *Meagher v Wayne State Univ*, 222 Mich App 700, 710; 565 NW2d 401 (1997). To establish a prima facie case of age discrimination, the 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 replaced by a younger person. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 177; 579 NW2d 906 (1998). Once the plaintiff has sufficiently established a prima facie case, a presumption of discrimination arises. *Lytle*, *supra* at 173. At the second stage of proofs, the burden of production then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the plaintiff's termination to overcome and dispose of this presumption. *Id*. The defendant's response need not persuade the court that the defendant was actually motivated by the proffered reasons, but need only raise a genuine issue of fact as to whether the defendant discriminated against the plaintiff. *Id*., quoting *Texas Dep't of Community Affairs v Burdine*, 450 US 248, 254-255; 101 S Ct 1089; 67 L Ed 2d 207 (1981). Once the presumption of discrimination drops out of the case, the plaintiff retains the ultimate burden of proving discrimination. *Town v Michigan Bell Telephone Co*, 455 Mich 688, 700; 568 NW2d 64 (1997). At this third stage of proof, in response to the defendant's motion for summary disposition, the plaintiff must come forward with evidence, including the previously produced evidence establishing the prima facie case, creating a material issue of fact on which reasonable minds could conclude that the employer's stated reason is a pretext for discrimination. *Lytle*, *supra* at 174-175 n 22, citing *Town*, *supra* at 698.

Plaintiff contends that he established a prima facie case of age discrimination, that defendants' reason for firing him was pretextual, and that he presented evidence of discrimination sufficient to survive defendant's motion for summary disposition. For purposes of argument, we will assume that plaintiff has established a prima facie case of age discrimination. Plaintiff was aged fifty-four years at the time defendants terminated his employment, and thus was a member of a protected class at the time he suffered an adverse employment action. *Lytle*, *supra* at 177 n 26. Furthermore, plaintiff's complaint alleges that he possessed adequate qualifications for the account manager position he held, and that defendant replaced him with a younger employee. *Id*. at 177.

Regarding the second stage of proofs, defendants have articulated a legitimate, nondiscriminatory reason for terminating plaintiff's employment. Specifically, defendants allege that plaintiff poorly performed the duties of his account manager position. Defendants' offer of this legitimate reason for plaintiff's termination removes the inference of discrimination created by plaintiff's statement of a prima facie case. *Town*, *supra* at 696.

Therefore, to succeed at the third stage of proofs, plaintiff must present evidence sufficient to permit a reasonable factfinder to conclude that defendants' true motive in terminating plaintiff's employment was discrimination. *Id*. In support of his claim, plaintiff avers that he was treated differently from other, younger employees in that he was the only one given an outdated computer, was

prohibited from working out of his home office, never received the prime tickets to client entertainment events that younger employees enjoyed, was denied permission to work at home while younger employees were permitted to do so, and was criticized for spending an inadequate amount of time with clients while other, younger employees who had spent the same amount or less time than plaintiff with their clients were not similarly criticized. To create an inference of disparate treatment, however, plaintiff must prove that he and these younger employees were similarly situated; that is, that all of the relevant aspects of his employment situation were nearly identical to those of the younger employees' employment situations. *Town*, *supra* at 699-700. Plaintiff has presented no evidence in this regard. It is impossible to discern from the record the identities or job duties of these younger employees, whether they had been with the company the same amount of time as plaintiff, whether they were also hired as a result of defendants' purchase of Olin, or by whom they were supervised. In short, it is impossible to determine whether these younger employees were similarly situated to plaintiff, so that there is nothing beyond plaintiff's unsubstantiated allegations on which to base an inference of disparate treatment. Mere allegations are insufficient to support such an inference. MCR 2.116(G)(4).

Plaintiff also argues that defendants' allegations of plaintiff's poor performance have no basis in fact. According to plaintiff, defendants kept increasing his workload and alleging new areas of deficiency so that plaintiff could not succeed and would never appear to be a satisfactory employee. Plaintiff alleges that defendant Lambert gave him an old computer incapable of performing the tasks necessary to his position, then criticized him for failing to perform these tasks. Plaintiff also avers that defendants' criticisms that he failed to communicate adequately with clients and failed to be a team player, and that other employees did not get along well with him are baseless.

However, a review of the record reveals support for defendants' criticisms. Attached to their motion for summary disposition, defendants supplied plaintiff's 1992-1994 yearly performance evaluations. While these evaluations praise plaintiff's sales, knowledge, and experience, they consistently note his inability to work as a member of the team, his neglect of certain of his accounts, his failure to share his knowledge and experience with other employees, his unacceptable efforts to communicate with coworkers and clients, and his lack of respect amongst his peers. Defendants also presented several 1995 performance review memoranda from Lambert to plaintiff dated April 12, August 21, October 4, and December 4, 1995. These communications represented defendants' attempt "to clearly communicate areas where [plaintiff's] performance is unacceptable and to work with [plaintiff] to correct the deficiencies identified." These memoranda cite many of the same areas of concern as noted within plaintiff's performance evaluations, and indicate that plaintiff's failure to immediately and consistently improve would result in more severe sanctions, including termination. Although many of the evaluations and memoranda indicate defendants' willingness to do what they could to help plaintiff improve, they do not note any marked improvement by plaintiff.

