STATE OF MICHIGAN

COURT OF APPEALS

GEORGE KOTFICA,

Plaintiff-Appellant,

v

HARLAN ELECTRIC COMPANY,

Defendant-Appellee.

UNPUBLISHED
July 14, 2000

No. 211783
Oakland Circuit Court
LC No. 96-529175 CL

Before: McDonald, P.J., and Gage and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant summary disposition of plaintiff's age discrimination and wrongful discharge claims based on defendant's termination of plaintiff's employment. Plaintiff alleges on appeal that a genuine issue of material fact exists regarding his age discrimination claim because defendant failed to appoint him as project manager of one of defendant's electrical contracting jobs, instead appointing a younger, less qualified individual.[1] We affirm.

This Court reviews de novo a trial court's ruling on a motion for summary disposition. When reviewing a motion brought pursuant to MCR 2.116(C)(10), this Court considers the entire record to determine if summary disposition was appropriate, making all reasonable inferences from the evidence in the light most favorable to the nonmoving party. *Morris v Allstate Ins Co*, 230 Mich App 361, 364; 584 NW2d 340 (1998). A (C)(10) motion is properly granted when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *de Sanchez v Michigan Dep't of Mental Health*, 455 Mich 83, 89; 565 NW2d 358 (1997).

To prove a claim of age discrimination under MCL 37.2202(1)(a); MSA 3.548(202)(1)(a), a plaintiff must show "by a preponderance of the evidence, that (1) she was a member of the protected

[1] Plaintiff presented only one issue in his statement of question presented, specifically defendant's failure to assign him the project manager position. Therefore, this Court will review only that issue. *Grand Rapids Employees Independent Union v City of Grand Rapids*, 235 Mich App 398, 409-410; 597 NW2d 284 (1999); MCR 7.212(C)(5).

class, (2) she suffered an adverse employment action, (3) she was qualified for the position, and (4) she was replaced by a younger person." *Lytle v Malady (On Rehearing)*, 458 Mich 153, 177; 579 NW2d 906 (1998). Once these elements are shown, the burden shifts to the defendant to establish a legitimate nondiscriminatory reason for the termination. *Id*. at 173. The defendant must set forth through admissible evidence the proffered legitimate reasons for the adverse employment decision. If the defendant satisfies this burden of production, the burden of proof then shifts back to the plaintiff to establish a triable issue of fact that the defendant's articulated reasons represent merely a pretext for discrimination. *Hall v McRea Corp*, 238 Mich App 361, 370; 605 NW2d 354 (1999). Plaintiff's claim of pretext will defeat a motion for summary disposition only if the plaintiff raises a triable issue that the defendant's asserted reason was pretextual and that the reason was a pretext for age discrimination. *Lytle*, *supra* at 175-176.

Plaintiff in this case asserted that as a fifty-nine year-old employee he belonged to a protected class, that he suffered an adverse employment action through defendant's failure to appoint him as project manager for the Cleveland Power Project (hereinafter "CPP"), that he was qualified for the position based on his many years of employment with defendant, and that Jacqueline Stroh, a younger person, instead received the position. These allegations sufficiently established a prima facie case of age discrimination. *Lytle*, *supra* at 177.

Defendant then raised a legitimate nondiscriminatory reason for its failure to appoint plaintiff to the position by showing that Stroh had computer skills necessary for the job and that plaintiff did not possess computer skills. Defendant showed through deposition testimony that City of Cleveland representatives and Morris Diesel, the CPP general contractor, wanted the job computerized because during the CPP's previous phases other electrical contractors experienced disorganization problems. Defendant's president, Glenn Lowenstein, and Stroh testified that Morris Diesel specifically requested on-line billing, progress reports, material orders, and inventory evaluations. Lowenstein, Stroh, and Richard Miller, one of defendant's senior vice-presidents and the CPP supervisor, testified that sixty to eighty-five percent of Stroh's CPP responsibilities were computer-related. Stroh assisted with the CPP bid process, wrote computer programs, and loaded labor rates, material prices, markups and subcontractor prices.

Through affidavits and deposition testimony, defendant also amply established that it chose Stroh for the project manager position on the basis of her computer skills. Stroh took computer programming courses in billing, productivity and construction scheduling, and studied software programs such as Excel, Power Point and other computer business applications. Furthermore, Stroh worked extensively on defendant's computer system prior to the project, wrote prior billing and tracking programs, and provided computer training for other employees of defendant. Plaintiff in contrast did not use defendant's computer system while employed with defendant, and possessed no computer skills.

In light of defendant's explanation, the burden then shifted to plaintiff to show that the reason asserted by defendant was merely pretextual, and that the real reason defendant denied plaintiff the position was age discrimination. *Hall*, *supra*. Plaintiff offered no evidence, however, that defendant's proffered explanation for Stroh's CPP project manager appointment was false, and thus failed to raise a

genuine issue of material fact that defendant's reason for choosing Stroh over plaintiff was pretextual. *Lytle, supra*.

In rebuttal of defendant's asserted reasons for Stroh's appointment, plaintiff simply argues that because defendant produced no documentation setting forth the CPP project manager's requisite computer skills, defendant failed to substantiate that computer skills were required for the project manager position, and that the job actually involved no more technological skill than that of any general project manager position. While plaintiff correctly observes that nothing in the CPP bid proposal specified that the project manager position required computer abilities or proficiency, the record indicates that the CPP job specifications specifically required computerized information exchange between Morris Diesel and the winning bidder. Moreover, we agree with the trial court that plaintiff's assertion that nothing indicated the project manager needed computer skills "is irrelevant because Plaintiff did not show that Defendant made a practice of documenting the requirements for other new positions." Lowenstein explained that defendant did not maintain specific job descriptions, and plaintiff presented no evidence to counter this statement.

