STATE OF MICHIGAN

COURT OF APPEALS

SAJJAD MAHMOOD,

Plaintiff-Appellee,

v

SOLVAY PHARMACEUTICALS, INC.,

Defendant-Appellant.

UNPUBLISHED
December 1, 2000

Nos. 213160; 214216
Oakland Circuit Court
LC No. 96-530928-CZ

Before: Zahra, P.J., and Hood and McDonald, JJ.

PER CURIAM.

Plaintiff brought this action against defendant, his former employer, alleging that he was terminated from his position as sales representative in violation of the Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq*. Plaintiff claimed that he suffered discrimination resulting in denial of promotion and termination because of his age, fifty-six years old, and his national origin, Pakistani. Following a jury trial, judgment was entered in favor of plaintiff on his claim of age discrimination for termination of his employment. The jury found in favor of defendant on the counts of age discrimination relating to promotion, and national origin discrimination in both promotion and termination. Defendant appeals as of right and only challenges the verdict with respect to the age discrimination claim. We affirm.

Defendant argues that the trial court erred in denying its motion for judgment notwithstanding the verdict. We disagree. In reviewing a decision on a motion for JNOV, this Court must view the testimony and all legitimate inferences from it in the light most favorable to the nonmoving party. *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998). A trial court's ruling on a motion for judgment notwithstanding the verdict is reviewed de novo. *Abke v Vendenberg*, 239 Mich App 359, 361; 608 NW2d 73 (2000). Judgment notwithstanding the verdict should be granted only when there was insufficient evidence presented to create an issue for the jury. *Pontiac School Dist v Miller Canfield Paddock & Stone*, 221 Mich App 602, 612; 563 NW2d 693 (1997). If reasonable jurors could have reached different conclusions, the motion was properly denied. *Id.*

Defendant also challenges the sufficiency of the evidence supporting the jury's verdict. When reviewing the sufficiency of the evidence in a civil action, this Court must view the evidence in the light most favorable to the plaintiff, and give the plaintiff the benefit of every reasonable inference which can be drawn from the evidence. *Scott v Illinois Tool Works, Inc*,

217 Mich App 35, 41; 550 NW2d 809 (1996). If, after reviewing the evidence, reasonable people could differ, the question is properly left to the trier of fact. *Id.*

In *Hall v McRea Corp*, 238 Mich App 361; 605 NW2d 354 (1999), this Court articulated the elements of a prima facie case of age discrimination in employment under the Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq*. "Under an intentional discrimination theory of age discrimination, the plaintiff must show (1) membership in a protected class, (2) discharge from employment, (3) that the plaintiff was qualified for the position, and (4) that he was replaced by a younger person. The plaintiff must prove the elements by a preponderance of the evidence." *Hall*, *supra* at 370, citing *Lytle v Malady (On Rehearing)*, 458 Mich 153, 172-173; 579 NW2d 906 (1998). Once plaintiff has come forward with evidence to satisfy these criteria, "[t]he burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the discharge." *Id.* If defendant proffers a legitimate reason, then the burden shifts to plaintiff to establish that the proffered reason was a pretext for age discrimination. *Id.*

We conclude that plaintiff offered sufficient evidence to create an issue for the jury. Plaintiff presented evidence to establish his prima facie case: Plaintiff was a member of a protected class. He was fifty-six years old at the time he was fired. Most of the other sales representatives were in their thirties. Secondly, defendant terminated plaintiff's employment, which constituted an adverse employment action. Next, plaintiff presented evidence that he was qualified for his job. The November 22, 1995, performance report, which was written just seven days before plaintiff was terminated, scored plaintiff as "fully competent." Finally, it was stipulated that plaintiff's replacement was thirty-four years old. We find that plaintiff satisfied the elements of his prima facie case.

Defendant offered a nondiscriminatory reason to support plaintiff's discharge. Defendant argued that plaintiff failed to follow the company's policy regarding the proper way to fill out its prescription activity cards (PACs). Defendant's policy provided that all information on the PAC was to be filled out contemporaneous with the distribution of the drug sample. Plaintiff did not fill out the interior of the card, but instead wrote notations on the margin of the card. Plaintiff filled in the information at a later time. Defendant presented evidence of the serious nature of this practice.

