STATE OF MICHIGAN

COURT OF APPEALS

ANTHONY MICALE and BARBARA MICALE, Plaintiffs-Appellants,	UNPUBLISHED June 1, 2001
v	No. 219721 Wayne Circuit Court
LITTLE CAESAR ENTERPRISES, INC., Defendant-Appellee.	LC No. 97-708296-NZ

Before: Hood, P.J., and Doctoroff and K.F. Kelly, JJ.

PER CURIAM.

Plaintiffs Anthony and Barbara Micale appeal as of right from an order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff Anthony Micale[1] was fifty-four years old in January 1997, when defendant terminated his employment. Defendant employed plaintiff since 1986, and transferred him to defendant's architecture and special designs department in 1994. Part of plaintiff's job responsibilities in this department consisted of developing ideas for defendant's "Caesarland" stores. In January 1997, plaintiff's supervisor informed him that he was being discharged because defendant was ceasing further development of the Caesarland concept. Plaintiff initiated this action in 1997, alleging in his amended complaint that his termination constituted age discrimination in violation of the Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*

On appeal, plaintiff claims the trial court erred by concluding that he had not presented sufficient evidence to support a prima facie claim of age discrimination. We review de novo a trial court's decision to grant a motion for summary disposition pursuant to MCR 2.116(C)(10). *Timko v Oakwood Custom Coating, Inc*, 244 Mich App 234, 238; ___ NW2d ___ (2001). When reviewing the trial court's decision on the motion, we view the pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Where the

[1] Plaintiff Barbara Micale's claim is for loss of consortium only. For the purpose of clarity, the term "plaintiff" will refer only to Anthony Micale.

evidence fails to create a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Id*.

To establish a prima facie case of age discrimination, a plaintiff must show by a preponderance of the evidence that he (1) was a member of a protected class, (2) suffered an adverse employment action, (3) was qualified for the position, and (4) was replaced by a younger person. *Kerns v Dura Mechanical Components, Inc (On Remand)*, 242 Mich App 1, 12; 618 NW2d 56 (2000); *Lytle v Malady (On Rehearing)*, 458 Mich 153, 172-173; 579 NW2d 906 (1998). Once a plaintiff establishes a prima facie case, a presumption of discrimination arises, and the defendant must articulate a "legitimate, non-discriminatory reason" for the plaintiff's termination to overcome the presumption. *Lytle*, *supra* at 173, quoting *Texas Dep't of Community Affairs v Burdine*, 450 US 248, 252-253; 101 S Ct 1089; 67 L Ed 2d 207 (1981).

Plaintiff argues that the trial court erred by concluding that his age discrimination claim was deficient because plaintiff was not qualified for his position. The trial court's conclusion appears to have been based on the fact that plaintiff did not have a professional architecture degree. However, "[a]n employee is qualified if he was performing his job at a level that met the employer's legitimate expectations." *Town v Michigan Bell Telephone Co*, 455 Mich 688, 699; 568 NW2d 64 (1997) (footnote omitted).

In this case, the record indicates that plaintiff received favorable performance reviews while employed by defendant. Furthermore, plaintiff testified that he was told by his supervisor that his termination was not attributable to the quality of his work. Defendant did not allege that plaintiff was not performing at a level that met defendant's legitimate expectations. Viewing the evidence in the light most favorable to plaintiff, we conclude that a factual issue existed regarding whether he was qualified.

However, the record also leads us to conclude that summary disposition of plaintiff's claim was appropriate because plaintiff failed to provide evidentiary support for his assertion that he was replaced by a younger coworker. In *Lytle*, *supra*, our Supreme Court clarified the meaning of the term "replaced" as it relates to age discrimination claims:

> [A] person is not replaced when another employee is assigned to perform the plaintiff's duties in addition to other duties, or when the work is redistributed among other existing employees already performing related work. A person is replaced only when another employee is hired or reassigned to perform plaintiff's duties. . . . [*Id*. at 177-178 n 27, quoting *Barnes v GenCorp Inc*, 896 F2d 1457, 1465 (CA 6, 1990).

In an attempt to create a factual dispute on this issue, plaintiff points to the testimony of his younger coworker who stated that after plaintiff was terminated, he assumed some of plaintiff's former duties. The coworker also indicated that he felt that he was doing plaintiff's job at times. However, he also testified that he continued doing the same work that he did before plaintiff was discharged, in addition to assuming plaintiff's duties. It is apparent that a genuine factual issue did not exist regarding whether plaintiff was replaced because the coworker merely assumed a portion of plaintiff's duties in addition to his own work, and the trial court properly

granted summary disposition for this reason. See *Sahadi v Reynolds Chemical*, 636 F2d 1116 (CA 6, 1980).

We also reject plaintiff's argument that a comment allegedly made by defendant's human resource manager and jokes allegedly made by plaintiff's coworkers and his supervisor amount to direct evidence of discriminatory animus sufficient to withstand summary disposition. This Court recently considered the impact of an age-related comment in a discrimination case. *Krohn v Sedgwick James of Michigan, Inc*, 244 Mich App 289; ____ NW2d ____ (2001). In *Krohn*, this Court relied on federal precedent in adopting a host of factors to determine whether "stray remarks" are probative of an employer's discriminatory motivation:

> (1) Were the disputed remarks made by the decisionmaker or by an agent of the employer uninvolved in the challenged decision? (2) Were the disputed remarks isolated or part of a pattern of biased comments? (3) Were the disputed remarks made close in time or remote from the challenged decision? (4) Were the disputed remarks ambiguous or clearly reflective of discriminatory bias? [*Id*. at 292.][2]

In this case, plaintiff claims that defendant's human resources manager made a comment to the effect that it was unfortunate that plaintiff was being let go because of his age. We do not agree that this stray remark creates a genuine issue of material fact regarding discriminatory intent. The statement was made by an individual who did not take part in the decision to discharge plaintiff, was an isolated comment, and was not part of a pattern of biased comments. Similarly, although the age-related jokes allegedly made by plaintiff's coworkers and supervisor were no doubt tasteless, they are more aptly characterized as office banter, and are not "reflective of discriminatory bias." *Krohn*, *supra* at 292.

Furthermore, the alleged remarks in the instant case are distinguishable from an age-related comment our Supreme Court recently considered in *Debrow v Century 21 Great Lakes, Inc*, 463 Mich 534; 620 NW2d 836 (2001). In *Debrow*, the Court held that a remark that could be interpreted as discriminatory that was made by the plaintiff's supervisor during the conversation in which the plaintiff was informed of his termination created a genuine issue of fact precluding summary disposition. *Id*. at 538-539. By contrast, the comments plaintiff points to here do not share the same temporal proximity to plaintiff's discharge, nor were the comments made by an individual who fired plaintiff. We are satisfied that the evidence of stray remarks in

---

[2] It should be noted that this Court in *Krohn* ruled on the relevancy and admissibility of a stray comment. The issue before us in the instant case is not whether the alleged comments are admissible, but whether the comments create a genuine factual dispute. Nevertheless, we find the analysis in *Krohn* to be dispositive. If the remarks alleged by plaintiff would not have been admissible in consideration of the factors enunciated in *Krohn*, then plaintiff would not be able to rely on the remarks as evidence of a genuine factual dispute. *Maiden*, *supra* at 123.

this case would not lead a reasonable factfinder to conclude that age was a determining factor in plaintiff's discharge. *Id*. at 539.

Affirmed.

/s/ Harold Hood
/s/ Martin M. Doctoroff
/s/ Kirsten Frank Kelly