Even though plaintiff acknowledged that he did not know what specifically was involved in or required for the CPP, plaintiff felt he deserved the CPP project manager position because he had much more experience in the electrical trade than Stroh. Plaintiff appears to claim that Stroh, whose background plaintiff characterized as essentially clerical, simply could not be more qualified than he for any project involving electrical work. Stroh admitted during her deposition that she had no electrical training and was never a project manager prior to the CPP. Plaintiff was a journeyman electrician who worked for defendant for thirty-five years. While the record abundantly supports plaintiff's assertion that he had more electrical experience than Stroh, Miller testified that none of plaintiff's inside electrical knowledge was actually transferable to dissimilar outside line work, such as that involved in the CPP.[2] Moreover, as noted above, plaintiff did not come forward with any evidence to rebut that the CPP project manager position required the computer skills that represented the basis for Stroh's appointment. *Lytle, supra*.

We further note that plaintiff expressed no interest in the CPP project manager position until several months after Stroh received the position on October 25, 1994. Plaintiff, who received notice of his impending termination in January 1995, wrote a letter to Lowenstein and defendant's former president on March 10, 1995, opining that he should replace Stroh as the CPP project manager because of his superior credentials. Plaintiff had no involvement in the CPP prior to this request for reassignment. Plaintiff's expression of interest in the job more than four months after Stroh's appointment appears to have been a mere afterthought of plaintiff in a last minute attempt to save his job.

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[2] Plaintiff acknowledged that outside electrical estimating, bidding and installation differed from inside work and that he had minimal outside electrical experience. We observe that plaintiff makes no claim that he should have been assigned to the CPP's field superintendent position, which was given to Gary Shortridge, who had abundant experience in defendant's outside electrical department.

Plaintiff also failed to raise a genuine issue of material fact that defendant's true reason for denying plaintiff the project manager job was age discrimination. Plaintiff testified that three years before defendant informed plaintiff of his termination, Miller, who later assigned Stroh the CPP project manager position, suggested that plaintiff think about retiring.[3] The trial court properly concluded, however, that Miller's comment occurred too remotely in time to the events at issue, particularly in light of other evidence supporting defendant's decision to appoint Stroh as CPP project manager. See *Ray v Tandem Computers, Inc*, 63 F 3d 429, 434 (CA 5, 1995) ("[A] single comment, made several years prior to the challenged conduct, is a stray remark too remote in time to support an inference of [age] discrimination in later employment actions."). We also note that Miller, born July 14, 1936, was only slightly younger than plaintiff, and that no indication exists that Miller uttered the comment in a discriminatory manner.

Lastly, plaintiff contends that defendant's discriminatory animus appears within two memos created by defendant's employees that reference plaintiff's age. On January 20, 1995, Lowenstein sent a memo to Bill Skibitsky[4] showing plaintiff's hire date, age and salary. The memo further indicated that plaintiff would not fit into the company's future plans because his expertise involved inside electrical construction, a field in which defendant would no longer participate because of its recent unprofitability. The memo also stated that defendant would offer plaintiff a salary and benefit plan through July 1995, or new employment, and would make job contacts on plaintiff's behalf. Nothing in the memo indicates that plaintiff's age constituted a factor of any significance, other than providing Skibitsky general information concerning plaintiff. Therefore, we conclude that the trial court properly found that "[t]he memo does not note Plaintiff's age in an improper way and thus does not support Plaintiff's discrimination claim."

The other memo, titled "EWI" and dated February 7, 1995, lists the ages and dates of birth of plaintiff, one of defendant's former owners John Harlan, and Earl Donahue, all of whom were at least fifty-nine years old. The memo references "Medicare" at one point, and otherwise appears to detail varying insurance coverage rates for employees within different age groups. The memo appears completely consistent with Lowenstein's explanation that the memo constituted the response to plaintiff's specific request for information about continuing his Electrical Workers Insurance coverage after his termination, and no expression of any discriminatory purpose or animus otherwise appears

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[3] According to plaintiff,

> [Miller] told me that, at my age, I should be thinking about getting retired. He said, don't you have a pension plan of some kind to take care of you? He said, are they paying your benefits?
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> When he told me that, at my age, I should be thinking about retiring and getting the hell out of here, I would take that as being derogatory, seeing that I felt that I would like to work till seventy or better. I enjoy working. I'm good at it.

[4] Skibitsky was president of L.E. Myers Company, which in 1995 purchased defendant's stock.

within the memo. Thus, after reviewing plaintiff's proffered evidence of age discrimination within the context of the entire record, we conclude that, even we were to assume that defendant's reason for not appointing him as CPP project manager was a pretext, plaintiff failed to show that age played any role in defendant's decision.

In light of plaintiff's failure to raise a triable issue that defendant's asserted reason was pretextual or that the reason was a pretext for age discrimination, we conclude that the trial court properly granted defendant summary disposition of plaintiff's age discrimination claim pursuant to MCR 2.116(C)(10). *Lytle*, *supra*; *Hall*, *supra*.

Affirmed.

/s/ Gary R. McDonald
/s/ Hilda R. Gage
/s/ Michael J. Talbot