However, plaintiff presented sufficient evidence that defendant's purported reason for terminating him was pretextual. To establish that the stated reason is pretext, a plaintiff must show that the reason had no basis in fact, that it was not the actual factor motivating the employment decision, or that the factor was not sufficient to justify the decision. *Feick v Monroe Co*, 229 Mich App 335, 343; 582 NW2d 207 (1998). Plaintiff testified that he routinely filled out only the margins of the card at the doctors' offices, and that he did this in the presence of both Susan Sullivan and William Dwyer, without reprimand. Although Sullivan and Dwyer denied observing plaintiff fill out the cards improperly, plaintiff's testimony was corroborated by Dr. Raymond Mercier and Dr. Krishna Kumer. Sullivan recommended plaintiff's discharge from the company. Plaintiff testified that Sullivan remarked about plaintiff being an "old man." Frank Garay testified to being present when Sullivan made the comment. On another occasion, Sullivan questioned plaintiff about male menopause and asked whether he suffered from fatigue and afternoon headaches.

Furthermore, plaintiff presented the testimony of Paul Whyard, who also had problems with his sample accountability, and underwent a disciplinary period. Plaintiff was terminated just days after his PAC procedure was first brought to the attention of management. Whyard received several warnings after Sullivan discovered his problems with his sample accountability. Whyard was never terminated. Defendant tried to distinguish between Whyard's sample accountability problems and plaintiff's sample accountability problems. Although Sullivan explained that Whyard's sample problems were less serious than plaintiff's PAC procedure, the jury was free to reject this explanation.

When the evidence is viewed in the light most favorable to plaintiff, we find sufficient evidence from which the jury could find that plaintiff's age was a determining factor in the decision to terminate him. Because sufficient evidence was presented to support the jury's verdict, we further find that the trial court properly denied defendant's motion for judgment notwithstanding the verdict.

Finally, defendant challenges the admission of portions of Roger Eaton's deposition testimony. During cross-examination, plaintiff's counsel asked Eaton what course of action he would have taken if he had observed improper use of the PACs. Eaton testified that he would have had a discussion with the sales representative, and if the situation did not improve, he would have pursued disciplinary measures. Defendant argues that this evidence was irrelevant and unfairly prejudicial. We disagree.

"This Court reviews trial court decisions to admit evidence for an abuse of discretion." *Harville v State Plumbing & Heating, Inc*, 218 Mich App 302, 323; 553 NW2d 377 (1996). "An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there is no justification or excuse for the ruling made." *Roulston v Tendercare Michigan, Inc*, 239 Mich App 270, 282; 608 NW2d 525 (2000).

"Generally, all relevant evidence is admissible, and irrelevant evidence is not admissible. MRE 402. Relevant evidence may be excluded if its probative value is substantially outweighed by the risk of unfair prejudice, confusion of the issues, waste of time, or risk of misleading the jury. MRE 403." *Roulston, supra* at 282. Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. MRE 401; *Roulston, supra*.

We find that Eaton's testimony was relevant as it tended to show the routine practice of the company in a particular situation. Eaton had accompanied plaintiff on field contacts, and had worked as a district manager for eight years. He was familiar with the company's procedures and its discipline policy. Eaton's testimony about his course of action if he had witnessed any improper handling of the PAC is relevant to Sullivan's behavior toward plaintiff when confronted with the same situation, as they both held the same position in the company. The general course of action of a district manager is relevant to an evaluation of Sullivan's reaction to plaintiff's blank PACs, and ultimately to whether defendant's reason for firing plaintiff was pretextual.

We do not find that the probative value of the evidence was substantially outweighed by its prejudicial effect. Eaton testified to his course of action when observing a sales representative

failing to follow procedure regarding the PAC. Defense counsel posed the same hypothetical scenarios to Dwyer and to Sullivan. Defense counsel asked Dwyer whether he would terminate an employee upon observing failure to correctly fill out a PAC, and whether Sullivan would have noted it in her report if she had observed such a breach of procedure. The doctors testified that plaintiff's method of having them sign the PAC was a routine practice of the sales representatives that they observed, and plaintiff testified that Sullivan and Dwyer observed him doing this and did not address it. Furthermore, we note that defense counsel opened the door to this line of questioning by raising the same hypothetical on direct examination. On cross-examination, plaintiff's counsel merely asked Eaton to elaborate on this point. We find no abuse of discretion.

Affirmed.

/s/ Brian K. Zahra
/s/ Harold Hood
/s/ Gary R. McDonald