Defendants also attached to their motion for summary disposition copies of various 1995 and 1996 email messages containing criticisms of plaintiff's failures to address and follow through with client communications and concerns, to provide necessary documentation, and to make himself available to other BASF employees. Specifically, these messages indicate that plaintiff had failed to follow up on an issue involving Ford Motor Company, that several email messages were written and forwarded to

various employees because "people keep asking George to do the same thing three, four and five times and it never gets done," and that "[a]gain and again, George neglects his responsibility. Something must be done to stop the damage." One of the message authors--someone other than defendant Lambert–-also demanded that plaintiff be removed from an account. Notably, defendant Lambert did not write most of these messages. Furthermore, the complaints evidenced within the email messages are nearly identical to those included by Lambert in plaintiff's evaluations.

Plaintiff has denied that these criticisms have any basis in fact, and proffers reasons as to why he was unable to meet defendants' employment expectations, for example, because they were unreasonable or were foisted on him only to prevent him from performing his other duties, or that he was unable to contact a client because the client did not have an answering machine, or that there was no internal company documentation regarding client contacts because he often used the internet for this purpose. Thus, plaintiff "is basically arguing that he was not responsible for the problems that the company was having . . . and thus, that defendant's stated reasons for his discharge must be a pretext." *Menard v First Security Services Corp*, 848 F2d 281, 287 (CA1, 1988).[1] Even assuming arguendo that plaintiff's performance was not as bad as defendants indicated and that reasonable explanations existed for plaintiff's failure to perform his job in a manner satisfactory to defendants, disproof of an employer's articulated reason for an adverse employment decision defeats summary disposition only if such disproof also raises a triable issue that discriminatory animus was a motivating factor underlying the adverse action. *Lytle*, *supra* at 175. Plaintiff must not merely raise a triable issue that the employer's proffered reason was pretextual, but that it was a pretext for age discrimination. *Id*. at 175-176.

Plaintiff has failed to establish that age was a motivating factor in the decision to terminate him. The only additional evidence that plaintiff offers in support of his contention that defendants discharged him because of his age consists of certain comments made by defendant Lambert. According to plaintiff, Lambert expressed his discomfort regarding attending a weekend ski trip with plaintiff and some clients because he was younger than plaintiff and the other participants, Lambert on one occasion remarked that his parents were "old and set in their ways," and Lambert on several occasions indicated to BASF customers that he was plaintiff's supervisor despite their age difference. However, Lambert's comments are only isolated and ambiguous statements that fail to establish that defendants relied on age in deciding to terminate plaintiff's employment. See *Phelps v Yale Security, Inc*, 986 F2d 1020, 1025-1026 (CA 6, 1993); *Gagne v Northwestern National Ins Co*, 881 F2d 309, 315-316 (CA 6, 1989).

Plaintiff also avers that the fact that he was given Lambert's old computer, was treated differently than younger employees, and was replaced by a younger man is further evidence of age discrimination. As discussed above, plaintiff failed to establish that he was similarly situated to these younger employees who were allegedly treated differently, so that his claim of disparate treatment fails. Regarding plaintiff's claim that he was replaced by a younger employee, this standing alone is insufficient to establish a violation of the age discrimination laws. *Shager v Upjohn Co*, 913 F2d 398, 401 (CA 7, 1990); *Laugesen v Anaconda Co*, 510 F2d 307, 312-313 n 4 (CA 6, 1975).

Thus, even if plaintiff's performance could be deemed satisfactory, and defendants' reason for firing him deemed false, plaintiff has nonetheless failed to establish a genuine issue of material fact that his age was a motivating factor in his discharge. *Lytle, supra*. Thus, we conclude that the trial court properly granted summary disposition for defendants. Because of our resolution of this matter, we need not address plaintiff's remaining arguments regarding the same actor defense and defendant Lambert's personal liability. *Ballman v Borges*, 226 Mich App 166, 170; 572 NW2d 47 (1997).

Affirmed.

/s/ Richard Allen Griffin
/s/ Hilda R. Gage
/s/ Robert J. Danhof

[1] In analyzing discrimination claims arising under the Michigan Civil Rights Act, Michigan courts have often resorted to federal precedent for guidance. *Harrison v Olde Financial Corp*, 225 Mich App 601, 606; 572 NW2d 679 (1997).